



Office of the Secretary

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

April 3, 2014

Re: *In the Matter of Music Teachers National Association, Inc.*
File No. 131 0118

Thank you for your comments regarding the proposed Decision and Order (“Consent Order”) in the matter of Music Teachers National Association, Inc. (“MTNA”). The Commission carefully reviewed all the comments received, including your comment.

MTNA is a professional association of over 20,000 music teachers. Collectively, MTNA members generate an estimated \$500 million in annual revenues. MTNA also is the umbrella organization for about 500 state and local music teacher associations across the country. In 2004, MTNA revised its Code of Ethics and imposed a ban on solicitations, thus prohibiting teachers from actively recruiting students from one another. A number of MTNA affiliates have adopted even more aggressive restraints on competition, including prohibitions on certain types of advertising, charging less than the community average, and offering scholarships or free music lessons to students.

The proposed Consent Order, negotiated between the Federal Trade Commission and MTNA, orders MTNA to cease and desist from restraining solicitation of teaching work. The proposed Consent Order also requires MTNA to take affirmative steps to discourage anticompetitive conduct on the part of its state and local affiliates. In particular, the proposed Consent Order requires that MTNA cease and desist from affiliating with any state or local music teachers association that MTNA knows is restraining (1) solicitation of teaching work, (2) certain types of advertising, or (3) price-related competition.

The Commission received about two hundred and thirty public comments, including yours, during the public comment period, expressing a variety of viewpoints on the proposed Consent Order. After reviewing all of the comments, the Commission has determined that the public interest is served by issuing the Decision and Order in final form.

This letter responds to the concerns regarding the proposed Consent Order that were submitted to the Commission. For your information, enclosed is a copy of the final Decision and Order. Relevant materials are also available from the Commission’s website at <http://www.ftc.gov>.

Professional associations like MTNA typically serve many important and procompetitive functions, including adopting rules governing the conduct of their members that benefit competition and consumers. However, most trade organizations are by their nature collaborations among competitors. As a result, the Commission and courts have long been concerned with anticompetitive restraints imposed by such organizations under the guise of codes of ethical conduct. For a professional association to prohibit honest competition as “unethical” behavior is particularly problematic. As the United States Supreme Court has recognized, association members can be “expected to comply in order to assure that they [do] not discredit themselves by departing from professional norms.”¹

Several commenters asserted that other professions, including doctors and lawyers, have restraints similar to MTNA’s non-solicitation provision. Actually, for decades, the Commission has investigated and issued orders against professional associations that, like MTNA, impede members from soliciting customers. The Commission issued an order in 1979 against the American Medical Association (“AMA”) that required AMA to cease and desist from restraining solicitation by doctors through its Principles of Medical Ethics.² The Commission and courts have also taken action against associations of psychologists, arbitrators, social workers, architects, certified public accountants, and community association professionals for including provisions in their ethical codes similar to MTNA’s non-solicitation provision.³ The Commission also has issued orders against professional associations – including associations of engineers, conservators of historic and artistic works, and store planners– requiring them to eliminate restraints on advertising and price competition.⁴ In sum, MTNA is required to comply with the very same competition principles the Commission applies to all professional associations. If there are professional associations that still have anticompetitive restraints, including restraints similar to MTNA’s non-solicitation provision, we invite members of the public to inform the Commission of such matters, including by submitting any available evidence. Complaints can be submitted by going to the FTC website at www.ftc.gov/faq/competition/report-antitrust-violation.

Several commenters claimed that the MTNA Code of Ethics is unenforceable and that it is only voluntary or aspirational. However, when MTNA added the non-solicitation provision at issue here to the Code in 2004, it also adopted a process for enforcement. As described by MTNA in its official journal *American Music Teacher*, MTNA established an

¹*Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 n.21 (1975).

²*American Medical Association*, 1979 FTC LEXIS 182 (1979), *enforced as modified*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided Court*, 455 U.S. 676 (1982).

