

Complaint

IN THE MATTER OF

**NATIONAL ASSOCIATION OF MUSIC
MERCHANTS, INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4255; File No. 001 0203
Complaint, April 8, 2009 – Decision, April 8, 2009

This consent order addresses allegations that the National Association of Music Merchants (NAMM), a trade association of more than 9000 manufacturers, distributors, and dealers of musical instruments and related products, arranged and encouraged the exchange among its members of competitively sensitive information that had the purpose, tendency, and capacity to facilitate price coordination and collusion among competitors. The order prohibits NAMM from encouraging, advocating, coordinating, or facilitating in any manner the exchange of information among musical instrument manufacturers and dealers relating to the retail price of musical instruments or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer. The order also prohibits NAMM from facilitating any musical instrument manufacturer or dealer in entering into or enforcing any agreement between or among musical instrument manufacturers or dealers relating to the retail price of any musical instrument or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer. In addition, the order requires NAMM to institute an antitrust compliance program; it requires the review by antitrust counsel of all written materials and prepared remarks by any member of NAMM's board of directors, employee, or agent of NAMM relating to price terms and minimum advertised price policies; the provision by antitrust counsel of appropriate guidance on compliance with the antitrust laws; and annual training of NAMM's board of directors, agents, and employees concerning NAMM's obligations under the Order. The order does not interfere with the ability of NAMM to engage in legitimate trade association activity, including its sponsorship of trade shows and other events. It explicitly excludes from its prohibitions the ordinary commercial activities of NAMM's members on the show floor and the publication or dissemination of aggregated survey data, the sharing of best practices and training materials, and the communication of information relating to creditworthiness, product safety, and warranty issues.

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Participants

For the *Commission*: Dana Abrahamsen, Barbara Blank, David Conn, Maria M. DiMoscato, Geoffrey M. Green, William L. Lanning, Teresa Martin, Steven Osnowitz, Jana Pariser, Mark D. Peterson, Christopher Renner, and Melanie Sabo.

For the *Respondents*: Debra Bernstein, Alston & Bird LLP; Frank M. Hinman, Bingham McCutchen; Joseph Datillo, Brouse McDowell; Larry Scarborough and J. Alex Grimsley, Bryan Cave; Rob Lipstein, Crowell & Moring; Michael R. Borasky, Eckert Seamans; Monica L. Rebuck, Hangle, Aronchick, Segal & Pudlin; Veronica G. Kayne, Haynes and Boone LLP; Michael McNeely, Law Offices of Michael D. McNeely; Steve Chidester, Luce, Forward, Hamilton & Scripps; Bill Codhina, Nixon Peabody; Larry F. Gitlin, Rapkin, Gitlin & Beaumont; Bryan King, Sheldon, Lim, Ruger & Kim LLP; Tara Reinhart, Skadden Arps.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the National Association of Music Merchants, Inc. has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Federal Trade Commission (“Commission”) that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

1. Respondent National Association of Music Merchants, Inc. (“NAMM” or “Respondent”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 5790 Armada Drive, Carlsbad, California 92008.

2. NAMM is a trade association composed of more than 9000 members that include manufacturers, distributors, and dealers of

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musical instruments and related products. Most U.S. manufacturers, distributors, and dealers of musical instruments are members of NAMM. NAMM serves the economic interests of its members by, *inter alia*, promoting consumer demand for musical instruments, lobbying the government, offering seminars, and organizing trade shows. In the United States, NAMM sponsors two major trade shows each year, where manufacturers introduce new products and meet with dealers. In addition, NAMM's trade shows provide competitors an opportunity to meet and discuss issues of concern to the industry.

3. The acts and practices of NAMM, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

4. An ongoing subject of concern in the musical instruments industry has been the increased retail price competition for musical instruments. Commencing in 1999, and continuing thereafter, numerous leading musical instrument manufacturers adopted minimum advertised price policies.

