



## NAIFA Chapter Keep it Legal Guide

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## **Objective**

NAIFA Chapters 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. Chapter 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 nonmembers. This guide also discusses other issues that may impact a Chapter's reputation or liability, such as antitrust concerns, the effect of incorporation on liability and public statements by Chapters.

This guide does not cover every circumstance that could have adverse legal consequences for a Chapter 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, Chapters should consult this guide, local counsel, NAIFA's General Counsel or NAIFA's Member & Chapter Services Department before taking action, unless the contemplated procedure is clearly proper.

## **Ethics Issues**

### **The Role of Chapters**

#### **Can Chapters take action against members?**

Yes. Every Chapter has the right to discipline those members who engage in conduct unbecoming a member, provided the correct procedure is followed. This procedure is discussed below under the topic of "Hearings."

#### **Can Chapters take action against nonmembers and companies?**

Maybe. Chapters have no authority to discipline nonmembers. NAIFA Chapters are concerned with the reputation of the insurance and financial services industry and the interests of consumers. However, Chapters do not regulate the industry; that is the business of state insurance and securities departments and other regulators. Chapters are on dangerous ground when they attempt to handle alleged unlawful acts or questionable practices of nonmembers or companies on their own.

However, NAIFA Chapters do have the right to report violations of law by nonmembers and companies to the proper authorities. Rather than taking action on its own, a Chapter may report violations of law by nonmembers and companies to the appropriate state or federal regulator. Of course, the Chapter 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 a Chapter 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 Chapter 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 Chapter complained. The law will not condone careless and unfounded charges that may affect a person's reputation and livelihood or a company's reputation and license.

A committee - or the Board itself in smaller Chapters - should meet to discuss a complaint against a nonmember 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 Chapter 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.

### **Can Chapters 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 engage in legislation, regulation and litigation which address these issues.

## **Authority to Control Membership**

### **Does NAIFA have to accept an application for membership?**

All applicants for membership should be considered on their own individual merits. Basic fairness should be the rule in determining whether to accept or reject applicants; professionals engaged in the sale of insurance or securities who otherwise qualify should normally be accepted. Chapters should not follow any general practice of rejecting applicants who fall into specific categories.

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 that are disparaging, that are not reasonably susceptible of verification or that might mislead consumers;
- Has an outstanding indebtedness to the Chapter;
- 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);
- Has engaged in conduct which, if engaged in by a Chapter 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 NAIFA Code of Ethics or another official policy of the association.

The Chapter 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 Chapter 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.

### **Do we have to accept a transfer application from another local Chapter?**

Transfer of membership from one Chapter to another is not a matter of right. The new Chapter 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 Chapter may communicate with the applicant's former Chapter before approving the transfer. Chapters have the right to reject transfer applications, but in view of their prior Chapter membership, every benefit of the doubt should be given to such applicants.

### **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 Chapter on that ground. A Chapter 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 Chapter for wrongful imposition of Chapter sanctions.

### **Must members comply with the bylaws?**

As a condition of membership, each individual signing a membership application agrees to be bound by the Chapter's bylaws. The bylaws of all NAIFA Chapters allow for amendment. As a result, consent to the bylaws in force when an individual joins a Chapter is also consent to the authority of the Chapter 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 Chapter, 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 Chapter bylaws. Second, the amendment must not discriminate arbitrarily against particular persons.

## **Complaints Against Members**

### **What is "conduct unbecoming a member"?**

Conduct unbecoming a member includes actions that are contrary to the NAIFA mission, breaches of the NAIFA Code of Ethics, blatant violations of the NAIFA Policy on Recruiting and Association Activities (see Resources section), 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.)

### **Who can file a complaint against a member?**

A complaint may be made against a member 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.

#### **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.

### **Ethics Hearings**

Care must be used in the preparation of the notice, 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 30 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 Chapter, or by the Chapter Executive Director 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 instead. 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 Chapter. 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 Chapter is sufficiently informed in advance. If this occurs, the Chapter should consider being represented by counsel.

### **Witnesses**

The Chapter 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 Chapter (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 Chapter. 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 testimony 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 Chapter 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 Chapter's evidence. If the accused elects to testify, members of the Board and the person in charge of presenting the Chapter's case may question the accused.

