

KEEP IT LEGAL

2014-2015 Association Guide



**IT PAYS TO
BE A MEMBER**

Table of Contents

Objective	3
Rights of Associations	3
1. Can we take action against members?	3
2. Can we take action against non-members and companies?	3
3. Can NAIFA associations represent members in disputes with their companies?	4
Authority To Control Membership	4
1. Do we have to accept an application for membership?	4
2. Do we have to accept a transfer application from another local?	5
3. Can we refuse a member’s renewal dues?	5
4. Must members comply with the bylaws?	5
Complaints Against Members	6
1. What is “conduct unbecoming a member”?	6
2. Who can file a complaint against a member?	6
3. Investigation of complaints against members	6
Hearings	6
Publicizing Disciplinary Action	9
Public Statements By Associations	10
Should Our Association Incorporate?	10
Non-Deductibility of Lobbying Expenses	10
Associations and the Antitrust Laws	10
The Federal Antitrust Laws	11
1. The Sherman Act	11
2. Other Laws	11
3. Per Se and Rule of Reason Offenses	11
4. McCarran-Ferguson Act	12
5. Noerr-Pennington Exception	12
6. State Action Exception	12

Association Antitrust Problem Areas	13
1. Discussion of Prices at Association Meetings	13
2. Boycotts	13
3. Tie-Ins	13
4. Applicants for Membership	13
5. Expulsion of Members.	13
6. Advertising.	14
7. Ethical Standards.	14
8. Association Programs	15
9. Meetings and Agendas.	15
10. Company-Association Meetings	15
 Process for Merging Associations	 16
 Process for Dissolving Associations	 17
 Resources	 18
Form of Notice of Hearing	18
Form of Notice of Decision.	19
NAIFA Policy on Recruiting and Association Activities	20
NAIFA Policy on Harassment.	20
 Code of Ethics	 22

Objective

NAIFA associations should protect and enhance the good name of the insurance and financial services industry. NAIFA is opposed to unethical practices in the promotion and distribution of insurance and financial services products. Association activities should reflect these principles. In accord with NAIFA's commitment to ethics, this guide suggests policies for addressing suspected violations of law and breaches of ethics by members and non-members. This guide also discusses other issues that may impact an association's reputation or liability, such as antitrust concerns, the effect of incorporation on liability, and public statements by associations.

This guide does not cover every circumstance that could have adverse legal consequences for an association or its members. Instead, this guide is intended to provide general information about certain association issues to raise awareness throughout the NAIFA federation. This guide does not constitute legal advice and must not be relied on as legal advice. As situations arise, associations should consult this guide, local counsel or NAIFA's General Counsel or Government Relations Department before taking action, unless the contemplated procedure is clearly proper.

RIGHTS OF ASSOCIATIONS

1. Can we take action against members?

Every local association has the right to discipline those members who commit offenses against the association, provided the correct procedure is followed. This procedure is discussed below under the topic of "Hearings." State associations and NAIFA national do not discipline individual members, except with respect to an individual's responsibilities as an officer, board member, or committee member of the state or national association.

2. Can we take action against non-members and companies?

Associations have no authority to discipline non-members. NAIFA associations are concerned with the reputation of the insurance and financial services industry and the interests of consumers. However, associations do not regulate the industry; that is the business of state insurance and securities departments and other regulators. Associations are on dangerous ground when they attempt to handle alleged

unlawful acts or questionable practices of non-members or companies on their own.

However, NAIFA associations do have the right to report violations of law by non-members and companies to the proper authorities. Rather than taking action on its own, an association should report violations of law by non-members and companies to the appropriate state or federal regulator. Of course, the association must have facts that indicate with reasonable certainty that a violation of law occurred. Complaints that are petty or are not supported by evidence have two possible undesirable consequences. First, while regulators may enforce the law if an association makes a proper case, vague complaints about "illegal" or "unethical" practices, without evidence, may sound like attempts to avoid competition. Such complaints damage the reputation of the association and cast doubt on valid complaints in the future. Second, an unjustified complaint may result in a suit for defamation or malicious prosecution by the party against whom the association complained. The law will not con-

done careless and unfounded charges that may affect an agent's reputation and livelihood or a company's reputation and license.

A committee - or the Board itself in smaller associations - should meet to discuss a complaint against a non-member or company. The committee should first determine which law is involved, and then fit the facts (not opinions) to that law. If it seems clear to the committee that there has been a violation of law, and the Board agrees, the association may report it to the appropriate regulatory agency. In doing so, a well-reasoned letter setting forth the facts and the specific alleged violation of law is usually better than an oral presentation. Oral complaints often omit important facts and conversation too easily strays from basic issues. The letter should not be sent to other persons and, pending disposition, the matter should be discussed only with representatives of the regulatory agency involved and within the association on an as-needed basis. If the state association has an effective liaison with a regulatory agency, the complaining association should consult with the state association before filing a complaint.

3. Can NAIFA associations represent members in disputes with their companies?

No. In 1948 an agent filed a complaint with the National Labor Relations Board (NLRB) against more than 180 life insurance companies charging that they controlled NAIFA in violation of the National Labor Relations Act. It was alleged that NAIFA was carrying on the functions of a labor union under company control. In 1949, a Settlement Agreement approved by the NLRB, was signed by NAIFA and the companies involved. NAIFA agreed that it would not engage in any activities reserved by law for labor organizations, such as dealing with employers concerning grievances, labor disputes, wages, hours of employment, or conditions of work. Additionally, the NAIFA Board has determined that NAIFA will not become

involved in legislation, regulation and litigation which attempts to address these issues. NAIFA tries to monitor its member associations to ensure that the restrictions imposed by the Settlement Agreement and the Board are followed.

