GLOBAL CAPACITY ALLIANCE COMPETITION POLICY AND GUIDELINES

The policy of the Global Capacity Alliance (hereinafter the "Association") is to adhere to all applicable antitrust and competition laws, including U.S. and other competition laws, and to avoid, and to take all appropriate steps to prevent, communications between competitors that are unlawful or create the impression of being unlawful. To that end, Association has created this "Competition Policy and Guidelines" (the "Guidelines") to help ensure the compliance of the Association and its member companies with the law. Please note that these Guidelines in no way replace antitrust and competition guidelines and compliance programs at Association member companies.

These Guidelines provide a statement of Association' antitrust compliance policies, a description of Association' antitrust compliance safeguards, and guidance regarding proper conduct at meetings and in communications involving Association and its members. Do not hesitate to contact Association's competition counsel with any questions regarding these Guidelines or any potential antitrust or competition issue:

Richard F. Riley Jr. Foley & Lardner LLP
O 202.295.4712 Email rriley@foley.com

I. Association Competition Compliance Policies

Association and its member companies are committed to free competition and free markets. One of the Association's core functions is to create an environment in which industry members can come together for the common good of the industry without violating antitrust and competition laws. Therefore, as a prerequisite to participation in Association activities, members should have a basic understanding of the antitrust laws, and what conduct might present concern.

A. Prohibited Conduct

Of all the legal actions that can be pursued under the antitrust and competition laws by any government or private entity, many involve unlawful agreements among competitors not to compete, or to restrict competition in some other way, that are not related to a legitimate business arrangement that may benefit consumers and competition. Such agreements are strictly prohibited by these Guidelines and must be avoided.

Most legal systems prohibit agreements, concerted practices, combinations and conspiracies that could restrain trade, including the Sherman Act and Clayton Act in the United States, as well as unfair methods of competition or deceptive trade acts and practices, including the Federal Trade Commission Act in the United States. Such laws are enforced by criminal investigations and prosecutions and civil enforcement actions by regulatory agencies including the United States Department of Justice and the Federal Trade Commission, state attorneys general. Certain of these legal provisions can also be used by private plaintiffs in civil lawsuits. Both a trade association itself and its members may be targets of enforcement if trade association activities facilitate anticompetitive conduct.

These legal actions and prosecutions usually allege a conspiracy or "horizontal agreement" among competitors, often alleged to have been hatched in conjunction with trade association meetings or social functions, and can carry enormous legal exposure and stiff civil and criminal penalties (including individual imprisonment, fines to individuals and director disqualification), damages, and injunctions. The frequency

and severity of fines and other penalties for antitrust and competition law violations has risen dramatically in the United States and across the world since the mid-2000s, and the treble damages provision of certain United States antitrust laws entitles plaintiffs to recover three times the amount of damages suffered on top of those fines. Injunctions restricting the future conduct of defendant entities can last for many years and cover areas of business beyond those involved in the lawsuit itself. Legal fees to defend such lawsuits can run into the millions of dollars, even if the lawsuit is resolved prior to trial. Compliance with these Guidelines is essential to avoid these harsh consequences.

It's also important to note that some conduct is considered "*per se*" or automatically illegal under the antitrust laws, without regard to the circumstances or the justification offered, and irrespective of the actual effect of the specific conduct on competition. Examples of this conduct include, but are not limited to, price fixing, bid rigging, and customer or territories allocation, described below.

Antitrust violations can be based on circumstantial evidence without any evidence of an explicit agreement. These Guidelines therefore prohibit not only formal written agreements, but oral agreements, "gentlemen's agreements," tacit understandings, "off the record" conversations, a "knowing wink," and the like, from which an unlawful agreement or understanding will be inferred.

1. Don't Discuss Prices or Pricing

Agreements between two or more competitors on what price, or price range, they are going to charge for a product or service concerning prices, known as "price fixing," are absolutely prohibited by the antitrust laws as *per se* violations.

These Guidelines therefore prohibit direct or indirect communication between any representatives of member companies concerning past, present or future prices. The word "price" as used here is broadly defined to include sales prices, pricing policies, elements of price, price formulas, bids, discounts, rebates, special deals, allowances, markups, warehousing charges, costs of raw materials, credit terms, terms and conditions of sale, transportation costs, manufacturing improvements, *etc*. All are factors bearing directly on the final "price," and under these Guidelines, they may not be discussed. For purposes of these Guidelines, "discuss" includes both a conversation between more than one member and the expression of the views or experience of any member to other members.

Please note that most evidence in price fixing cases is circumstantial and liability can be based on inferring a scheme from a few isolated facts. For example, if price movements routinely follow meetings between competitors' representatives, that can be cited as circumstantial evidence of an agreement to fix prices. It is thus critical to conduct yourself to avoid even the appearance of impropriety.

