



# **Anti-Trust Compliance Procedures**

*Adopted by the Northeast Gas Association Board of Directors June 4, 2003*

*Amended by the Northeast Gas Association Board of Directors June 20, 2018*

## Objective

The Northeast Gas Association (NGA) and its member companies are committed to full compliance with all laws and regulations, and to maintaining the highest ethical standards in the way we conduct our operations and activities. Our commitment includes strict compliance with federal and state anti-trust laws, which are designed to protect this country's free competitive economy.

## Responsibility for Anti-trust Compliance

Compliance with the anti-trust laws is a serious business. Anti-trust violations may result in heavy fines for corporations, and in fines and even imprisonment for individuals. While NGA's attorneys provide guidance on anti-trust matters, you bear the ultimate responsibility for assuring that your actions and the actions of any of those under your direction comply with the anti-trust laws.

## Anti-trust Guidelines

In all NGA operations and activities, you must avoid any discussions or conduct that might violate the anti-trust laws or even raise an appearance of impropriety. The following guidelines will help you do that:

- **Do** consult counsel about any documents that touch on sensitive anti-trust subjects such as pricing, market allocations, anti-employee poaching practices, refusals to deal with any company, and the like.
- **Do** consult with counsel on any non-routine correspondence that requests an NGA member company to participate in projects or programs, submit data for such activities, or otherwise join other member companies in NGA actions.
- **Do** use an agenda and take accurate minutes at every meeting. Have counsel review the agenda and minutes on sensitive anti-trust subjects such as pricing, market allocations, anti-employee poaching practices, refusals to deal with any company, and the like, before they are put into final form and circulated.
- **Do not** have discussions with other member companies about:
  - \* your company's prices for products or services, or prices charged by your competitors.
  - \* costs, discounts, terms of sale, profit margins or anything else that might affect those prices.
  - \* the resale prices your customers should charge for products you sell them.
  - \* allocating markets, customers, territories or products with your competitors.
  - \* limiting production.
  - \* whether or not to deal with any other company.
  - \* any competitively sensitive information concerning your own company or a competitor's.
  - \* anti-employee poaching practices.
- **Do not** stay at a meeting, or any other gathering, if those kinds of discussions are taking place.
- **Do not** discuss any other sensitive anti-trust subjects (such as price discrimination, reciprocal dealing, or exclusive dealing agreements) without first consulting counsel.
- **Do not** create any documents or other records that might be misinterpreted to suggest that NGA condones or is involved in anticompetitive behavior.

***Please notify NGA of any conduct at an NGA-sponsored event that you believe raises anti-trust issues.***

**Table of Contents**  
**NGA Anti-trust Compliance Procedures**

I.	Introduction .....	5
II.	The Anti-trust Laws: A Basic Framework .....	5
III.	Possible Anti-trust Violations to Avoid .....	5
	1. Agreements That Restrain Competition – Section 1 of the Sherman Act .....	5
	2. Some Troublesome Agreements .....	6
	3. Other Types of Agreements That Also May Raise Concerns Under the Anti-trust Laws .....	7
	4. RD&D Issues.....	8
	5. Other Conduct That May Violate the Anti-trust Laws Even Without an Agreement of Any Type .....	9
IV.	Anti-trust Matters of Particular Interest to Trade Associations .....	10
V.	Some Practical Guidelines on Preventing Problems at Meetings, in Records and in Contacts with Others .....	12
VI.	Responsibility for Compliance, Monitoring and Enforcement.....	14
VII.	Conclusion .....	15

## **I. Introduction**

It is the policy of the Northeast Gas Association (NGA) and its member companies to comply strictly with all laws, including federal and state anti-trust laws that apply to NGA operations and activities.

Compliance with the letter and spirit of the anti-trust laws is an important goal of NGA and is essential to maintaining NGA's reputation for the highest standards of ethical conduct.

The procedures discussed below formalize NGA's continuing anti-trust compliance program and are to be observed by each of you – NGA officers and employees, NGA member company representatives and other persons – who may be involved in any way in NGA's operations and activities. The program cannot work unless each of you does your part. We appreciate your participation.