AUTHORITY TO CONTROL MEMBERSHIP QUALITY

1. Do we have to accept an application for membership?

Under local association bylaws, each applicant for active membership must be elected by a majority vote of the Board of Directors. (Associate and Honorary members are elected by a two-thirds vote of the Board.) The Board should decline to accept applicants who do not obtain the necessary number of votes. However, local associations should not follow any general practice of rejecting applicants who fall into specific categories. All applicants should be considered on their own individual merits. Basic fairness should be the rule in determining whether to accept or reject applicants; agents engaged in the sale of insurance who otherwise qualify should normally be accepted.

The Board of Directors may decline to accept an applicant who meets a membership category definition if the applicant:

- Has engaged in business conduct involving false, misleading, or defamatory statements;
- Makes comparative claims about competing products which are disparaging, which are not reasonably susceptible of verification, or that might mislead consumers;
- Has an outstanding indebtedness to the association;
- Is applying for membership for the apparent primary purpose of recruitment in violation of the NAIFA Policy on Recruiting and Association Activities (see Resources section, p. 18);

- Has engaged in conduct which, if engaged in by an association member, would be characterized as “conduct unbecoming a member” (see subheading “Complaints Against Members”);
- Has engaged in conduct amounting to a violation of insurance, securities, or other laws; or
- Will be unable to conform to the Code of Ethics or another official policy of the association.

The association is under no duty to advise an applicant of the reason for their rejection. In most cases it is best not to give reasons, to spare the association and the applicant unnecessary embarrassment, particularly if the reason for rejection reflects unfavorably on the applicant’s character. Any rejected applicant should be written a simple letter of regret that the Board did not approve their application.

2. Do we have to accept a transfer application from another local?

Transfer of membership from one association to another is not a matter of right. The new association should require the transferee to complete a membership application, to be approved by the Board of Directors in the same manner as other applications. The new association may communicate with the applicant’s former association before approving the transfer. Associations have the right to reject transfer applications, but in view of their prior local association membership, every benefit of the doubt should be given to such applicants.

3. Can we refuse a member’s renewal dues?

An individual who has been elected to membership obtains a valuable privilege. This privilege cannot be taken away arbitrarily, provided dues are timely paid. Members who pay their dues on time have a right to renewal of their membership. Their membership can be taken away only after a hearing of formal charges before the Board of Directors, as discussed under the

topic of “Hearings.” Unless a member has been expelled as a result of such formal action, refusal to accept renewal dues could amount to a wrongful expulsion and may lead to a lawsuit against the association on that ground. An association may discipline a member in good standing only after charges of conduct unbecoming a member are sustained by a two-thirds vote of the entire Board of Directors after a proper hearing. Disciplining any member without a proper hearing might create a claim against the association for wrongful imposition of association sanctions.

4. Must members comply with the bylaws?

As a condition of membership, each individual signing a membership application agrees to be bound by the association’s bylaws. The bylaws of all NAIFA associations allow for amendment. As a result, consent to the bylaws in force when an individual joins an association is also consent to the authority of the association to amend the bylaws in the future. Each member is bound by properly adopted amendments, even though a member may vote against an amendment, and even though it may have a personally adverse effect.

Bylaws are a contract between the members and the association, bestowing the rights and privileges and imposing the duties of membership. Any change in the bylaws is a change in this contract. As a result, certain rules govern the validity of bylaw amendments. First, a bylaws amendment must be adopted in accord with the procedure for amendment described in the association bylaws. Second, the amendment must not discriminate arbitrarily against particular persons.

COMPLAINTS AGAINST MEMBERS

1. What is “conduct unbecoming a member”?

Conduct unbecoming a member includes actions that are contrary to the mission of the association, breaches of the NAIFA Code of Ethics, blatant violations of the NAIFA Policy on Recruiting and Association Activities (see Resources section, p. 18), violations of insurance or securities laws, and violations of other laws which indicate that a member is not of good moral character and reflect unfavorably on the association. (See, for example, an excerpt from NAIFA’s policy regarding harassment, Resources section, p. 18.)

2. Who can file a complaint against a member?

A complaint may be made against a member of the association by another member, by a committee, or by any other person. All that is necessary is a good faith allegation of facts which, if true, would indicate that the member is guilty of conduct unbecoming a member. The complaint should be made to the committee appointed to handle such matters, or to the Board of Directors if there is no such committee.

Naturally, the mere filing of a complaint should not be allowed to raise an implication of guilt. While the matter is being investigated, suggestive comments such as – “Jones is in trouble with the Investigating Committee” – are unfair and should be avoided.

3. Investigation of complaints against members

The Board of Directors should direct an appropriate committee to investigate a complaint against a member. If possible, since the Board will ultimately decide the issue, the investigating committee should not include Board members. The complaining and complained-of parties should take no part as an investigator or as a Board member in resolving the case. It is vital that the investigating committee be as impartial as possible.

The investigating committee should attempt to gather evidence on both sides of a charge. The sole aim of this committee is to decide whether or not the evidence warrants a hearing – not to decide guilt or innocence. Many cases involve a mere misunderstanding, and a complaint against a member who has acted ill-advisedly but without bad intent can often be handled by sound advice, without any formal action. After careful consideration has been given to the complaint, the investigating committee should make its recommendation to the Board of Directors. The Board may either dismiss the complaint or decide to proceed with it. In the latter event, a hearing will be necessary.

HEARINGS

Care must be used in the preparation of the notice and the conduct of a hearing, the process used to reach a decision, and the imposition of any discipline. State laws governing the operation of non-profit associations should be reviewed before proceeding with a disciplinary hearing. Disciplinary action may be taken against a member only after a proper hearing before the Board of Directors.

