Antitrust Compliance Guide for Association and Board Leadership

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ANTITRUST COMPLIANCE GUIDE FOR ASSOCIATION AND BOARD LEADERSHIP

2014 Edition

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INTRODUCTION

Real estate brokers and salespeople and association executives, elected officers, and directors, must have a basic understanding of the federal antitrust laws.

This guide is not intended as a substitute for the legal advice and counsel provided by an association's own attorney. Rather, it is designed to be used to assist associations and boards in identifying questionable or sensitive conduct and discussions, and to help ensure that the legitimate affairs of the association are not subject to misinterpretation by government antitrust enforcers or private attorneys.

The key to any association of REALTORS® antitrust compliance program is the awareness, sensitivity, and sophistication of the association's elected leadership and staff.

- *First and foremost, association leadership must be aware of the types of conduct prohibited by the antitrust laws.*
- *Second, association leadership must be sensitive to how the antitrust laws can be and are applied in the context of the real estate industry and, more specifically, to the activities of a real estate trade association.*
- *Third, association leadership must have the firmness and sophistication to be able to influence the behavior of association members and promptly and unequivocally rule "out of order" any discussion or activity that could lead to antitrust litigation and/or liability for the association.*

What are the preventative measures that an association and its elected leadership and staff can take to help ensure the association's compliance with the antitrust laws?

CONDUCT OF ASSOCIATION MEETINGS

Agendas

Association meetings should be held only when there is legitimate business to be conducted.

- *The association executive should draft an agenda for each Board of Directors or Executive Committee meeting. The agenda should be sent to each participant in advance.*
- *The agenda should be specific and avoid references to discussion topics in language that might raise antitrust suspicion such as "marketing practices" or "economic conditions."*
- *Particularly sensitive topics should be reviewed in advance by association counsel.*

Prohibited Discussions

The association executive and, if necessary, association counsel should attend all meetings of the Board of Directors or Executive Committee to ensure that prohibited discussions of commission rates or potential boycotts do not occur. If a prohibited topic is raised, the association

executive or counsel should immediately interrupt the discussion and require that the topic be changed. If the discussion persists, the association executive or counsel should insist that the presiding officer of the meeting rule the discussion out of order, declare the meeting adjourned, and that the minutes reflect the presiding officer's ruling and adjournment.

Minutes

Minutes should be kept of all meetings of the Board of Directors, Executive Committee, and standing committees.

- *The minutes should summarize accurately and concisely the action taken at the meeting.*
- *The minutes should be reviewed by association counsel to be sure that the language used to record the results of the meeting is not subject to misinterpretation.*

Professional Standards/ Arbitration Hearings

The association executive should attend all professional standards or arbitration panel hearings to ensure that both substantive and procedural requirements are met. Association counsel should review all decisions of a professional standards or arbitration panel that present novel, unique or controversial issues to ensure that the decision was rendered in conformance with all applicable rules, regulations and procedures and, therefore, can be defended or enforced in court, if necessary.

Informal Meetings

The association should prohibit the use of association offices or facilities for "informal" or "rump" meetings of members. Given their unauthorized character, meetings of this type are uniquely susceptible to abuse and misinterpretation. To the extent an incriminating meeting takes place at the association office, or elsewhere with the knowledge and consent of association leadership, the association itself could be implicated in any antitrust litigation that arises from the meeting.

FOLLOW APPROPRIATE "BOARD OF CHOICE" PRACTICES

Competition Among Associations

Under the "Board of Choice" concept associations compete with each other to attract and retain members and deliver to them association products and services. The status of associations as competitors requires them to be sensitive to how the antitrust laws apply to their actions as competitors of other associations. The most obvious and perhaps most serious violation of the antitrust laws is, of course, pricefixing. Associations may not agree or confer about their prices, that is, the dues and fees they charge for membership and other services.

