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Re: Proposed Amendment to AIA Code of Ethics and Professional Conduct

Elizabeth Chu Richter, FAIA
2015 AIA President
The American Institute of Architects
1735 New York Ave., NW
Washington, DC 20006-5292

Dear Elizabeth:

The Architects/Designers/Planners for Social Responsibility ("ADPSR") enlisted our firm to research and analyze the AIA's antitrust concerns arising from the ADPSR's proposed rule set out in its August 1, 2014 letter to the AIA. ADPSR's proposed rule 1.402 (the "Proposed Rule") states "[m]embers shall not design spaces intended for execution or for torture or other cruel, inhuman, or degrading treatment or punishment, including prolonged solitary confinement."

On December 11, 2014, then-AIA president Helene Combs Dreiling responded that AIA decided not to make the proposed changes to its Code of Ethics. She reasoned "[t]here is real potential of antitrust challenges to such a rule" and that "such challenges might come either from federal or state enforc[e]ment authorities, for example, or from AIA members arguing that restrictions on their right to design legally sanctioned structures unduly restrains

their ability to compete in the relevant markets." ADPSR sought our help to research potential antitrust issues associated with the Proposed Rule. Based upon our research summarized below, we conclude that no serious antitrust concerns arise from the Proposed Rule.

I. Background on Antitrust Scrutiny of Professional Organizations

Antitrust scrutiny in response to a professional organization's ethical rule could arise in two forms. First, a government agency (such as the Federal Trade Commission or the Department of Justice) may initiate an investigation. Second, individual litigants may challenge the ethical rule through litigation. We do not believe the Proposed Rule is vulnerable to either form of antitrust scrutiny.

Numerous professional organizations have set forth rules or position statements similar to the Proposed Rule. For example, American Medical Association ("AMA") Code of Medical Ethics Opinion 2.06 states, "[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution." Physicians who decide to participate in executions can choose not to be members of the AMA. The Proposed Rule, like AMA Opinion 2.06, would only apply to AIA members. Therefore, architects who would like to design spaces intended for execution or solitary confinement can choose not to be members of the AIA.

The American Nurses Association issued the statement that "[t]he American Nurses Association (ANA) is strongly opposed to nurse participation in capital punishment. Participation in executions, either directly or indirectly, is viewed as contrary to the fundamental goals and ethical traditions of the nursing profession." ANA Revised Position

Statement (Jan. 28, 2010), *available at* http://www.nursingworld.org/MainMenuCategories/EthicsStandards/Ethics-Position-Statements/prtetcptl14447.pdf. Similarly, the American Psychiatric Association released a position statement on segregation of prisoners that "[p]rolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates." Position Statement on Segregation of Prisoners with Mental Illness (2012), *available at* file:///C:/Users/13805/Downloads/Position-2012-Prisoners-Segregation.pdf. These analogous ethical rules and policy statements have not been subject to antitrust scrutiny. The cases that do reference these professional rules do not question them on antitrust grounds, but rather treat them as valid. *See, e.g.*, *Cooey v. Strickland*, 589 F.3d 210, 227 (6th Cir. 2009) (referencing the existence and enforceability of AMA Opinion 2.06, which prohibits physicians from participating in executions, but not addressing any antitrust concerns).

II. Antitrust Prohibitions Under the Sherman Act

An antitrust challenge to the Proposed Rule would likely invoke Section 1 of the Sherman Act, which prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce[.]" 15 U.S.C. § 1 (1976). Despite the breadth of this language, courts have long interpreted Section I to prohibit only concerted activity which unreasonably restrains trade. *See, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (explaining that the Supreme Court "has not taken a literal approach to this language"). In analyzing the Sherman Act, the Supreme Court reasoned that a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be "*per se*"

unreasonable—in which the court presumes the restraint is unreasonable—or because the restraint violates the "Rule of Reason"—which tests whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or destroy competition. *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457–58 (1986).

Antitrust laws do not prohibit professional associations from adopting reasonable ethical codes designed to protect the public. Indeed "[s]uch self-regulatory activity serves legitimate purposes, and in most cases can be expected to benefit, rather than to injure, competition and consumer welfare." *Am. Acad. of Ophthalmology*, 101 F.T.C. 1018 (1983); *see also* Federal Trade Commission, Other Agreements Among Competitors, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/other-agreements-among.