Notice

The accused member must be given reasonable notice of the time and place of the hearing, of the specific charges they will be called upon to defend, and that the member will have an opportunity to be heard and to present evidence on their own behalf. At least thirty days notice should be given in writing. Certified mail should be used for the notice and the receipt should be kept for introduction as evidence at the hearing. The letter may be signed by any officer of the association, or by the association executive at the direction of the Board of Directors.

The letter should clearly state that the member is accused of conduct unbecoming a member

of the association, and set forth the specific charge(s) against the member. A statement of the specific charge will be sufficient if it adequately informs the accused of the exact charge they will have to defend against at the hearing. A charge that the accused is guilty of “conduct unbecoming a member,” without more, would be insufficient. The notice should briefly state names, dates, places and facts which constitute the offense(s) with which the accused is charged, and which add up to “conduct unbecoming a member.” Nothing should be alleged in the letter which is not supported by evidence. (A sample notice form appears in the Resources section of this guide.)

The accused is under no duty to answer the letter notifying them of the hearing. The hearing should not be delayed if the accused fails to appear at the appointed time and place without good reason and advance approval by the Board of Directors. However, failure of the accused to appear should not of itself be relied on as sufficient ground for taking disciplinary action.

Place of Hearing and Presiding Officer

Before the notice has gone out, someone should be appointed to make arrangements for the hearing room. The room should be private and only essential people should be present. The President should preside at the hearing, unless he or she has a personal interest in the case. In that event the President should not take part in the hearing, or in the decision as a member of the Board, and the President-Elect should preside. If the President-Elect is ineligible to preside for the foregoing reason, the Board should elect a presiding officer from among its members. The presiding officer is charged with conducting the hearing fairly.

Minutes

There is no necessity for a recording or transcript of the hearing, but all documentary evidence should be preserved. Someone should take notes of the names of witnesses and the

general nature of the testimony in the event that questions arise after the hearing. The documentary evidence and the minutes of the hearing, if any, should be marked “confidential” and be kept by the Secretary at least until the case has been fully resolved.

Right to Counsel

According to Robert’s Rules of Order, the accused member has the right to counsel at the hearing, provided that counsel is also a member of the association. It seems advisable, however, to permit the accused to be represented by professional counsel of their own choosing, at the accused’s expense, provided that the association is sufficiently informed in advance. If this occurs, the association should consider being represented by counsel.

Witnesses

The association may call whatever witnesses it chooses to substantiate the charge. The accused also has the right to call witnesses to defend against the charge. The presiding officer should keep testimony from straying too far afield and preserve order during the testimony. The Board may compel members of the association (other than the accused) to testify. Refusal of any member to give material testimony is cause in itself for disciplinary action against that member, unless the refusal is justified – for example, on the ground that the testimony might be self-incriminating.

Presentation of Evidence

A member of the investigating committee, or some other member, may present the case for the association. This person calls the witnesses and introduces the evidence that supports the charge, following which the accused may call witnesses and introduce evidence, if the accused wishes to do so. Assuming the accused is present at the hearing, the accused has the right to hear and challenge all of the evidence. Board members can also ask questions of witnesses. When both sides have offered their tes-

timony and evidence, each should be given the opportunity to make a closing statement.

Testimony of Accused

The accused member has the right not to answer questions or make a statement. It is the burden of the association to prove its case. The accused has no burden to disprove the charge. It is improper to conclude that the accused is guilty merely because of the accused's refusal to testify, to present evidence or to contest the association's evidence. If the accused elects to testify, members of the Board and the person in charge of presenting the association's case may question the accused.

Rules of Evidence

The association is not a court of law. The Board is not required to observe the technical rules of evidence that apply to the trial of lawsuits. The Board may consider evidence that would be inadmissible in court. Since the hearing is not governed by strict rules of evidence, the Board should not be distracted by technical objections. The Board should be guided by common sense in admitting or refusing evidence. When evidence is offered, a good test of whether it should be considered is the question: "What does this have to do with the case?" If the evidence tends to explain, support or refute any important issue in the case, it should generally be considered. It is improper to receive evidence supporting any charge of misconduct that was not set forth in the notice of hearing.

Board Deliberation

After each side has presented its evidence and made closing statements, all persons except the Board should leave the room and the Board should then attempt to arrive at a decision. The burden of proving the guilt of the accused member is on the association. It is not up to the accused to prove his innocence. However, the weight of evidence needed to sustain the charge need not be "beyond a reasonable doubt." In association hearings the Board need

only determine that the evidence presented persuades them that it is more likely than not that the accused is guilty.

Decision

The Board's first decision is whether or not the accused is guilty. The presiding officer should urge each Board member to ask questions about the evidence and state their understanding of the case, after which a vote should be taken on the question of guilt or innocence. Voting should be by secret ballot unless the Board agrees to an oral vote.

Only those Board members who were present at the entire hearing may vote. Votes by two-thirds of the total number of Board members (including members who may have been absent) are necessary for a finding of guilt. If less than two-thirds of the total number of Board members vote in favor of guilt, the charges must be dismissed. (If two-thirds of the number of Board members is a fraction, such as 11.2, the vote necessary for a finding of guilt must be the next highest whole number; in this case 12.)

If there is a two-thirds vote in favor of guilt, the next question to be decided is the nature of the penalty – i.e., reprimand, suspension or expulsion. By secret ballot, the Board should first vote on reprimand. If two-thirds of the entire Board does not vote for this penalty, then a vote should be taken on suspension. Finally, if two-thirds do not vote for suspension, then the question of expulsion should be voted upon. (The least extreme penalty, reprimand, is voted on first to give the accused every possible chance to avoid the extreme penalty of expulsion.) Voting should continue until a two-thirds vote has been obtained. The Board may consider extenuating circumstances before deciding on a penalty.

