

# Antitrust Compliance Program Guidelines

As Approved: February 25, 2016

## 1.0 Antitrust Compliance Commitment

The policy of the Energy Storage Association (“ESA” or “the Association”) is to comply with all federal, state and local laws, including the antitrust laws. It is expected that all member company representatives and staff involved in ESA activities will be sensitive to the unique antitrust issues raised by trade associations and, accordingly, will take all steps necessary to comply with applicable antitrust laws. While the Association brings significant procompetitive benefits to industry participants, suppliers and customers, it is committed to not becoming a vehicle for firms to reach unlawful agreements regarding prices or other aspects of competition or to boycott or exclude firms from the market.

## 2.0 Antitrust Violations Can Have Severe Consequences

Violations of the antitrust laws can have very serious consequences for ESA, its members and their employees.

### 2.1 Criminal Penalties

Antitrust violations may be prosecuted as felonies and are punishable by significant fines and imprisonment. Individual violators can be fined up to \$1 million and sentenced to up to 10 years in federal prison for each offense, and corporations can be fined up to \$100 million for each offense. Under some circumstances, the maximum fines can go even higher, to twice the gain or loss resulting from the violation. The events that give rise to an antitrust violation often provide the basis for other charges, such as wire fraud, mail fraud, and making false statements to the government. Those charges, if proven, carry additional penalties.

The additional consequences of a criminal antitrust violation for an association or corporation include exposure to follow-on treble damages suits, exposure to enforcement actions in other jurisdictions or countries, disruption of normal business activities and the expense of defending investigations and lawsuits. The additional consequences for an individual who commits an antitrust violation include loss of freedom (jail), loss of job and benefits, loss of community status and reputation, loss of future employment opportunities and exposure to litigation.

### 2.2 Civil Penalties

In contrast to criminal actions, civil cases can be initiated by individuals, companies and government officials. They can seek to recover three times the amount of the damages, plus attorney's fees. Even unfounded allegations can be a significant drain on an association's and its members' financial and human resources, as well as an unproductive distraction from the Association's mission. For these reasons, ESA strives to avoid even the appearance of impropriety in all its dealings and activities.

## 3.0 Basic Antitrust Principles and Prohibited Practices

### 3.1 Antitrust Statutes

The principal federal antitrust and competition laws are the Sherman Act, the Clayton Act, the Robinson-Patman Act and the Federal Trade Commission Act.

The Sherman Act prohibits “every contract, combination . . . or conspiracy” which unreasonably restrains competition, as well as monopolizing, attempting to monopolize, or conspiring to monopolize any part of trade or commerce.

The Clayton Act prohibits exclusive dealing and “tying” arrangements, as well as corporate mergers or acquisitions which may tend substantially to lessen competition.

The Robinson-Patman Act prohibits a seller of goods from discriminating in price between different buyers when the discrimination adversely affects competition. It also prohibits purchasers of goods from soliciting and receiving discriminatory prices from suppliers. This statute applies only to sales of commodities; it does not cover sales of services or intangibles.

The Federal Trade Commission Act prohibits “unfair methods of competition” and “unfair or deceptive acts or practices” in or affecting commerce.

### **3.2 “Per Se” Offenses**

Certain antitrust violations are referred to as “per se” offenses. Conduct that falls in this category is automatically presumed to be illegal by the courts, and the absence of any actual harm to competition will not be a defense. Even an agreement that is obviously for the good of society may be a violation of the antitrust laws if it adversely impacts competition. Conspiracies falling in the “per se” category are likely to be prosecuted as criminal offenses, and include the following:

*Price-fixing agreements:* Agreements or understandings among competitors (or potential competitors) directly or indirectly to fix, alter, peg, stabilize, standardize or otherwise regulate the prices paid by customers are automatically illegal under the Sherman Act. An agreement among buyers fixing the price they will pay for a product or service is likewise unlawful. “Price” is defined broadly to include all price-related terms, including discounts, rebates, commissions, credit terms and warranty terms. Agreements among competitors to fix, restrict or limit the amount of product that is produced, sold or purchased, or the amount or type of services provided, may be treated the same as price-fixing agreements.

*Bid-rigging agreements:* Agreements or understandings among competitors (or potential competitors) on any method by which prices or bids will be determined, submitted or awarded are per se illegal. This includes rotating bids, agreements regarding who will bid or not bid, agreements establishing who will bid to particular customers, agreements establishing who will bid on specific assets or contracts, agreements regarding who will bid high and who will bid low, agreements that establish the prices firms will bid and exchanging or advance signaling of the prices or other terms of bids.