5. Between 2005 and 2007, NAMM organized various meetings and programs at which competing retailers of musical instruments were permitted and encouraged to discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices. Representatives of NAMM determined the scope of discussion by selecting moderators and setting the agenda for these programs. At these NAMM-sponsored events, competitors discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail prices and margins; and other competitively sensitive issues.

6. In many instances, the exchange of information and opinion arranged by NAMM, as set forth in Paragraph 5 above, served no legitimate business purpose for NAMM or its members.

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7. The exchange of information among NAMM members, as alleged herein, had the purpose, tendency, and capacity to facilitate collusion and to restrain competition unreasonably.

Violations Alleged

8. As set forth in Paragraph 5 above, NAMM arranged and encouraged the exchange among its members of competitively sensitive information, in violation of Section 5 of the FTC Act, as amended.

9. The acts and practices of Respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of April, 2009, issues its complaint against Respondent.

By the Commission.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the National Association of Music Merchants, Inc. (hereinafter “NAMM” or Respondent), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent NAMM is a corporation organized, existing and doing business under and by virtue of the laws of the State of New

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York with its principal place of business located at 5790 Armada Drive, Carlsbad, CA 92008.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

THE PARTIES

- A. “Respondent” or “NAMM” means the National Association of Music Merchants, Inc., its successors and assigns, and its directors, trustees, officers, representatives, committees, subcommittees, boards, divisions, agents, and employees.
- B. “Commission” means the Federal Trade Commission.

OTHER DEFINITIONS

- C. “Antitrust Compliance Officer” means a person appointed under Paragraph II.B.1.(a) of this Order.
- D. “Antitrust Counsel” means a lawyer admitted to practice law in one or more of the judicial districts of the courts of the United States. Antitrust Counsel may delegate obligations under this Order to another lawyer supervised by Antitrust Counsel.
- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. §41 *et. seq.*, and the Sherman Act, 15 U.S.C. §1 *et. seq.*

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- F. “Distribution” or “Distributed” means, with respect to Prepared Remarks or Written Materials, transmittal or delivery by any means.
- G. “Global Economic Summit” or “Global Summit” means the particular recurring event attended by Musical Products industry leaders, media, and advisors, including those events held in Carlsbad, California, such as the Fifth Global Summit in 2004, the Sixth Global Summit in 2007, and any future event held where NAMM performs the same, or substantially the same, organizing and hosting role as it did for previous Global Summits.
- H. “Member of the Board of Directors” means any member of Respondent’s Board of Directors, including any Member of the Executive Committee, acting in an official capacity or having the apparent authority to act in an official capacity.
- I. “Member of the Executive Committee” means any member of Respondent’s Executive Committee, acting in an official capacity or having the apparent authority to act in an official capacity.
- J. “Minimum Advertised Price Policy” means any Musical Product Manufacturer’s policy, program, or provision of any program that conditions the sale or continued sale of its Musical Products to Musical Product Dealers upon the advertisement or display of Musical Products at or above a specified minimum dollar amount.
- K. “Musical Product(s)” means any musical instrument or musical instrument accessory sold or offered for sale by Respondent’s members.
- L. “Musical Product Dealer” means any person, corporation, or entity that in the course of its business offers for sale or sells to consumers any Musical Product in or into the United States, including, but not limited to, retail establishments,

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catalogue sellers, and internet retail sites, and the officers, agents, and employees thereof.

