

ACTIVE ARCHIVE ALLIANCE ANTITRUST GUIDELINES

A. Background

Launched in early 2010, the Active Archive Alliance (“Alliance”) is a non-profit industry trade association formed to promote active archive data storage through strategies that include ensuring inter-compatibility, communicating best practices, and educating current and prospective users on active archive storage technologies. Membership with the Alliance is open to leading providers of tiered storage technologies, including file systems, object storage, HSM applications, cloud storage, high density tape, flash and disk storage. Members share best-of-breed solutions, best practices, and industry testimonials in order to learn how their respective organizations can achieve fast, active access to data in the most cost-effective manner.

These Antitrust Guidelines (“Guidelines”) affirm the Alliance’s commitment to compliance with federal and state antitrust laws (collectively, “Laws”) and serve to inform current and prospective members of the Alliance of the policies applicable to membership with respect to the Laws.

B. Antitrust Policy, In General

Involvement with a trade association in general provides opportunities for communications among industry competitors, resellers, customers and suppliers requiring strict compliance with Laws. Special precautions must be taken to avoid the potential risk of an antitrust violation resulting from improper conduct or activities undertaken by members of a trade association.

It is the policy of the Alliance to fully comply with all federal, state and local laws, rules and regulations applicable to the Alliance, including all Laws, and to avoid conduct that may give even the appearance of wrongdoing. Compliance with Laws fosters full and fair competition thereby furthering the stated purposes of the Alliance.

C. Why Antitrust Compliance is Necessary

Antitrust compliance is essential to avoid the substantial civil and criminal penalties that can be imposed for violations of Laws. If, in the course of their Alliance activities, members of the Alliance act as facilitators of an antitrust violation or violate Laws in the context of Alliance activities, they could subject themselves, their respective companies, and the Alliance to severe fines and penalties. The most serious violations carry the potential for criminal penalties, under which the Alliance or its member companies could be fined up to \$100 million per offense, and individuals involved could be fined up to \$1 million per offense and imprisoned for up to ten years. Higher fines can be assessed under some circumstances. In addition, persons who suffer harm because of an antitrust

violation can recover treble damages, plus their litigation costs and attorney's fees. Penalties under state antitrust laws may also apply.

The mere allegation of an antitrust offense can impose enormous personal and professional costs on the companies and individuals accused. Even when charges are ultimately proved untrue, the costs to an organization and its members of defending against unfounded allegations are likely to be substantial.

While it is impossible to anticipate every situation that might arise, these Guidelines provide Alliance members with practical guidance to help identify and avoid conduct that raises potential antitrust concerns to ensure that the activities of the Alliance and its members remain within the Laws. You should, however, consult with legal counsel for the Alliance or your respective company with any questions or concerns regarding antitrust compliance with respect to conduct undertaken in connection with Alliance matters.

D. Conduct That Raises Antitrust Concerns

1. Agreements among competitors about matters on which they would otherwise compete.

These present the greatest antitrust concern to the Alliance and its members. Certain agreements are considered so likely to harm competition that they are prohibited *per se*, without any inquiry into whether they are reasonable or justified. These include agreements to:

- a) fix prices or any term or condition of sale, such as credit, insurance, transportation terms or warranties;
- b) divide markets, such as by allocating service territories or customers who will be served;
- c) limit sales, service, or capacity levels;
- d) boycott or refuse to deal with any competitor or customer;
- e) discriminate in favor of any competitor or customer; and
- f) monopolize or attempt to monopolize markets.

2. Agreements which operate to restrain trade unreasonably.

These types of agreements are judged under the "rule of reason," which weighs the competitive benefits of the agreement against its potential for competitive harm. These are generally agreements that are designed to improve service or reduce costs

through cooperation. Facility sharing agreements, for example, would be judged under the rule of reason, provided that they are not merely a cover for an activity that is *per se* illegal.

3. What is an “agreement” for antitrust purposes?

An “agreement” for antitrust purposes need not be written, nor must it be supported by specific oral statements. Courts can and do infer agreements from conduct, from the surrounding circumstances and, most commonly, from notes, minutes, memoranda, and other documents that, when read together, support a claim that an agreement was reached. The Alliance and its members must ensure that their respective companies’ commercial decisions are made unilaterally and independently and that they do not engage in any activity that would make it appear otherwise.

4. What should you do if you believe an agreement or activity may be of antitrust concern?

You should immediately contact legal counsel for the Alliance and, if appropriate, your company’s counsel to address the concern. You should not speculate, either orally or in writing, as to the lawfulness or the legal consequences of specific conduct, although you should request that the conduct be stopped pending consultation with legal counsel.

E. Guidelines for Alliance Meetings

To ensure that antitrust violations do not occur and that there is no appearance that anti-competitive activity is taking place, every participant in Alliance’s meetings and activities must adhere to the following guidelines:

1. Keep in mind the stated purposes of the Alliance, and participate only in discussions that further those purposes.

Free and open discussion on matters of concern to members is essential to the success of Alliance activities. Discussion among Alliance members should, however, be limited to matters that appropriately advance the Alliance’s stated purposes.

