

# FEDERAL RESERVE BANK *of* NEW YORK

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## Antitrust Guidelines for the Payments Risk Committee and Associated Working Groups

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### Introduction

The United States 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 permits participants and competitors to join together on committees to make recommendations for industry reforms, best practices, and other such activities. But because such committees bring together competitors to discuss economic, financial, and market conditions, they can be subject to antitrust scrutiny. Care must be taken when members communicate – whether at formal or informal meetings, conference calls, or electronically – to ensure that no conduct becomes or appears anticompetitive.

Enforcement of the antitrust laws can come from not only the U.S. Department of Justice and state authorities, but also private individuals or entities who feel aggrieved by a particular course of conduct. Given the high profile of the Federal Reserve Bank of New York (“FRBNY”) within the financial community, committee members must expect careful scrutiny of their actions.

All members should review these Guidelines carefully and share them with any of their staff involved in Committee projects. If you have any questions about these Guidelines, please contact an attorney from the Federal Reserve Bank of New York.

### Impermissible Conduct

Some conduct can violate the antitrust laws even though it has some beneficial effects on the market. This conduct could fall within the activities that antitrust law deems *per se* illegal. To avoid problems and embarrassment, committee members should never engage in any of the following conduct or activities.

- **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.
- **Sharing Pricing Information:** Committee members should never share or compare 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 implicit attempt to fix prices, fees, or commissions.
- **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 in a prescribed manner, or to boycott any individual, firm, or group of firms. Members may not discuss setting prices for any particular customer or customers, nor should they agree to deal or not to deal with particular customers in a specific product.

- **Allocation of Customers or Territories:** Members should never agree to allocate customers or products among themselves. Discussions concerning plans to expand into or withdraw from certain geographic or product markets should be avoided.

## **Conduct that May or May Not Be Permissible**

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. While antitrust law recognizes the benefits of these activities in many situations, care should be taken to ensure that otherwise permissible activities do not mask or promote actions that are or could be interpreted as anticompetitive.

- **Standard setting:** Standard setting should be avoided if the standard under consideration would prevent certain entities (or groups of entities) from competing in the market or where significant barriers to entry would be raised. In all cases, the standards must be based on legitimate business reasons, such as improving the efficiency, stability, or integrity of the relevant market. Market participants’ adherence to standards must be voluntary.
- **Information sharing:** Committee members may discuss common problems and challenges of a general, administrative, or logistical nature, but no discussions should have as their purpose encouraging uniform action 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, detailed information-sharing among members concerning confidential, proprietary, or competitively sensitive information, including but not limited to prices, business plans, marketing plans, new product development, internal costs, or non-public profit estimates, can raise antitrust concerns. Such proprietary information may be shared, aggregated, and disseminated for legitimate business reasons through an FRBNY staff member.
- **Best Practices Recommendations:** This is one of the most important activities of industry committees and can be done legally so long as a few principles are kept in mind. Best practice recommendations may not have the purpose or effect of eliminating competition in the pricing of products or services. Standards should seek to enhance the efficiency, stability, and integrity of the market and should discourage practices that have a detrimental effect on customers.

## **Legislative Activities**

The Committee may from time to time present views regarding governmental and regulatory matters to legislative bodies. 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, committee members are advised to confine these communications and agreements to good faith, reasonable attempts to influence government actions.

## **Procedures to ensure compliance**

Notwithstanding the restrictions outlined above, the value of external committees is clear. Best practices recommendations, market studies, and press releases are all ways in which such committees may meet their respective mandates. All these activities are acceptable because they are designed to improve the functioning, reputation, and integrity of the market.

However, to maximize compliance with the spirit and letter of the antitrust laws – and to promote transparency, consistency, and fairness in committee proceedings – the following procedures should be followed:

- Each committee should appoint a secretariat to serve as the repository of official records.
- Before every meeting, the secretariat should circulate an agenda to members.
- The proceedings should be recorded in minutes. An opportunity to review and amend or object to the minutes should be provided to all Committee members, and the Committee should begin each meeting by discussing and formally adopting the minutes of the prior meeting.
- At least one FRBNY attorney should attend all meetings, conference calls, or other committee-sponsored activities.
- Committee members should police themselves, and are encouraged to report suspected violations of this policy to an attorney. Even discussions outside formal meetings or conference calls between competitors – including conversations that are assumed to be “off the record”— could result in antitrust scrutiny.