- M. “Musical Product Manufacturer” means any person, corporation, or entity that manufactures or distributes Musical Products to Musical Product Dealers for resale to consumers, and the officers, agents, and employees thereof.
- N. “NAMM Event” includes any trade show, town hall meeting or any similar event that NAMM sponsors and organizes and for which NAMM has final authority over the list of invitees. NAMM Event also means any meeting or teleconference of Respondent’s Board of Directors or Executive Committee to which the entire Board of Directors or Executive Committee has been invited to participate.
- O. “Prepared Remarks” means the final version of any script, speech, or other statement prepared for Distribution at, or in advance of, a NAMM Event, a Global Summit, or an event at which any Member of the Board of Directors, employee or agent of Respondent delivers a speech or statement.
- P. “Price Terms” means:
 - 1. The retail or wholesale prices, resale prices, credit terms, or terms defining, setting forth, or relating to monetary or non-monetary compensation paid by or on behalf of any Musical Product Dealer or other person who acquires one or more Musical Products; or
 - 2. The retail or wholesale prices, resale prices, credit terms, return policies, volume or other discounts, rebates, or other policies, programs, conditions, or terms defining, setting forth, or relating to monetary or non-monetary compensation of any Musical Product Manufacturer.

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Provided, however, that Price Terms do not include purchase for personal use by an employee of Respondent or donation for charitable use.

- Q. “Resale Price Maintenance Policy” means any Musical Product Manufacturer’s policy, program, or provision of any program that conditions the sale or continued sale of its Musical Products to Musical Product Dealers upon the sale of Musical Products at or above a specified minimum dollar amount.
- R. “Written Materials” means the final version of any written or paper document, or any electronic version of any document, audio recording, video recording, photograph, or other data, created on, included in, or stored on any computer, computer file, electronic mail, audio CD, DVD, or other electronic or magnetic storage media prepared for Distribution at, or in advance of, a NAMM Event, a Global Summit, or an event at which any Member of the Board of Directors, employee or agent of Respondent delivers a speech or statement.

II.

IT IS FURTHER ORDERED that:

- A. Respondent, acting directly or indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, forthwith shall cease and desist from:
1. Urging, encouraging, advocating, suggesting, coordinating, participating in, or facilitating in any manner the exchange of information between or among Musical Product Manufacturers or Musical Product Dealers relating to:
 - (a) the retail price of Musical Products; or

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- (b) any term, condition or requirement upon which any Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised Price Policies or Resale Price Maintenance Policies.
2. Entering into, adhering to, enforcing, urging, encouraging, advocating, suggesting, assisting or otherwise facilitating any Musical Product Manufacturer or Musical Product Dealer to enter into, adhere to or enforce any combination, conspiracy, agreement or understanding between or among any Musical Product Manufacturers or Musical Product Dealers relating to:
- (a) the retail price of any Musical Product;
 - (b) any term, condition or requirement upon which any Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised Price Policies, or Resale Price Maintenance Policies; or
 - (c) the refusal to do business, or the reduction of business, with particular Musical Product Manufacturers or Musical Product Dealers.

Provided, however, that nothing in this Paragraph II.A prohibits Respondent from engaging in, participating in, coordinating, urging, encouraging, or suggesting to others to engage in any conduct protected by the *Noerr-Pennington* doctrine;

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Provided, further, however, that nothing in this Paragraph II.A prohibits the participants in Respondent's trade shows from conducting their commercial activities on the show floor in their ordinary and customary manner;

Provided, further, however, that nothing in this Paragraph II.A applies to meetings of industry participants not attended by Respondent at which Respondent's role is limited to the provision of a venue, a speaker, administrative support, refreshments, or other incidentals; and

Provided, further, however, that nothing in this Paragraph II.A prohibits Respondent from publishing or disseminating, by any means: (i) information relating to creditworthiness, product safety, and warranty service issues; (ii) links to individual web sites of Musical Product Manufacturers, Musical Product Dealers, distributors, sales representatives, consultants, industry associations, education and arts associations, societies, and organizations; (iii) NAMM or third-party publications or material containing advertisements, brand image, or public relations material; (iv) aggregated survey data, such as that published in Music Trades, The NAMM Global Report Featuring Music USA, and the Cost of Doing Business Survey; or (v) in the context of industry education, including the sharing of best practices and training materials, generic references to Price Terms, Resale Price Maintenance Policy, and the terms and conditions on which Musical Product Manufacturers and Musical Product Dealers do business.