## **II. The Anti-trust Laws: A Basic Framework**

Anti-trust laws are designed to promote vigorous and fair competition and to provide American consumers with the best combination of price and quality. These procedures focus mainly on the federal anti-trust and trade regulation laws created by the Sherman Act, Clayton Act, Robinson-Patman Act and Federal Trade Commission Act. Most states and the District of Columbia have their own anti-trust laws, which frequently (although not always) parallel the federal laws.

The U.S. Department of Justice is authorized to prosecute Sherman Act violators as criminal felons, who may be severely fined and, in the case of individuals, imprisoned. In addition, the Justice Department, state attorneys general and private parties may bring civil suits and recover three times (treble) their actual damages, court costs and (in private suits) their attorneys' fees from corporations and individuals who have violated the federal anti-trust laws. The Federal Trade Commission has its own statutory authority to enforce anti-trust laws through civil and administrative proceedings.

## **III. Possible Anti-trust Violations to Avoid**

### **1. Agreements That Restrain Competition – Section 1 of the Sherman Act**

The most common anti-trust violations of which you should be aware fall within Section 1 of the Sherman Act. They result from agreements – typically with competitors, customers or suppliers – that unreasonably restrain competition. Thus, the anti-trust laws prohibit NGA and its member companies from agreeing to do certain things that they could legally do if they acted independently.

Any type of agreement, understanding or arrangement between competitors – whether written or oral, formal or informal, express or implied – that limits competition is subject to anti-trust scrutiny. Moreover, any attempt to reach such an agreement may be unlawful, even if it is unsuccessful.

### **2. Some Troublesome Agreements**

The courts have found that certain types of agreements always (or almost always) violate the anti-trust laws. These give rise to "per se" violations. They frequently include agreements of the kinds discussed here.

#### **Price-Fixing and Bid-Rigging Agreements**

Any agreement between competitors on prices charged to others for products or services violates the anti-trust laws. Every direct price-fixing agreement is illegal, whether it is meant to raise, lower or just stabilize prices. Agreements may be illegal as well even if they only indirectly affect prices because they involve such things as discounts, promotional allowances, standardization of customer or delivery services, and uniform credit terms and billing practices. It is also illegal for competitors to agree on

the prices they will pay for products or services sold by other persons, or to engage in collusive bidding practices (or bid-rigging).

### **Resale Price Agreements**

Although pertinent Supreme Court authority has undergone some changes (in 1997), agreements between a seller and a customer on the price at which the customer will resell a product are still frequently illegal. The seller may, however, suggest a resale price so long as it is completely clear that the customer is free to accept or reject the suggestion and will not be penalized if it decides to disregard the suggestion.

### **Agreements to Allocate Markets, Customers, Territories or Products**

It is illegal for competitors to agree to divide or allocate customers or territories. An agreement among competitors is also illegal if it provides that they will refrain from selling a certain product generally, or in any geographic territory or to any category of customer.

### **Group Boycotts and Collective Refusals to Deal**

Agreements among independent concerns that they will boycott or refuse to buy from particular suppliers or sell to particular customers are generally prohibited by the anti-trust laws. This does not necessarily preclude sharing certain information about a company (e.g., concerning its credit history) so long as there is no discussion on whether to deal with that company.

### **Agreements to Control Production**

Agreements among competitors to increase or restrict services or production levels are always problematic under the anti-trust laws. The same is true of agreements among competitors to limit the quality of production, restrict the products or services sold to a particular customer, refrain from introducing new products and services or eliminating old ones, or accelerate the introduction or withdrawal of a product or service.

### **Tying Arrangements**

A "tie-in" or "tying" arrangement permits a buyer to purchase one (tying) product or service only if it agrees to buy a second, distinct (tied) product or service from the seller. This might happen, for example, if a utility were to refuse to sell natural gas to a manufacturer unless the manufacturer also purchased proprietary software owned by the utility. These types of agreements should be avoided.