III. The Proposed Rule Is Ethical, It Does Not Seek to Restrain Trade

As an initial matter, any opponents to the Proposed Rule would have trouble labeling it a "conspiracy to restrain trade." Numerous courts require a "conscious commitment to a common scheme designed to achieve an unlawful objective" to establish a Sherman Act violation. *Toscano v. Prof'l Golfers Ass'n*, 258 F.3d 978, 983 (9th Cir. 2001) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)); *see also U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 1002 (11th Cir. 1993) ("Federal antitrust law requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately."). Many courts also require an economic motive underlying the contested behavior. *See, e.g.*, *Poindexter v. Am. Bd. of Surgery, Inc.*,

911 F. Supp. 1510 (N.D. Ga. 1994) ("Proof of a conspiracy to restrain trade requires a showing that conspirators had a rational economic motive for entering into the conspiracy, as well as a conscious commitment to cooperate in a scheme designed to achieve an unlawful objective."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596–97 (1986) ("if [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy"). Because the objective of the Proposed Rule is purely ethical, it would be difficult for an opponent of the Proposed Rule to establish an economic motive, much less an unlawful motive. As such, an antitrust challenge to the Proposed Rule will very likely fail to establish that the Proposed Rule is a restraint on trade.

In any event, even if an opponent of the Proposed Rule could establish it is a restraint on trade, the opponent would further have to establish that the Proposed Rule fails the Rule of Reason: also a very unlikely finding.

IV. The Proposed Rule Meets the Rule of Reason

The Supreme Court has recognized that professional services' "[e]thical norms may serve to regulate and promote [] competition, and thus fall within the Rule of Reason." *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 696 (1978). Indeed, courts are notoriously reluctant to apply a *per se* analysis to professional organizations' ethical rules. *See Ind. Fed'n of Dentists*, 476 U.S. at 458 ("we have been slow to condemn rules adopted by professional associations as unreasonable *per se*"); Michael K. Braswell & Stephen L. Poe, *The Residential Real Estate Brokerage Industry: A Proposal for Reform*, 30 Am. Bus. L.J. 271, 302–03 (1992) ("The courts generally apply the 'rule of reason' test in determining

whether activities of a trade association violate the Sherman Act, with only those associational activities that unreasonably restrain trade constituting violations.").[1] The Supreme Court "has taken pains to preserve the possibility that a particular practice which could be viewed as a violation of the Sherman Act in another context, should be viewed and treated differently in the circumstances peculiar to a learned profession." *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 222 (7th Cir. 1990); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 788 (1975) ("The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."). Given courts' reluctance to apply the *per se* rule to professional organizations' ethical rules, it is extremely unlikely a court will find the Proposed Rule *per se* unreasonable.

Under the "Rule of Reason," the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. *Ind. Fed'n of Dentists*, 476 U.S. at 457–58. The Rule of Reason requires balancing the anticompetitive effects and possible efficiency gains or business justifications of the challenged practice. *Cal. Dental Ass'n*, 128 F.3d at 727.

The Supreme Court has never found that a professional organization's purely ethical rule violates the Sherman Act. While non-economic justifications for a restraint on trade are

[1] *Per se* rules of illegality are appropriate only when conduct is manifestly anticompetitive—that is, it has a "pernicious effect on competition and lack any redeeming virtue." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); Fundamentals of Antitrust Law, AHLA-PAPERS P02129701 ("Without inquiry into the particular market context in which the restraint was found, courts generally have presumed restraints to be unreasonable per se involving horizontal price fixing, [] market division, [] and group boycotts.") (internal citations omitted).

generally not considered in the Rule of Reason analysis, the Supreme Court has recognized that professional associations' ethical rules promote values "independent of the values attributed to unrestrained competition [that] must enter the equation." *Wilk*, 719 F.2d at 227. Indeed, the Sixth Circuit reasoned that "some professional practices might survive antitrust scrutiny under the rule of reason even though illegal in other contexts." *Smith v. N. Michigan Hosps., Inc.*, 703 F.2d 942, 949 (6th Cir. 1983); *see also United States v. Nat'l Soc. of Prof'l Engineers*, 555 F.2d 978, 983–84 (D.C. Cir. 1977) *aff'd*, 435 U.S. 679 (1978) (describing a doctrine "that, in limited contexts, permits a business group to adopt a rule or practice that is narrowly defined in terms of intended social benefits notwithstanding potential effect on price, [and] may come to have application to ethical rules of professional associations narrowly confined to interdiction of abuses"). Moreover, the AIA has a strong argument that it would be overly rigid to foreclose consideration of the public interest justification simply because it is non-economic—particularly when there is no economic self-interest promoted by the Proposed Rule. Such a broad reading of the Supreme Court cases would impede numerous important ethical rules and would largely defeat the purpose of many ethical rules set forth by professional associations.[2]