B. Respondent shall:

1. Institute a program to comply with this Order and with the Antitrust Laws, which program shall require:
 - (a) The appointment and maintenance of an Antitrust Compliance Officer for the duration of this Order. For the first three (3) years of this Order, the

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Antitrust Compliance Officer shall be Antitrust Counsel. After the third anniversary of the date this Order becomes final, a new Antitrust Compliance Officer may be appointed who shall be Antitrust Counsel, a Member of the Board of Directors, or the general counsel of Respondent. Respondent shall direct the Antitrust Compliance Officer to take reasonable steps to develop, implement, administer, monitor, and actively supervise a program to obtain Respondent's compliance with this Order and with the Antitrust Laws.

- (b) The appointment and maintenance of Antitrust Counsel, who shall also serve as the Antitrust Compliance Officer until at least the third anniversary of the date this Order becomes final. Within fifteen (15) days of the date this Order becomes final, Respondent shall appoint Antitrust Counsel to provide legal advice to Respondent. Respondent shall direct Antitrust Counsel to take reasonable steps to develop, implement, administer, monitor, and actively supervise a program to obtain Respondent's compliance with this Order and with the Antitrust Laws. Antitrust Counsel shall also train an Antitrust Compliance Officer to take reasonable steps to obtain Respondent's compliance with this Order and with the Antitrust Laws.
- (c) Annual in-person training of Respondent's Board of Directors concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct;
- (d) Annual training of Respondent's employees and agents concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as

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they apply to Respondent's activities, behavior, and conduct;

- (e) Review and written approval by the Antitrust Compliance Officer, prior to Distribution, of:
 - (i) All Written Materials and Prepared Remarks by any Member of the Board of Directors, or by any employee or agent of Respondent, acting in an official capacity or having the apparent authority to act in an official capacity, that concern or relate to the Price Terms, margins, profits, Minimum Advertised Price Policies, or Resale Price Maintenance Policies for Musical Products; and
 - (ii) All final agendas and materials Distributed at, in advance of, or after any meeting of Respondent's Board of Directors or Executive Committee.
- (f) Provision of a written statement that provides context-appropriate guidance on compliance with the Antitrust Laws to all Musical Product Manufacturers or Musical Product Dealers who are scheduled speakers at NAMM Events and Global Summits;
- (g) Certification, in writing, by each Musical Product Manufacturer or Musical Product Dealer who is a scheduled speaker at a NAMM Event or Global Summit that he or she is in receipt of, and has read, the written statement provided in Paragraph II.B.1(f);
- (h) Implementation and administration of a procedure to enable persons (including, but not limited to, Respondent's members, officers, directors, employees, and agents) to report violations of this Order and the Antitrust Laws to the Antitrust Compliance Officer and Antitrust Counsel,

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confidentially and without fear of retaliation of any kind; and

- (i) Implementation of internal policies and procedures that provide for discipline for members of Respondent's Board of Directors, employees, and agents for failure to comply fully with this Order, which policies and procedures shall require, among other steps, the termination or discharge of any such person who engages in such conduct only after conviction and all appeals have run or after civil liability and all appeals have run, provided that such termination or discharge does not violate any other applicable U.S. law.
2. Require the personal attendance of Antitrust Counsel at all NAMM Events and Global Summits for three (3) years from the date this Order becomes final.
3. Require that Antitrust Counsel be present at, or be a party to, any meeting or teleconference conducted by Respondent to which the entire Board of Directors or Executive Committee has been invited to participate, for three (3) years from the date this Order becomes final.
4. Require the recitation of a statement:
 - (a) At the commencement of each meeting of the Board of Directors and Executive Committee that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws; and
 - (b) At the commencement of each NAMM Event and Global Summit that provides context-appropriate guidance on compliance with the Antitrust Laws.

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Provided, however, that Respondent may satisfy the requirements of this Paragraph II.B.4 with respect to NAMM University or “NAMM U” sessions (other than NAMM U breakfast sessions) by enclosing in any materials provided to session attendees a copy of a written statement that provides context-appropriate guidance on compliance with the Antitrust Laws.