When the Board arrives at its decision, the accused and counsel, if any, should be called

back into the room. The presiding officer should state the decision and the penalty – if there is one – to the accused member, after which the hearing may be adjourned. After the hearing a letter should be sent to the accused officially stating the action taken. The purpose of this letter is to leave no doubt as to the Board's decision, and to provide a written record of the decision for the association. (A form for such a letter is in the Resources section of this guide.) There is no appeal from the decision of the local association, either to the state association or to NAIFA. Ordinarily, if the association has acted in good faith and in accord with the foregoing procedure, the member should have no valid ground for appeal to the courts.

Consequences of Discipline

An expelled member loses all membership privileges, all interest in the funds and property of the local, state and national associations, and all rights to use the name and emblem of the local, state and national associations. The member is not entitled to a refund of dues for the balance of the year in which he or she is expelled. A suspended member forfeits the privileges of membership only for the period of suspension, but a reprimand carries with it no loss of the privileges of membership. The period of suspension should be for a specified time period and not a conditional period of time (e.g. until Mr. Smith starts acting ethical).

PUBLICIZING DISCIPLINARY ACTION

The members of the association have the right to know that a member has been expelled or otherwise disciplined. But the means used to inform the membership should not be such as would normally come to the attention of outside parties. So, for example, it would be inadvisable to notify the members through the Internet, association newsletter/magazine or other similarly circulated publications. The

membership may be notified either by confidential letter from the secretary, or in a closed meeting of the association. The notice to members should merely state that the member has been expelled, suspended or reprimanded for conduct unbecoming a member. It is not advisable to recite the reason for such actions. NAIFA and the state association should be notified, for adjustment of membership records, deletion from *NAIFA's Advisor Today* and other mailing lists in cases of expulsion, and temporary deletion in cases of suspension.

NAIFA's associations are not regulatory agencies. The disciplinary action they take may not mean that the member is no longer fit to retain a professional license or to continue to represent a company. For example, an act that violates NAIFA's Code of Ethics is not necessarily a violation of any law. Moreover, even conviction of a member by an association for violation of a law, based on "some evidence," does not mean that the same charge could be sustained in court or before a regulatory body. It is therefore generally inadvisable to publicize the action taken by the association to the individual's company, the public, or others, including the member's general agent or manager (if the latter are not also members). However, an association can give notice that a member has been expelled to any person to whom an expelled member falsely holds himself out as still being a member. Where a notice of this kind is permissible, it should merely state that the individual is no longer a member of the association and should not state the nature of the charge or the facts leading to expulsion.

If it is reasonably certain that the evidence on which the association's decision was based would also be sufficient to prove a violation of law at a hearing under the insurance or securities laws, the Insurance Department or other appropriate regulatory body should be informed of the action taken by the association. In that case, the association may

proceed to present the case to the appropriate regulatory body as outlined in the section on “Action Against Non-Members and Companies.” Action regarding a substantiated violation of law should not end in the association. If a regulatory agency is to protect the public effectively, violations of law by licensees must be brought to its attention. This should be done promptly, and the association should be prepared to assist the regulatory agency if requested.

PUBLIC STATEMENTS BY ASSOCIATIONS

Association statements that claim or imply that members are the only reliable agents, or that the public should not buy certain products, or deal with certain agents or companies, may violate unfair trade practice, antitrust, or defamation laws, and could give rise to a claim against the association. This may be so even though the association does not use specific names in the statement. Associations must take care to avoid issuing any public statement which might be construed as being false, malicious, misleading or derogatory.

SHOULD OUR ASSOCIATION INCORPORATE?

It is sometimes mistakenly believed that if an association is incorporated, the members are shielded from individual liability for defamation, wrongful expulsion, malicious prosecution, and other claims. However, individuals cannot escape the legal consequences of their wrongful acts by committing them in the name of a corporation. Incorporation will normally protect members against personal liability for the debts of the association. But if a member, nonmember or a company has been wronged by some act of the association, they may be able to recover damages from those individual members who participated in or approved of the wrongful act, as well as from the association. The foregoing refers only to the effect of

incorporation on individual liability for wrongful acts. NAIFA does not discourage incorporation. As a matter of sound business practice incorporation is advisable.

NON-DEDUCTIBILITY OF LOBBYING EXPENSES

Individual members of non-profit associations such as the NAIFA federation cannot deduct as ordinary and necessary business expenses, for federal income tax purposes, that portion of dues used to engage in federal or state lobbying activities. Every year NAIFA communicates to association members the amount of the national and state portion of their dues that is not deductible. This information is included on renewal notices and in new member kits.

ASSOCIATIONS AND THE ANTITRUST LAWS

It is NAIFA policy to take special care to comply with the antitrust laws. Antitrust laws help to maintain the system of free enterprise that is vitally important to our industry and to the country. Anything that threatens open commerce has long been looked upon with suspicion and disfavor. This section is intended to create an awareness of antitrust principles as they apply to activities conducted by members of the NAIFA federation.

The antitrust laws deal broadly with any unlawful agreement, combination of competitors, or conspiracy that restrains trade or commerce. Associations like the NAIFA federation are by their very nature a group of competitors. Association leaders should be familiar with the antitrust laws so that if improper activity is suggested, or inadvertently fallen into, they can recognize the warning signs and take corrective action to prevent a breach of the law. Individuals and associations who violate antitrust laws can be fined and individuals can also be imprisoned. In a severe case an associa-

tion can be ordered disbanded. Private actions brought under the antitrust laws by aggrieved companies, agents or members of the public may result in an order to pay triple the amount of actual damages, as well as attorney's fees. Even if an antitrust charge is defended successfully, the case can be very expensive and disruptive and can harm an association's reputation.