³*In re National Academy of Arbitrators*, 135 F.T.C. 1 (2003) (restraints on solicitation and advertising); *Nat’l Ass’n of Social Workers*, 116 F.T.C. 140 (1993) (restraints on solicitation and advertising); *Am. Psychological Ass’n*, 115 F.T.C. 993 (1992) (same); *In re The Community Associations Institute*, 1993 FTC LEXIS 374 (1993) (restraints on solicitation); *In re Rhode Island Board Of Accountancy*, 107 F.T.C. 293 (1986) (restraints on solicitation and price competition); *see also Mardirosian v. American Institute of Architects*, 474 F. Supp. 628, 647 (D.D.C. 1979) (non-solicitation clause in a professional services association’s code of ethics “had the purpose and necessary effect of suppressing competition”). Solicitation by lawyers generally is regulated by the States acting as sovereigns, and not by a private professional association. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449 (U.S. 1978) (“the State -- or the Bar acting with state authorization -- constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent”). When a State acting as sovereign properly regulates lawyer solicitation, that regulation is not subject to an antitrust challenge.

⁴*Inst. of Store Planners*, 135 F.T.C. 793 (2003) (restraints on price competition); *Am. Inst. For Conservation of Historic & Artistic Works*, 134 F.T.C. 606 (2002) (restraints on price competition); *Nat’l Soc’y of Prof’l Eng’rs*, 116 F.T.C. 787 (1993) (restraints on advertising).

Ethical Concerns Committee to deal with alleged violations of the Code.⁵ The enforcement process provides that if the involved parties cannot resolve their ethical issues, then the Executive Director and the Ethical Concerns Committee may assist in their resolution. They may also refer grievous cases to the MTNA Board of Directors. After following certain procedures, “[t]he Board may exonerate the member, determine that certain conditions should be met in order to maintain MTNA membership, or terminate membership according to the MTNA Bylaws.”⁶

Several commenters expressed concern that removing the non-solicitation provision from MTNA’s Code of Ethics would allow judges to solicit students during music competitions. The proposed Consent Order, however, does not prohibit MTNA and its affiliates from adopting and enforcing reasonable principles, rules, guidelines, or policies governing the conduct of judges during music competitions sponsored or held by MTNA or any affiliate.⁷

Several commenters argued that the Commission does not have authority or jurisdiction over MTNA because MTNA is a non-profit association. It is well established that the Commission has jurisdiction over non-profit organizations that confer, or are organized for the purpose of conferring, economic benefits to their for-profit members.⁸ MTNA is such an organization.

Several commenters stated that the MTNA non-solicitation provision does not cause competitive harm because students are free to transfer to another music teacher when they desire, and because there are other ways to attract students, including by advertising. The existence of some unrestricted methods of competition does not justify or excuse unreasonable restrictions on other forms of competition. Solicitation of clients is an important avenue of competition because it provides an opportunity for service providers to let potential clients know of the possibility of lower priced or higher quality services.⁹

Several commenters argued that the proposed Consent Order was unnecessary because MTNA removed the non-solicitation provision from its Code of Ethics during the investigation. Discontinuance of an anticompetitive practice in response to an investigation is not a defense, nor does it obviate the need for formal relief. If there were no Order, such action could of course be revived by MTNA. As with all of the Commission’s enforcement activity, our goal in this case is to stop the anticompetitive conduct at issue and to ensure that it does not occur in the future.

⁵ Gary L. Ingle, *Code of Ethics*, AMERICAN MUSIC TEACHER June/July 2004 at 2, 99.

⁶ MTNA’s Ethical Concerns at C.4 (attached as Appendix A). MTNA posted this procedure on its web site, but removed it during this investigation.

⁷ Proposed Consent Order II.B (“nothing in this Paragraph II shall prohibit Respondent from adopting and enforcing, or accepting as an Affiliate or maintaining an affiliate relationship with any Affiliate that adopts and enforces, reasonable principles, rules, guidelines, or policies governing . . . (ii) the conduct of judges during music competitions sponsored or held by Respondent or any Affiliate”).