5. Require the audio or video recording of each panel discussion or presentation at all NAMM Events and Global Summits, prompt delivery of each such recording to the Antitrust Compliance Officer, and the retention of each such recording in the custody and control of the Antitrust Compliance Officer for five (5) years, provided that Respondent need not require the audio or video recording of meetings of the Board of Directors or Executive Committee.
6. Publish a copy of this Order and the Complaint issued by the Commission, and the internet address of the link to the Commission’s press release concerning this Order on the Commission’s web site at www.FTC.gov, in the first electronic edition of NAMM’s newsletter prepared for publication after this Order becomes final, in the same size and font as regularly featured items in NAMM’s newsletter.
7. Within thirty (30) days after the date this Order becomes final:
 - (a) Distribute, electronically or by other means, return receipt requested, to each Member of the Board of Directors a copy of this Order and the Complaint issued by the Commission, and a letter in the form of the letter attached as Exhibit A to this Order; and,
 - (b) Publish on Respondent’s official web site until the termination of this Order, a copy of this Order and

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the Complaint issued by the Commission, and a letter in the form of the letter attached as Exhibit A to this Order, with a link from NAMM's home or menu page, entitled "Antitrust Compliance," in the same size and font provided to other menu items. The Order shall remain accessible through common search terms and archives on the web site until the termination of Respondent's obligations under this Order.

8. Within thirty (30) days of the date any person becomes a Member of the Board of Directors, distribute electronically or by other means, return receipt requested, a copy of this Order and the Complaint issued by the Commission. In addition, a hard copy of this Order and the Complaint shall be provided to any new member at the first subsequent meeting of the Board of Directors, and any new member shall certify in writing that he or she is in receipt of, and has read, this Order and the Complaint.

Provided, however, that nothing in this Paragraph II.B prohibits Respondent from instituting additional components to its compliance program; and

Provided further, however, that full compliance with Paragraph II.B is not a defense to a violation of Paragraph II.A.

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III.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date the Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order. For the period covered by this report, the report shall include, but not be limited to:
1. The names, business addresses, e-mail addresses, and business phone numbers of the Antitrust Compliance Officer and Antitrust Counsel;
 2. A description in reasonable detail of the program instituted by Respondent to comply with Paragraph II.B.1 of this Order;
 3. A list of the NAMM Events and Global Summits held within sixty (60) days after the date the Order became final, including the title of each NAMM Event and Global Summit, and the dates on which and the locations at which each was held;
 4. A copy of all Written Materials and Prepared Remarks Distributed by Respondent, and reviewed by the Antitrust Compliance Officer under Paragraph II.B.1(e), at each NAMM Event, Global Summit, or other event at which any Member of the Board of Directors, employee or agent of Respondent delivered a speech or statement within sixty (60) days after the date the Order became final;
 5. The names, business addresses, e-mail addresses, and business phone numbers of each Member of the Board of Directors and each Member of the Executive Committee;

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6. The name and business address of each Member of the Board of Directors to whom Respondent distributed, electronically or by other means, a copy of this Order and the Complaint issued by the Commission, the date Respondent distributed the documents, and the date each person signed for receipt or electronic receipt was received by Respondent;
 7. A copy of NAMM's newsletter in which Respondent published this Order and the Complaint issued by the Commission; and
 8. A description and explanation, in reasonable detail, of any affirmative action taken by Respondent with regard to Paragraph II.B.1(i) of this Order.
- B. One (1) year after the date the Order becomes final, annually for the next nine (9) years on the anniversary of the date the Order becomes final, and at such other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order. For the periods covered by these reports, these reports shall include, but not be limited to:
1. The names, business addresses, e-mail addresses, and business phone numbers of the Antitrust Compliance Officer and Antitrust Counsel;
 2. The name and business address of each Member of the Board of Directors to whom Respondent distributed, electronically or by other means, a copy of this Order and the Complaint issued by the Commission, the date Respondent distributed the documents, and the date each person signed for receipt or electronic receipt was received by Respondent;

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3. The name, title, and business address of each person required to receive, and who has received, annual in-person training concerning Respondent's obligations under this Order, an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct, and the identity of the Antitrust Compliance Officer, and the name, title, and business address of the person who conducted the training; and
4. A description and explanation, in reasonable detail, of any affirmative action taken by Respondent with regard to Paragraph II.B.1(i) of this Order.

