



*Antitrust Compliance*



## ANTITRUST AND REAL ESTATE

Antitrust Compliance Guide  
for REALTORS® and  
REALTOR-ASSOCIATE®s



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ANTITRUST  
COMPLIANCE GUIDE  
FOR REALTORS<sup>®</sup> AND  
REALTOR-ASSOCIATE<sup>®</sup>s

2008 Edition

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# INTRODUCTION

Today, REALTORS® are in a precarious position. They serve their clients and customers in an environment of mounting legal complexity. Failure to understand and anticipate these complexities can lead to litigation of monumental proportions. This is especially true in the area of antitrust.

## Antitrust Sensitivity

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The purpose of this handbook is *not* to convert real estate brokers and salespeople into antitrust lawyers or counselors. Rather, this guide is intended to *sensitize* brokers and salespeople to the antitrust “red flags” that will inevitably arise in their day-to-day business affairs, and in their participation in their local board or association of REALTORS®.

Antitrust sensitivity is an imperative for real estate brokers in today’s marketplace. Real estate and housing are a vital part of the American economy, and therefore, a concern of government at all levels. This means that the real estate brokerage business is under constant scrutiny, and any anticompetitive conduct is likely to be detected and prosecuted.

Real estate brokers vigorously compete to secure an inventory of listings to offer for sale. But at the same time, brokers regularly cooperate with one another as subagents, buyers’ agents or non-agent “transaction brokers” or “facilitators,” to identify a ready, willing, and able buyer. This dual tradition of competition and cooperation, which is unique to the real estate profession, presents opportunities for

antitrust suspicion, and occasionally misconduct, almost on a daily basis. In today's business environment, antitrust sensitivity is a prerequisite for survival.

## **The Value of Antitrust Compliance Programs**

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As in medicine, the cause of a disease must be determined before a cure can be sought or preventative measures undertaken. The same is true with legal liability in general and antitrust liability in particular. Brokers and salespeople who can identify the sources of potential antitrust vulnerability will be able to take measures to ensure that their conduct complies with the dictates of the antitrust laws. This Guide offers advice on both the ways brokers and agents may run afoul of the antitrust laws, as well as the structure of an antitrust compliance program for real estate firms and sales associates.

An antitrust compliance program is a business necessity for several reasons. Brokers must institute an office compliance program because they will be held responsible for conduct of their sales associates. A brokerage firm cannot avoid antitrust liability simply because it did not authorize the price-fixing scheme undertaken by its sales associates and sales associates from another firm. Ignorance is never an excuse for any violation of the law. Therefore, continuous education and training of sales associates is essential.

But more importantly, antitrust education and compliance can lead to confidence and freedom to vigorously pursue legitimate business activity.



Too often, brokers and sales people are overly inhibited in their conduct by their ignorance of what they can say and do without limiting unreasonable risks of antitrust or other legal liability.

Real estate brokers and salespeople must also constantly remind themselves that the outcome of courtroom trials, particularly antitrust trials, does not necessarily depend upon what actually happened at the time an alleged violation occurred. The outcome of a trial depends entirely upon what the “trier of fact,” either a judge or a jury, *believed* took place. As a result, antitrust compliance programs are concerned as much with avoiding conduct that creates the *appearance of* a conspiracy in restraint of trade as with conduct that actually constitutes such a conspiracy. Nowhere is the opportunity greater to create appearances that real estate brokers are conspiring to restrain competition than in sales associates’ dealings with actual and potential clients and customers.

## RELATIONS WITH CUSTOMERS AND CLIENTS

### **Establishing the Company Commission Rate**

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One of the most fundamental decisions that any business must make is establishing the price it will charge for its products or services. Real estate brokerage firms are no different. Each must establish the fee it will

charge for professional services rendered to clients. This is true whether the fee is a commission charged to a seller for successfully procuring a ready, willing, and able buyer for the seller's property, the fee is charged to a buyer for representing him as a buyer's agent, or the fee applicable to the broker providing some other real estate services.

The keys to avoid antitrust vulnerability based upon the fees a broker establishes for professional services rendered to a client are as follows:

- *establish the fees unilaterally without consultation or discussion with persons affiliated with any other competing firm*
- *ensure that when the company's brokers or salespeople discuss fees with actual or potential clients they use words that clearly convey to the listener the fact that the company does, in fact, price its services independently*

When a firm establishes its commission rate or fee structure, it must understand that antitrust conspiracies may and have been found with little evidence that the alleged conspirators *actually consulted or reached agreement with* another before making a competitive business decision, such as establishing a fee structure. One court held that it was enough for a competitor to announce to one or more competitors his intention to take a particular action, where the competitors then adopted the same course of action within a short period of time. The announcement was construed as an invitation to conspire, and the subsequent

action by the other competitors construed as an acceptance of this invitation. The inference of conspiracy was drawn even if each of the other competitors had independently decided to implement the particular policy.