⁸ *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 767 n.6 (1999).

⁹ *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (“Solicitation also enables the seller to direct his proposals toward those consumers who he has a reason to believe would be most interested in what he has to sell. For the buyer, it provides an opportunity to explore in detail the way in which a particular product or service compares to its alternatives in the market. In particular, with respect to nonstandard products like . . . professional services . . . these benefits are significant.”).

Several commenters (including MTNA members) indicated that they would continue their practice of not soliciting students from competing studios; several commenters expressed the opinion that soliciting students from other studios is unethical, unprofessional, inconvenient or inappropriate. The proposed Consent Order requires that MTNA cease and desist from restraining solicitation of teaching work. The proposed Consent Order does not require or obligate music teachers to solicit students from other studios. Individuals are free independently to decide how to conduct their music teaching business, including deciding whether or not to solicit students from other studios. However, music teachers may not agree to refrain from this type of competition. Similarly, several commenters raised concerns that the proposed Consent Order regulates music teachers. The proposed Consent Order applies to MTNA only. The proposed Consent Order does not regulate the business practices of individual music teachers.

It assists the Commission's analysis to hear from a variety of sources in its work on antitrust and consumer protection issues, and we appreciate your interest in this matter.

By the Commission.

Donald S. Clark
Secretary

Appendix A

Ethical Concerns

Direct communication is essential in resolving ethical concerns. Members are strongly encouraged to work out ethical problems themselves. If issues cannot be resolved by the involved parties, the Executive Director and a three-member MTNA Ethical Concerns Committee may assist in their resolution. Grievous cases may be referred to the MTNA Board of Directors. Procedures for handling ethical concerns are outlined below. Each step will be followed in a timely fashion with the utmost tact and confidentiality. Communication with others beyond the parties involved will take place only when necessary or required by law.

A. Submission of a Concern

1. A member may report an alleged ethical infringement by another member to the Executive Director/CEO. An issue reported first to a member of the Ethical Concerns Committee will be referred to the Executive Director/CEO.
2. The Executive Director/CEO will send the reporting member an outline of ethical concerns procedures and a request for written documentation, which must contain the specific charges, supporting evidence, and the reporting member's address, phone number, email address, and signature.
3. The Executive Director/CEO may stop the process at any point, finding that the issue does not constitute a clear code violation warranting intervention.
4. The Executive Director/CEO may be able to expedite a resolution. The member charged with the alleged infringement, if contacted, will be given the opportunity to respond to the reported concern. The reporting member will be made known to the reported member if deemed necessary to facilitate a resolution.
5. When ethical concerns cannot be immediately resolved, the Executive Director/CEO will send the submitted documentation to the MTNA Ethical Concerns Committee, along with any response from the reported member.

B. Ethical Concerns Committee

1. Upon receipt of the ethical concern documentation, the committee will conduct communication with the reporting member and the reported member in an effort to resolve the issue.
2. The reporting member will be made known to the reported member if deemed necessary to facilitate a resolution.
3. The committee may stop the process at any point, finding that a resolution is not forthcoming and further intervention would not be productive.
4. Concerns Committee reports to the Board of Directors will not contain names of the involved members.

C. Referral to MTNA Board of Directors

1. Particularly grievous ethical offenses may be referred by the committee to the Board of Directors.
2. The Board will send a written notice to the reported member of his/her ethical infringement, possible consequences, and the right to comment or a hearing.
3. The hearing, if requested, will take place at a regular meeting of the Board of Directors, and the member may have legal representation. All costs are the responsibility of the member.
4. The Board may exonerate the member, determine that certain conditions should be met in order to maintain MTNA membership, or terminate membership according to the MTNA Bylaws, Article III/2.
5. If certain conditions should be met in order to maintain membership, the Board will set a deadline for the submission of a report showing that those conditions have been met.