

FTC crackdown on associations’ bylaws underscores the importance of antitrust counsel



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Whenever there is an opportunity for competitors to get together, there is a chance that they will start to talk about things they shouldn't, such as how they compete with one another. The purpose of many trade associations is to bring competitors together. Almost every price-fixing case brought by the Department of Justice (DOJ) has, somewhere in the case, a trade association that facilitated the cartel that is being prosecuted.

Recent actions by the Federal Trade Commission (FTC) challenging the [by-laws of trade associations](#) should therefore come as no surprise to anyone, yet some commentators have tried to ridicule the FTC's actions. The FTC's actions were [designed to promote competition](#) and help consumers, and it should be commended. (Note: Although I serve as a compliance monitor for the FTC, these opinions are my own, and do not represent the position of the FTC.)

In December 2014, the FTC resolved cases against two trade associations by requiring them to amend their organizational documents. The Professional Lighting and Sign Management Companies of America, Inc. (PLASMA), had bylaws that prohibited members from providing commercial lighting or sign services to a customer located in the designated territory of another member, unless the member had first declined to perform the work. The bylaws also prohibited members from maintaining a price list for work performed in the designated territory of another member. The organization also sought to prohibit any member from soliciting or competing for the customers (or prospective customers) of another member for

one year following termination of membership. Each of these restrictions clearly limit the ability of members to compete, and would provide a strong basis for bringing an action against the parties if a trade association was not involved.

The FTC also brought an action against the Professional Skaters Association's code of ethics, which prohibited members from soliciting pupils of other members and required each member, "[p]rior to acting as a coach," to "determine the nature and extent of any earlier teaching relationship with that skater and other members." Again, these restrictions presented fairly naked restraints of trade. Under the antitrust laws, competitors cannot agree not to compete. The fact that it occurs in the context of a trade association provides no protection.

The implication for trade and professional associations is clear. Do the by-laws, code of ethics, or any document restrain competition among members? Are there restrictions on pricing, posting prices, or competitive bidding? Are there any justifications for restrictions on member competition, such as health and safety? Is there a policy prohibiting exchange of competition information by members? All these areas should be reviewed by antitrust counsel promptly if they haven't been reviewed recently.

The implications for members of trade or professional associations (whether companies or individuals): Have you reviewed the antitrust policies of every association you belong to? Do you even know what trade associations you belong to? Antitrust counsel or the compliance officer should review the company's list of trade associations, and if one does not exist, one should be created. Once the list is assembled, the by-laws and policies of each association should be reviewed to make sure that no antitrust violations are waiting to explode.