It is therefore imperative that brokers never discuss or reveal their intentions concerning fees or other competitive business activities with or to competitors. Such actions taint not only the subsequent decisions made by the broker who raised the subject but also the decisions of other competitors to whom the discussions or announcements were directed.

Not only must brokers avoid any discussions that could imply that commissions or commission splits are the result of collusion or agreement, but they should also take positive steps to establish that they unilaterally determine their commission rates and splits.

Each time a broker changes the firm's commission rate or commission split he should document the business reasons for that decision. This documentation could take the form of a memo to the firm's sales manager and salespeople, that is maintained in the firm's files, explaining the basis for the decision in terms of the firm's current costs and expenses and prevailing economic conditions. The memo should make apparent to the reader that the decision was unilaterally made based upon the particular economic circumstances facing the firm. Distribution of the memo should be restricted solely to persons affiliated with the firm.

The firm's sales associates must also take care to present pricing policies to clients in a manner which confirms that the fees or

prices were independently established. This means they should *never* respond to a question about fees by referring to the pricing policies of other competitors or to a policy of the local board or association of REALTORS® that supposedly prohibits or discourages price competition. Sales associates should *never* use statements such as the following:

- *“This is the rate every firm charges.”*
- *“I’d like to lower the commission, but no one else in the MLS will show your house unless the commission is X%.”*
- *“Before you decide to list with XYZ Realty you should know that because they are ‘discount’ brokers, members of the association won’t show their listings.”*
- *“I’d like to (reduce the commission... shorten the listing term...accept an exclusive agency listing), but if I do the MLS won’t accept the listing.”*

Salespeople who make these statements are antitrust accidents waiting to happen. They are a danger to their broker, their association of REALTORS®, and all other competitors in the market. Additional examples of “Dangerous Words and Phrases” are illustrated in **Appendix A**.

Brokers and salespeople must learn to explain and, if necessary, defend their firm’s pricing policies and other competitive business decisions in terms that are consistent with *competition*, not conspiracy. If the firm cannot or will not reduce its commission upon a client’s request, sales associates should point out

the value of the services the client will receive for the fee charged and how these services are most likely to lead to a transaction at a fair price in the shortest period of time. Because time is money, a fast and efficient transaction can often save a client much more than a reduction in the commission.

## **Establishing Other Listing Policies**

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The commission rate is not the only “price” that can be unlawfully fixed by competing real estate brokers. Conspiracies to fix the length of a listing, the type of listing accepted (exclusive right to sell, exclusive agency, or open), or the formula upon which compensation will be based (flat fee, percentage of the sales price, or a variable percentage depending upon the sales price) also may be *per se* illegal. In short, price-fixing includes an agreement to fix *any* economic term of the listing agreement.

Firms that have established company policies on the length, type or variability of compensation rates must train their salespeople to explain these policies to clients in the language of competition. This means communicating to the client how the firm’s policies will allow the client to best achieve their real estate goals. If a firm’s policies cannot be explained in these terms, competitive forces will ultimately compel the firm to modify its policies or, alternatively, be driven out of business. The purpose of the antitrust laws is to preserve the efficient operation of these competitive market forces.

Under no circumstances should a client be told that the firm's terms must be accepted because "this is what all brokers do" or "no one else will cooperate unless you accept the listing on these terms." This "language of conspiracy" suggests that the firm's policies are the result of concerted action among competitors in the marketplace. If a judge or jury later relies on this language to infer a conspiracy, the reasonableness of that inference is likely to be affirmed on appeal, whether or not a conspiracy actually existed.

## RELATIONS WITH COMPETITORS

### **Establishing the Company Policy on Compensation for Cooperating Brokers**

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A *per se* illegal price fixing conspiracy may involve not only the prices a firm *charges* customers or clients, but also the prices it *pays* for goods and services. The real estate brokerage business is characterized by both competition and cooperation among competitors. Competition occurs to secure the listing. Cooperation occurs when other firms are invited, through an MLS or otherwise, to assist in finding a ready, willing and able purchaser or tenant. Listing brokers traditionally initiate these cooperative efforts of other brokers by offering the successful cooperating broker a portion of the commission received from the seller, often called a commission "split."