### **Rules of Evidence**

The Chapter 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 Chapter. 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 Chapter 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 (unless the Board agrees to an oral vote), 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 Chapter. Ordinarily, if the Chapter 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 association, and all rights to use the name and emblem of NAIFA and its Chapters. 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. not "until Mr. Smith starts acting ethical").

### **Publicizing Disciplinary Action**

The members of the Chapter have the right to know that a member has been expelled or otherwise disciplined, if they request this information. The means used to inform the membership should not be such as would normally come to the attention of outside parties. For example, it would be inadvisable to notify the members through the Internet, Chapter newsletter/magazine or other similarly circulated publications. The membership may be notified by confidential letter from the Secretary, in a closed meeting of the Chapter, or only upon request. A 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 must be notified, for adjustment of membership records, deletion from mailing lists in cases of expulsion or temporary deletion in cases of suspension.

NAIFA's Chapters 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 a Chapter 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 Chapter 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, a Chapter 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 NAIFA 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 Chapter'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 may be informed of the action taken by the Chapter. In that case, the Chapter 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 Chapter. 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 Chapter should be prepared to assist the regulatory agency if requested.

## **Legal Best Practices**

### **Public Statements by Chapters**

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

### **Why Must Chapters Incorporate?**

NAIFA requires that Chapters be incorporated as a sound business practice. Incorporation will normally protect members against personal liability for the debts of the Chapter. But if a member, nonmember or a company has been wronged by some act of the Chapter, 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 Chapter. It is sometimes mistakenly believed that if Chapter 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.

### **Non-Deductibility of Lobbying Expenses**

Members of non-profit associations, such as NAIFA members, 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 members the amount of the national and state portion of their dues that is not deductible. This information is included on application materials and renewal notices.

### **Chapters 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 NAIFA Chapters.

The antitrust laws deal broadly with any unlawful agreement, combination of competitors or conspiracy that restrains trade or commerce. Associations like NAIFA Chapters are by their very nature a group of competitors. Chapter 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 Chapters who violate antitrust laws can be fined and individuals can also be imprisoned. In a severe case, a Chapter 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 a Chapter's reputation.

## **The Federal Antitrust Laws**

### **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 Chapters, representatives and members are capable of making contracts. NAIFA's structure could also satisfy the interstate commerce requirement in two respects: first, NAIFA members sell the products of interstate insurance and financial services companies; and second, the relationship among NAIFA and its Chapters could be viewed as being within the flow of interstate commerce.

Thus, NAIFA is subject to the Sherman Act and other federal antitrust laws. Chapter 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 agents to refuse to sell the products of any company that deals directly with the public or to agree on a fee schedule. These could all be antitrust violations even if the agreement is informal and never put in writing.

### **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 Chapters, 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.

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.

### **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 Chapters are price fixing and group boycotts. It is imperative that NAIFA 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 Chapter 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 Chapter 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 Chapter programs and services.

### **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 Chapter activities from coverage under the antitrust laws, even though the Chapters happen to be made up primarily of insurance professionals.

### **Noerr-Pennington Exception**

There are important antitrust exemptions that do apply to NAIFA and its Chapters. 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 associations 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 Chapters, 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.

### **State Action Exception**

Chapters 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 Chapters, 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.

## **Chapter Antitrust Problem Areas**

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

### **Discussion of Prices at Chapter Meetings**

Chapters must studiously avoid any discussion of price. Although insurance and financial advisors do not set prices for financial products, there may be room for impermissible discussion of other aspects of price, such as fees that are sometimes charged to clients by agents or advisors.

### **Boycotts**

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

### **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 a Chapter took the position that prospective exhibitors at its meetings must also buy advertising in the Chapter’s publication or join the Chapter.

### **Applicants for Membership**

If a Chapter 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, if 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 insurance and financial services industry. 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, nonmembers may be required to pay a higher price for such services than is required of dues-paying members.

### **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.

### **Advertising**

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

Depending on the circumstances, Chapter advertisements and public statements can harm competition.