THE FEDERAL ANTITRUST LAWS

1. The Sherman Act

The Sherman Act is violated when there is (i) a contract or conspiracy among two or more entities, (ii) that unreasonably restrains trade, and (iii) that affects interstate commerce. NAIFA and its affiliates, representatives, and members are capable of making contracts. NAIFA's structure could also satisfy the interstate commerce requirement in two respects: first, members of NAIFA's local associations sell the products of interstate insurance companies; and second, the relationship among local, state and national NAIFA associations could be viewed as being within the flow of interstate commerce.

Thus, the NAIFA federation is subject to the Sherman Act and other federal antitrust laws. Association leaders must be sensitive to actions that could be challenged as antitrust violations. For example: an agreement among insurance agents not to sell policies of a particular insurer until it raises the level of commissions, ceases to sell certain products, or "conforms" in some other way, could be considered an unreasonable restraint of trade. It could also be a violation for an association of salespeople to refuse to sell the products of any company that deals directly with the public. Another example might be a group of salespeople agreeing on a fee schedule. These could all be antitrust violations even if the agreement is informal and never put in writing.

2. Other Laws

Another antitrust law is the Clayton Act, which makes it unlawful to sell a commodity with the understanding that the purchaser will not deal with competitors of the seller, if the effect would be to substantially lessen competition or tend to create a monopoly. Of more relevance to associations, the Clayton Act also prohibits certain tie-in sales, where a seller refuses to sell a product unless the buyer also agrees to purchase a different product from the seller; for example, requiring membership in some cases in order to receive an association publication.

The Robinson-Patman Act is another of the antitrust laws. It prohibits unreasonable price discrimination between different purchasers of goods, if the adverse effect on competition would be substantial. The Act also prohibits selling at unreasonably low prices to eliminate competitors. The Federal Trade Commission Act was adopted to prevent false advertising, unfair methods of competition, and unfair or deceptive acts or practices that affect commerce. An example of an unfair trade practice might be where independent retailers (perhaps insurance agents) agree with a product's manufacturer not to sell the same product made by any other manufacturer.

3. Per Se and Rule of Reason Offenses

There are two kinds of antitrust violations: the first are called per se offenses — acts that are inherently violations of the law; without regard to their purpose or intent. Examples of per se violations of concern to associations are price fixing and group boycotts. It is imperative that NAIFA federation members not attempt to bargain or agree with companies or other insurance and financial advisors on the percentage, amount or general level of commissions, or take any action or make any threats or statements that tend to set commissions or premiums at a certain level, or stabilize commissions or premiums. Any association proposal that would directly or indirectly affect the price of

the product, or price competition among companies and agents, must be viewed with alarm and avoided.

The other kind of antitrust violation is known as a “rule of reason” violation. In cases that are not per se offenses, the rule of reason disregards restraints of trade which are of little consequence, or are only incidental to competition or to another lawful agreement. Under the rule of reason, individuals can show that, although there may be an adverse effect on trade or commerce, the effect was not an unreasonable one and was justified under the circumstances. Most association practices would probably be judged under a rule of reason standard. Such practices would include membership policies, procedures for disciplining members, and policies with regard to access by nonmembers to association programs and services.

4. McCarran-Ferguson Act

The law treats the insurance industry somewhat differently than other industries, in that the McCarran-Ferguson Act provides for state regulation and exempts the industry from the general application of the federal antitrust laws. But this exemption narrowly applies only to “the business of insurance,” such as the underwriting of risks and relationships between insurance companies and their policyholders. The McCarran-Ferguson Act exemptions for insurance would not protect association activities from coverage under the antitrust laws, even though the associations happen to be made up primarily of insurance professionals.

5. Noerr-Pennington Exception

There are important antitrust exemptions that do apply to NAIFA and its member associations. Conduct that would violate the antitrust laws under other circumstances is permissible if it is aimed at influencing legislation or regulation. This exemption is referred to as the “Noerr-Pennington” doctrine, so-called after two Supreme Court cases that held that asso-

ciations did not violate the antitrust laws when they sought legislative action, even though enactment of that legislation would restrain trade. The rationale of the two cases was that the antitrust laws do not supersede the right to petition legislative and regulatory bodies. Thus, combinations of competitors, like NAIFA associations, can engage in legislative and regulatory activity — even when an anti-competitive result would ensue from the legislation or regulation.

An important limitation to this exception is that the legislative or regulatory activity must not be used as a sham to cover up otherwise anti-competitive activity. The legislative or regulatory activity must be conducted in good faith to solve a reasonably perceived problem, and not with the main purpose of interfering with the business opportunities or relationships of competitors.

6. State Action Exception

Associations can also engage in some conduct otherwise impermissible under the antitrust laws if they are following a state legislative or regulatory authorization, prohibition or mandate. This exception to the antitrust laws is known as the “state action” or “Parker v. Brown” doctrine. Under this doctrine, there is immunity for anti-competitive conduct if it is the product of a clearly articulated state policy that is actively supervised by the state. For NAIFA associations, this might mean, for example, that although injury to competition might result, it would still be permissible to participate in an insurance commissioner’s advisory committee, if the committee is validly constituted. Likewise, associations can adopt a policy against members rebating commissions - even though that might otherwise constitute a Sherman Act violation of price-fixing - because of the “state-action” of the legislature in adopting anti-rebate laws. Where the state has taken action to prohibit agents from rebating, compliance with the state’s action, even though anti-

competitive, would not be a violation of the federal antitrust laws.

ASSOCIATION ANTITRUST PROBLEM AREAS

To avoid conflict with antitrust laws, associations must be aware of antitrust problems that can arise in certain areas, such as those described below.

1. Discussion of Prices at Association

Meetings

Associations must studiously avoid any discussion of price. Although life insurance agents do not set prices for products, there may be room for impermissible discussion of other aspects of price, such as fees that are sometimes charged to clients by agents. And in states where rebating is legal, it would violate antitrust laws to have discussions that could affect the percentage of rebate to be given, as this would affect price.