Conspiracies among competitors to fix the compensation paid for the cooperative efforts of other brokers are also *per se* illegal. For this reason, brokers must determine their cooperative compensation policies in the same unilateral and independent manner that they establish the commission or fees charged to clients. Listing and cooperating brokers may, of course, discuss or negotiate the compensation they will pay to each other. But these discussions should *never* include representatives of a third office or extend to address what each will offer to pay to other offices.

By the same token, sales associates should be specifically directed *never* to suggest to potential clients that they should not do business with another firm because other brokers will not cooperate with that firm. When comparing their split policies with those of other firms, sales associates should point out to potential clients that the efforts of other firms are important to the marketing effort, and cooperative compensation is offered to other offices as an incentive to sell the potential client's property.

Moreover, under no circumstances should sales associates suggest that other firms have agreed not to cooperate with firms that offer less than a particular commission split.

## **Varying Compensation Among Cooperating Offices**

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From time to time, a broker may decide to offer one or more potential cooperating offices a different amount for their services

than the broker offers to other cooperating offices. This freedom to vary cooperative compensation offers from office to office is permitted by the antitrust laws, and is consistent with the fundamental proposition that cooperative compensation offers are to be determined unilaterally by each broker.

Nevertheless, varying compensation offers among cooperating offices can lead to allegations that the variations were the product of a conspiracy to boycott or “punish” another brokerage office, especially if a lesser amount is being offered.

The lesser cooperative compensation offered is frequently motivated by a reduction in the cooperative compensation offered by other offices. In other words, “I’ll give you what you give me”—also known as a reciprocal split. On other occasions, the decision to offer the lesser compensation is motivated simply by an objection to the potential cooperating office’s general business practices, or by alleged substandard performance by the firm in other cooperative transactions between the two companies.

Although a firm may independently determine to offer a particular firm a smaller commission split than is offered to other firms, a potential problem arises when other firms may make a similar determination, even when all firms have in fact acted unilaterally and independently. When two or more firms elect to offer a third firm the same lesser cooperative compensation during the same period of time, an inference is raised that the firms are acting pursuant to a conspiracy, rather than independently.



If a claim of conspiracy is asserted, this inference must be rebutted with countervailing evidence that the decision *to offer lesser compensation* was individually and independently made. The best evidence to rebut the inference of conspiracy is evidence of a rational business motivation and conscious business decision that is consistent with independent decision-making, such as the additional costs incurred by the listing office, when dealing with the cooperating office at issue.

This need to rebut the inference of conspiracy demonstrates the antitrust danger inherent in a real estate firm's decision to vary its compensation offers among cooperating offices. Any decision to vary the firm's compensation offers should be carefully considered. This is especially true if the firm is aware that another firm has already lowered its cooperative compensation offer to the same firm. If the decision is nevertheless made to lower the offer, the business reasons for the decision should be documented in a memo, circulated to the firm's sales associates, and maintained in the firm's files. The memo should make clear that the decision was based upon an independent assessment of the circumstances facing the firm at the time.

## **Ethical Duties Affecting Broker Cooperation**

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Cooperation among competitors is the norm in the real estate business. For the most part, this cooperation results in a more competitive and more efficient real estate industry. But cooperation among competitors can also be the basis of actual

or perceived antitrust violations, such as price-fixing or group boycotts. The REALTORS® Code of Ethics contains several Articles and Standards of Practice that promote pro-competitive cooperation among real estate brokers. However, since broker cooperation can also present an opportunity for illegal collective conduct among a group of brokers, special care must be taken to ensure that the Articles of the Code that deal with REALTORS®' business relationships with other brokers are clearly understood and applied strictly according to their specific terms.

### **Article 3–Duty to Cooperate**

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Article 3 of the REALTORS® Code of Ethics provides that:

*REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees or to otherwise compensate another broker.*

This Article confers upon all REALTORS® an ethical obligation to engage the services of other brokers in the marketing of the client's property. It is important to note that the duty to invite cooperation includes cooperation from other brokers, not only other REALTORS®. Article 3 creates a presumption that cooperation among REALTORS®, and among REALTORS® and other real estate brokers, is the norm. Deviations from this practice are likewise presumed to be the exception. If an Article 3 complaint is filed, the burden is on the REALTOR® withholding cooperation to explain his conduct by showing that

cooperation under the circumstances was not in the client's best interests.