Market Allocation

Another serious antitrust violation occurs when competitors engage in "market allocation." In the association context, this means that associations may not, for example, agree to allocate among themselves the exclusive right to:

- *Recruit or accept as members persons in specified geographic areas*
- *Recruit or accept specified types of members (e.g., commercial, appraisal, etc.)*
- *Offer particular products or services to members*

Mergers

Mergers of associations or MLSs may also raise potential antitrust concerns. Association mergers must be analyzed and assessed for their vulnerability to attack as unlawfully eliminating or reducing inter-association competition in violation of the antitrust laws. An association merger designed to produce an organization capable of serving members more effectively at the same or even lower costs is legitimate and lawful.

On the other hand, a merger which is intended, designed and implemented primarily to produce a new, larger association free of the challenge of competing for members with other associations may risk violating the antitrust laws. This vulnerability is heightened if the new association's post-merger conduct appears to exploit the new competition-free environment, such as by raising dues to levels above those of each of the merged associations, and/or that which

could be charged if the association faced competition from others.

Multiple Listing Service (MLS)

Another area requiring care is in the operation of Multiple Listing Services. Associations of REALTORS® and MLSs may not, *under any circumstances*, determine, prescribe,agree upon, or discuss the fees they charge or intend to charge participants in their respective MLS systems. All prices and fees must be established unilaterally by each association operating an MLS, based on its own business judgement and without any discussion or collaboration with others operating MLS systems.

Joint or Regional MLSs

An important context in which antitrust issues may arise is in the operation of regional MLS by several boards in a geographic market area. In some cases, regional MLSs are simply information-sharing facilities, whereby each participating board operates its own MLS but gains access to the listing data of each others' participating MLS through the regional facility.

In other cases, participating associations establish a self-standing MLS operation, organized as a separate corporation wholly-owned by the participating associations. Participants may gain access to the MLS directly from the MLS, or through one of the participating boards acting as a "retailer" of the MLS services provided by the "wholesaler," the regional MLS. In either case, it is critical that each board *independently* establish the fees to be charged to participants for MLS participation.

Associations who share access to an information-exchange system, or who jointly own and operate a regional MLS, *cannot* minimize or eliminate competition by agreeing on the fees each will charge MLS participants, or on minimum or maximum fees to be charged. Moreover, the regional MLS itself may not set, limit, direct or otherwise control the fees which those associations, in turn, charge participants who access the MLS "through" them. Of course, in circumstances where participants gain access to the regional MLS directly from the MLS entity, rather than "through" a participating local association, it is entirely appropriate and lawful for the MLS to establish the fees which it will charge its customers, the participants.

Associations operating MLSs, whether independently or in some form of regional facility, may also not agree on other aspects of MLS services. They may not, for example:

- *Agree on the territories in which each will operate, such as by each association or MLS accepting only listings on properties in prescribed geographic areas*
- *Agree to allocate the types of property listings each will accept, such as where one association or MLS accepts only commercial listings in exchange for another's exclusive right to include farm property listings*

Multiple listing services and, in particular, large, strong regional MLSs may also have to consider the competitive consequences and appearances of their conduct to avoid a claim that they are monopolizing or attempting to monopolize the MLS market.

Where large regional or other collective MLSs have substantial market dominance, they need to use special care to ensure that their policies and efforts are designed and operated to serve the interests of real estate professionals and consumers.

MLSs that operate in an anti-competitive manner can be detrimental or destructive to other local independent or REALTOR® -owned MLS operations. For example, "predatory" below-cost pricing strategies which have the intent and/or effect of driving other independent or REALTOR® -owned MLS operations out of business may be viewed as attempts to monopolize the market and must be avoided.

MAINTENANCE OF ASSOCIATION RECORDS

Association executives, in consultation with association counsel, should implement a document retention and destruction policy. Documents should not be kept any longer than reasonably necessary and should be destroyed when their useful life is over.

The keeping of "dual", "secret", or "private" files by association executives, elected officers, committee chairmen or directors, should be prohibited. These files, by their very nature, are tempting depositories for records of "off the record" communications and, quite understandably, attract the attention of antitrust investigators.