A good test of such Chapter 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 Chapter's motives are to provide relevant information to the public about the Chapter or the insurance and financial services industry and 2) the Chapter 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 Chapter publications, if a Chapter 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 Chapter's publication could suffer an impermissible competitive disadvantage in its marketing efforts. Considering the wide range of outlets for insurance and financial services advertising, NAIFA Chapter publications probably could not be demonstrated to have the kind of market power under which an antitrust violation can occur. Chapters should reserve the right to refuse to accept any advertisement for any reason in their contracts and solicitations for advertisements in a Chapter 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 Chapters 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. Chapters 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 Chapter publications. Moreover, NAIFA Chapters have 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 a Chapter to prohibit or police advertising by members. The basic rule is that advertising must not be untrue, unfair, deceptive, misleading or defamatory. Chapters should generally avoid condemning advertising that does not fall into those categories. A Chapter's unreasonable restraint on the advertising of insurance and financial services would be viewed with suspicion by antitrust regulators.

### **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 subscribe to the Code when they join, and they may be held accountable to its provisions. Chapters 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.

### **Chapter Programs**

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

### **Meetings and Agendas**

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

### **Company-Chapter Meetings**

NAIFA Chapters 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 Member & Chapter Services Department.

## Form of Notice of Hearing

June 1, 202\_

(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 Chapter on Monday, the first day of July, 202\_\_ 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 Chapter on a charge that you are guilty of conduct unbecoming a member of NAIFA in that, on or about the 5th day of April 202\_\_, 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 one must always be given. Paragraph two 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 two.)



## Form of Notice of Decision

July 10, 202\_\_

(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, 202\_\_, 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 NAIFA.

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

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 one and all of paragraph two 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**

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

The official activities of NAIFA and its Chapters 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.

## **Discrimination and Harassment**

*Excerpt from the NAIFA Employee Handbook (September 2021).*

NAIFA is committed to providing a work environment that is free from all forms of discrimination and conduct that can be considered harassing, coercive, or disruptive, including sexual harassment. Actions, words, jokes or comments based on an individual's sex, race, color, national origin, age, religion, disability, sexual orientation, or any other legally protected characteristic will not be tolerated.

Harassment 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. The following is a partial list of harassment examples, but is not all-inclusive:

Verbal conduct such as epithets, derogatory gestures, jokes, comments, slurs, or unwanted sexual advances, invitations, or comments;

Visual conduct such as derogatory and/or racially/sexually-oriented cartoons, clothing, drawings, posters, photographs, or objects;

Transmitting sexually suggestive, derogatory, or offensive materials via Association computers (e.g. email) or accessing such information on the Internet;

Physical conduct such as assault or attempts or threats to commit assault, unwanted touching, blocking normal movement, or interfering with work;

Stalking, consisting of a pattern of conduct directed by one employee to another employee, the intent of which is to follow, alarm, or harass the victim or their family;

Cyber stalking, consisting of the use of electronic means of communication to threaten to inflict bodily harm, extort money or things of value, or abuse, terrify, annoy, harass, or embarrass any person;

Imposing one's religious beliefs or convictions on other employees;

Threats and demands to submit to sexual requests as a condition of continued employment or the receipt of products or services, to avoid the loss of employment-related benefits, or as a condition of offers of employment benefits or preferential treatment; and

Retaliation for having reported or threatened to report harassment.

Conduct constitutes harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of employment; (2) submission or rejection of the conduct is used as a basis for making employment decisions; or, (3) the conduct has the purpose or effect of interfering with work performance or creating an intimidating, hostile, or offensive work environment.

Harassment 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 NAIFA). Such conduct by vendors or visitors to NAIFA will also not be tolerated.

If an employee experiences or witnesses harassment, NAIFA recommends, but does not require the employee to immediately tell the person displaying offensive behavior to stop. The offending person may not be aware that the conduct is unwelcome or offensive. The employee should immediately report any incident of discrimination or harassment to any supervisor, the Human Resources Department, or any member of the management team. Any supervisor or manager who becomes aware of possible discrimination or harassment must immediately advise the Human Resources Department so it can be investigated in a timely and confidential manner. Employees may raise concerns and make reports without fear of reprisal or retaliation.

All allegations of discrimination or harassment will be quickly and discreetly investigated. To the extent possible, confidentiality of the reporting party, of any witnesses, and of the alleged harasser will be protected against unnecessary disclosure.

Anyone engaging in discrimination or harassment will be subject to disciplinary action, up to and including termination of employment. Employees who falsely accuse another employee, member or vendor of discrimination or harassment will be subject to disciplinary action, up to and including termination.

## **NAIFA 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 by acting in their best interest.

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: September, 1918; Latest Revision: July, 2019, NAIFA Board of Trustees*