## **Article 16–Duty Not to Solicit the Client of Another REALTOR®**

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Article 16 of the REALTORS® Code of Ethics provides that:

*REALTORS® shall not engage in any practice or take any action inconsistent with the agency or other exclusive relationships recognized by law that other REALTORS® have with clients.*

Article 16 principally forbids REALTORS® from engaging in targeted solicitation of persons the REALTOR® knows, or reasonably should have known, to have an exclusive relationship with another REALTOR®. Significantly, Standards of Practice 16-4 and 16-5 limit the broad scope of that restriction on competitive behavior, and permit a REALTOR® desiring to solicit a specific potential client to ask the REALTOR® with the exclusive relationship to disclose when that relationship will terminate. The REALTOR® will then know when that potential client is free to consider the services of other brokers. If the REALTOR® refuses to disclose the listing termination date, the other REALTOR® is relieved of any duty under Article 16 to refrain from immediately soliciting that REALTOR®'s client.

Standard of Practice 16-2 further states that Article 16 does not forbid REALTORS® from making general announcements of the availability of their services using

techniques such as direct mail, or other forms of general media advertising, *even if* some of the recipients of the REALTOR®'s promotional material are persons with preexisting exclusive listings with other REALTORS®.

Since Article 16 prohibits a limited form of activity that is ordinarily viewed as typical competitive conduct, e.g., solicitation of business, it is imperative that REALTORS® understand that Article 16 *only* prohibits solicitations that are specifically *targeted* at persons the REALTOR® knows, or should have known, to have preexisting relationships with another REALTOR®. Article 16 is also narrowly limited to prevent claims that it's purpose is to prevent, rather than to protect and even encourage, competitive behavior among real estate brokers.

A solicitation campaign would be considered *targeted* if it were aimed, for example, only at sellers whose names appeared in an MLS compilation or whose homes had for sale signs on display. This limited ban on otherwise legitimate competitive conduct is considered justified because REALTORS® are simultaneously obligated under Article 3 to cooperate with all other brokers on mutually agreeable terms. The cooperation contemplated by Article 3 is unlikely to occur if a potential consequence of the cooperation is the solicitation of the REALTOR®'s clientele by other REALTORS®.

Nevertheless, Article 16's ban on solicitation is extremely limited, and efforts to expand Article 16 beyond its intended scope are almost certain to create unreasonable risks of antitrust liability.

## Comparative Advertising

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Courts have held that truthful, non-deceptive advertising is beneficial to consumers and, therefore, pro-competitive. Conversely, any rule of a private trade association that restricts the ability of association members to advertise truthfully is almost certain to risk violating the antitrust laws. Therefore, it is essential that Article 12 of the REALTORS® Code of Ethics governing advertising by REALTORS® be construed *only* to prohibit advertising that can reasonably be found to be deceptive or not presenting a true picture to the public. In particular, Article 12 does not prohibit otherwise truthful advertising that is thought to be distasteful, unprofessional, overly aggressive, or offensive.

Article 12 of the REALTORS® Code of Ethics provides that:

*REALTORS® shall be careful at all times to present a true picture in their advertising and representations to the public. REALTORS® shall also ensure that their professional status (e.g., broker, appraiser, property manager, etc.) or status as REALTORS® is clearly identifiable in any such advertising.*

A common issue presented by Article 12 is whether it prohibits advertising that compares one REALTOR®'s accomplishments with those of another REALTOR®, or so-called "comparative" advertising. Some have argued that advertising implying that the skills of one REALTOR® are superior to those of another REALTOR® is necessarily untrue under

Article 12 at least as far as the REALTOR® who suffered the unfavorable comparison is concerned.

This interpretation of Article 12 is overbroad. An association of REALTORS® would likely violate the antitrust laws if it applied Article 12 to prohibit comparative advertising altogether.

Article 12, properly construed, only prohibits advertising that is objectively untrue or deceptive. Advertising is untrue or deceptive if it contains factual assertions that are untrue, or assertions that may be true, but when taken in context lead a reasonable consumer to reach factually inaccurate conclusions.

A “factually inaccurate conclusion” plainly does *not* include a conclusion that one REALTOR® provides services that are superior to those of another REALTOR®. Claims of superiority are inherently incapable of objective proof. Furthermore, claims designed to induce a consumer to believe that one product or service is better than another is the primary objective of *all* advertising.