2. All meetings must operate on the basis of a pre-circulated agenda.

A written agenda sets the meeting tone and provides topical guidance that enables participants to know whether they are acting in accordance with the stated purposes of the Alliance. Any questions concerning the agenda should be raised with Alliance counsel or your company’s counsel before the meeting, if possible. At the meeting, discussion of matters outside of the agenda should, generally, be avoided.

3. Avoid discussion of matters pertaining to the way your company competes, including, without limitation, discussions concerning any member or non-member company's prices, services, customers, costs, or non-public future plans.

Discussions among competitors concerning commercial or competitive matters carry a significant antitrust risk. Even if those discussions are not *per se* unlawful, they may be used later to suggest that the Alliance or its members had an implicit or tacit agreement that would violate the Laws.

There should be NO discussions at Alliance meetings of any matters involving:

- Prices, cash discounts, rebates, costs, credit terms or other commercial terms or conditions (e.g., insurance, transportation, or warranties) with respect to any product or service;
- Service levels or quotas;
- Specific customers, competitors or markets of any Member company, including any refusal to deal with or allocation of customers, suppliers, territories, products or services among Members;
- Information concerning any Member company's costs, profits, inventory, pricing formulas, market share, or other information of a non-public nature;
- Limitation or control of production, manufacturing processes, or sales;
- Strategies involving a Member company's current or future purchasing/sales, market shares, customers, suppliers or territories; or
- Future competitive behavior, including price changes and investment in or development of new technologies.

If you become aware of any such discussions, you should stop the discussion until the matter can be reviewed with counsel. If the conversation continues, excuse yourself. Report any such conversations to legal counsel for the Alliance or your company.

4. Do not engage in any off the record or sidebar discussions regarding the way in which your company competes or otherwise does business.

Substantive discussions should be limited to formal meetings at which counsel, a member, or staff representative knowledgeable on antitrust issues is present. Informal discussions of the type that could take place outside of a formal meeting often raise the most serious antitrust problems. No substantive discussion should take place in small groups or during sidebar sessions outside a formally constituted Alliance meeting.

5. **Official minutes of Alliance meetings must be accurate and complete.**

As the official record of Alliance proceedings, minutes of meetings are of great legal significance. They should accurately and briefly summarize the discussion, describe any actions taken and give the reasons for those actions. The Chairman of each committee should take responsibility for ensuring that minutes of meetings are clear, concise, accurate and complete. Any questions regarding the minutes should be raised with antitrust counsel before they are circulated to members.

6. **Do not disparage other companies or their products or services.**

Alliance members should not take actions that could be construed as expressing an agreement to exclude or discriminate against any company, whether or not it is an Alliance member.

7. **If you are in doubt about any activity in connection with an Alliance meeting, consult the Alliance's or your company's legal counsel.**

No discussion can fully delimit the scope of permissible and impermissible activities under the Laws. Counsel should be consulted whenever a matter appears to raise antitrust concerns.

F. Document and E-Mail Guidelines

Many antitrust investigations and lawsuits are fueled by poorly phrased or exaggerated statements in internal documents, with e-mails being a leading culprit. Common sense should be used when composing documents and e-mails. No matter how informal or private a communication is intended to be, it must be assumed that anything written in a document or e-mail is potentially discoverable in an investigation or lawsuit. As a general rule, nothing should be put in writing that you would not want read aloud to a prosecutor, plaintiff's lawyer, or jury composed of people who know nothing about you or your business.

Examples of statements that should be avoided:

- Language suggesting guilt (such as "read and destroy")
- Words of aggression or competitive exclusion (such as "dominate the market," "kill the competition," or "get rid of the discounters").
- Statements or speculation regarding the legality or legal consequences of any action of the Alliance.
- Statements suggesting or advocating that members of the Alliance make joint decisions on pricing, production, capacity or other aspects of competition, such as

references to “industry consensus,” “industry understanding,” “industry acceptance,” or “rational competition.”

G. Standards, Certification, and Codes of Ethics

Trade association standard-setting and certification programs and codes of ethics can be highly procompetitive and beneficial to suppliers and customers. Antitrust problems will arise, however, if a standards or certification program or a code of ethics is used as a device for fixing prices, restraining output, or chilling innovation, or if it has the effect of boycotting or unreasonably excluding competitors from the market.

Standards and certification programs and codes of ethics must serve identifiable public interests, such as preventing false or deceptive marketing practices, and they must do so in a manner that does not unreasonably restrict competition. Standards and certification programs and codes of ethics must not have the purpose or effect of unreasonably restraining price or quality competition, limiting output of products or services, or discouraging innovation. No company should be denied certification on grounds that it is not a member of any Alliance or organization, that it is a “discounter,” or that it is a foreign corporation. No company should be boycotted on any grounds, including lack of certification or noncompliance with a code of ethics.