Q: During an Association meeting, an individual stands up and, in the course of making an unrelated comment, mentions that his company intends to raise its prices 2% the following week. No one else in the room reacts or speaks up, and there is no further discussion of pricing. Can you pretend this never happened?

A: No. Even that brief mention of pricing, taken out of context, could lead to an inference that unlawful agreement has occurred. Upon reference to company-specific pricing information, you should have stood up, left the meeting, and informed competition counsel of exactly what happened, and the actions you took.

2. Don't Discuss Capacity or Production Levels

Certain topics are so closely linked with pricing that discussion between competitors regarding them can create an inference of potential unlawful agreement. These topics include capacity or production levels, regarding which of these Guidelines prohibit direct or indirect communication between any representatives of member companies.

Q: Following an Association Committee meeting you attended, you take a look at the meeting minutes and notice that one section implies that the Committee members discussed the industry taking more "down time" over the holidays. You know that conversation did not occur, and understand that the minutes are actually intended to reference a permissible conversation on a different topic that did happen during the meeting. Should you speak up?

A: Yes. Though Association staff and competition counsel are careful to ensure that all communication accurately reflects what transpired at meetings in a way that cannot be misinterpreted, it is both appreciated and expected that each Association meeting participant ensures compliance with this policy. If you see or hear something that seems off, promptly raise it with Association' competition counsel.

3. Don't Discuss Allocation of Territories or Customers

Any attempt on the part of competitors to control, limit or allocate the customers to whom they will sell, or the territories in which sales are made, is likely to be found to be illegal *per se*. As a result, competitors should not engage in any discussions that might be construed as facilitating market or customer allocation.

Q: During cocktails following an Association meeting, a contact at a competing company suggests to you that it would be much more efficient for the industry if certain companies focused their sales in certain regions to address increased shipping costs and transportation challenges. What should you do?

A: Immediately end the conversation and report the fact that you did so to the appropriate contact in your company's legal department and to Association's competition counsel. No matter the justification offered, this is a violation of these Guidelines.

4. Don't Discuss Bids

These Guidelines prohibit "bid-rigging," meaning any agreement among competitors on the content of their bids, that one party will not submit a bid, that one party will submit a bid that is designed to lose, or anything else that reduces competition in the bid process, such as excluding other competitive bidders, as well as communication regarding the identity of the persons who are or who are not bidding, prices or terms of bids, or decisions to bid on selected items.

B. <u>Conduct Requiring Caution</u>

Some areas of Association activity must be conducted with extra caution, as while they are generally beneficial to the industry and to consumers, they can impact competition. These activities are judged under the so-called "rule of reason," analyzing in light of the relevant circumstances whether their purpose or effect unreasonably restrains competition. The following are examples of association activity that could create antitrust exposure if they are not properly designed, supervised, and monitored.

1. Follow Safeguards for Industry-Wide Statistics

To the extent that Association gathers, compiles and/or disseminates statistics related to the industry's performance, Association shall remove any identifying information before such statistical data is distributed, and keep the original data secure and confidential. Consistent with guidance from regulatory agencies, any statistics distributed by Association:

- will not allow for the exchange of customer-specific information;
- will not estimate or project future price information;
- will use historical data only;
- ensures that data supplied by members is kept confidential from other members and from third-parties (except where appropriate for Association business and where the third-party is subject to a confidentiality agreement), and is destroyed as soon as is practical after the data is aggregated and the reports created and in no event later than one year; and
- publishes aggregated data, presented in a way that prevents the identification of any particular member's data.

Association's competition counsel will conduct periodic reviews of any statistics compiled by the Association to ensure continued compliance with applicable law and best practices.

Consistent with these Guidelines, member companies must not discuss any statistics in any more individually identifiable form than the aggregate statistics distributed by Association, if any.

Q: After sending the relevant data to Association, a representative of a competing member company emails both you and a third member's employee, and suggests that the three of you also, separately remove identifying information from your companies' data and share it amongst yourselves. Can you do so?

A: No. Data sharing in that situation would lack many of the critical safeguards used by Association in gathering and disseminating statistics, and would create significant risk. You should reject any such invitation and report it to your company's legal counsel and the Association's competition counsel.

2. Participate in Appropriate Industry Advocacy

As a trade association, one of Association's important roles is to make its members' views known to governmental bodies such as regulatory agencies and state and federal legislatures. Advocacy to the government on behalf of the industry as a whole is activity protected from antitrust liability. But as certain types of lobbying activities are excepted from this doctrine, such advocacy still should be conducted with caution and in coordination with legal counsel.

3. Observe Fair and Representative Procedures in Standard-Setting

The Association will participate in developing industry/engineering standards for electric power transmission and distribution market and technology functions and certify compliance with the standards

for various aspects of the electric power transmission and distribution industry]. Association requires any such standard to promote a legitimate goal such as safety, uniformity, or quality. For any collective standard-setting discussion or comment, Association ensures that all pertinent points of view are considered and represented, including non-member industry representatives, other industry participants, governmental representatives and others who could be affected by the changes. The adoption of any standard by Association should always be coordinated with legal counsel (both the Association´s competition counsel and the company´s counsel).