In short, most restrictions on advertising are highly suspect under the antitrust laws, and such restrictions should apply only to proscribe false or misleading advertising. Truthful advertising, even if it offends some competitors, is considered to be pro-competitive and restrictions imposed upon such advertising by trade associations will violate the antitrust laws.

# RELATIONS WITH AN ASSOCIATION OF REALTORS®

## Participation in Board Meetings

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A broker who participates in the affairs of an association of REALTORS® should be alert to discussions at an association meeting relating to commission levels, pricing structures, or marketing practices of other brokers. Brokers who find themselves in the midst of such discussions should immediately suggest that the topic be changed and, if unsuccessful, should promptly leave the meeting. If minutes of the meeting are being taken, they should insist that their departure be noted for the record.

## Use and Abuse of the REALTORS® Code of Ethics

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The United States Supreme Court has held that industry self-regulation by a code of ethics is a legitimate trade association function so long as the code can be shown to promote competition by improving industry performance or efficiency. Codes of ethics may not under any circumstances be used to discourage or eliminate competition by, for example, prohibiting or restricting creative, innovative or “alternative” business practices, no matter how “undignified,” “aggressive” or “nontraditional” such competitive practices may appear to be.

The REALTORS® Code of Ethics is no exception. The Code of Ethics, as

interpreted and applied through the official Standards of Practice and Case Interpretations, has withstood analysis by federal and state antitrust enforcement agencies and competent private antitrust attorneys. Various Articles also have withstood legal challenges in several states.

The REALTORS® Code of Ethics can nevertheless be misused and abused. REALTORS® cannot insulate themselves from antitrust charges by asserting that they were only invoking the grievance or arbitration facilities of a local association. The REALTORS® Code of Ethics does *not* regulate pricing, listing policies, or otherwise truthful advertising practices of REALTORS®. Thus, the Code is never violated by REALTORS® who do the following:

- *Charge discount or flat fee commissions*
- *Engage in comparative but otherwise truthful advertising*
- *Act in the capacity of buyer's brokers, transaction brokers or facilitators*
- *Offer variable commissions depending upon whether the property is sold cooperatively or in-house*
- *Accept open or exclusive agency listings*
- *Employ general mass media advertising campaigns that reach persons whose properties are already listed with other REALTORS®*

REALTORS® who pursue grievances seeking to prohibit these types of practices, or who



apply the Code to discipline REALTORS® who employ them, are misusing the Code of Ethics and exposing themselves and their associations to antitrust liability.

## **Service on an Association's Professional Standards Committee**

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A REALTOR® who serves on a Professional Standards Committee must constantly be aware of the sensitivity of that position. It is classic human nature for a person who is the recipient of an adverse finding by a grievance or arbitration panel to conclude that the panel was not interested in the merits of the case but rather was engaged in an unlawful anticompetitive vendetta. A Professional Standards Committee member must therefore be exceedingly careful that no aspect of a grievance or arbitration proceeding gives even the appearance of prejudice or unfairness.

## **Relations with Other Service Providers and Organizations**

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An allegation of a group boycott is the most common antitrust claim asserted against real estate brokers. A group boycott is *per se* illegal if the purpose of the boycotters is to deny a business access to goods or services necessary for it to compete in the marketplace. Real estate brokers can become the targets of boycott allegations if two or more brokers agree to refuse to cooperate with a third broker, or to cooperate only on unfavorable terms or conditions.

Another type of *per se* illegal group boycott is one targeted at a supplier or

purchaser, rather than a competitor, of the alleged conspirators. Concerted refusals to deal with suppliers or purchasers will be treated as *per se* illegal whenever they involve the purposeful elimination of competition, regardless of the ultimate motive or objective of the alleged conspirators. As a result, real estate brokers may not employ group boycotts as a weapon against the providers of other goods or services necessary or useful in the practice of real estate brokerage.

## **Newspapers and “Homes” Magazines**

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A specific example of a common temptation for brokers to engage in a group boycott occurs when brokers become frustrated with the advertising rates or other practices of a local newspaper. This frustration can lead to a suggestion that brokers collectively agree to reduce their advertising, or refuse to advertise altogether, unless and until the newspaper lowers its advertising prices or changes its policies. Such a suggestion, if implemented, would constitute a *per se* illegal group boycott.

