

UPDATE ON THE FEDERAL TRADE COMMISSION'S INVESTIGATION OF THE AGO



As many of you are aware, the U.S. Federal Trade Commission sent the AGO a letter of inquiry in 2015 asking about some of our practices and procedures. The FTC is responsible for enforcing antitrust laws. Their letter focused on provisions of our Code of Ethics that prohibit members from seeking employment in a position held by another member and

permit applying for a job only when a position is vacant. The FTC also looked into our practice of publishing salary guidelines and model contract provisions that organists may use in negotiations with their respective employers. The agency believes that these provisions are not only anticompetitive but may be illegal under Section 5 of the FTC Act and under Section 2 of the Sherman Act because they interfere with the competition that should naturally occur between two organists.

In response to the FTC's inquiry letter, the AGO retained experienced antitrust counsel. Our counsel, Claudia Higgins of Kaye Scholer LLP, spent many years as a member of the FTC staff and its management team. She knows the staff members conducting this inquiry, and she explained to us the rationale behind the FTC's position.

Last fall, AGO Headquarters provided the agency staff with documents and information they requested. Subsequently, in December, AGO Past President John Walker and I along with our counsel met with FTC staff members at the FTC Headquarters in Washington, D.C., to discuss various aspects of their inquiry. Although the FTC staff listened carefully to our position and were respectful, they maintained that our Code of Ethics and website will require changes to meet the requirements of the antitrust laws.

The FTC's position with the AGO is not unusual. In fact, it closely mirrors positions the agency has taken with other associations. For example, a few years ago the Music Teachers National Association received an inquiry concerning their internal procedures. Several other cases have followed the same pattern as well. The FTC has investigated the National Association of Teachers of Singing, the Professional Skaters Association, and the California Association of Legal Support Professionals among others.

While working through this process with the FTC, Past President John Walker, President Michael Bedford, and I have kept the National Council fully informed. Although we would like to continue operating as we have for many years, we believe that we need to adjust our procedures to modify those that have been questioned by the FTC staff. If we were to decide instead to battle this out in court, the costs to defend our position could be astronomical, and we would stand a good chance of losing on the merits. On the other hand, we do not think

that the changes we will need to make to satisfy the FTC will adversely affect our organization. The changes would be to modify one ethics provision while deleting two others; discontinue publishing salary guidelines; and discontinue publishing model contract provisions. All AGO chapters must follow these rules as well. Rigorously.

For more than ten months we have been engaging with the FTC to determine exactly what the FTC believes we need to change. Currently, we are still talking with the FTC about specifics, but we have exchanged several drafts so we know to a significant extent what will be required. At the end of this inquiry we will likely enter into a settlement agreement with the FTC that will mirror cases similar to ours, such as those I referenced above. We will keep you closely apprised of our efforts. After all, this is your organization.

If any reader of this column has questions, I would be glad to try to answer them for you. Let me hasten to add that I am not unduly concerned about the outcome of this process. Our plan is to enter into a settlement agreement that will require changing the ethics provisions at issue and removing the salary and contract provisions from our national website and the websites of our chapters. The agreement with the FTC will also require us to take specific steps to ensure that all of our members are given appropriate notice of the changes in our procedures and that all of our chapters agree to abide by the settlement's requirements.

It is worth noting that in connection with the settlement agreement, the FTC will make a set of allegations regarding their points of concern, but the AGO will not be asked or required to acknowledge any wrongdoing. We will just agree to make changes going forward.

Let's consider this an opportunity to push the proverbial reset button. We are being given a chance to stop acting in a manner that may be unlawful, and we should be grateful for it. We have an opportunity to return to our roots as an educational organization, and we should be thankful for that as well. In that spirit, with the FTC's approval, we will begin an educational campaign to help clergy better understand the work of organists.

As part of the agreement with the FTC, the AGO executive director has been designated as the anti-trust compliance officer for the Guild, so it will be my job to ensure that all components of the Guild abide by the terms of the consent order. Chapters that don't abide by the rules and do not certify in writing that they will do so must discontinue their affiliation with the Guild. It will be my responsibility to ensure that all chapters sign the certification form.

Friedrich Nietzsche wrote, "That which does not kill us, makes us stronger." Together we will get through this, and it will make us stronger.

JAMES THOMASHOWER

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Statutory Language Supporting the FTC's Inquiry

Here are excerpts of the statutes cited by the FTC. As you can see, the statutory language is broad and general.

Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45):

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." (<https://www.law.cornell.edu/uscode/text/15/45>)

Section 1 of the Sherman Act (15 U.S.C. § 1):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall

make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." (<https://www.law.cornell.edu/uscode/text/15/1>)

Section 12 of the Clayton Act (15 U.S.C. § 12, et seq.):

"Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eigh-

teen hundred and ninety; sections seventy-three to seventy-six, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act." (<https://www.law.cornell.edu/uscode/text/15/12>)