## **Activities That Illegally Restrain Competition**

**NGA operations and activities must not be used to reach or further agreements among member companies (or other persons) in any of the following areas:**

- **NGA's or member companies' prices for products or services**
- **The prices at which products or services should be resold**
- **Allocations of markets, customers, territories or products**
- **Collective refusals to deal with someone**
- **Limitations on production**
- **Tying arrangements.**

**To avoid even the appearance of impropriety, the subjects indicated above must not be discussed or addressed in the course of any NGA-related operations, events or other activities without the prior approval of counsel.**

### **3. Other Types of Agreements That Also May Raise Concerns Under the Anti-trust Laws**

Here are some examples – though not a complete list – of agreements whose legality depends on the circumstances involved:

#### **Exclusive Dealing**

Exclusive dealing arrangements come in various forms. Some might require a customer to sell exclusively the products of a particular company or coerce a supplier into refusing to sell to its customer's competitors. Others might compel a customer to purchase all of its requirements for a particular product or service from a single supplier.

#### **Reciprocity**

In a reciprocal dealing arrangement, a customer makes purchases from a supplier only on the condition that the supplier will buy products or services from the customer. Such reciprocal arrangements are particularly troublesome when one of the parties is openly or implicitly coerced.

#### **Product Standardization**

Competitors may create lawful agreements to establish industry product standards. Those agreements may cause problems under the anti-trust laws, however, if they have an anticompetitive effect (e.g. where standardization makes it easier for competitors to set common prices).

#### **Anti-Employee Poaching Agreements**

Competitors may not enter into agreements that limit their right to offer employment to another competitor's employees. In today's economy where employees with certain skill sets are difficult to find, companies have entered into agreements providing that they will not offer employment to, or "poach" each other's employees. The Department of Justice and the Federal Trade Commission have adopted the position that such agreements violate the anti-trust laws and that companies found guilty of entering into such agreements may be civilly and possibly criminally liable.

#### **Activities That Also May Be Illegal, Depending on the Circumstances**

**NGA operations and activities must not be used to reach or further agreement among member companies (or other persons) in any of the following areas without prior approval of counsel:**

- **Exclusive dealing arrangements**
- **Reciprocal sales and purchase agreements**
- **Product standardization.**

**To avoid even the appearance of impropriety, the subjects indicated above must not be discussed or addressed in the course of any NGA-related operations, events or other activities without the prior approval of counsel.**

### **4. RD&D Issues**

Research, development and deployment (RD&D) of natural gas technologies is a major component of NGA's activities through its NYSEARCH program, developed originally under the New York Gas Group (NYGAS). There are several issues related to RD&D that require special attention.

As part of its RD&D efforts, NGA contracts with third parties to develop new technologies and industry products. It also sponsors research on testing methodologies to enable gas distribution companies to better compete. The fact that these new products, technologies and testing methodologies are developed jointly by competitors raises anti-trust concerns of which NGA and its members must be aware.

The Federal Trade Commission takes the position that joint RD&D by competitors is typically procompetitive. However, NGA must still take appropriate steps to ensure that its development of gas distribution and transmission products, technologies, and test methods does not violate anti-trust laws.

NGA must also be aware of the potential anti-trust implications that could result from a trade association performing product evaluation functions and developing guidelines that could become *de facto* standards.

The mere fact that a trade association develops a guideline or a standard for an industry is not, standing alone, an anti-trust violation. However, such actions could have anticompetitive effects, and a trade association should therefore take steps to insulate its guideline, standard setting, and product evaluation activities from anti-trust liability. An association that develops voluntary industry guidelines may face anti-trust problems if a guideline favors some competitors and discriminates against others. Similarly, association product evaluations that further the interests of certain potential vendors, to the exclusion of others, may result in anti-trust liability.

To avoid anti-trust liability, NGA should ensure that any guidelines, standard setting, or product evaluations it performs are not biased, do not limit participation in the market for anticompetitive purposes, are closely tailored to further legitimate procompetitive and product safety goals, and that the processes resulting in the guideline, standard, or evaluation are not manipulated by special interests as a means to harm competitors. In addition, NGA should ensure that it follows written procedures when writing guidelines, setting a standard, or evaluating a product, since this is strong evidence of an intent not to restrain trade.