A lawful alternative to a concerted refusal to deal with a newspaper occurs when brokers and/or associations of REALTORS® instead create an alternative advertising vehicle, such as a “homes magazine” or guide. These are publications that contain advertisements for individually listed properties and, in some cases, firm advertisements. Such publications are distributed at no charge to the public at restaurants, train stations, grocery stores, airports, or other locations with a high

volume of pedestrian traffic. The creation of such publications, whether through a local board of REALTORS® or through an outside publisher, is pro-competitive conduct that the antitrust laws encourage. Rather than organizing a boycott of an alleged monopolist, purchasers of the allegedly monopolized product have joined together to offer a competitive alternative.

It is important to understand, however, that a joint venture to create a “homes magazine” *cannot* include an agreement among the brokers in the venture, or the board members, that they will only advertise in the homes guide and not in the local newspaper. Such an agreement is the functional equivalent of an agreement to boycott the newspaper and could be held *per se* illegal. All those entitled to advertise in the publication must retain their freedom to advertise wherever else they may find it beneficial to do so.

## **“Codes of Mutual Understanding” with Other Industry Groups**

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In their day-to-day business affairs, real estate brokers regularly deal with persons in other sectors of the real estate industry, or in real estate-related businesses such as appraising, mortgage lending, the practice of law, or insurance. Often an association of REALTORS® will create formal relationships with associations representing these other businesses, such as a local home builders or bar associations, to discuss problems or issues of common concern. These relationships, whether formal or informal, sometimes include attempts by the two industry groups to

establish “codes of mutual understanding” or other agreements setting forth generally accepted business practices that the two industries should observe when dealing with one another.

While these agreements or codes may well be an efficient way of reconciling differences between the two industries, they also present potentially serious antitrust risks. This is especially true if the codes address such matters as pricing or compensation practices, advertising, or any other matters that deal with competition between or among persons in the two industries. If such agreements are negotiated, either formally through an association of REALTORS® and its industry counterpart, or informally between major firms in the two industries, these agreements should be reviewed by competent antitrust counsel before they are implemented.

## OFFICE COMPLIANCE PROGRAM

### **Salesperson Education**

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The ability of real estate brokers to ensure that their firm will comply with the antitrust laws is in direct proportion to their ability and willingness to educate their salespeople. This commitment to education is imperative because, like it or not, a broker will be held liable for the actions and statements of salespeople who are acting on the broker’s behalf. It is foolhardy to accept this liability without any effort to limit it.

The first step a broker should take in coming to grips with this responsibility and liability under the antitrust laws is to be sure the firm's salespeople have at least a working knowledge of how the antitrust laws are applied in the real estate industry. A broker should insist that each salesperson attend an antitrust legal education program at least once every two years. This antitrust education program could be offered by the board of REALTORS® or conducted by the broker, the firm's sales manager, or legal counsel. In addition, all new salespersons should be required to attend a company orientation program that includes a presentation on antitrust compliance.

## **Antitrust Orientation and Office Policy**

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Every real estate brokerage firm should have a written office-wide antitrust compliance policy that is applicable to every employee and independent contractor—brokers, salespeople, and secretaries alike.

During the antitrust compliance portion of the orientation, it should be announced that the firm has a strict antitrust compliance policy, and that deviations from the policy will not be tolerated. Each salesperson should be provided with a written copy of this policy and asked to sign an acknowledgement that he or she has read and understood the policy and agrees to abide by it. A sample office policy is included as **Appendix B**.

## **Reporting Sources of Potential Liability**

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Salespeople must be instructed to report to their broker or sales manager any suggestions by salespeople from other firms that could be interpreted as an invitation to fix commissions or boycott a competitor. Failure to do so should be grounds for discipline. Once an incident has been reported, a broker should immediately take steps to disavow any participation by his firm in such a scheme. If one of the firm's salespeople initiated the discussions, that salesperson should be disciplined.

## **Document Retention and Destruction**

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Every real estate firm should establish an office-wide document retention and destruction policy. Certain legal documents, such as corporate articles of incorporation, bylaws, and minutes, should be permanently kept on file. Contracts with suppliers and vendors should be kept for at least four years after the contract has expired. Financial records and transaction files, particularly those having tax implications, should also be kept for at least four years.

## **Access to Legal Counsel**

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Every real estate firm should have access to competent legal counsel. If the firm's corporate counsel does not have antitrust expertise, the counsel should be asked to

identify other counsel to be consulted when antitrust issues arise. Antitrust legal advice may be sought whenever the firm intends to adjust its commission rates, fees paid to cooperating firms, or whenever the firm plans to implement a business strategy that may adversely affect its competitors.

