



## Association Anti-Trust Compliance

Anti-Trust compliance is critical for associations like NECA, particularly those comprised of competitors. Associations must be vigilant in their operations to avoid Anti-Trust violations, which can result in severe civil and criminal penalties.

### Overview of Anti-Trust Laws

#### The primary Federal Anti-Trust statutes include:

**Sherman Anti-Trust Act (§1):** This foundational law prohibits any agreement among competitors that restrains trade or commerce. It addresses concerted actions between two or more entities that have the effect of limiting competition. The law is broad, covering a range of activities, from price-fixing and market allocation to bid-rigging. Violations can lead to both criminal and civil penalties, with the burden often on plaintiffs to prove that an unlawful agreement existed.

**Clayton Anti-Trust Act:** This act complements the Sherman Act by addressing specific practices that the Sherman Act does not cover, such as mergers and acquisitions that could substantially lessen competition. It also includes provisions against exclusive dealing agreements and tying arrangements, where a company might force a buyer to purchase an unwanted product to get a desired one. The Clayton Act is also the basis for private lawsuits, allowing individuals to sue for triple damages if they have been harmed by Anti-Trust violations.

#### Per Se illegal agreements

Certain agreements are considered illegal “per se” under Anti-Trust laws, meaning they are inherently anticompetitive and do not require further inquiry into their effects on the market:

- **Price Fixing:** Any agreement between competitors to raise, lower, or stabilize prices is per se illegal. This includes not only the final price of goods and services but also related terms like discounts, credit terms, and trade-in allowances. Even discussions among competitors that could lead to price agreements are dangerous and could be seen as evidence of an illegal conspiracy.
- **Market Allocation:** When competitors agree to divide markets among themselves, such as by geographic area, customer type, or product line, they eliminate competition in those areas, which is inherently harmful to the market and consumers. This type of agreement is also per se illegal because it restricts consumer choice and prevents free market competition.
- **Bid Rigging:** Agreements where competitors collude to manipulate the outcome of a bidding process are also per se illegal. This might involve competitors agreeing to submit inflated bids, rotate winning bids, or even withdraw bids altogether to ensure a predetermined winner. Such practices are particularly egregious as they undermine the integrity of competitive bidding and lead to higher costs for consumers and businesses alike.

- **Group Boycotts:** When competitors agree not to do business with a particular company or individual, they can effectively drive that entity out of the market. Such boycotts are illegal, especially when they are designed to enforce illegal price-fixing agreements or punish a competitor. These actions are considered per se illegal because they directly harm competition by excluding competitors from the market.

These activities can lead to significant penalties, including imprisonment for individuals and heavy fines for organizations.

### Criminal and civil Anti-Trust violations

- **Criminal Penalties:** The U.S. Department of Justice's Anti-Trust Division actively enforces criminal Anti-Trust violations. Individuals found guilty of participating in illegal activities such as price fixing, market allocation, or bid rigging can face severe penalties, including imprisonment for up to 10 years and fines of up to \$1 million. Organizations involved can be fined up to \$100 million, or twice the gain derived from the illegal acts. Given the severe consequences, associations must ensure that their activities do not facilitate or support these illegal agreements.
- **Civil Penalties:** Civil enforcement is equally rigorous, with the DOJ, Federal Trade Commission (FTC), state attorneys general, and private parties all having the authority to bring suits. Civil suits often focus on compensating victims of Anti-Trust violations, with successful plaintiffs entitled to treble (triple) damages, plus attorney fees. This creates a strong financial incentive for businesses and individuals harmed by Anti-Trust violations to pursue litigation. Associations must be particularly cautious as civil cases can stem from even inadvertent violations, and the damages awarded can be substantial.

### Court cases of note

- [Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc., 456 U.S. 556 \(1982\)](#): This landmark case established that associations could be held liable for the anticompetitive actions of their members if those members use the association's processes or authority to harm competitors. In this case, members of the American Society of Mechanical Engineers (ASME) used their influence within the organization to create standards that disadvantaged a competitor, leading to a ruling against ASME under the "apparent authority" doctrine. This case underscores the importance of ensuring that association activities and decisions are fair, transparent, and free from the influence of any single member or group.
- [United States v. American Airlines, Inc., 743 F.2d 1114 \(5th Cir. 1984\)](#): This case involved conversations between competitors about fixing prices, which were ultimately used as evidence of an attempt to conspire, even though no formal agreement was reached. The case illustrates how even informal discussions between competitors about prices can be risky and potentially illegal, emphasizing the need for strict Anti-Trust compliance during any interactions with competitors.

### Association-Specific Concerns

**Associations must be especially careful in several key areas to avoid Anti-Trust violations:**

**Membership Requirements and Expulsion:** Membership rules should be objective, transparent, and consistently applied to avoid any appearance of anti-competitive exclusion. If a membership decision appears to be motivated by a desire to harm competition, such as excluding a price-cutter, it could be considered a per se violation. Associations should ensure that all membership decisions are made based on legitimate, pro-competitive reasons and that due process is provided to those denied membership or expelled.

#### Services to members and non-members

Associations often provide essential services such as certification, accreditation, or access to industry events. These services must be offered fairly, without discriminating against non-members in a way that could harm competition. For example:

- **Certification and Accreditation:** If certification is a prerequisite for operating in a particular market, denying it to certain companies could be seen as a way to limit competition. Associations should ensure that their certification processes are fair and transparent, allowing any qualified company to obtain the necessary credentials. This includes state licensing education requirement credits and other types of certifications.
- **Membership Benefits:** Offering essential services only to members, such as access to critical industry data or exclusive networking opportunities, could be problematic if these services are indispensable for competing in the market. Associations should periodically review their service offerings to ensure that they are not inadvertently creating barriers to competition and that any differences in service levels between members and non-members are justifiable and not anticompetitive.

#### Best practices for Anti-Trust compliance

**Establish Clear Membership Criteria:** Ensure that all membership requirements are clearly defined, objective, and consistently applied. This helps avoid any perception that membership decisions are being used to exclude competitors or limit competition.

**Monitor Competitive Activities:** Associations should regularly review their activities, programs, and services to ensure they are not inadvertently facilitating anticompetitive behavior. This includes monitoring any collaborative efforts among members to ensure they do not cross the line into illegal agreements.

**Promote Transparency:** Transparency in decision-making processes, particularly in areas like membership and service access, can help prevent Anti-Trust issues. Associations should document their decisions and provide clear justifications for any actions that could be perceived as limiting competition.

**Regular Training and Awareness:** Implement regular Anti-Trust training for all association members, staff, and leadership. This training should focus on identifying potential Anti-Trust risks and understanding the legal boundaries within which the association must operate.

By adhering to these guidelines, NECA Chapters can mitigate the risk of Anti-Trust violations and ensure compliance with federal laws. Understanding and implementing Anti-Trust policies is essential for fostering a competitive, fair, and legally compliant marketplace.

*This material is for informational purposes only. The material is general and is not intended to be legal advice. It should not be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, applicable CBAs, prime contracts, subcontracts, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.*