Provided, however, that nothing in this Paragraph III shall require the provision of information protected by the attorney-client privilege, work product doctrine, or other applicable privilege.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger or consolidation of Respondent; or
- C. Any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

V.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

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- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on April 8, 2029.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS
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Exhibit A**EXHIBIT A**

(Letterhead of NAMM)

Dear Member:

As many of you know, the Federal Trade Commission has conducted an investigation concerning Minimum Advertised Price policies ("MAP policies") and retail pricing in the music products industry.

To end the investigation expeditiously and to avoid disruption to its core functions, NAMM has voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement and a Decision and Order by the Federal Trade Commission, pertaining to NAMM's practices with regard to NAMM events and programs and other related matters.

In general, the Federal Trade Commission has prohibited NAMM from engaging in certain activities involving information exchanges among its members relating to MAP policies, retail margins, and retail pricing in connection with the sale and marketing of musical products. In addition, NAMM will be required to implement an antitrust compliance program. A copy of the Federal Trade Commission Decision and Order is enclosed and sets forth the specific requirements of the Order that apply to NAMM. The Decision and Order is also available on the Federal Trade Commission website at www.FTC.gov.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with the National Association of Music Merchants, Inc. (“NAMM” or “Respondent”). NAMM is a trade association composed of more than 9000 members that include manufacturers, distributors, and dealers of musical instruments and related products. The agreement settles charges that NAMM violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by arranging and encouraging the exchange among its members of competitively sensitive information that had the purpose, tendency, and capacity to facilitate price coordination and collusion among competitors. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

NAMM is a trade association. Most U.S. manufacturers, distributors, and dealers of musical instruments are members of NAMM. NAMM serves the economic interests of its members by, among other things, promoting consumer demand for musical

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instruments, lobbying the government, offering seminars, and organizing trade shows. In the United States, NAMM sponsors two major trade shows each year, where manufacturers introduce new products and meet with dealers. In addition, NAMM's trade shows provide competing manufacturers, distributors and retailers of musical instruments an opportunity to meet and discuss issues of concern to the industry.

An ongoing subject of concern to NAMM members in recent years has been the increased retail price competition for musical instruments, and whether that competition benefitted consumers more than it benefitted NAMM members. Between 2005 and 2007, NAMM organized various meetings and programs for its members at which competing retailers of musical instruments were permitted and encouraged to exchange information and discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices. Representatives of NAMM determined the scope of information exchange and discussion by selecting moderators and setting the agenda for these programs. At these NAMM-sponsored events, NAMM members discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail price and margins; and other competitively sensitive issues.

II. Legal Analysis

Adam Smith famously warned of the danger of permitting competitors even to assemble in one place.¹ The Federal Trade Commission does not take nearly so jaundiced a view toward trade association activities. The Commission is aware that trade associations can serve numerous valuable and pro-competitive functions, such as expanding the market in which its members sell;

¹ "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* 55 (Great Books ed. 1952) (1776).

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educating association members, the public, and government officials; conducting market research; establishing inter-operability standards; and otherwise helping firms to function more efficiently.