2. Boycotts

A boycott is a “concerted refusal to deal” with a particular person or entity. If association members refuse to sell the products of a particular company, or refuse to do business with a bank that lawfully sells insurance, those would be examples of potentially objectionable boycotts. Associations should avoid any proposal to “put pressure on” or refrain from doing business with other agents or companies because of marketing practices or policies.

3. Tie-ins

Tie-ins occur when the purchase of one product or service is conditioned on the purchase of another unrelated one (the tied product). For example, an unlawful tie-in could be alleged if an association took the position that prospective exhibitors at its meetings must also buy advertising in the association’s publication or join the association.

4. Applicants for Membership

If an association is required to accept every applicant, then the purposes which impel the formation of associations would be compromised. However, rejection of an applicant may be said to have an anti-competitive effect, in that rejection might unduly restrict an applicant’s opportunity to do business. The rule seems to be that so long as it is not a matter of economic necessity to belong to an association, then the association is not required to accept all applicants. “Economic necessity” exists where membership provides access to something that is essential to effective competition, and where denial of membership is likely to have predominantly anti-competitive effects. It is doubtful that association membership could be legally proven to be essential to success in the sale of life insurance and financial services. But even if such were the case, the exclusion of applicants can be acceptable if association services that are essential to effective competition are made available to non-members. In such a case, however, non-members may be required to pay a higher price for such services than is required of dues-paying members.

5. Expulsion of Members

If associations need not accept all applicants, then they need not keep all members permanently. However, once an individual joins an association, he or she obtains a property right in that membership. If an individual is to be deprived of membership, basic due process and fairness must be accorded that member, meaning that the member must be given reasonable notice of the charges against them and an adequate opportunity to defend against them at a fair hearing. (The procedure for disciplinary action is outlined elsewhere in this guide.) While due process alone is no defense against an antitrust violation, it is evidence of an association’s intent to be fair and to comply with the law.

6. Advertising

Problems here can take three forms: (a) advertising and public statements by the association; (b) advertisements submitted by third parties for association programs and publications; and (c) attempts by associations to control advertising by their members.

Depending on the circumstances, association advertisements and public statements can harm competition. A good test of such association action is to ask if the content might make it more difficult for someone to do business in the community. An affirmative answer to this question does not necessarily mean that the statement cannot be made, but it should evoke caution. The proposed statement should be evaluated to ensure that 1) the association's motives are to provide relevant information to the public about the association or the insurance and financial services industry; and 2) the association reasonably believes that the statement is accurate. The antitrust laws are designed to protect competition, not competitors, and to encourage useful consumer information in the marketplace. Critical statements about competitors are permissible if they are accurate, useful to consumers, and made in good faith.

With respect to advertising in association publications, if an association has "market power," it could be deemed unlawful to refuse to make space available to competing advertisers. "Market power" depends on particular factual circumstances and the presence of alternative advertising outlets. In some situations, a potential advertiser that is denied the opportunity to advertise in the association's publication may suffer an impermissible competitive disadvantage in its marketing efforts. Considering the wide range of outlets for insurance and financial services advertising, NAIFA federation publications probably could not be demonstrated to have the kind of market power under which an antitrust violation can occur.

Associations should reserve the right to refuse to accept any advertisement for any reason in their contracts and solicitations for advertisements in an association publication.

Advertising that appears truthful and aimed at the improvement of business conditions in the insurance and financial services marketplace should, however, be presumed acceptable and associations should use care in rejecting advertisements for insurance and other financial products which have been approved for sale by the insurance department or another regulatory agency. But associations have latitude in selecting advertising because there are usually multiple outlets for insurance and financial advertising and advertisers may have difficulty establishing that it is a matter of economic necessity for their ads to be included in association publications. Moreover, the NAIFA federation has an interest in monitoring advertisements in its publications to avoid false and misleading advertising of insurance and other financial products and services.

A third potential advertising issue involves attempts by an association to prohibit or police advertising by its own members. The basic rule is that advertising must not be untrue, unfair, deceptive, misleading, or defamatory. Associations should generally avoid condemning advertising that does not fall into those categories. An association's unreasonable restraint on the advertising of insurance and financial services would be viewed with suspicion by antitrust regulators.

7. Ethical Standards

NAIFA's Code of Ethics is a broad and general statement having its basis in adherence to law and the provision of good service to the public. All members of NAIFA associations subscribe to the Code when they join, and they may be held accountable to its provisions. But associations should be wary of attempting to impose standards on members (or, perhaps indirectly, on companies) that are more extensive than the law requires, particularly if those standards can be viewed as limiting opportunities to compete, restraining price competition, or depriving consumers of information they might find useful in making informed buying decisions.

8. Association Programs

Associations are sometimes approached by entrepreneurs who want to exhibit products or services at meetings or appear on association programs to further their marketing goals. Associations need not provide a platform for all viewpoints. But if other entrepreneurs are customarily afforded a platform at association meetings, then any such request should be reviewed in the context of "economic necessity" for the applicant to appear on the association's program. If the entrepreneur will not suffer a significant competitive disadvantage by denial of an appearance on the association's program, then it is probably safe to say that a platform need not be provided. Associations should reserve the right to refuse to accept any exhibitor for any reason in their contracts and solicitations for exhibitors at association conventions or meetings.

9. Meetings and Agendas

Where possible, associations should conform to written agendas for meetings and prepare minutes of the proceedings. This allows associations to provide evidence of the subjects covered and actions taken. Discussions that are impermissible at association meetings can be equally objectionable if held out in the hall, or during a break, or indeed in any way which might fairly be considered in connection with the association's activities.

10. Company-Association Meetings

NAIFA associations often meet with other associations and company officials to discuss issues of common concern. Since these meetings are made up of competing companies and individuals, and all competitors are not in attendance, it is especially important to be sensitive to — and to avoid — agreements or understandings that could have anti-competitive effects.

