

2015 LEGAL SEMINAR



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Annual Antitrust Compliance Program and Other Matters

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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 uniformly; brokerage listing/sales activity must be conducted with respect to properties in the market area of the MLS in which participation is sought.

VOW Compliance Issues cont'd

- “Referral VOWs” not prohibited but require MLS participation.
- 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*, 2105 WL 4597529 (D.Md. July 6, 2015)
- *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, ____ U.S. ____, 135 S.Ct. 1101 (2015).

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

III. Political & Lobbying Activities by 501(c)(6) Organizations

- 501(c)(6) trade associations, for the most part, are a subset of (c)(4), (c)(5), (c)(6) orgs for political and lobbying purposes – rules generally the same.
 - Rev. Rul. 2004-6 treats (c)(4), (c)(5), (c)(6) the same regarding political campaign activities and §527 disclosure and tax requirements. See also *IRS Technical Instruction Program Manual* (2003).

Political & Lobbying Activities by 501(c)(6) Organizations

- Lobbying: Unlimited. Quintessential form of “improving conditions in the industry.” May be 100% of association’s budget.
- Political campaigns: Political campaign activity, including independent expenditures (“vote for” etc.), cannot be “primary” activity or purpose.

Political & Lobbying Activities by 501(c)(6) Organizations

- Nov. 2013 - IRS published ANPR on political campaign activity by (c)(4) organizations. Withdrawn after 150,000 mostly critical public comments.
 - Any new regs likely to explicitly cover (c)(5) and (c)(6) orgs.
- (c)(4), (c)(5), (c)(6) orgs taxable on political campaign expenditures (up to amount of net investment income) under §527(f).

Political & Lobbying Activities by 501(c)(6) Organizations

- §162(e) and §6033(e) lobby/proxy tax:
 - Expenditures by taxable person or entity for lobbying and political activity are nondeductible under §162(e).
 - Nondeductibility is “passed through” to taxable member companies when 501(c)(6) organization makes lobbying or political expenditures.
 - Association must provide notice to members in the dues statement of nondeductible portion of dues and must pay 35% “proxy tax” if it fails to give notice.



§527 Political Organizations

- Must be organized & operated “primarily” to engage in “exempt function activities” (election or defeat of candidates for federal, state, or local office).
- Taxable income of 527 organizations excludes all income reserved for use for an exempt function; essentially taxed only on investment income.



§ 527 Political Organizations

- Must file notice under §527(i) (Form 8871) and periodic reports of contributions and expenditures under §527(j) (Form 8872).
- Federally (FEC) registered political committees and “qualified state or local political orgs” (“QLSPOs”) exempt from filing reports under §527(j)(5).

§501(c)(6) Associations and Affiliated 527 Organizations

- Under 527(f), 501(c)(6) associations are taxed to the extent they act as political organizations.
 - Tax under § 527(f) imposed on lesser of “exempt function” (i.e., direct political campaign) expenditures or the organization’s net investment income.
 - Exempt function expenditures include contributions to political committees and other expenditures made directly to influence elections.
 - Tax rate is 35%.

§501(c)(6) Associations and Affiliated §527 Organizations

- Separate segregated fund or PAC established and operated by a (c)(6) association treated as a separate entity not subject to §527(f) tax.
- Transfer of dues or other contributions to the SSF/PAC are not taxable to the association under §527(f) so long as transferred “promptly and directly.” Reg. §1.527-6(e).
 - Such transfers to SSF/PAC can be done “ad hoc” or “as needed” as determined by the association if transferred “promptly and directly” per Reg. § 1.527-6(e). PLR 8628001, 9622002.

§501(c)(6) Associations and Affiliated §527 Organizations

- “Indirect expenses” (admin., overhead) and expenses “allowable” under federal or state election law not taxable under 527(f) under the “Reserved Regulations.” 1.527-6(b).
- Expenditures not taxable under Reserved Regulations include political campaign communications directed exclusively to members.
 - Does this tax exclusion also apply to independent expenditures permitted under *Citizens United*?

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