

EXPERT ANALYSIS

5 Antitrust Lessons for Trade Associations From 2 Recent FTC Challenges

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The Federal Trade Commission approved final orders against two trade associations March 3, and in both cases the FTC found the groups adopted rules that restricted competition among their members. The FTC ordered both associations to eliminate these rules, adopt an antitrust compliance policy and retain an antitrust compliance officer for the next 20 years.

The decisions should prompt other trade associations to consider taking a fresh look at their bylaws, membership rules and codes of ethics to ensure they are compliant with antitrust laws.

THE PLASMA ACTION

The Professional Lighting and Sign Management Companies of America is an association of about 25 commercial lighting firms operating in 39 states.

PLASMA's bylaws and standard operating procedures contained provisions designating designate specific "territories" for each of its members. These bylaws provided that:

- No member may work in another member's territory unless the other member first declines that work.
- Any work performed in another member's territory must follow a set price schedule.
- After a member leaves the association, it is barred from soliciting or competing with other members' customers for one year.

These provisions unreasonably restrained competition in violation of Section 5 of the Federal Trade Commission Act, the FTC alleged. *In the Matter of Prof'l Lighting & Sign Mgmt. Cos. of Am.*, No. C-4507, *decision and order issued* (F.T.C. Mar. 3, 2015).

The FTC ordered PLASMA to distribute a statement to its members, board and employees asking them to stop imposing these restraints; to adopt an antitrust compliance program; and to appoint an antitrust compliance monitor for the next 20 years.

THE PROFESSIONAL SKATERS ACTION

The regulator challenged in a separate case a provision in the code of ethics of the Professional Skaters Association, a group of more than 6,000 ice skating coaches. *In the Matter of Prof'l Skaters Ass'n*, No. C-4509, *decision and order issued* (F.T.C. Mar. 3, 2015).

The provision prohibited members from "solicit[ing] pupils of another member." In other words, the rule effectively prohibited coaches from approaching ice skaters to propose switching coaches.

This Professional Skaters Association broadly interpreted the non-solicitation rule, and coaches who broke the rule could face suspension and termination of membership, the FTC alleged.

In at least one instance, a coach who broke the rule lost his insurance coverage, and the association declared him ineligible to work with skaters on Team USA.



Bylaws and operating procedures that designate specific “territories” for each of the members of an organization representing commercial lighting firms unreasonably restrained competition, the FTC said.

The agency said the ethics rule was an unreasonable restraint of trade in violation of Section 5, and it ordered the association to abandon the rule.

The FTC also ordered the association to notify the skating community about the rule change, to adopt an antitrust compliance policy and to appoint an antitrust compliance officer for the next 20 years.

Interestingly, however, the FTC struck a balance in how far it would push the association.

The association is not prohibited from adopting reasonable rules about in-person solicitations of skaters actively engaged in lessons or preparing for competitions.

The order also allows the adoption of rules against deceptive solicitations, as well as rules that prevent the sexual or physical abuse of children.

LESSONS FOR TRADE ASSOCIATIONS

The two FTC actions stand as a timely reminder that most trade associations, by their very nature, are a form of “contract, combination ...or conspiracy” among competitors, and their actions are subject to scrutiny under federal and state antitrust laws.

Here are five key takeaways for trade associations from these recent actions:

- First and foremost, trade associations should not adopt rules that unreasonably restrict competition among members. Such restrictions can take many forms, ranging from explicit non-compete provisions to more subtle arrangements such as territorial restrictions, mandatory price schedules and non-solicitation provisions, just to name a few.
- It does not matter whether a restriction is couched as a membership requirement, a bylaw or a “rule of ethics.” As long as the restriction has the purpose or effect of restraining competition, it may be subject to antitrust scrutiny.
- Although trade association rules can pose risks to competition, they also often serve valuable, legitimate goals like preventing deceptive or dangerous activities. When adopting and enforcing trade association rules, trade associations should tie rules to these valuable, legitimate goals.
- By a similar token, there is nothing inherently wrong with designating specific territories for members. Indeed, the FTC order in the PLASMA case allows the association to specify regions where its members “can quickly respond for service.” But such territorial designations must account for, and must not unreasonably restrain, competition in those regions.
- Finally, because the antitrust laws are complex and nuanced, trade associations should periodically engage experienced counsel to review their rules and practices to ensure compliance. As another layer of comfort where appropriate, associations should also consider having antitrust counsel proactively monitor meetings or provide periodic antitrust compliance reminders to members in advance of meetings.



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