At the same time, it is imperative that trade association meetings not serve as a forum for rivals to disseminate or exchange competitively-sensitive information, particularly where such information is highly detailed, disaggregated, and forward-looking. The risk is two-fold. First, a discussion of prices, output, or strategy may mutate into a conspiracy to restrict competition. Second, and even in the absence of an explicit agreement on future conduct, an information exchange may facilitate coordination among rivals that harms competition. In light of the long-recognized risk of antitrust liability, a well-counseled trade association will ensure that its activities are appropriately monitored and supervised.²

According to the Complaint, NAMM's activities crossed the line that distinguishes legitimate trade association activity from unfair methods of competition. A respondent violates Section 1 of the Sherman Act and Section 5 of the FTC Act when it engages in

² See, e.g., Steven J. Fellman, *Antitrust Compliance: Trade Association Meetings and Groupings of Competitors: The Associations's Perspective*, 57 *Antitrust L. J.* 209 (1988) ("Counsel should receive agendas of all committee meetings in advance of the meetings and make sure that he or she monitors committee meetings that may involve antitrust-sensitive issues."); Kimberly L. King, *An Antitrust Primer For Trade Association Counsel*, 75 *Fla. Bar J.* 26 (2001):

Here are a few things trade association counsel, executives, and members generally should and should not do: DO encourage the trade association to help expand the markets within which its members compete; . . . DON'T let the association be used as a forum for discussion of members' price-related terms of sale, geographic areas or customers to be served, or the kinds of goods or services to be offered; DON'T let the association adopt rules governing price-related terms under which members sell goods or services; DON'T let the association be used as a conduit for anticompetitive exchanges of information, such as current pricing to particular customers or planned price increases; DON'T let the association be used to facilitate an agreement among competitors to refuse to deal with any third person . . .

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concerted conduct that has the principal tendency or the likely effect of harming competition and consumers. *California Dental Ass’n v. Federal Trade Commission*, 526 U.S. 756 (1999).³ The conduct of a trade association or its authorized agents is generally treated as concerted action. *E.g.*, *California Dental Ass’n v. FTC*, 526 U.S. 756 (1999); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008) (“When an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members.”).

The Complaint alleges that at meetings and programs sponsored by NAMM, competing retailers of musical instruments and other NAMM members discussed strategies for raising retail prices. Firms also exchanged information on competitively-sensitive subjects – prices, margins, minimum advertised price policies and their enforcement. And not only did NAMM sponsor these meetings, but its representatives set the agenda and helped steer the discussions. The antitrust concern is that this joint conduct can facilitate the implementation of collusive strategies going forward.⁴ For example, such discussions could lead competing NAMM members to refuse to deal with a manufacturer, distributor, or retailer unless minimum advertised price policies, or increases in minimum advertised prices,

³ Although the Commission does not directly enforce the Sherman Act, conduct that violates the Sherman Act is generally deemed to be a violation of Section 5 of the FTC Act as well. *E.g.*, *Fashion Originators’ Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941).

⁴ Concerted action that impairs competition by facilitating collusion may be challenged under Section 1 of the Sherman Act. *E.g.*, *United States v. Container Corp.*, 393 U.S. 333 (1969) (agreement to exchange price information); *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936) (agreement to exchange price information); *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9th Cir. 1952) (agreement to standardize product); *United States v. Rockford Memorial Hospital Corp.*, 898 F.2d 1278 (7th Cir. 1990) (merger).

Unilateral conduct that impairs competition by facilitating collusion may be challenged under Section 5 of the FTC Act. *E.g.*, *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *In the Matter of Valassis Communications, Inc.*, C-4160, 2006 FTC LEXIS 25 (April 19, 2006) (invitation to collude); *In the Matter of Sony Music Entertainment, Inc.*, C-3971, 2000 FTC LEXIS 95 (Aug. 30, 2000) (minimum advertised price policy).

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were observed and enforced against discounters.⁵ Alternatively, NAMM members could lessen price competition in local retail markets. Any or all these strategies may result in higher prices and harm consumers of musical instruments. Any savings from lower manufacturing costs would be reserved to NAMM members, and not shared with consumers in the form of lower retail prices.