Elected Leadership

Association files of elected officers and directors should be recovered from them upon the expiration of their terms. The files should be examined by the association executive or counsel, and any unnecessary or unofficial material discarded before the files are turned over to their successors.

Distribution of Association Records

Copies of association correspondence and memoranda should be kept to a minimum. Almost any document can be misinterpreted by someone who is determined to do so. Limited distribution of association documents will keep the risk of misinterpretation to an acceptable level.

All correspondence and memoranda between an association and its counsel should be kept in a segregated file and should not be disseminated beyond the addressees unless approved in advance by association counsel. This type of treatment for attorney-related material is essential to preserve the association's right to assert the attorney-client privilege of confidentiality.

ASSOCIATION AND MLS FORMS

Many associations publish standard form listing or property sale contracts for use by their members. Since these forms are disseminated by the association, their contents are often cited as constituting

collective action by the association to regulate or control the types of listings or other business practices of its members. Accordingly, any forms developed by the association and offered for use by its members should be reviewed to delete any provisions related to the following:

- *Preprinted commission rates or cooperative commission splits*
- *Preprinted "%" sign or "$" sign in the space reserved for expression of the broker's compensation*
- *A predetermined listing duration, such as 90 or 120 days*
- *Clauses automatically renewing the listing unless cancelled by the property owner*
- *A predetermined "protection period"*

Commission Schedules

Associations may also wish to consider inserting an explicit preprinted notice on all listing forms stating that commission rates and contract terms are not regulated by law and are subject to negotiation between the broker and seller. This notice would aid in dispelling any notion that association members continue to adhere to a commission schedule even though the schedule was long since abolished.

CONSIDER AND ADOPT APPROPRIATE MLS ACCESS POLICIES

Non-Member Access

NAR policy permits limiting access to an MLS owned and operated by one or more local associations of REALTORS®. Although this policy has been challenged as a violation of federal and state antitrust laws, the policy has been successfully defended in state and federal courts in all but two of those cases.

As a result of this success, in all states but California, Florida, Georgia, and Alabama, it is lawful to limit MLS access to REALTORS®. Nevertheless, associations and MLSs may face a challenge to a policy restricting MLS access to REALTOR® members. Because of the strong track record of success in such cases, there is a good probability that a claim that MLS access must be offered to nonmembers can be defeated. The prospects for success are never certain in litigation matters, however, and the costs of financial and other resources (time, staff) may be substantial.

For that reason, and other business reasons, some associations have opted to admit nonmembers to their MLSs to completely eliminate the prospect of litigation over the issue. In such cases, the MLSs often make MLS participation available on the condition that nonmembers agree to the following:

- *Arbitrate disputes with other MLS participants using the REALTOR® association arbitration system*

- *Abide by certain rules derived from the NAR Code of Ethics, and in particular, the obligation not to solicit sellers of properties listed with other members during the term of the listing agreement*
- *To pay MLS fees that are modestly higher than the fees paid by REALTOR® members, who contribute indirectly to the operation of the MLS through payment of REALTOR® dues*

Associations may find it helpful to consider these questions prior to the time they may be challenged regarding access of nonmembers to their MLSs, in order to have the opportunity to deliberate and carefully consider the issues free of the pressure brought on by an actual or threatened lawsuit.

ASSOCIATION ADVERTISING PUBLICATIONS

From time to time association members may raise concerns about the advertising rates or other practices of a local newspaper. This can lead to a suggestion that brokers should collectively reduce their advertising, or refuse to advertise altogether, unless and until the newspaper lowers its advertising prices or changes its policies. Such action must be avoided because, if implemented, it would almost certainly constitute a per se illegal group boycott.

Homes Guides

Some groups of members and associations have also produced and distributed their own advertising publication, such as a "Homes Guide" or a similar circular. These publications are usually distributed at no cost to the public and contain advertisements for individually listed properties and, in some cases, firm advertisements.