Need Assistance?

If you have questions concerning any of the material contained in this guide, please call the NAIFA General Counsel or Government Relations Department.

Process for Merging Associations

*When two local associations merge, one association is really dissolving and the other one is absorbing those members. Therefore, the dissolving association must follow the same basic procedures as a regularly dissolving association.

1. BOTH the dissolving and absorbing associations must give their STATE association office a letter signed by their local president.
 - a) Dissolving Local – The letter must state that $\frac{3}{4}$ of its current members approved the merger with “X” association. Also MUST state that all funds will be transferred from the dissolving association(s) to the association accepting the new members or another 501c (6) organization of their choice.
 - b) Absorbing Local – The letter must state that $\frac{3}{4}$ of the absorbing association’s members approved the merger. If a name change will result from this merger that should also be stated in the letter provided to the state association as well.
2. The dissolving association(s) must also file a final tax return with the IRS notifying them of their dissolution. Consult with your accountant if you have questions about the process of notifying the IRS about mergers and dissolutions.
3. The information discussed in items 1 & 2 must be forwarded to your state association. The state association must then pass along that information in addition to a letter from the state board approving the merger and stating that the dissolving association does not have any outstanding financial obligations to the state. This information should be forwarded to Michelle Zaman, Program Manager-Association Services via email mzaman@naifa.org or by fax 703-770-8480.
4. NAIFA ensures that the dissolving association has met all financial obligations to the national organization.
5. Once ALL of this information is received, it is put before the NAIFA National Board of Trustees for discussion. Once the Board of Trustees approves the motion, the state and local associations are informed of the approval and ONLY THEN are the current members transferred to the absorbing association and the dissolving association is omitted from the NAIFA database. The association absorbing members of a disbanding association will also absorb the disbanding association’s lapsed members for the current membership year.
6. The association which absorbed the dissolved association also needs to amend its bylaws to update its territory, dues and name if applicable, and forward a copy of those bylaws to their state and national NAIFA office.
7. The absorbing association from the merger will have its membership goal increased as well as its begin year count to include the members moving from the dissolved association. The absorbing association will assume the entire begin year count and membership goal of the disbanding association.
8. Please note that state laws governing the merger and dissolution of incorporated and unincorporated associations vary from state to state. For information about the particular laws in your state in this area, please consult with the appropriate state regulatory authority or local counsel.

Please contact Michelle Zaman at (703) 770-8228 with questions.

Process for Dissolving Associations

1. The dissolving association must give their STATE association a letter signed by their local president stating why the association wishes to dissolve. Included with this letter MUST be the following pieces of information:
 - a) A letter signed by the local president stating that $\frac{3}{4}$ of the dissolving association's current members approved the dissolution. Within this letter, the local association should state exactly where its funds will be transferred.
 - b) A list detailing exactly where each member within the dissolving association should be transferred to (This is critical information because the national Board of Trustees can not approve a dissolution unless it has this listing) .
 2. The state association must send the Association Services Department at NAIFA the written information noted above. In addition, the State Board must forward NAIFA a letter approving the dissolution and stating that the local association does not have any outstanding financial obligations. This information should be forwarded to Michelle Zaman, Program Manager-Association Services via email mzaman@naifa.org or by fax (703) 770-8480.
 3. The dissolving association(s) must also file a final tax return with the IRS notifying them of their dissolution. Consult with your accountant if you have questions about the process of notifying the IRS about mergers and dissolutions.
 4. NAIFA ensures that the dissolving association has met all financial obligations to the national organization.
 5. Once ALL of this information is received by the Association Services Department at NAIFA, it is put before the Board of Trustees for discussion. Once the Board of Trustees approves the motion, the state and local associations are informed of the approval and ONLY THEN are the members transferred to the appropriate association(s) and the dissolving association is removed from the NAIFA database.
 6. The association(s) absorbing members of a disbanding association will have its membership goal increased as well as its begin year count to include the number of current members moving from the dissolved association. The association absorbing members of a disbanding association will also absorb the disbanding association's lapsed members for the current membership year.
 7. If multiple associations are involved in absorbing members of a disbanding association it is the responsibility of the state association to indicate in their approval letter to NAIFA National which association(s) should absorb the current membership year's lapsed members of the disbanding association.
 8. Please note that state laws governing the merger and dissolution of incorporated and unincorporated associations vary from state to state. For information about the particular laws in your state in this area, please consult with the appropriate state regulatory authority or local counsel.
- Please contact Michelle Zaman at (703) 770-8228 with questions.

Resources

FORM OF NOTICE OF HEARING

June 1, 201__
(CERTIFIED MAIL)
Mr. John Doe
1000 Y Street
City, State 10001

Dear Mr. Doe:

By direction of the Board of Directors of NAIFA- _____, you are hereby notified of and requested to appear at a hearing before the Board of Directors of the Association on Monday, the first day of July, 201__ at 10:00 a.m., in the Green Room of the Acme Hotel, 200 Z Street, City, State.

The purpose of this hearing will be to consider whether or not you should be expelled from or otherwise disciplined by this association on a charge that you are guilty of conduct unbecoming a member of this Association in that, on or about the 5th day of April 201__, you, as a life insurance agent for the XYZ Life Insurance Company, did receive from one John Jones the sum of \$_____ in payment of a premium on a certain life insurance policy in the face amount of \$_____ issued by the XYZ Life Insurance Company to said Jones, and that you did not remit this premium to the Company, but instead, unlawfully appropriated the premium to your own use.

You should arrange to have present at the hearing all witnesses whom you may wish to testify on your behalf. You will also be given the opportunity at the hearing to present such other evidence as you may desire. Counsel may represent you at the hearing, at your expense, if you desire such representation and if the association is notified in writing of your intent to be so represented by counsel.