## **5. Other Conduct That May Violate the Anti-trust Laws Even Without an Agreement of Any Type**

You should also be aware of anti-trust law violations that may take place even where there is no agreement among competitors or anyone else. The most common violations of that type are briefly discussed here.

### **Monopolization**

The law of monopolization (including attempts to monopolize and agreements to monopolize) is extremely complicated. Basically, when any enterprise enjoys a strong market position for a particular product, it should be concerned about questions of monopolization. The law of monopolization often comes into play in mergers or acquisitions for companies that actually compete or could compete with each other. No enterprise should take actions that might be viewed as evidence of an intent to acquire or maintain monopoly power in a particular market, to drive a particular competitor out of business or to prevent somebody from entering the market.

### **Price Discrimination**

The Robinson-Patman Act and some state anti-trust laws restrict a seller from charging different prices for its goods to competing customers at the same point in time. Those laws also forbid sellers in certain circumstances from discriminating when they offer promotional materials, services or other inducements to individual customers in an effort to have the customers engage in in-house promotions or advertising. Buyers, in turn, are prohibited from knowingly inducing or receiving a discriminatory price, promotional allowance or service. These general prohibitions have a number of exceptions, which are too complex to be discussed here.

### **Unfair Competition**

The Federal Trade Commission Act (FTC Act) prohibits all "unfair methods of competition" and "unfair or deceptive acts or practices." The FTC Act covers anti-trust violations like those discussed above, but also

forbids conduct that falls short of those violations. The FTC Act prohibits all forms of deceptive or misleading advertising and trade practices, such as disparaging a competitor's product, harassing a customer or competitor, and stealing trade secrets and customer lists.

### **Contact legal counsel for advice on any situations potentially involving:**

- **Attempts to eliminate competition**
- **Price discrimination**
- **Advertising of products and services**
- **Potentially unfair business practices (e.g., acquiring customer lists).**

## **IV. Anti-trust Matters of Particular Interest to Trade Associations**

A number of anti-trust cases against trade associations have focused on situations that go to the heart of what those organizations are about.

### **Membership**

Because a trade association by its very nature provides certain commercial and other benefits to its members, the denial of membership to qualified competitors of the members could violate anti-trust laws. Membership should be open to all companies that satisfy basic membership requirements, and any decision to deny membership or expel a member company should be reviewed with counsel. All member companies should have an equal opportunity to participate in NGA activities and benefits. In addition, certain programs and activities may need to be opened to nonmember companies if their exclusion would put them at an unreasonable competitive disadvantage to member companies.

### **Collection and Dissemination of Data**

Statistical data may obviously be compiled for legitimate purposes. Statistical information also may cause problems from an anti-trust standpoint, however, if its use somehow harms competition. This might happen, for instance, if statements in NGA publications were to suggest what specific product, prices, storage levels or market demand should or would be in the future. Broadly speaking, the farther removed the data are from prices and costs, the less company-specific they are, the more historical they are, and the wider their public dissemination is, the less likely it is that they will raise anti-trust problems. As a general rule, particular market-sensitive data supplied by individual member companies should never be discussed or disseminated without advice of counsel. Legal counsel should be consulted before new information exchange programs are implemented.

### **Codes, Standards and Certification Programs**

Reasonable industry codes, standards and certification programs may promote quite valid interests, including the protection of safety, health and the environment and the maintenance of high standards of ethics and conduct. You should nonetheless be alert for anticompetitive effects that a particular standard may have. For example, a product standard that is unreasonably biased in favor of one manufacturer's product at the expense of another's may raise significant anti-trust problems. Care should therefore be used both in creating and applying codes, standards and certification criteria, and in influencing other organizations as they do so. Legal counsel should be consulted during the process of establishing, implementing and administering industry codes, standards and certification programs.

### **Marketing and Communications**

Like the other activities discussed above, marketing and communications serve valid interests, but can raise anti-trust problems under some circumstances. Be careful that all advertising, announcements and other communications that might affect competition are accurate and are in no way deceptive or



misleading. Cooperative advertising programs may be suspect if they discriminate and benefit certain companies at the expense of their competitors.