Creation of such publications is inherently *pro-competitive* in that it provides a competitive alternative advertising opportunity.

Illegal Boycotts

Notwithstanding the pro-competitive nature of real estate advertising publications, such activity cannot and must not include an agreement among the brokers involved in the venture, or association members, that they will advertise *only* in the "Homes Guide" and not in the local newspaper. Such an agreement may constitute a *per se* illegal boycott of the newspaper. All potential advertisers in any publication must retain their freedom to advertise wherever else they may find it desirable or beneficial to do so.

RELATIONSHIP WITH ASSOCIATION COUNSEL

Every association should have access to competent legal advice, particularly in the antitrust area. The extent of any individual association's use of counsel will, of course,

depend upon the nature and extent of the association's activities and programs. An association should, however, never hesitate to insist upon a retainer agreement that defines, in advance, the fees that will be charged for a lawyer's services.

The association's counsel must be fully aware of all of the association's activities. An association should provide its counsel with a complete set of association and MLS governing documents, as well as all policy and procedure manuals of the state associations and National Association.

An association should provide the name of its counsel to the state associations and National Association to ensure that he or she receives any and all notices, communications or other information those organizations disseminate to association counsel.

An association also should, if possible, send its counsel to the periodic legal seminars sponsored by the National Association and, in some cases, state associations. NAR staff attorneys regularly appear at these sessions to brief local association counsel on recent developments affecting associations and REALTORS®.

Association counsel should further:

- *Review any amendments to association or MLS governing documents*
- *Consult on any sensitive membership or professional standards matters*
- *Attend and prepare minutes of meetings where legally sensitive matters are discussed*

STATE OR FEDERAL ANTITRUST INVESTIGATIONS

Before filing a formal complaint, the Department of Justice, the Federal Trade Commission and most state antitrust enforcement agencies usually investigate a person or firm whom they suspect might have violated the antitrust laws. Pre-complaint investigations often begin with the receipt of a civil investigative demand (CID) or a similar investigatory request, which can require the respondent to produce documents, answer written interrogatories, or give oral testimony under oath.

Investigations can also be conducted even less formally by federal or state investigators seeking to meet with association leadership or members to discuss particular activities or concerns. Investigators may even appear unannounced at the association offices and ask to see certain documents or interview certain association officers.

Associations should adhere to the following procedures when they find themselves the object of an antitrust investigation or the recipient of a complaint.

1. *Association personnel should refer all requests for access to association files to the association executive.*
2. *An association executive should verify the identity of any stranger seeking to examine association documents, or wishing to "study" association operations.*

3. *An association executive should refer any request from a government investigator for an interview or copies of association documents to the association's attorney, and notify the state associations and National Association immediately upon receipt of such a request. The same procedure should be followed if the association receives a civil investigative demand, or an actual complaint.*

4. *All subsequent communications between the association and the government agency should take place through the association's counsel. The express approval of counsel should be secured before any questions are answered or documents are provided to the investigators. Interviews with the government investigators should be given only in the presence of association counsel.*

5. *All subsequent inquiries from the press or the public should be referred to the association executive or a designated association spokesperson, who should acknowledge that an inquiry has been received and that the association intends to make every reasonable effort to cooperate with the government investigators. Requests for additional information or commentary should be referred to association counsel.*

CONDUCT OF GRIEVANCE AND ARBITRATION PROCEEDINGS

A grievance or arbitration proceeding is the only time that discussions of the business practices of a particular real estate broker is permissible at a meeting held by an association of REALTORS®. The issue before the hearing panel is whether or not those practices are in accord with the Code of Ethics, in the case of grievance matters, and entitlement to compensation, in the case of arbitration proceedings. The association executive must ensure that professional standards proceedings are never used overtly or covertly to "punish" or discipline a broker engaged in unusual or innovative brokerage practices.

The association's grievance and arbitration procedures must be in writing, reviewed by counsel, and conform in principle with NAR's *Code of Ethics and Arbitration Manual*.