In addition, correspondence and records of communications with the firm's attorney should be kept in a segregated file, and should not be disseminated outside the firm without prior consultation with the attorney. Limited distribution of attorney-related documents is necessary to preserve the attorney-client privilege of confidentiality.

## **Standard Form Contracts**

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If the firm uses standard form listing contracts, those forms should not contain any preprinted commission rates, predetermined listing periods, automatic renewal clauses, or predetermined protection periods.

## **Responding to an Antitrust Investigation or Complaint**

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Despite a REALTOR®'s efforts to ensure that the firm's salespeople are complying with the antitrust laws, the firm may nevertheless become the object of an antitrust investigation or complaint. Most actions initiated by government antitrust enforcement agencies begin with an investigation of the person or firm that the agency suspects may have violated the

law. Brokers should have an office policy that requires salespersons to refer all requests for information from a government antitrust enforcement agency to the broker or sales manager.

If a representative of an antitrust enforcement agency inquires about the business affairs of a REALTOR® or REALTOR® firm, or if a formal subpoena or a complaint is received, the matter should be referred immediately to the firm's attorney. All subsequent correspondence and communications with the government agency or plaintiff should be through the firm's lawyer. The REALTOR® should also immediately contact their association of REALTORS®, state association, and the General Counsel's Office of the NATIONAL ASSOCIATION OF REALTORS® so that any assistance available from these organizations can be provided as quickly as possible.



# CONCLUSION

In their day-to-day business decisions concerning the fees they charge clients or the compensation they pay to cooperating offices, real estate brokers must be absolutely certain that their decisions are the result of independent business judgments about market conditions facing the firm. Consultations with competitors about these decisions can result in otherwise reasonable actions being held to be *per se* illegal, or even felonies.

An antitrust compliance program is essential for every real estate brokerage firm. The written program should be straightforward and understandable by the firm's salespeople, and kept current as laws and their interpretations change. Furthermore, the importance of adherence to the policy by the firm's salespeople should be communicated from the highest levels of the company. Salespeople cannot be expected to take seriously a policy that senior management does not consider a priority.

Finally, antitrust compliance is not simply a means to avoid treble damage liability and costly and protracted litigation. Universal antitrust compliance ensures the ability of all competitors to succeed to the extent their skill, industry and foresight will permit. Once the firm's salespeople understand the "rules of the road," they are free to focus their energies on the legitimate pursuit of additional listings, sales, and income opportunities for themselves and the firm.

# APPENDIX A

## Dangerous Words and Phrases

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The following are examples of words or phrases occasionally used by salespeople that would permit a judge or jury to infer that real estate brokers are engaged in an illegal conspiracy:

- *“I’d like to lower the commission rate but the board has a rule...”*
- *“This is the rate that everyone charges.”*
- *“The MLS will not accept less than a 120-day listing.”*
- *“Before you list with XYZ Realty, you should know that nobody works on their listings.”*
- *“If John Doe was really professional (or ethical), he would have joined the board.”*
- *“The board requires all REALTOR® firms to make their salespeople join.”*
- *“The best way to deal with John Doe is to boycott him.”*
- *“If you valued your services as a professional, you wouldn’t cut your commission.”*
- *“No board member will accept a listing for less than ninety days.”*
- *“Let him stay in his own market. This is our territory.”*
- *“If he was really a professional, he wouldn’t use part-timers.”*

# APPENDIX B

## Antitrust Compliance Policies of

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*(Name of Firm)*

1. The commission rates of our firm are based upon the cost of the services we provide, the value of these services to our clients, and competitive market conditions. Our commission rates are not determined by agreement with, or recommendation or suggestion from, any person not a party to a listing agreement with our firm.
2. Salespersons affiliated with this firm shall not participate in any discussion with any person affiliated with, or employed by, any other real estate firm concerning the commission rates charged by this firm, or any other real estate firm in our community.
3. When soliciting a listing, or negotiating a listing agreement, no salesperson affiliated with this firm shall make any reference to a "prevailing" commission in the community, the "going rate," or any other words or phrases which may suggest that commission rates are uniform or standard in our marketing area.

4. The amount of cooperative compensation, or commission split, offered by this firm to cooperating brokers is determined by the level of service we can expect a cooperating office to perform, and the amount of compensation necessary to induce cooperation under prevailing market conditions. Commission splits are not intended, and may not be used, to induce or compel any other real estate firm in our marketing area to raise or lower the commission they charge to their client.
  