C. Permissible Conduct

Certain Association activities present little competition concern, including monitoring and disseminating information about government regulations and environmental issues; evaluating best practices for safety performance; and studying infrastructure, environmental, technical, or health and safety problems which may arise in the industry. These Guidelines permit and encourage communication and discussion concerning these subjects.

Q: Association has organized a committee and is inviting a number of representatives from member companies to discuss ways to design and advocate for new industry regulations that foster more efficient markets. Is it ok to discuss this topic?

A: Yes. Discussion on best practices in this and many other pro-competitive and beneficial areas is among the many benefits of participation in Association. When meetings like this take place and these Guidelines are observed, both the industry and consumers benefit. However, before adopting any specific measure, the same should be coordinated with legal counsel (both the Association´s competition counsel and the company´s counsel).

II. Association Competition Compliance Safeguards

Association designs all Association policies, events and communications to achieve the goals of the Association while avoiding any conduct that could be considered unlawful under the antitrust and competition laws. For example, because exclusion of an entity from a trade association by virtue of its membership criteria can give rise to antitrust liability, Association membership criteria are carefully crafted to be non-discriminatory, objective, in furtherance of the pro-competitive purposes of Association, procedurally fair, and enforced uniformly and consistently. Any proposed revisions to the Association membership criteria are reviewed by Association' competition counsel.

Staff of the member companies of Association who attend the Association´s meetings receive annual advanced antitrust training from Association's competition counsel, to ensure all of these activities continue to be conducted in accordance with these Guidelines and with current antitrust and competition law principles.

Association also maintains specific safeguards designed to protect its members in the course of its activities. Association strictly enforces these protocols to ensure compliance with the antitrust and competition laws to protect Association and its members.

- All official Association meetings have agendas distributed in advance, detailing the topics to be covered. These agendas are approved in advance by Association' competition counsel, and are designed to keep all discussions on track and within the bounds of these Guidelines and the antitrust and competition laws.

- All presentation materials are reviewed and approved beforehand by Association' competition counsel, whether given by Association members or outside presenters.

- Association includes written antitrust guidelines among the materials provided to presenters and attendees in advance of its events.

- Association staff and competition counsel have developed antitrust reminders, including one-page summaries that are distributed to attendees at Association meetings as appropriate.

- All official Association meetings are memorialized in minutes that are reviewed by Association' competition counsel before distribution. These minutes provide a record of who attended Association meetings and what was discussed.

- Attendees at Association Committee meetings annually complete a certification of compliance with these Guidelines.

- Communications from Association to its members are reviewed by Association' competition counsel. Emails, newsletters, and web site content are approved by Association staff and competition counsel where the content merits review.

- Antitrust counsel is present at official Association meetings, as determined necessary by Association' competition counsel. At the beginning of these meetings, competition counsel provides reminders regarding antitrust and competition law and these Guidelines.

III. Association Members' Role to Help Ensure Antitrust and Competition Compliance

As set forth above, Association policy is to avoid all communications between competitors that are unlawful or could create the impression of being unlawful. Association member companies should assume that there is no "grey area" with respect to the antitrust and competition laws, and consider it part of membership to be on the alert for contact between competitors that is or could be perceived as running afoul of the antitrust and competition laws. Conduct that falls into any one of the following categories should be considered unlawful and avoided at all costs:

- Setting or discussing past, present, or future prices with competitors
- Dividing territorial markets between competitors
- Dividing customers between competitors
- Agreeing on levels of production with competitors
- Agreeing to exclude competitors from the market
- Distorting the bidding process
- Boycotting customers, suppliers or vendors
- Exchanging any confidential, competitively sensitive information

If an Association member observes any potentially unlawful interactions, the member should voice his or her objection and alert Association' competition counsel. In addition, a member who comes across an Association document that reflects prohibited activity should immediately bring it to the attention of Association' competition counsel. Remember that even individuals who do not actively participate in an unlawful discussion, or who do not formally agree to act in a certain way, risk incurring liability for themselves, their company, and Association merely by virtue of their awareness of any potentially unlawful communication.

IV. Contact Association' Competition Counsel with Any Questions

These Guidelines supplement, but do not replace, the antitrust and competition compliance programs in place at each Association member company. Every member should identify an appropriate contact within their legal department to whom questions may be directed in the event that antitrust concerns should arise, or from whom to seek training and guidance, but members also should not hesitate to contact Association' competition counsel. In every instance, the wisest course of action if you are uncertain regarding the lawfulness of any conduct or communication by Association members is to contact counsel.

Richard F. Riley Jr. Foley & Lardner LLP
O 202.295.4712 Email rriley@foley.com