

# FEDERAL RESERVE BANK *of* NEW YORK

## **Antitrust Guidelines for Members of the Federal Reserve Bank of New York's Advisory and Sponsored Groups**

As of March 2, 2018

### **Introduction**

The U.S. Congress and most states have enacted antitrust laws to promote competition by ensuring that business activities are conducted in an open and competitive atmosphere, and that no unreasonable restraints are placed on competition. Antitrust law does not prohibit participants and competitors from joining together on committees, including groups such as those the Federal Reserve Bank of New York (“FRBNY”) has created to address particular issues or markets, make recommendations for industry reforms and best practices, or advise the FRBNY with respect to various matters (collectively, “FRBNY Groups” or “Groups”).

FRBNY Groups can be subject to antitrust scrutiny because they may bring together competitors to discuss economic, financial, and market conditions. Accordingly, care must be taken when members of any FRBNY Group (“Members”) communicate, whether at formal or informal meetings, on conference calls, or electronically, so that no conduct becomes or appears anticompetitive.

Enforcement of the antitrust laws can come from not only the U.S. Department of Justice, Federal Trade Commission, and state authorities, but also private individuals or entities who feel aggrieved by a particular course of conduct. Antitrust violations may result in criminal and civil liability, and penalties for antitrust violations may include significant corporate and individual fines and damages, and imprisonment for individuals.

The FRBNY and FRBNY Groups are committed to strict compliance with the law. Members are individually responsible for ensuring that their actions comply with the antitrust laws. Members should expect careful scrutiny of their actions.

These Antitrust Guidelines (“Guidelines”) apply to all activities related to any FRBNY Group, including activities of working groups. **Adherence to these Guidelines by Members is mandatory and is a condition on participation in any Group.** Members should review these Guidelines carefully, including the Appendix, which contains a list of best practices and a list of activities that should be avoided. Members should share these Guidelines with any of their staff involved in FRBNY Group projects and working groups.

Because the different Groups vary in the nature of their work and membership, the antitrust concerns raised may be different for different Groups, and some portions of this Guidance will apply more directly to some Groups’ activities than to others. Members

should police themselves, and should raise any questions about and report suspected violations of the Guidelines to an FRBNY staff member or an attorney for their respective firms (or, where applicable, to an attorney retained specifically to represent the relevant FRBNY Group's Members in connection with Group activities). Anonymous reporting is also available using the FRBNY's Integrity Hotline: (877) 52-FRBNY. To the extent attorneys for the FRBNY attend Group meetings, they are acting as counsel to the FRBNY, not to the Members or the Group.

## **Impermissible Conduct**

"*Per se*" violations of antitrust laws are illegal regardless of their effects on competition. To avoid embarrassment and legal liability, Members should never engage in any of the following conduct or activities in conjunction with their work on an FRBNY Group.

- **Price Fixing Agreements:** Members should never agree to fix prices, fees, commissions, or any other element of the price or terms of a transaction. They should also never make agreements that could have the effect of fixing prices, fees, or commissions. Discussions concerning these issues should always be avoided, and Members should never share or compare confidential, proprietary or competitively sensitive information concerning their firms' prices or fees, or the process of setting prices or fees, including costs that impact pricing or bidding, as this may be seen as an attempt to fix prices, fees, or commissions. Certain confidential, proprietary or competitively sensitive information may be shared, aggregated, and disseminated through the secretariat for the relevant FRBNY Group when appropriate to advance the Group's work.
  
- **Boycotts:** "Boycotts" refers to agreements among competitors to refuse to deal with someone, or to deal with a particular firm (or firms) differently than others. Members should never agree either to treat a particular individual, firm, or group of firms (including a sector of an industry) in a prescribed manner, or to boycott any individual, firm, or group of firms (including a sector of an industry). Members may not discuss setting prices for any particular customers or vendors, nor should they agree to deal or not to deal with particular customers or vendors in a specific product.
  
- **Allocation of Customers or Market Division:** Members should never agree to allocate customers or products among themselves. Members may not discuss confidential, proprietary or competitively sensitive plans to expand into or withdraw from certain geographic or product markets.

## **Group Activities**

The following activities may or may not be permissible, depending on the circumstances. Antitrust law applies a "rule of reason" analysis to activities that are not *per se* illegal,

weighing the anti-competitive effects against the pro-competitive justification for an activity. Care should be taken that otherwise permissible activities do not mask or promote actions that are or could be interpreted as anticompetitive. Care should also be taken to consider whether the Group's procompetitive aims can be achieved through less restrictive means.