The association's counsel should be present if the parties to a grievance or arbitration hearing have counsel present, or when the matters to be considered would appear to involve particularly complex or sensitive issues.

The association's professional standards committee must insist that all complaints be provided in writing, that all hearings be transcribed or recorded, and that the records be maintained for a suitable length of time to protect the association.

Before an association imposes a disciplinary sanction of suspension or expulsion from association membership, the association should consider whether it is advisable to first seek a declaratory judgement from a court of competent jurisdiction to confirm that the suspension or expulsion does not violate any law.

ASSOCIATION LIABILITY FOR THE CONDUCT OF ITS VOLUNTEER LEADERSHIP

The United States Supreme Court has held that a trade association will be liable under the antitrust laws for the conduct of its volunteer members when those members are acting with the "apparent" authority of the association.

As a result of this ruling, an association of REALTORS® can be held liable if any of its volunteer leaders use their official positions within the association to engage in antitrust violations, even if their conduct is expressly contrary to the association's rules, regulations, policies, and procedures. Associations must therefore, at a minimum, be sure:

- *That all persons who serve on or chair antitrust-sensitive committees, such as the Grievance, Professional Standards, Multiple Listing and Membership Committees, are thoroughly familiar with the association's rules, regulations, and procedures governing those committees.*

- *That the decisions of these committees are subject to review or approval by the Board of Directors of the association.*

An association may not disclaim liability for the misuse of authority by its volunteer leaders by asserting that they acted contrary to the association's instructions or policies. If an association puts a person in a position where he or she can misuse or misinterpret his or her authority as a representative of the association, the association, as well as the member, must pay the consequences.

PROPER APPLICATION OF THE NAR DUES FORMULA

The National Association's dues formula is intended to allocate the costs of operating the National, state, or local associations in the most equitable manner possible. The National Association's Board of Directors determined that allocating costs according to the size of a member's office is the fairest method available, since the benefits derived from association membership accrue to the REALTOR®'s business activities as a whole.

The number of licensees affiliated with a REALTOR® was ultimately selected as the best measure of firm size because it met the three fundamental criteria that were deemed to be essential to any viable dues formula: ease of administration, fairness, and preservation of the independent contractor status of the salesperson.

The entire rationale supporting the dues formula is undermined, however, when the dues formula is mis-characterized as requiring a REALTOR® to "pay the dues" of his non-member salespeople, or alternatively, as requiring all salespeople of a REALTOR® to also join the association. If a REALTOR® in fact "paid the dues" of his salespeople by paying his REALTOR® dues, those salespeople might in some states be deemed "employees" for tax or insurance purposes. Such a characterization might also allow the dues formula to be construed as a form of "compulsion" to require all salespeople to join the association.

To suggest that the association, through the dues formula, requires all salespeople of a REALTOR® to join the association is equally untrue and even more dangerous. A local association may not interfere with the relationship between a REALTOR® and his salespeople, including whether or not a REALTOR®'s salespeople are themselves association members. To characterize the dues formula as imposing this requirement is to admit to an antitrust violation.

Properly characterized, however, the dues formula has withstood attacks as an unreasonable restraint of trade, a *per se* illegal tying arrangement, and a violation of the "independent contractor" criteria.

CONCLUSION

An association's antitrust compliance program should act as an "early warning" system to permit the association and its members to avoid antitrust problems by anticipating them. The antitrust laws also evolve over time, and an affirmative effort must be made by every association of REALTORS® to keep abreast of this evolution. Awareness of, and compliance with, the antitrust laws *cannot* be haphazard. It must be the product of a positive comprehensive compliance program.

ANTITRUST COMPLIANCE QUIZ

True or False
(Circle One)

T **F** 1. Several association members remained at the restaurant bar after an association of REALTORS® installation banquet and agreed that they would all raise their commission rates from six to seven percent beginning the first of the month. The association of REALTORS® cannot be liable for this conduct since it occurred *after* the association banquet.