5. When soliciting or negotiating a listing agreement, no salesperson affiliated with this office shall disparage the business practices of any other real estate firm, nor suggest that this office, or any other office, will not cooperate with any other real estate firm. Listing presentations shall focus exclusively upon the level of service and professionalism provided by this office, the results we have achieved for other clients, and the value the client can expect to receive for the fees we charge. Potential clients should be invited, and encouraged, to compare the value of our services to those of any other real estate firm in our marketing area. Likewise, any salesperson who is invited by a potential client to compare our services with those of any other real estate firm should do so by emphasizing the nature and quality of the services we provide.

6. Whenever a salesperson is unsure about the proper way to respond to the concerns of an actual or potential client or customer, or whenever a salesperson has been present during an unauthorized discussion of fees or commissions, he should contact his principal broker or sales manager immediately. If necessary, the broker or manager will consult our firm's attorney.

I have read, understand, and agree to abide by, the policies and procedures set forth above.

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*(Date)*

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*(Name of Salesperson)*

# APPENDIX C

## Antitrust Self-Test

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*True or False*

(Circle One)

- T**   **F**   1. Since real estate salespeople are independent contractors, a broker will not be held liable if one of his salespeople agrees with a salesperson from another firm to fix real estate commissions.
- T**   **F**   2. If I am present at a meeting where two of my competitors agree to fix commissions, I can avoid liability for their conduct so long as I remain silent.
- T**   **F**   3. Even though my salespeople are independent contractors, I may establish the commission rate for my firm and require them to charge that rate.
- T**   **F**   4. I recently hired a salesperson who has 20 years of experience at another firm. With such vast experience, there should not be any need for this person to participate in an antitrust orientation program.

- T F** 5. The best way to persuade a seller that he should not insist on an open listing is to tell him that the MLS will not accept open listings.
- T F** 6. It is unethical for a REALTOR® to charge a seller a higher commission rate if the property is sold through a cooperating broker than if the property is sold in-house.
- T F** 7. A seller who wants to negotiate a reduced commission rate should be told that the rate we charge is the same as all other firms in town.
- T F** 8. A REALTOR® who operates an unprofessional flat fee business model may be violating the Code of Ethics.
- T F** 9. If one of my salespeople participates in a price-fixing discussion, my firm cannot be held liable unless I have personal knowledge of the salesperson's conduct.
- T F** 10. If I impose and enforce an antitrust compliance program within my firm, I will not be sued for an antitrust violation.

## Test Answers

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### 1. False.

A broker is responsible and liable for the conduct of his salespeople, whether they are independent contractors or employees.

### 2. False.

Silence in the midst of a price-fixing discussion is no defense. Indeed, conduct consistent with the illegal agreement can be viewed as participation in the agreement. The only way to avoid association with an illegal conspiracy of which you are aware is to openly and affirmatively repudiate it.

### 3. True.

Even though his salespeople are independent contractors, a broker may still obligate them to abide by the firm's commission rate.

### 4. False.

Although the basic principles of antitrust law remain unchanged from year to year, case decisions may change important nuances of the law. Moreover, the extraordinary risks and penalties of antitrust violations merit periodic "refreshers" of antitrust sensitivity. It is therefore recommended that all salespeople and brokers attend antitrust education programs at least once every two years.



### **5. False.**

An MLS rule prohibiting the dissemination of open listings should not be used as a crutch with a seller who insists on an open listing. Reference to the MLS rule could suggest a REALTOR® conspiracy to refuse to accept open listings from sellers. A REALTOR® who wishes not to accept open listings should point out how this type of listing operates to the disadvantage of the seller and broker alike.

### **6. False.**

The Code of Ethics may not be used to influence the rate or form of broker compensation negotiated between a REALTOR® and his client.

### **7. False.**

Reference to the fees of other brokers is a cop out for the weak salesperson. The seller should be sold on your firm's ability to get results for the fees you charge—or else you do not deserve the listing.

### **8. False.**

The professional standards enforcement process of an association of REALTORS® provides no cover for an antitrust violation. The Code of Ethics should never be applied to challenge particular business models.

## **9. False.**

Just as ignorance of the law is no excuse, a broker's ignorance of his salesperson's conduct is no defense to an antitrust charge. A brokerage firm will be held liable for the conduct of its salespeople whether or not the principal broker was personally aware of that conduct.

## **10. False.**

Unfortunately, even a strictly enforced comprehensive antitrust compliance program does not guarantee that a lawsuit will never be filed against the firm or the persons affiliated with it. An antitrust compliance program will, however, help to ensure that any suit that is filed may be successfully defended.



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