# Antitrust Compliance Policy
of
GPA Midstream Association
and
GPSA Association

(December 2019)

Trade associations, such as GPA Midstream Association ("GPA") and GPSA Association ("GPSA", and together with GPA, the "Associations"), are organizations of competitors. Trade associations perform many useful and lawful functions, but they present inherent antitrust implications in their operations and those of their committees.

The purpose of this policy is to assist the Associations, their members companies, such members' representatives, and the Associations' staff not only to avoid violations of antitrust law, but to prevent any appearance of violation. This policy is not intended to substitute for the legal advice members may receive from their own company's legal advisors. Nor is it intended to be a comprehensive review of all antitrust-related issues that may arise.

The Associations' member companies, their representatives, and staff are continually counseled and reminded to avoid any discussions or actions which have the remotest antitrust implications. The Associations shall engage legal counsel ("Legal Counsel") to be available to counsel members and the Associations' staff regarding antitrust compliance whenever necessary.

## I. Application of Antitrust Laws to Association Activities

Most trade association conduct involves concerted action by members and therefore is subject to strict scrutiny under both federal and state antitrust laws. Associations are particularly vulnerable to attacks by federal and state antitrust enforcers, because an association is, by its nature, a group of competitors joined together for a common business purpose.

A conviction for violating an antitrust law may result in stiff fines for an association, its members and their representatives; jail sentences for individuals who participated in the violation; a consent decree under which the association must operate; or a court order disbanding the association.

## II. The Sherman Act and the Federal Trade Commission Act

The most important antitrust statutes relating to association activities are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Section 1 of the Sherman Act prohibits "contracts, combinations, or conspiracies . . . in restraint of trade." Since trade associations are by definition "combinations", they are particularly vulnerable.

The Sherman Act prohibits any understanding affecting the price of a product or a service even if that understanding will benefit consumers.

Association members must also remember that the Sherman Act is a criminal conspiracy statute. Even if an individual is not an active participant but simply attend a meeting where other members of an association engage in an illegal discussion concerning price-fixing, he may still be held criminally responsible, even though he said nothing during the discussion. Mere attendance at such a meeting may be sufficient to imply acquiescence in the discussion and thereby make the individual liable to as great a penalty as those who actively agreed to fix prices.

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Unlike the Sherman Act, the Federal Trade Commission Act reaches anti-competitive acts committed by single persons or companies, whether or not there is any agreement or "combination"; like the Sherman Act, it also covers joint actions.

The FTC has broad power to determine what constitutes an unfair method of competition or an unfair or deceptive act or practice under any given circumstances.

# III. Penalties for Violation of the Antitrust Laws

Federal antitrust laws may be enforced against associations, their member companies, the members' individual representatives, and association staff both by government officials and by private parties through treble damage actions. In both cases, penalties are severe.

An individual convicted of a criminal violation of the Sherman Act may be fined as much as $1,000,000 and imprisoned for up to ten years. A corporation convicted of such a criminal offense may be fined as much as $100,000,000. However, under alternative sentencing guidelines a higher fine may result if the Court imposes a fine of twice the amount of the loss caused to victims or twice the gain to the conspirators.

Violation of the Federal Trade Commission Act can result in issuance of a cease and desist order, which will place extensive governmental restraints on the activities of the association and its members. Failure to obey such an order can result in penalties of up to $42,500 (as adjusted annually) for each daily violation.

In addition to governmental prosecution for a criminal or civil violation, the association can face private action for treble damages brought by competitors or consumers. A finding of violation of an antitrust law in such a private action will result in payment by the convicted party of three times the damages to the injured plaintiff.

# IV. Antitrust Problem Areas of Association Activity

## A. "Per Se" Violations

Section 1 of the Sherman Act is construed as outlawing only those arrangements which "unduly" or "unreasonably" restrain interstate or foreign trade or commerce. Normally, an arrangement is tested by its purpose and effect to determine whether the restraint is "undue" or "unreasonable." However, certain arrangements and activities are conclusively presumed to be "unreasonable" in

and of themselves and deemed to be indefensible under all circumstances and, therefore, illegal. These "per se" or automatic violations include:

1. *Price Fixing*. Experience shows that the price-fixing prohibitions of the Sherman Act are most likely to be violated and most likely to be strictly enforce by the government. Price-fixing cannot be justified by the defense that the prices set are reasonable or that the ends sought through the price-fixing behavior are worthy. Therefore prices and pricing policies must not be discussed among the Associations' members, including, for example, during meetings, networking events, socials, informal gatherings or otherwise. (Such prohibition is not intended to limit specific, legitimate engagements between an individual supplier offering its products and/or services to an individual customer, such as during vendor exhibitions hosted by the Associations. However, all other price or pricing policies discussions are to be strictly avoided.) "Price fixing" encompasses not only agreements or combinations with competitors on a selling price, but it may also include, for example, agreements to buy up surplus goods, to adhere to a formula for determining prices, to standardize discounts, to control raw material prices, to control or standardize the price of services, and any other agreement or combination which has the net result of affecting the prices of goods or services. Furthermore, discussion of even peripheral matters relating to price, such as credit policies and terms of sale should also be avoided.