Sincerely

Title

(The information in Paragraph 1 must always be given. Paragraph 2 should always contain the general charge of conduct unbecoming a member; the specific allegation or allegations should then be given in the remainder of Paragraph 2.)

FORM OF NOTICE OF DECISION

July 10, 201__
(CERTIFIED MAIL)
Mr. John Doe
1000 Y street
City, State 10001

Dear Mr. Doe:

At a hearing before the Board of Directors of NAIFA- _____, conducted on July 1, 201__, based upon charges against you of which you had been previously informed in writing, the Board of Directors duly voted to sustain said charges. The charges having been sustained, the Board of Directors further duly voted to expel you from membership in this Association.

Accordingly, you are hereby notified that you are no longer a member of this Association, that any interest you may have in the funds and property of the Association is forfeited, and that you are no longer entitled to the use of the name, emblem or other insignia of this Association or the state and national associations.

Sincerely

Title

(In cases of suspension, the letter must set forth the exact length of suspension. In cases of reprimand, the second sentence of Paragraph 1 and all of Paragraph 2 should be amended to include the Board's exact admonition. If the charges are dismissed, the member should also be notified in writing.)

NAIFA Policy on Recruiting and Association Activities

The official activities of NAIFA and its state and local associations shall not be used as a forum or means for individual members to actively or directly recruit other members to their companies or agencies (i.e., proselytizing).

Association time and resources must focus on NAIFA's mission to advocate for a positive legislative and regulatory environment, enhance business and professional skills and promote the ethical conduct of our members. Proselytizing is not consistent with this mission and is not appropriate association business.

This policy shall not be construed to interfere with an individual member's freedom to recruit others on their own time, in connection with their own business affairs, apart from association activities. This policy also shall not be construed to preclude company or agency advertising, exhibits or sponsorships in connection with association publications or activities.

Adopted by the NAIFA Board of Trustees on March 17, 2005

NAIFA Policy on Harassment

Excerpt from the NAIFA-National Employee Handbook (2007)

The law does not permit, nor will NAIFA tolerate harassment of employees by other employees, or by its members, vendors or customers. Likewise, NAIFA will not tolerate harassment of a member, vendor or customer by any employee of NAIFA.

This includes harassment because of race, sex, religion, color, national origin, disability, age, or any other basis protected by federal, state or local law, ordinance or regulation. Such conduct by an employee could result in disciplinary action up to, and including termination of employment.

While it is not easy to define precisely what harassment is, it includes any physical, verbal and visual conduct that creates an intimidating, offensive, or hostile work environment or which interferes unreasonably with a person's work performance. Such conduct constitutes harassment when:

- 1) Submission to the conduct is made either an implicit or explicit term or condition of an individual's employment;

- 2) Submission to or rejection of the conduct is used as a basis for an employment decision affecting the individual; or,
- 3) The harassment has the purpose or effect of unreasonably interfering with an employee's work performance or creates an intimidating, hostile, or offensive work environment.

The following are some examples of conduct that may be considered harassment. This list is provided as a sample of inappropriate workplace conduct, but is by no means all-inclusive.

- a) Verbal conduct such as epithets, derogatory gestures, jokes or comments, slurs or unwanted sexual advances, invitations or comments;
- b) Visual conduct such as derogatory and/or racially/sexually-oriented cartoons, clothing, drawings, posters, photographs or objects;
- c) Transmitting sexually suggestive, derogatory or offensive materials via association computers (e.g., E-mail) or accessing such information on the Internet while at work;
- d) Physical conduct such as assault or attempts or threats to commit assaults, unwanted touching, blocking normal movement or interfering with work;
- e) Stalking in the workplace, consisting of a pattern of conduct by one employee of another employee, the intent of which is to follow, alarm, or harass the victim or their family member;
- f) Imposing one's religious beliefs or convictions on other employees;
- g) Cyber stalking in the workplace, consisting of the use of electronic means of communication, including emails, internet and intranet, to threaten to inflict bodily harm or physical injury or exhort money or things of value, or abuse, terrify, annoy, harass or embarrass any person.
- h) Threats and demands to submit to sexual requests as a condition of continued employment, receipt of products/services, or to avoid the loss of some other employment-related benefits, and offers of employment benefits, preferential treatment or extra services in return for sexual favors; and,
- i) Retaliation for having reported or threatened to report harassment.

Such behavior is unacceptable in the workplace itself and in other work-related settings such as business trips and social events with co-workers (whether or not the social event is sponsored by the Association). Such conduct by vendors or visitors to our organization also will not be tolerated.

Code of Ethics

PREAMBLE:

Helping my clients protect their assets and establish financial security, independence and economic freedom for themselves and those they care about is a noble endeavor and deserves my promise to support high standards of integrity, trust and professionalism throughout my career as an insurance and financial professional. With these principles as a foundation, I freely accept the following obligations:

- To help maintain my clients' confidences and protect their right to privacy.
- To work diligently to satisfy the needs of my clients.
- To present, accurately and honestly, all facts essential to my clients' financial decisions.
- To render timely and proper service to my clients and ultimately their beneficiaries.
- To continually enhance professionalism by developing my skills and increasing my knowledge through education.
- To obey the letter and spirit of all laws and regulations which govern my profession.
- To conduct all business dealings in a manner which would reflect favorably on NAIFA and my profession.
- To cooperate with others whose services best promote the interests of my clients.
- To protect the financial interests of my clients, their financial products and my profession, through political advocacy.

Adopted 2012 – NAIFA Board of Trustees



**IT PAYS TO
BE A MEMBER**

National Association of Insurance and Financial Advisors
2901 Telestar Court • Falls Church, VA 22042-1205 • 877-TO-NAIFA • www.NAIFA.org

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