### Government Relations

There is a constitutional right to petition legislatures and government agencies for action and, if properly undertaken, such activity is not subject to the anti-trust laws. The right to petition, however, does not provide unlimited anti-trust protection. If the activity in question is not really designed to achieve government action but rather amounts to a sham used to injure competition, for example, it may raise serious anti-trust problems. Moreover, activities are not immunized from the anti-trust laws simply because a government representative encourages and happens to participate in them.

## V. Some Practical Guidelines on Preventing Problems at Meetings, in Records and in Contacts with Others

Meetings, communications and contacts that touch on anti-trust matters present special challenges. A simple example will illustrate this. Suppose that competitors were to discuss their prices at a meeting or in a document, and that their prices increased shortly afterward. A jury might view this as evidence that their discussions led to an agreement on pricing, and thus violated the anti-trust laws. In a case like that, the mere appearance of illegality – even when the parties may in fact have done nothing wrong – can cause serious problems. The guidelines that follow are designed to help you not only comply with the anti-trust laws, but also avoid even the appearance of impropriety.

### Meetings

NGA meetings regularly bring together representatives of member companies that are potential or actual competitors. It is important, therefore, that certain ground rules be followed to eliminate any suspicion that a particular meeting might be used for anticompetitive purposes:

- **Do** prepare an agenda and have NGA counsel review it before the meeting regarding any issues on sensitive anti-trust subjects such as pricing, market allocations, refusals to deal with any company, and the like.
- **Do** provide a copy of “Northeast Gas Association Anti-trust Compliance Guidelines” to every participant at the meeting.
- **Do** have an NGA staff member attend the meeting.
- **Do** invite legal counsel to attend if the meeting might involve matters having to do with competition.
- **Do** follow the agenda at your meeting. Do not permit departures from the agenda for discussions of sensitive anti-trust subjects such as pricing, market allocations, anti-employee poaching practices, refusals to deal with any company, and the like – unless counsel approves.
- **Do** keep accurate minutes, and have counsel review them for any sensitive anti-trust subjects such as pricing, market allocations, anti-employee poaching practices, refusals to deal with any company, and the like before they are put into final form and circulated.
- **Do not** discuss any subjects that might raise anti-trust concerns (including prices, market allocations, anti-employee poaching practices, refusals to deal, and the like) unless you have received specific clearance from counsel in advance. If someone begins discussing a sensitive subject, **do not** allow the discussion to continue. If the discussion does continue, **do not** allow the meeting to continue.

When member company representatives get together and talk before or after formal meetings, there should be no discussions that raise anti-trust concerns even in such informal settings.

### Records

When we talk about “records,” we are referring to any of the various communications people record in some tangible form every day – in documents, e-mail, videotapes, audio recordings (such as voice mail) and the like. These records are sometimes inaccurate, often less precise or artful than we would like, and all too frequently subject to misinterpretation. You should prepare every record with the thought that it might someday have to be produced to government officials or plaintiffs’ lawyers, who will interpret your

language in the worst possible way. The following guidelines may help you avoid problems in matters involving competition:

- **Do** avoid creating unnecessary records.
- **Do** use language that is clear, simple and accurate.
- **Do** avoid language that might be misinterpreted to suggest that NGA condones or is involved in any anticompetitive behavior.
- **Do**, as much as possible, limit yourself to facts and avoid offering opinions.
- **Do not** use joking or aggressive language (e.g., "Let's kill our competitors").
- **Do not** use language that might arouse suspicion (e.g., "For limited distribution" or "Destroy after reading").
- **Do not** speculate about the legality of specific conduct.
- **Do not** keep records longer than necessary for business or legal purposes. [See NGA Record Retention Policy on NGA Website.]
- **Do not** hesitate to consult counsel about any nonroutine correspondence requesting an NGA member company to participate in projects or programs, submit data for such activities or otherwise join other member companies in NGA actions.