T **F** 2. REALTOR® A, chair of the membership committee of the local association of REALTORS®, sent a letter on association stationery to a competitor who had applied for association membership. REALTOR® A advised the applicant that his application would be rejected, even though the Membership Committee had not considered the application, and the applicant otherwise met the association's criteria. Since REALTOR® A acted contrary to the association's established policy, the association is not liable for his conduct.

T F 3. Under the NATIONAL ASSOCIATION OF REALTORS® model board bylaws dues formula, a REALTOR® must pay the dues of any of his salespeople who do not choose to join the association.

T F 4. REALTOR® X, President of the local association of REALTORS®, maintained a "private" file in her office where she kept diaries and notes of meetings and discussions she had as an association President. Since REALTOR® X kept this file for her own personal use, contents of the file cannot be used as evidence against the association.

T F 5. A local association of REALTORS® received a written opinion from its counsel that the advertising guidelines the association imposed on its members probably violated the antitrust laws. The association executive reprinted that opinion in the association newsletter. Since the association's counsel wrote the opinion, it will be subject to the attorney-client privilege of confidentiality if the association is later sued.

T **F** 6. At a recent meeting of the Forms Committee of the local association of REALTORS®, the committee voted to preprint "120 days" in the listing duration clause since nearly all listings appearing in the association's MLS were 120 day listings. This is not evidence of an antitrust violation because members are free to use other forms or strike out "120 days" and insert a different term.

T **F** 7. Several members of the local association of REALTORS® opposed the membership application of Broker A because they felt he had not acted in the best interest of his client in several transactions. They did not submit these objections in writing to the association's Membership Committee because they did not want to offend Broker A, but rather transmitted them orally to the Chair. These objections can be considered by the committee because they are based on first-hand knowledge of the objecting members.

T **F** 8. An association of REALTORS® may not suspend or expel a member for unethical conduct because to do so would constitute an illegal boycott or concerted refusal to deal.

QUIZ ANSWERS

1. False.

Depending on the circumstances, an association of REALTORS® could be held liable for this conduct if the members involved acted under "the color of" an association of REALTORS® function. Association leaders must always be vigilant to ensure that unauthorized discussions do not occur before, during, or after an association sponsored meeting.

2. False.

An association of REALTORS® may be liable for the "official" conduct of its leaders, even if that conduct is expressly contrary to the association's stated policies.

3. False.

A REALTOR® who pays dues based upon the number of non-member licensees in his office is *not* paying the dues of his salespeople, but rather is paying his own dues. Non-member salespeople are not association members and are not entitled to any rights or privileges of association membership.

4. False.

"Private", "dual", or "secret" files of association leaders can be subpoenaed in an antitrust suit, and their contents used against the association. Such files should not be maintained.

5. False.

The attorney-client privilege is waived if the attorney's opinion is distributed outside the leadership of the association. Since the opinion was disseminated to the general membership, it is no longer privileged and may be used as evidence against the association.

6. False.

Standard forms promulgated by an association of REALTORS® can be used as circumstantial evidence that an association has conspired to "standardize" the terms and conditions of listing agreements entered into by association members. Clearly negotiable terms such as the listing duration and broker's fee should never be preprinted on a standard form prepared by an association of REALTORS®.

7. False.

An applicant for association membership has a right to address objections to his membership application in a hearing before the Membership Committee and, if necessary, before the association's Directors. Thus, all objections must be specific and in writing if they are to be given any consideration by the committee.

8. False.

The REALTORS® Code of Ethics is a legitimate method of industry self regulation. The United States Supreme Court has upheld industry self-regulatory schemes imposed through trade

associations so long as their pro-competitive effects outweigh their anti-competitive effects. The REALTORS® Code of Ethics must be vigorously enforced by local associations of REALTORS®, even to the extent of suspending or expelling offending members. This can, and should, be done so long as the Code is strictly construed according to the applicable Standards of Practice and Case Interpretations and enforced pursuant to the procedures set forth in the National Association's *Code of Ethics and Arbitration Manual* or its local equivalent.

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