- **Information Sharing:** Members may discuss common problems and challenges of a general, administrative, or logistical nature, but no discussion should have as its purpose encouraging uniform action or reducing or eliminating competition. Information about a member's business may be shared in order to foster general understanding, and to contribute to the drafting of best practice recommendations. However, information sharing among Members concerning confidential, proprietary, or competitively sensitive information can raise antitrust concerns. Such information includes but is not limited to information on prices, business plans, marketing plans, new product development, internal costs, non-public profit estimates, hiring, employee compensation, and investments. Antitrust concerns surrounding information sharing may be heightened for some FRBNY Groups due to the nature or composition of the groups. When appropriate to advance an FRBNY Group's work, certain confidential, proprietary or competitively sensitive information may be shared, aggregated, and disseminated through the secretariat for the relevant FRBNY Group.

- **Best Practices Recommendations/Standard Setting:** These are some of the most important activities of certain Groups and can be done legally so long as a few principles are kept in mind. Best practices recommendations and standard setting should seek to enhance the efficiency, stability and integrity of the market and should discourage practices that have a detrimental effect on customers. Best practices recommendations and standard setting may not have the purpose of reducing or eliminating competition in the pricing of products or services, fees, commissions, advertising or any other dimension or restricting transactions with particular parties or on particular platforms. Members may not agree to condition entry into or participation in a market on the adoption of best practices. In addition, members may not use best practices as a collective agreement not to transact with specific counterparties or on specific platforms. Such an agreement could constitute an unlawful boycott.

- **Legislative Activities:** FRBNY Groups may from time to time present their views regarding governmental and regulatory matters. Antitrust law specifically recognizes the right of competing members of a market to present a unified position to the government on issues impacting their market. However, Members are advised to confine these communications and agreements to good faith, reasonable attempts to influence government actions.

## Procedures

FRBNY Groups have created a number of procedures to help maximize compliance with the letter and the spirit of the antitrust laws and to promote transparency, consistency, and fairness in group proceedings.

- The secretariat will serve as the repository of official records.
- The secretariat will provide each member and each non-member participating in group activities with a copy of these Guidelines.
- All Group meetings will have an agenda which will be made available on the group's website.
- Minutes of Group meetings, including a list of all attendees, will be recorded and made available on the group's website.
- All meetings, working group sessions, conference calls, and other Group-sponsored activities will be attended by an FRBNY staff member.
- Any materials that will be presented at Group meetings or shared with Members in furtherance of Group activities should be made available to the secretariat in advance of distribution. The secretariat should handle any distribution to Members.
- Members may consult with their own counsel on matters related to Group meetings and activities.
- Members should police themselves, and should raise any questions about and report suspected violations of these Guidelines to an FRBNY staff member or an attorney from their respective firms (or, where applicable, to an attorney retained specifically to represent the relevant FRBNY Group's Members in connection with Group activities). Concerns may also be conveyed anonymously by calling the FRBNY's integrity hotline at (877) 52-FRBNY.

## **Appendix**

To aid your application of these Guidelines, below is a list of “dos” and “don’ts.”

### **Do:**

- Members should police themselves, and should raise questions about and report suspected violations of these Guidelines to an FRBNY attorney or an attorney for their respective firms (or, where applicable, to an attorney retained specifically to represent the relevant FRBNY Group’s Members in connection with Group activities). Anonymous reporting is also available using the FRBNY’s Integrity Hotline: (877) 52-FRBNY.
- Members should inform their Group secretariat about any and all meetings, working group sessions, conference calls, and other group-sponsored activities that take place outside of the regularly scheduled group meetings.
- Members should provide any materials that will be presented at Group meetings or shared with Members in furtherance of Group activities to the secretariat in advance of distribution. The secretariat should handle any distribution to Members.
- Members should distribute copies of these Guidelines to any colleagues or vendors who work with them on Group matters.
- Members should be mindful that their discussions or actions could draw scrutiny or incur reputational harm even if they do not cross a legal line.

### **Don’t:**

- In conducting Group activities, Members should not, without prior review by an FRBNY staff member, have discussions with other Members about:
  - their company’s prices for products, assets, or services, or prices charged by competitors;
  - costs, discounts, terms of sale, profit margins, or anything else that might affect those prices;
  - the resale prices its customers should charge for products or assets it sells to them;
  - allocating vendors, markets, customers, territories, products, or assets with competitors;
  - limiting production or offering of services;
  - whether or not to deal with any other company;
  - details of their employees’ compensation;
  - lending standards, interest rates, or loan origination output;

- any competitively sensitive information concerning its company or a competitor's; or
  - any other sensitive antitrust subjects in conducting Group activities (such as price discrimination, reciprocal dealing, or exclusive dealing agreements).
- Members should not stay at a meeting, or any other gathering, if these kinds of discussions are taking place.