### **Outside Contacts**

Whenever you have contact with outside parties on anti-trust matters, always keep in mind that even completely innocent behavior may be misinterpreted. If a government representative, a private attorney or investigator, or any other outside person contacts you for information that might relate in some way to anti-trust subjects, tell that person that you are not authorized to provide the information but will have an authorized person respond. You should then immediately contact legal counsel.

If a representative of a government agency appears at an NGA office unannounced and requests to review office files or interview employees, politely advise the representative that it is the policy of NGA to cooperate with all government agencies. However, NGA policy requires that counsel be consulted prior to providing access to records or employees. Obtain the name of the government representative, the identity of the agency involved, and a brief idea of the purpose of the investigation. Invite the representative to have a seat in the office reception area and immediately contact counsel for advice on how to proceed. In the remote situation where the investigator has a search warrant and demands immediate access to company records, obtain a copy of the search warrant, comply with the terms of the search warrant and immediately consult counsel.

## **VI. Responsibility for Compliance, Monitoring and Enforcement**

### **Responsibility for Anti-trust Compliance**

While the NGA's attorneys will provide guidance on anti-trust matters, furnish training as appropriate and answer questions, it is ultimately your responsibility to ensure that your actions with NGA comply with the anti-trust laws. You are expected to avoid all discussions and activities that may involve improper subject matter or procedures – and this includes such things as agreeing on prices, on how to allocate markets or customers, on entering into anti-employee poaching agreements, on placing limits on production, and on refusing to deal with certain suppliers or customers – and to avoid even the appearance of impropriety.

### **Communicating Anti-trust Policy and Procedures**

Copies of these procedures will be distributed to each NGA officer and employee. NGA will assist in providing copies of these procedures to NGA member company representatives whose responsibilities with NGA might require knowledge of the anti-trust laws. They are also available on NGA's website ([www.northeastgas.org](http://www.northeastgas.org)).

NGA's attorneys will make presentations as appropriate on compliance with the anti-trust laws to NGA employees and to NGA member company representatives to the extent their activities might bear on NGA's compliance with the anti-trust laws. In addition, all NGA officers and employees and NGA

member company representatives are encouraged to contact the NGA's attorneys at any time with questions they may have concerning anti-trust compliance.

### **NGA Whistleblower Policy**

NGA will not take adverse action against any member, member representative, or employee solely for the reason that such member, member representative, or employee makes a good faith report of what they reasonably consider to be a violation of federal, state or local statutes. NGA has established a standard complaint system for reporting all such violations. No member, member representative, or employee will be discharged, retaliated against or discriminated against in any manner for reporting what they, in good faith, believe to be such a violation. [The NGA Whistleblower Policy can be found on the NGA website.]

### **Compliance Monitoring and Enforcement**

The NGA's attorneys will monitor and audit NGA operations and activities as appropriate to ensure compliance with these procedures and the anti-trust laws in general. They also will promptly investigate any conduct that is reported or otherwise suspected to violate the anti-trust laws. Any such violations may result in immediate disciplinary action, up to and including termination of employment (for NGA employees).

NGA recognizes that its own employees are an important source of information about possible anti-trust violations in connection with NGA's activities. It therefore requires that employees promptly report any suspected violations of the anti-trust laws. Such reports may be made anonymously. Only persons with a need to know about such reports will be advised of them. Intimidating, retaliating against or imposing any form of retribution on any employee for reporting suspected violations of the anti-trust laws may result in disciplinary action, including possible termination of employment.

## **VII. Conclusion**

If you have any question about whether any of NGA's operations or activities may violate anti-trust laws, contact the NGA's attorneys. We look forward to working with you to ensure that NGA, its officers and employees, and the representatives of its member companies strictly comply with both the letter and the spirit of those laws in all of your activities with NGA.

### **Comments**

Whenever you have any question about whether particular NGA activities might raise anti-trust problems, contact the NGA President, Thomas M. Kiley.

NGA appreciates the helpful suggestions and guidance offered by the General Counsel's Office of the American Gas Association (AGA) in developing these NGA procedures.

*Adopted by the Board of Directors of the Northeast Gas Association at a meeting held on June 4, 2003.  
Amended by the Board of Directors of the Northeast Gas Association at a meeting held on June 20, 2018.*