2. *Agreement to Divide Customers or Allocate Territories*. An agreement or understanding among members of an association to divide customers is, in and of itself, a criminal act. Even an informal agreement whereby one member agrees to stay out of another's territory will constitute a violation of the antitrust laws.

3. *Agreement to Limit Supply*. Any agreement or understanding between competitors to restrict the volume of goods they will produce or the quantity of services they will make available for sale is illegal.

4. *Boycotts*. Any agreement or understanding between suppliers and/or customers that they will not sell to, purchase from, or deal with particular outsiders is illegal.

5. *Tying Arrangements*. Certain agreements imposed by a seller who enjoys a substantial market position that its sale of one product compels the buyer also to purchase a different (or tied) product may be illegal.

## B. Association Efforts to Influence Governmental Action

The Supreme Court has held that the Sherman Antitrust Act is inapplicable to bona fide group efforts to influence legislative action. Subsequent lower court decision have extended this privilege (known as the Noerr-Pennington doctrine) to include influencing other governmental agencies besides legislative bodies, but have left its bounds somewhat uncertain.

In general, one has a right to meet and collect necessary information and to make joint presentations with respect to governmental activities of common interest. This is conduct which is protected to a much larger degree than are other forms of joint activity. GPA and its legislative and regulatory advocacy committee(s) should confine their activities to legitimate matters relating to actual or prospective governmental policy-making activities, including legislative and

regulatory rulemaking, unless other activities are cleared by Legal Counsel. GPSA should coordinate any advocacy activities through the GPA.

It is may be desirable to collect information which is important to the subject of regulation, but which nevertheless may be of value to one competitor as opposed to another. For example, an inquiry might be made in dealing with a regulatory body as to how some rule, law or regulation would affect each company. When it is necessary to collect information of this kind on an industry wide basis in order to respond effectively to a regulatory or legislative proposal, the method of doing so should be guided by Legal Counsel. For example, the Associations may be counseled to use a consultant who obtains and organizes the particulars, and the individual companies do not, or it may be desirable that the companies communicate separately with a regulatory agency. Information of competitive value, particularly including information on the effect of regulation on individual companies, should not be discussed or exchanged. See more below regarding data gathering.

## C. Guidelines for Data Gathering, Research, and Statistical Reporting

An association that gathers data, performs research, and identifies and reports statistics must be prepared to demonstrate procompetitive benefits outweighing anticompetitive effects. Therefore the Associations and their members must adhere to the following guidelines:

1. Research projects will be determined by the consent of a large broad-based range of membership with due consideration given to general industry benefit from the project.

2. The Associations will not collect and/or exchange information except to achieve a specific, legitimate, pro-competitive purpose.

3. The method of collecting and/or exchanging information will be guided by Legal Counsel to apply appropriate safeguards. Safeguards may include that information sought is historical (more than three months old), collected by a third party, from at least five sources, with no source greater than 25% of the data, and disseminated only in aggregated, anonymous form.

4. The Associations will not assess penalties for failure of members to furnish data, nor will they use compulsory means, such as inspection of members' books, to assure accuracy of reports.

5. Individual company data will not be identified or be capable of identification. Data or averages disclosed will be from groups large enough so that no individual company’s data can be determined, such as by another company "backing out" its own data.

6. There will be no editorial comment or analyses of the data if it relates to prices, output or costs.

7. Members will maintain independent decision-making power, including with regard to reporting data. Each member may change its business policy or procedure at any time and without prior notice to the Associations.

8. The data disseminated will be made readily available upon reasonable terms to both the Associations' members and non-members, including that a reasonable fee may be required of non-members.

## D. Guidelines for Drafting Standards and Specifications

An association that develops industry standards or specifications may face antitrust problems if such activities favor some competitors and discriminate against other.