*Market or customer allocation agreements:* Agreements or understandings among competitors (or potential competitors) to allocate or divide markets, territories or customers are always illegal.

### **3.3 Activities Unlawful When Unreasonably Restraining Competition**

There are other activities that, though typically not subject to criminal prosecution, are nevertheless sensitive, and may lead to investigations or litigation and liability when they constitute unreasonable restraints upon competition.

*Group boycotts:* An agreement with competitors, suppliers or customers not to do business with another party may be found illegal as a boycott or “concerted refusal to deal.”

*Vertical price-fixing agreements:* Agreements between suppliers and resellers that establish resale prices, particularly minimum resale prices, may be unlawful and are still considered per se offenses under many state antitrust statutes.

*Tie-in sales:* A supplier conditioning the sale of one product on the customer purchasing a second product may be unlawful.

*Agreements not to solicit others’ employees:* An agreement with competitors not to solicit each other’s employees, or to do so only on certain terms, may be found unlawful if it restricts competition.

## **4.0 Guidelines for Meetings and Other Association Activities**

ESA meetings, conference calls and other activities by their very nature bring competitors together, and although they generally are lawful and procompetitive, they also might provide opportunities for participants to reach unlawful agreements. It is important to remember that an antitrust violation does not require proof of a formal agreement. A discussion among competitors of a sensitive topic, such as the desirability of a price increase, followed by common action by those involved or present, could, depending on the circumstances, be enough to convince a judge or jury that there was an unlawful agreement.

In light of the costs involved in defending antitrust claims, even when they are without merit, it is necessary to conduct ESA meetings in a manner that avoids even the appearance of improper conduct. Generally, the best way to accomplish this is by following regular procedures and avoiding any discussion of competitively sensitive topics.

## 4.1 Meetings

Meetings of the Association will be conducted according to the following procedures:

Written meeting agendas will be prepared in advance; agendas for all meetings of the Board of Directors and Executive Committee, as well as other meetings with potential antitrust significance, will be reviewed in advance by the Association's General Counsel. Agendas will not include any subjects that are inappropriate for consideration or discussion.

Meeting handouts and presentations should, whenever feasible, be distributed in advance of meetings.

Meetings will follow the written agenda and not depart from the agenda except for legitimate reason, which should be recorded in the minutes. Informal or "off the record" discussions of business topics are not permitted at meetings or other activities of the Association.

The Association's General Counsel, or an appropriate designee, will be present at all meetings of the Board of Directors and the Executive Committee, as well as at other meetings at which sensitive issues are being discussed or at which officers of member companies will be present.

Accurate and complete minutes will be prepared for each Association meeting. The minutes will include the time and place of the meeting, a list of all individuals present and their affiliations, a statement of all matters discussed and actions taken, with an appropriate summary of the reasons therefor, and a record of any votes taken. Drafts of meeting minutes will be reviewed by the Association's General Counsel.

All Association meetings will be scheduled by the Association's administrative office, and no informal sessions or meetings will be held.

Because of their sensitive nature, certain topics will not be discussed at meetings of the Association unless otherwise advised by the Association's General Counsel. These prohibitions apply equally to all Association-sponsored social functions or other informal Association gatherings. Off-limit topics include:

- current or future prices, price levels, costs or profit margins;
- what is a fair or rational profit level;
- actions which could lead to standardizing or stabilizing prices;
- pricing or bidding methodologies or procedures;
- pricing practices or strategies, including methods, timing or implementation of price changes;
- cash or other discounts, rebates, service charges or other terms and conditions of sale;
- credit terms;
- product warranty terms;
- whether or how prices, warranties or other terms of sale are advertised;
- actual, planned or projected production, production capacity or capacity utilization;
- projected demand;
- confidential company plans for new products;
- dividing or allocating geographic or product markets or customers;
- company market share information;
- whether or on what terms to do business with a supplier, competitor or customer;
- whether or on what terms to solicit others' employees for employment;
- the business practices of individual firms;
- the validity of any patent or the terms of a patent license; and
- ongoing litigation, unless being reported upon by ESA's General Counsel.

Sometimes an enthusiastic person may make statements at a meeting that sound as if they could be indicative of the existence of an express or implied violation of the antitrust laws. Should such a statement be made at an Association meeting, ESA's General Counsel or, in the absence of the General Counsel, the meeting chair or senior staff person present will immediately clarify the situation by determining that no antitrust concern is raised or, if there is such a concern, by terminating discussion of the inappropriate topic. If such a discussion nevertheless continues, the meeting will be terminated.