The potential for competitive harm from industry-wide discussions must be weighed against the prospect of legitimate efficiency benefits. Here, the Complaint alleges that no significant pro-competitive benefit was derived from the challenged conduct.

⁵ In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2717 (2007), the Supreme Court explained that competing retailers, by acting together to compel a manufacturer to implement or enforce a vertical distribution restraint, may harm competition:

A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement.

The Court also observed that antitrust condemnation may be appropriate where resale price maintenance policies are adopted or enforced pursuant to an agreement among manufacturers.

Resale price maintenance may, for example, facilitate a manufacturer cartel. . . . An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers. . . . To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel [*i.e.*, a manufacturer cartel or a retailer cartel], it, too, would need to be held unlawful under the rule of reason.

Id. at 2717-18.

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The Commission does not contend that the exchange of information among competitors is categorically without benefit.⁶ Rather, the allegation is that here – taking into account the type of information involved, the level of detail, the absence of procedural safeguards, and overall market conditions – the exchange of information engineered by NAMM lacked a pro-competitive justification.

III. The Proposed Consent Order

NAMM has signed a consent agreement containing a proposed consent Order. The proposed Order enjoins NAMM from encouraging, advocating, coordinating, or facilitating in any manner the exchange of information among musical instrument manufacturers and dealers relating to the retail price of musical instruments or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer. The proposed Order also enjoins NAMM from facilitating any musical instrument manufacturer or dealer in entering into or enforcing any agreement between or among musical instrument manufacturers or dealers relating to the retail price of any musical instrument or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer.

In addition, the proposed Order requires NAMM to institute an antitrust compliance program. The proposed Order requires, *inter alia*, the review by antitrust counsel of all written materials and prepared remarks by any member of NAMM's board of directors, employee, or agent of NAMM relating to price terms and minimum advertised price policies; the provision by antitrust counsel of appropriate guidance on compliance with the antitrust laws; and annual training of NAMM's board of directors, agents, and employees concerning NAMM's obligations under the Order.

⁶ See *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (explaining that the exchange of information can, in some circumstances, increase economic efficiency and render markets more, rather than less, competitive). See also Richard A. Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 Geo. L. J. 1187, 1193-97 (1979).

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The proposed Order would not interfere with the ability of NAMM to engage in legitimate trade association activity, including its sponsorship of trade shows and other events. The proposed Order explicitly excludes from its prohibitions the ordinary commercial activities of NAMM's members on the show floor, and any conduct protected by the *Noerr-Pennington* doctrine. In addition, the proposed Order excludes from its prohibitions the publication or dissemination of aggregated survey data, the sharing of best practices and training materials, and the communication of information relating to creditworthiness, product safety, and warranty issues.

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

AMERICAN TELECOM SERVICES, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4256; File No. 082 3114
Complaint, April 15, 2009 – Decision, April 15, 2009

This consent order addresses the offer of rebates by American Telecom Services, Inc., a company that has advertised and sold products to the public, including telephones and telephone services. The order prohibits the respondent from misrepresenting, in any manner, expressly or by implication, the time in which any rebate will be mailed, or otherwise provided to consumers; from failing to provide any rebate within the time specified or, if no time is specified, within 30 days of receiving a properly completed request; and from misrepresenting any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate. The order requires the respondent to make available to the Commission, upon request, a specimen copy of all advertisements or rebate forms containing the representation covered by this order, all materials that were relied upon in disseminating the representation, and all written or electronic complaints relating to rebates and any responses to those complaints. The order also requires the respondent to provide a copy of the order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives whose duties include the exercise of managerial responsibility with respect to the subject matter. In addition, the order requires the respondent to notify the Commission prior to any change in the corporation that may affect compliance obligations arising under the order and to file periodic reports with the Commission.

Participants

For the *Commission*: Linda K. Badger and Matthew D. Gold.

For the *Respondent*: Sean P. Gates, Morrison & Foerster.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Telecom Services, Inc., a corporation (“ATS” or