Standardization may be pro-competitive and beneficial in such ways as designating size, grade and quality standards so that any purchaser may know, for example, that a "size 15 collar" on a shirt will be the same size regardless of brand, or that a 2" x 4" shall be a minimum of a certain size, etc. Standardization may also eliminate hazardous products. On the other hand, standardization programs may be anti-competitive if their purpose or effect is to eliminate competition in quality, product improvement, or research, or to eliminate or seriously disadvantage some competitors or raise substantial barriers to entry into the market such as standardizing upon a product that is patented, or that requires scarce raw materials or that will require some competitors to engage in extensive retooling, etc.

In connection with the setting of standards or specifications, the following guidelines should not be deviated from without guidance from Legal Counsel:

1. Do not enter into an agreement to adhere to industry standards. Each company should preserve its freedom to conform or not.

2. Do not adopt a standard that results in the elimination of incentive for industry members to improve their products or engage in research.

3. Do not enter into a standardization program where there will be penalties, coercion or compulsion to enforce the standards adopted.

4. Do not standardize on a product that requires use of a patent or technical information not available on equal terms to everyone in the industry.

5. Do not standardize on a raw material that is scarce or difficult for non-members of the association to obtain.

6. Do not impose standards which may deprive consumers of legitimate options, such as eliminating less expensive product lines, or which may limit price competition.

The Associations shall develop standards or specifications, and interpret such standards and specifications, to achieve pro-competitive, objective, consistent, expert determinations that benefit the broader industry and ultimately the public and consumers.

# V. How to Avoid Antitrust Problems

## A. General Operating Procedures

1. *Meetings*. Because a committee that meets without having an agenda is open to the charge that it might have been meeting for something improper, agendas for all meetings should be prepared and given to participants before the meetings. Similarly, accurate minutes on what transpired at all meetings should be kept. All agendas and minutes of meetings should be reviewed by Legal Counsel prior to distribution for conformance to these guidelines. The Associations intend to and shall use reasonable efforts to have Legal Counsel in attendance at all meetings of their Boards of Directors and Executive Committees. The Associations will also use reasonable efforts to have Legal Counsel in attendance at any other meeting sponsored by one of the Associations upon reasonable advance request of any member. All meetings of the Associations should be appropriately scheduled as either regular or special meetings in compliance with the applicable Association's bylaws.

2. *Documents*. Captions on letters to and from committees like "confidential" (indeed anything suggesting secrecy), should be avoided wherever possible. A suggestion of secrecy or the destruction or retrieval of documents could be the foundation for an adverse inference with respect to a paper that otherwise is innocuous. Such actions should be avoided. Furthermore, the Associations should each develop and then maintain a formal document retention/disposal program.

3. *Public Statements*. Speeches, newsletters, press releases, statements to governmental agencies, etc., prepared by any of the Associations' spokespersons should be reviewed by Legal Counsel in advance.

4. *Conduct Outside of Meetings*. This Policy is intended to governing any gathering or interaction of representatives of member companies for purposes of one or both of the Associations, whether during meetings, networking events, socials, informal gatherings or otherwise. Members must not discuss competitive or sensitive matters with each other at any time.

5. *Membership*. Assuming that the members of the Associations derive an economic benefit from membership, the denial of membership to an applicant may constitute a restraint of trade because such a denial may limit the ability of the applicant to compete. Any action by one of the Associations or its Board of Directors which has the effect of rejecting a membership application or terminating membership should not become final without approval by Legal Counsel. Further, the Associations should not restrict members from dealing with non-members or limit access to information developed by the Association, unless such limitation are for a legitimate purpose and objectively reasonable, such as the charging of a reasonable fee to non-members.

6. *Program Changes*. Legal Counsel should approve in advance all new association programs or changes in existing programs that may have potential antitrust implications.

7. *Counsel Prior to Staff Engagement*. No staff member of the Associations should have authority to communicate with officials of the Federal Trade Commission, the Antitrust Division of the Department of Justice or States' Attorneys General without prior approval of Legal Counsel.

8. *Policy Distribution*. All members of the Associations should receive a copy of this Antitrust Policy Statement and it should be posted on the Associations' websites. Each committee or section head or any person leading one of the Associations' meetings or functions of any kind should be furnished a copy of this policy at least once a year.

9. *Periodic Update*. Legal Counsel should periodically update members concerning antitrust matters and the Associations' antitrust compliance program.

