

ANTITRUST GUIDELINES FOR CONDUCTING IN-PERSON AND VIRTUAL MEETINGS OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

The main purpose of the antitrust laws is to prevent collective action by competitors to restrain trade. Trade associations, which are by definition collections of competitors, receive special scrutiny from the antitrust enforcement agencies. The Association must adopt prudent, conservative approaches to antitrust compliance in order to avoid the harsh criminal penalties, the high costs of defending civil suits, and the devastating impact of private treble damage actions associated with antitrust violations.

Members and staff should recognize that criminal antitrust enforcement is directed at the individuals involved. Individuals can be prosecuted and sentenced to financial penalties and prison terms for acts they commit on behalf of their company, employer, or association.

The following guidelines for the conduct of in-person and virtual meetings of the Association and its Councils, Committees, Task Forces, Working Groups, Clubs, subcommittees, sub councils, and ad hoc groups that might be formed (hereafter “Association unit”) and are designed to assist the Association in preventing even the appearance of engaging in activities that violate the antitrust laws.

I. Notice & Agenda

Each meeting must be preceded by a notice to the members of the Association unit involved and a copy of the draft agenda. This notice will alert the members to the business to be considered and enable them to prepare for a productive meeting. Providing the agenda in advance can also alert members and staff to matters that may raise legal questions and furnishes them an opportunity to seek advice of counsel prior to the meeting.

The draft agenda should be modified as necessary and then approved prior to the meeting. Once the agenda is approved, it should be followed.

II. Discussion Topics

The limits of permissible discussion at a meeting cannot be precisely defined in the abstract. However, a conservative approach requires that the following topics should be avoided at meetings unless counsel is alerted in advance and approves the proposed discussion:

- Current or future (projected) prices or any elements of price or pricing policies, including the terms and conditions of particular sales, such as credit terms, discounts, terms of sale, profit margins, or other financing arrangements, or warranties.
- Sales or production targets, inventory and marketing methods.
- Future marketing plans or strategies, including sales territories, plans to begin and/or end the production of certain types of products, or the timing of marketing efforts or changes in product lines.
- Refusals to supply products or services to specific customers or groups of customers, or to serve specific geographic territories.

- Costs of specific inputs.
- Complaints regarding inputs obtained from a particular vendor or class of vendors, and refusals to continue purchasing from those vendors.

Other discussion topics are not necessarily free from risk. Because it is difficult to specify what actions may present risks under the antitrust law's "unreasonable restraint of trade" standard, counsel should be consulted prior to discussion of any topics that could have the effect of reducing competition.

III. Conduct of Meetings

All meetings are conducted consistent with *Robert's Rules of Order*. Meetings should be conducted in a manner that affords all members an opportunity to present their views. All opinions should be considered before actions are voted upon. The chair of the meeting should undertake this responsibility.

Counsel, staff members and the meeting chairs have the responsibility to terminate any discussion or, if necessary, the meetings themselves if the discussion is diverted toward topics that may raise questions under the antitrust laws. The meeting chairs and the staff members who attend are responsible for maintaining their familiarity with basic antitrust principles and the Association's antitrust guidelines.

Members attending virtual NAHB meetings should remember that the antitrust laws apply with equal force to virtual meetings as they do to in-person meetings. To ensure compliance during virtual meetings, members should only use the "chat" function to record their attendance or to be recognized in order to ask a question of a speaker. No general comments, private or side conversations should occur in the "chat" function. Members wishing to be recognized during the virtual meeting should use the "raise your hand" feature, similar to procedure used during in-person meetings. Members speaking or making a presentation should take precautions when "sharing" their screen to ensure proprietary information is not inadvertently displayed.

IV. Presence of a Staff Member

The Association's policy is to require full-time attendance of either Association legal counsel or a staff member trained in antitrust compliance issues at all meetings of the Association and its units. If neither counsel nor a trained staff member can attend a meeting, it should be postponed unless counsel has been consulted in advance and agrees that it is permissible to proceed.

V. Informal "Rump" Sessions

When a meeting is adjourned, it should be terminated in all respects. Informal "rump" sessions by which small groups of members continue their discussions of business matters, may present a temptation for "confidential" discussions of prohibited topics. Association counsel and staff have been instructed to urge meeting participants to avoid participation in rump sessions.

VI. Role of Association Counsel

Obviously, Association legal counsel cannot attend all meetings of the Association and its units. However, counsel should be given the opportunity to review in advance all meeting agendas; counsel should plan to attend those meetings for which antitrust sensitive issues are included on the agenda. In addition, if the chair of an Association unit or the responsible staff member believes that potentially sensitive matters may arise during an upcoming meeting which requires the attendance of counsel, they should contact counsel so coverage can be arranged. Counsel should also be given the opportunity to review in advance materials that are to be distributed at meetings, as well as the minutes that are prepared afterwards.

VII. Minutes

The legal significance of minutes of meetings must not be underestimated. They are the official record of the meetings of the Association and its various units, and ordinarily they comprise the principal contemporaneous evidence of what transpired at the meetings. They are one of the first types of documents that litigants and investigators will request.

It is the staff's responsibility to prepare concise minutes that accurately describe the actions that were taken, the justification for those actions and, where appropriate, additional pertinent information. The minutes are not intended to represent a verbatim account of members' discussions during the meeting, but rather a summary of actions taken. Furthermore, the minutes should be reviewed by Association counsel, and stored by the staff contact for the respective Association unit. A copy of materials that were distributed at meetings should be appended to the minutes or referenced and stored with the minutes.

It is the Association's policy that members should not make private records of the activities related to any meeting. Members are asked instead to rely on the official minutes prepared by the Association staff, and to participate in the review and approval of those minutes.

Conclusions

Whenever competitors meet, the potential for antitrust compliance issues arises. The Association has established guidelines and procedures with the object of not only avoiding any violation of the antitrust laws, but also avoiding any activities that might give the appearance of illegality or that might lead to investigation or litigation. By following the guidelines set forth above and in the Association's Antitrust Statement & Best Practices, the members can meet to transact lawful Association business without incurring significant antitrust risks.

Any questions or concerns during an in-person or virtual meeting should be raised when it occurs, or followed up via email to Office of the General Counsel. Similarly, direct any questions or concerns about NAHB's Antitrust Policies to Office of the General Counsel.