

# Annual Antitrust Compliance Program and Other Matters

National Association of REALTORS® 2015 Annual Attorney Seminar  
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## **I. Department of Justice Antitrust Compliance**

1. “An annual program for NAR Member Boards and their counsel that includes a discussion of the antitrust laws (as applied to Member Boards) and this Final Judgment.”

- All MLSs must adopt (and have adopted) the VOW Policy and Rules.
- NAR must direct MLSs to correct any application, adoption, or enforcement of VOW rules that violates the Final Judgment, and deny insurance coverage for MLSs that fails to do so.
- NAR must provide quarterly reports to DOJ of any complaints of such violations.
- An MLS may not prohibit or restrict electronic transmission of property listing information that may be provided to consumers in other ways, and may not “unreasonably disadvantage or discriminate against” brokers in their use of VOWs to provide information to consumers.

### 2. VOW Compliance Issues

- Compliance with and application of the “Participation Rule”:
  - A participant must “...actively endeavor(s) ... to list real property of the type listed on the MLS or to accept offers of cooperation and compensation ....”
  - The test is *effort*, not success; MLSs must apply enforcement efforts in a uniform manner; brokerage listing/sales activity must be conducted with respect to properties in the market covered by the MLS in which participation is sought.
- “Referral VOWs”
- Continuing application of VOW Policy and Final Judgment/Decree after November 18, 2018.

### 3. Other Issues

- Listing Syndication - MLSs and Participants sharing listing data with publishers.
- New NAR Antitrust Video

## II. Antitrust Litigation

- *Metro. Reg'l Info. Sys. v. Am. Home Realty Network*, 2015 WL 4597529 (D. Md. July 6, 2015); See also 948 F.Supp.2d 538 (D. Md. 2013).  
<http://www.realtor.org/legal-case-summaries/counterclaim-against-nar-dismissed>
- *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, \_\_\_\_ U.S. \_\_\_\_, 135 S. Ct. 1101 (2015).  
[http://www.supremecourt.gov/opinions/14pdf/13-534\\_19m2.pdf](http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf)

COESTERVMS.com v. Virginia State Real Estate Appraisal Board,  
No. 1:15-CV-980 (E. D. Va. )

## III. Political and Lobbying Activities of Exempt Organizations.

### 1. Political/Lobbying Activities by Section 501(c)(4), 501(c)(5) and 501(c)(6) organizations.

- 501(c)(4), 501(c)(5) and 501(c)(6) organizations are treated essentially identically for purposes of their political activity. Rev. Rul. 2004-6 treats (c)(4), (c)(5) and (c)(6) organizations the same with respect to participation in political campaign activities and Section 527 disclosure and tax requirements. See also *IRS Technical Instruction Program Manual* (2003). <http://www.irs.gov/pub/irs-tege/eotopic103.pdf>
- Lobbying: Unlimited. Lobbying on issues of interest or concern to association members is a quintessential form of “improving conditions in the industry” and permitted without limit. 100% of trade association’s expense budget can be lobbying. Rev. Ruls. 61-177, 67-293, 71-53
- Political campaign activity. In contrast, political campaign activity, including independent expenditures (“vote for....,” “defeat....”), may not be an organization’s “primary” activity. (1.504(c)(4)-1(a)(2)(ii); GCM 34233)
- In November 2013 the IRS published an ANPR addressing the activities that would constitute (and presumably expand the scope of) political activity by (c)(4)s, but later withdrew that notice after receiving a deluge (150,000!) of comments. In May, 2014 the IRS has indicated it intends to issue new proposed rules and hold hearings, but hasn’t yet done so.
- 501(c) organizations are taxable on political activity under 527(f).
- 162(e): Expenditures for lobbying and political campaign activity are nondeductible; Under 162(e)(3) such nondeductibility is “passed through” to make the portion of dues or similar amounts paid to an exempt organization engaged in such activities nondeductible by those members who pay such dues.

All such expenditures are presumed to be paid for by dues. 6033(e) requires an exempt organization to provide on the dues statement a notice to members of the nondeductible portion of such dues, and if it fails to do so must pay a tax (35%) on the expenses incurred for such lobbying and political activity.

## **2. Section 527: Political Organizations**

- Political organizations must be organized and operated “primarily” to engage in “exempt function” activities: expenditures to elect or defeat candidates for federal, state, or local office.
- Must file notice under 527(i) (Form 8871) and reports under 527(j) (Form 8872).
- Federally registered political committees exempt from filing notice; Federal PACs and “Qualified State or local political organizations” exempt from filing reports. 527(j)(5).
- Taxable income of 527 organizations excludes all income reserved for use for an exempt function. The result is that they are essentially taxed only on investment income.

## **3. Section 527 (f) and the relationship between 501(c) organizations and related 527 organizations – Tax imposed on political expenditures of 501(c) organizations.**

- 501(c) organizations are taxed under 527(f) to the extent they act like political organizations: Tax imposed on the lesser of their net investment income or expenditures for exempt functions at 35%.
- Exempt function expenditures include contributions to political candidates or committees or other direct expenditures intended to influence the election of candidates to political office.
- 501(c) organizations may establish a “separate segregated fund” or PAC to engage in political activities and not incur tax under 527(f); transfers of dues or other contributions to the Fund are not taxable exempt function expenditures if made “promptly and directly.” Treas. Reg. 1.527-6(e)
- 501(c) organizations may transfer contributions or dues to the Fund on an “ad hoc”, “as needed” basis as determined by the organization; if done “promptly and directly” such transfers are not taxable expenditures under 527(f). PLR8628001; PLR9622002.
- “Indirect expenses” (administration, overhead), and expenses “allowable” under the Federal Election Campaign Act or comparable state statutes are not taxable exempt function expenditures under the “Reserved Regulations.” Treas. Reg. 1.527-6(b)(2), (3).

- Expenditures not taxable under the Reserved Regulations include communications directed only to members related to political campaigns; whether “independent expenditures” are similarly not taxable under 527(f) remains uncertain.