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[2] *See, e.g.*, AMA Code of Medical Ethics Opinion 2.11, Gene Therapy (restricting the use of gene therapy and genetic manipulation for use "only for therapeutic purposes" and explaining that "[e]fforts to enhance 'desirable' characteristics through the insertion of a modified or additional gene, or efforts to 'improve' complex human traits—the eugenic development of offspring—are contrary not only to the ethical tradition of medicine, but also to the egalitarian values of our society"); National Society of Professional Engineers Code of Ethics, Rule III(1), Professional Obligations, *available at* http://www.nspe.org/resources/ethics/code-ethics III(1)(c) (stating "[e]ngineers shall not accept outside employment to the detriment of their regular work or interest"); *see generally Am. Acad. of Ophthalmology*, 101 F.T.C. 1018 (1983) ("self-regulatory activity [such as

The FTC has explained, "[t]he legality of a professional society's ethical rules under the antitrust laws depends upon their purposes and competitive effects." *Am. Acad. of Ophthalmology*, 101 F.T.C. 1018 (1983). The Proposed Rule does not prohibit architects from designing prison facilities altogether. Rather, it restricts only the design of spaces "intended for execution or for torture or other cruel, inhuman, or degrading treatment or punishment, including prolonged solitary confinement." In light of this, and because architects who would like to design spaces intended for execution or solitary confinement can choose not to be members of the AIA, the Proposed Rule has no effect on competition. Moreover, the Rule of Reason does not necessitate a narrow definition of pro-competitive virtues. *See Kreuzer*, 735 F.2d at 1493 ("[A] concerted refusal to deal may be used to advance the group's social and moral objectives unrelated to the group's business and economic interests. Therefore, because group exclusionary tactics have different purposes and because some are not inconsistent with public policy, it is necessary to evaluate their economic impact beyond the asserted intent of the group engaged in the boycott."). Assuring that members of the AIA do not participate in human rights violations facilitates

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professional organizations' ethical codes] serves legitimate purposes, and in most cases can be expected to benefit, rather than to injure, competition and consumer welfare"); *Goldfarb*, 421 U.S. at 788 ("The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."). The AIA's Antitrust Compliance Statement and Procedures emphasizes "[r]easonable industry codes, standards and certification programs may promote quite valid interests, including the protection of safety, *health* and the environment and *the maintenance of high standards of ethics and conduct*." American Institute of Architects, Antitrust Compliance Statement and Procedures at 8 (September 2002), *available at* http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiap074120.pdf (emphasis added). The Proposed Rule serves to promote these very values.

trust in the marketplace, strengthens good governance, and promotes overall competition.[3] Although the Proposed Rule may dictate that AIA members refrain from a minor subset of work, the Proposed Rule overall facilitates trust in the market.

Indeed, the Proposed Rule fits cleanly within the DC Circuit's reasoning "that, in limited contexts, [] a business group [may] adopt a rule or practice that is narrowly defined in terms of intended social benefits notwithstanding potential effect on price, [and] may come to have application to ethical rules of professional associations narrowly confined to interdiction of abuses." *United States v. Nat'l Soc. of Prof'l Engineers*, 555 F.2d 978, 983–84 (D.C. Cir. 1977) *aff'd*, 435 U.S. 679 (1978) (citing *Bd. of Trade of Chi. v. United States*, 246 U.S. 231 (1918) and *Goldfarb*, 421 U.S. 773).

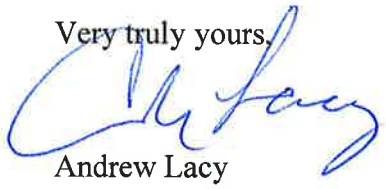
Conclusion

Any ethical rule that places a restriction on how architects practice may have some marginal impact on competition. However, the cases that have raised antitrust concern have much greater consequences on competition—such as major restrictions on advertising or refusals to deal with categories of other professionals: a far cry from the very limited impact

[3] *See generally* Sue Woodrow, *Ethics as a building block of economic growth: Global insights and Indian Country models* (July 1, 2010), *available at* https://www.minneapolisfed.org/publications/community-dividend/ethics-as-a-building-block-of-economic-growth-global-insights-and-indian-country-models ("Trust is at the heart of good governance, and good governance, in both the corporate and public sectors, promotes sustainable business growth. In the absence of good governance, unethical behavior can flourish. The problem is circular; if unchecked, unethical behavior undermines the rule of law, thereby further weakening legal and administrative institutions. The cost of poor ethics management goes beyond padded payrolls or monies siphoned into personal expense accounts. A lack of reliable, transparent, and consistent governance is a powerful disincentive to invest or otherwise do business."); *Quality of Care*, 21 Conn. L. Rev. at 624 ("practices producing greater benefits than harms should be beyond antitrust scrutiny when they are genuinely necessary to improve market performance").

of the Proposed Rule. Given the case law discussed above, long-standing analogous rules within other professional organizations that have not raised antitrust concerns, and the overall value courts place on professional organizations' ethical rules, no serious antitrust concerns arise from the Proposed Rule.

Very truly yours,



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