10. *Reporting Misconduct/Investigation/Corrective Action*. Members or staff observing any conduct associated with the Associations' events or activities that violates or may violate this policy should reports such incidents promptly to the Associations' staff or Legal Counsel. (To the extent information relates to individual companies or the industry generally, that information should be reported to individual company counsel in the first instance.) There will be no penalty or retaliation against anyone for providing information regarding a potential violation. Reported potential violations will be investigated appropriately. Depending on the facts and circumstances, the investigation may include the following steps: an interview of the person who reported the alleged violation to obtain complete details regarding the alleged violation; interviews of anyone who is alleged to have committed the acts of alleged violation; and interviews of anyone who may have witnessed, or who may have knowledge of, the alleged violation. The investigation will be handled in as confidential a manner as possible consistent with a full, fair and proper investigation and subject to any applicable legal requirements. The Associations will take prompt and effective corrective action, depending on the particular facts and circumstances. Corrective action may include, for example: training or disciplinary action ranging from verbal or written warnings to termination of employment or membership, depending on the circumstances.

## B. Self-Regulation

The Associations must not:

1. Adopt regulations or policies which have price-fixing implications, such as prohibitions on advertising of prices, or which unreasonably restrict the ability of any member or group of members to compete.

2. Require members to refrain from dealing with a member who has violated one of the Associations' rules, policies or bylaws.

3. Enforce any rule, policy or bylaw provision arbitrarily.

4. Impose unreasonably severe penalties for violation of a rule, policy or bylaw.

## C. Topics to Avoid

1. Current or future prices. (Great care must be taken in discussing past prices).

2. What constitutes a "fair" profit level.

3. Possible increases or decreases in prices.

4. Standardization or stabilization of prices.

5. Pricing procedures.

6. Cash discounts.

7. Credit terms.

8. Control of sales.

9. Allocation of markets.

10. Refusal to deal with an entity because of its pricing or distribution practices.

11. Whether or not the pricing practices of any industry member are unethical or constitute an unfair trade practice.

# VI. A Case in Point

The following discussion of an actual case highlights the potential problems associated with association activities and the antitrust law.

The Supreme Court held in *Hydrolevel Corp. v. The American Society of Mechanical Engineers,* 456 U.S. 556 (1982), that a non-profit organization may be held liable for treble damages under the antitrust laws if the officers of one of its committees, as part of conspiracy with others, issue an anti-competitive "interpretation" (or misinterpretation) of one of the organization's standards for the committee officer's own purpose or for the purpose or benefit of his company. The holding of the Supreme Court may be properly viewed as a limited one resulting from the particularly unscrupulous acts of two individuals who were officers of an American Society of Mechanical Engineers ("ASME") subcommittee. These individuals gave a written opinion on ASME stationery, and with the apparent approval of the subcommittee as a whole. The opinion in effect indicated that a "low-water fuel cutoff" manufactured and sold by plaintiff Hydrolevel was in violation of ASME's code. One of the two subcommittee officers was a vice president of McDonnell & Miller, Inc., the major producer of low-water fuel cutoffs.

While this case arose only because of clearly imprudent and unlawful actions by only several members of a very large industry association, it is critical that similar associations use this case as a reminder of their responsibilities to fairly serve their member companies and the public as well. Of particular interest are the following antitrust exposures of an industry association which were discussed by the Supreme Court in its decision:

A. A standard-setting organization such as ASME has the opportunity for anti-competitive activity by its members, or the members' employees. The court stated:

"The facts of this case dramatically illustrate the power of ASME's agents to restrain competition. M & M instigated the submission of a single inquiry to an ASME subcommittee. For its efforts, M&M secured a mere 'unofficial' response authored by a single ASME subcommittee chairman. Yet the force of ASME's reputation is so great that M&M was able to use that one 'unofficial' response to injure seriously the business of a competitor."

B. The courts will likely hold the industry association liable for antitrust violations committed by its members under the theory that such members, or their employees, had "apparent authority". Such liability will occur even though the industry association was unaware of the improper acts and did not formally ratify these improper acts of several of its members.

C. The fact that the industry association does not benefit from the anti-competitive acts of its agents is not a defense.

D. The fact that an industry association is a nonprofit organization is not a defense to an antitrust violation.

The Supreme Court stated in conclusion:

"When ASME's agents act in its name, they are able to affect the lives of large numbers of people and the competitive fortunes of businesses throughout the country. By holding ASME liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority, we recognize the important role of ASME and its agents in the economy, and we help to ensure that standard-setting organizations will act with care when they permit their agents to speak for them."

The concepts of consensus and due process used to develop and revise standards must be used in the area of standard interpretation. There was no claim that the ASME code was anti-competitive. It was the lack of the procedures designed to assure consensus and due process in the interpretation that gave rise to the problem.

The possibility of personal liability and member liability for those who participate in voluntary standards has in no way been changed by the decision in Hydrolevel vs. ASME. Had ASME's procedures been different for its interpretive process, the court might not have applied liability to ASME itself.