## **4.2 Programs**

All new ESA programs and program modifications which have potential antitrust significance will be reviewed and approved by the Association's General Counsel. The Association's General Counsel should be consulted regularly whenever any question of antitrust compliance arises in the context of the Association's activities.

## **4.3 Membership**

ESA's membership criteria must be carefully drafted and applied. Any Board of Directors action in rejecting a membership application will be subject to review by the Association's General Counsel before taking effect.

## **4.4 Standards-Related Activities**

ESA's standards-related activities, including the development of product standards or the provision of comment on standards being developed by others or on the development of building and other codes, whether by government or private entities, can be highly procompetitive and beneficial to suppliers and customers. Antitrust problems may arise, however, if a standard or code provision is used as a device for fixing prices, restraining output or chilling innovation, or if, without legitimate technical basis, it has the effect of unreasonably excluding competitors or their products from the market. ESA staff will involve the Association's General Counsel or special counsel as necessary in any standards-development or code-related activities.

## **5.0 Oversight and Implementation Responsibilities**

The Board of Directors has the responsibility to oversee the implementation of the Association's Antitrust Compliance Policy. The Chief Executive Officer is responsible for day-to-day management and implementation of the Policy. ESA's General Counsel is responsible for advising and periodically updating the Association and its leadership on antitrust law developments and on any necessary revisions of this Policy.

## **6.0 Acknowledgement**

All members of the Association will receive a copy of this Policy when they join the Association. All members of the Association's Board of Directors, as well as all other Association volunteers, will be required to sign an acknowledgment that they have received and read the Policy and agree to act in accordance with its terms.

## **7.0 Compliance**

Reports of noncompliance with this Policy should be promptly communicated to the Association's Chief Executive Officer. Members determined to have violated or failed to comply with this Policy will receive a letter from the Association's General Counsel. Because compliance with Association policies is a membership requirement, membership may be terminated as a result of member company violations of this Policy.

## **8.0 Conclusion**

ESA recognizes the value of trade association activities when undertaken consistently with applicable law. Every effort will be made to avoid even the appearance of engaging in any activity that might be viewed as having an unreasonably adverse effect on competition in the energy storage industry or related business. Association volunteers should contact ESA's Chief Executive Officer or, in his or her absence, the ESA General Counsel for guidance if they have any question about the propriety of a proposed Association activity or discussion.

To: ESA Members and Staff

From: Kelly Speakes-Backman, Chief Executive Officer

**Re: Antitrust Compliance - Quick Reference**

The Energy Storage Association (“ESA” or “Association”) has in effect an Antitrust Compliance Policy (“Policy”). The Policy is intended for the guidance of ESA member company representatives, officers, directors and staff, when engaged in any activity conducted in the name of, or on behalf of, ESA. All such persons are expected to be familiar with the Policy and to follow it both in letter and spirit.

The following cautionary statements are taken from the full Policy and are intended to be used as a quick reference tool. This document is not a substitute for the full Policy, which is available from the Association’s office and with which all are expected to be conversant. At all Association meetings and events, including informal gatherings before, during or following such meetings and events, ESA members, their representatives and guests will not discuss any of the following competitively sensitive topics:

1. Current or future prices, price levels, costs or profit margins.
2. What is a fair or rational profit level.
3. Actions which could lead to standardizing or stabilizing prices.
4. Pricing or bidding methodologies or procedures.
5. Pricing practices or strategies, including methods, timing or implementation of price changes.
6. Whether or how prices, warranties or other terms of sale are advertised.
7. Cash or any other discounts, rebates, service charges or other terms and conditions of sale.
8. Credit terms.
9. Product warranty terms.
10. Actual, planned or projected production, production capacity or capacity utilization.
11. Projected demand.
12. Confidential company plans for new products.
13. Dividing or allocating geographic or product markets or customers.
14. Company market share information.
15. Whether or on what terms to do business with a supplier, competitor or customer.
16. Whether or on what terms to solicit other companies’ employees for employment.
17. The business practices of individual firms.
18. The validity of any patent or the terms of any patent license.
19. Ongoing litigation, unless being reported upon by ESA’s General Counsel.

**We hope the above rules will be helpful as you participate in ESA meetings and other activities. If you have any questions about antitrust compliance, do not hesitate to contact ESA’s General Counsel:**

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