

## Federal Court Sets Aside Civil Investigative Demand

On January 25, 2023, Quinn Emanuel obtained a Court order setting aside in full a Civil Investigative Demand that DOJ’s Antitrust Division had issued to the National Association of REALTORS®.<sup>1</sup> The Court’s order bars the Division from continuing an investigation it agreed to close in 2020 as part of a settlement agreement with NAR. The Division had attempted to unilaterally back out of the settlement in order to resume its investigation, and NAR filed suit to enforce the agreement.

The government’s authority to conduct investigations and demand documents in connection with its investigations is expansive. But the Court’s decision here shows that the government’s investigative authority does have limits—and that, in certain circumstances, the target of an investigation can enforce those limits. Rather than accept that the Antitrust Division could reopen its investigation or impose additional conditions on NAR after settling earlier claims, NAR sued the Division and argued that, by resuming its investigation and issuing its Civil Investigative Demand, the Division violated its settlement commitments. And NAR won. The Court agreed with NAR, held that “reopening the same investigation it had agreed to close”<sup>2</sup> breached the settlement, and set aside the Civil Investigative Demand.

### I. Background

The Antitrust Division opened an investigation into certain NAR rules and policies in 2019. The Division issued a Civil Investigative Demand to NAR that year, and then issued a second Civil Investigative Demand in 2020. But by November 2020, the Division and NAR had agreed to settle the Division’s potential claims against NAR. NAR agreed to make changes to a limited set of its rules and to consent to entry of a Court decree. In return, the Division agreed to provide written confirmation that it had closed its investigation into two NAR rules not addressed in the consent decree and that NAR had no obligation to respond to the two Civil Investigative Demands. On November 19, 2020, the Division filed a complaint and proposed consent decree with the Court, and the then-Assistant Attorney General sent a closing letter to NAR.

The Antitrust Division never ultimately asked the Court to enter the decree. In July 2021, seven months after filing the complaint, the Division abruptly withdrew it. The Division never suggested that NAR failed to comply with any term of the settlement agreement. NAR had, in fact, upheld its end of the bargain. Nevertheless, immediately after withdrawing its complaint, the Division issued a new Civil Investigative Demand to NAR that sought much of the same information the Division had demanded in the investigations it agreed to close as part of the parties’ settlement.

### II. NAR’s Petition

Another NAR took the dispute right back to the Court. It filed a petition to set aside the new Civil Investigative Demand. Petitions to set aside Civil Investigative Demands are rare. Orders granting petitions to set aside Civil Investigative Demands are even rarer. But on January 25, the Court granted NAR’s petition in full. After reviewing the parties’ settlement discussions and the documents memorializing the settlement, the Court found that the “Antitrust Division’s commitment to close its investigations . . . was essential to the

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<sup>1</sup> See Memorandum Opinion, *National Association of REALTORS v. United States*, Case No. 1:21-cv-2406-TJK, Dkt. 25 (Jan. 25, 2023).

<sup>2</sup> *Id.* at 8.

parties' reaching a settlement.”<sup>3</sup> “With that common-sense interpretation of the parties' settlement in hand,” the Court “conclude[d] that the new [Civil Investigative Demand] violates the agreement” and granted NAR's request to set the demand aside.<sup>4</sup>

This decision makes clear that the United States government must abide by its settlement commitments. The Court rejected the Antitrust Division's position that its agreement with NAR “contemplated only a letter worth nothing but the paper on which it was written.”<sup>5</sup> Instead, the Court explained, the closing letter would not provide the agreed “relief if the Antitrust Division was free to reopen the investigations” it committed to close.<sup>6</sup> And the Court reaffirmed that the government may not unilaterally change the terms of a settlement after those terms are set: “The government, like any party, must be held to the terms of its settlement agreements, whether or not a new administration likes those agreements.”<sup>7</sup>

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the Court's opinion, please do not hesitate to reach out to:

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<sup>3</sup> *Id.* at 7-8.

<sup>4</sup> *Id.* at 8, 11.

<sup>5</sup> *Id.* at 9.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 11.