Standards and certification programs and codes of ethics should adhere to principles of *voluntariness* and *due process*. Due process means that all companies with a direct and material stake have a right to participate through the standards development organization in the formation of the standard, certification criteria, or code of ethics; the process is open and free from dominance by any particular industry segment or company; and there is a right to appeal from adverse actions.

More specifically, any standard, certification, or code of ethics activity of the Alliance will be conducted in accordance with the following basic rules:

- Participation in the creation of a standard, certification program, or code of ethics will be voluntary and will be open on reasonable terms to all persons who are directly and materially affected. Any fee or cost charged to participants will be reasonable, and membership in the Alliance will not be a requirement to participate.
- Timely notice of standards-setting, certification or code of ethics activities should be provided to all parties known to be directly and materially affected.
- No industry segment, interest group, or company should be allowed to dominate the process. All views and objections should receive fair and equitable consideration.

- Written procedures should govern the methods used to develop standards or certification criteria, and these procedures should be available for review by any interested person.
- The written procedures should specify realistic, readily available, and timely appeals procedures for the impartial handling of complaints concerning any action or inaction by the Alliance with regard to its standards, certification, or code of ethics activities.

H. Member and Non-Member Surveys

Surveying members and other market participants can raise antitrust concerns because there is substantial risk that competitors will use the survey to exchange business information that could harm competition. On the other hand, surveys can have procompetitive benefits and can be structured in such a way as to avoid antitrust liability. These Guidelines could not and do not anticipate all of the antitrust risks present with any given survey. The Alliance and/or its members should consult counsel before developing or issuing any survey for distribution among members or others.

I. Exemptions from Antitrust Laws

There are immunities from and exemptions to the Laws that may apply in some circumstances to activities of the Alliance and its members. Antitrust laws do not, for example, prohibit:

- Good faith efforts to seek action from any branch of the government;
- Intrastate activities undertaken pursuant to a clearly articulated state policy to replace competition with regulation, and which are actively supervised by the state.

Antitrust exemptions can be narrowly construed, and their application to specific conduct generally raises significant questions of law and fact. Therefore, if activity is of the type to raise antitrust concerns, it should never be simply assumed that an exemption applies. Rather, the issue should be raised with counsel.

J. Enforcement

Members will be provided a copy of these Guidelines, together with a summary of these Guidelines in the form of the Meeting Protocol Key Reminders attached hereto as Exhibit A, upon request. These Guidelines shall also be made available on the Alliance website. The Meeting Protocol Key Reminders shall be read by the Chairman or his or her designee at the beginning of each Alliance meeting. Orientation for new directors and officers of the Alliance shall also include an overview of antitrust compliance and member responsibilities.

Members that violate or fail to comply with these Guidelines will receive a letter from Alliance counsel. Because compliance with Alliance policies, including these Guidelines and the Laws, is a mandatory condition of membership with the Alliance, any violation of these Guidelines or the Laws may result in immediate termination of membership with the Alliance.

K. Conclusion

These Guidelines are designed to make the Alliance and its members aware of antitrust “danger zones.” If you understand and adhere to these Guidelines, the legitimate business purposes of the Alliance can be conducted with minimum antitrust risk.

These Guidelines do not, however, cover every issue that might arise, nor should you take these Guidelines as advice that any specific conduct does or does not violate the Laws. Rather, you should advise Alliance counsel or your company’s legal counsel whenever you have any questions concerning compliance with any laws in connection with Alliance matters.

Exhibit A

**ACTIVE ARCHIVE ALLIANCE
MEETING PROTOCOL KEY REMINDERS**

At the opening of each Board of Directors and All-Members meeting of the Active Archive Alliance, the Chairman or his or her designee shall recite the following points:

1. A written agenda has been prepared for this meeting. We will not discuss any topics outside of the agenda and will take written minutes of the meeting.
2. Avoid any off the record or sidebar discussions regarding the manner in which your company competes or otherwise conducts business.
3. During this meeting, there will be NO discussion of:
 - Prices, cash discounts, rebates, costs, credit terms or other commercial terms (e.g., insurance, transportation or warranties) with respect to any product or service;
 - Service levels or quotas;
 - Specific customers, competitors or markets of any Member company, including any refusal to deal with or allocation of customers, suppliers, territories, products or services among Members;
 - Information concerning any Member company's costs, profits, inventory, pricing formulas, market share, or other information of a non-public nature;
 - Limitation or control of production, manufacturing processes or sales;
 - Strategies involving a Member company's current or future purchasing/sales, market shares, customers, suppliers or territories; or
 - Future competitive behavior, including price changes and investment in or development of new technologies.
4. Should any Member become aware that improper conduct has or may have taken place, or if you have any concerns regarding any of the remarks made at this meeting, please state your concerns for the record and consult with legal counsel for the Alliance or your company.
5. Members may receive a full copy of the Alliance Antitrust Guidelines upon request or by visiting the Alliance website.