



The Voice of Canada's
Personal Care
Products Industry

COMPETITION LAW TRADE ASSOCIATION COMPLIANCE GUIDE

COSMETICS ALLIANCE CANADA

**Accepted by the
Cosmetics Alliance Canada (CCTFA at the time)
Board of Directors on April 28, 2011**

TABLE OF CONTENTS

I.	Introduction	1
II.	Canadian Competition Law	1
	(A) Criminal Provisions	2
	(B) Civil Provisions	2
	(C) Investigations and Enforcement	2
III.	Compliance Policies and Procedures	3
	<i>Specific Conduct</i>	3
	(A) Communications and Agreements Between Competitors	3
	(B) Misleading Advertising	7
IV.	Basics of Competition Law Compliance	8

I. Introduction

Cosmetics Alliance Canada (“Cosmetics Alliance” or the “Association”) is committed to complying with Canadian competition law. A reputation for honesty, integrity and fair dealing is important to our ongoing success. This reputation results, in part, from our members’ commitment to complying with the law in all aspects of our business. Accordingly, this Competition Law Compliance Guide (the “Guide”) has been established as part of the Association’s commitment to regulatory compliance so that we comply with competition law while providing value to our members and effectively representing their interests.

While we do not expect you to become legal experts, we do expect you to be able to recognize situations that can give rise to competition law issues so that you will know when to seek legal advice.

This Guide focuses on the risks raised under competition law by common trade association activities, and provides a number of practical guidelines designed to help you anticipate and prevent contraventions of competition law before they occur, and detect and report contraventions if they do occur.

All Cosmetics Alliance employees, directors and members are required to read and understand this Guide. Compliance with Canadian competition law is a condition of your ongoing involvement with the Association.

Please note that the contents of this Guide are for general reference only, and cannot be viewed as legal advice on the application of Canadian competition laws to particular situations. The Guide is not a substitute for advice from counsel, who should be consulted in a situation where clarification on the application of Canadian competition laws is required. If you have any questions about the contents of this Guide, please contact Cosmetics Alliance’s President and CEO.

II. Canadian Competition Law

The purpose of Canadian competition law is to maintain and encourage effective competition across the country. This is achieved through the Canadian *Competition Act* (the “Act”), a federal law that prohibits certain activities that may reduce or prevent competition, or else harm consumers. The Act applies across all industries, except those that have specific legislation overriding its operation or which are otherwise exempted. It is important for trade associations and their members to be aware of the application of competition law and potential risks relating to their activities.

The Act contains both criminal and civil provisions that establish rules regarding how competitors may deal with each other, as well as how businesses may treat their suppliers and customers. It is administered and enforced by the Commissioner of Competition (the “Commissioner”), who is head of the Competition Bureau (the “Bureau”).

(A) Criminal Provisions

The Act makes certain types of conduct illegal. Examples of such conduct include criminal conspiracy (such as price fixing).

Both individuals and the entities they serve may be charged with criminal offences. Violation of the criminal provisions may result in prosecution by the Public Prosecutions Service of Canada (the “PPSC”), upon recommendation by the Commissioner, in a manner similar to other criminal offences. Conviction of a criminal offence is punishable in the same way as conviction under the *Criminal Code* – namely, by fine and/or imprisonment. Private individuals may also commence actions for damages suffered as a result of conduct that contravenes the criminal provisions. Class actions have therefore become increasingly common across Canada. In such lawsuits, private individuals often seek damages against companies and/or their employees in the millions of dollars. Conduct that potentially contravenes the criminal provisions can expose you and the Association to significant consequences, and must be avoided.

In recent years, the Commissioner has been increasingly aggressive in pursuing prosecutions under the criminal provisions of the Act, particularly in regards to price fixing. Fines under the conspiracy provisions have consistently escalated. The Commissioner is also making a point of seeking charges against individuals, as opposed to charging only corporate defendants. On a number of occasions, management representatives have received prison terms for violations of the Act.

(B) Civil Provisions

The civil provisions, if contravened, can result in the federal Competition Tribunal (the “Tribunal”) making an order to stop the anti-competitive conduct and in some cases, requiring payment of substantial fines. Examples of conduct subject to the civil provisions include civil agreements. Defending cases of this nature is an expensive and time consuming process that may impact the Association’s operations.

(C) Investigation and Enforcement

The Bureau receives thousands of complaints every year from competitors, consumers, suppliers, customers and others with respect to potentially anti-competitive conduct. While some complaints are frivolous and some are malicious, at least a few lead to major government cases. Amnesty (immunity) and leniency programs,¹ as well as “whistle-blowing” programs² also encourage complainants to come forward.

The Commissioner investigates complaints of particular significance and, in specific circumstances, may decide to commence an inquiry and possibly formal proceedings. The

¹ For more information on the Bureau’s immunity and leniency programs, please see the below links:
http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02000.html
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02816.html>

² The Act contains provisions that encourage employees to disclose information about potential offences under the Act to the Bureau and affords protection to employees who do so. The Act further makes it a criminal offence for employers to take measures against employees who complain to the Bureau. For more information, please contact legal counsel.

Commissioner's investigative powers are broad and include, among others, the ability to compel production of documents, demand sworn responses to written requests for information, search offices or private premises, seize records and interview individual employees under oath. Wiretaps may also be used in limited circumstances. Responding to investigations is time consuming, expensive and intrusive. Please contact legal counsel for information on how to respond to search warrants and information requests from the Bureau.

III. Compliance Policies and Procedures

Below is an overview of the practices that may give rise to concern under the Act. As well, you will find guidelines designed to help you anticipate and prevent contraventions before they occur and detect and report contraventions if they do occur. As a general matter, all discussions and written documents should highlight Cosmetics Alliance's pro-competitive nature.

Specific Conduct

(A) Communications and Agreements Between Competitors

Trade associations perform many legitimate purposes, such as promoting their common interests to the public, government and other targeted audiences, and their activities generally do not raise issues under the Act. However, the very nature of trade associations, as they often bring together competitors, creates a risk that they could be used, directly or indirectly, as a vehicle for anti-competitive activities. In particular, associations could be used to assist in the implementation of anti-competitive agreements and other collective actions that raise competition law issues. Trade associations must therefore be careful to avoid conduct which could be in violation of the Act.

By way of background, parties that "agree" with each other to engage in coordinated conduct on particular competitively sensitive matters may be participating in a conspiracy. The parties must intend to enter into the agreement, but the agreement does not need to be in writing and does not need to be implemented. Criminal conspiracy does not require proof that the agreement in question will result in an undue prevention or lessening of competition. The penalty for criminal conspiracy is a fine of up to \$25 million and/or 14 years imprisonment. Other competitor collaborations, such as joint ventures and strategic alliances, will be examined under a civil provision.

The criminal conspiracy provisions apply to the following types of agreements between competitors or potential competitors: 1) price fixing agreements; 2) market allocation agreements; and 3) output restriction agreements. Each type of agreement is described below:

- Price Fixing Agreements: Price fixing occurs when otherwise independent businesses agree to set prices at a particular level or agree on minimum prices. Such agreements may also take the form of restrictions or guidelines on prices decided by a trade association. Price fixing includes agreements to fix prices at a predetermined level, to eliminate or reduce discounts, to increase prices, to reduce the rate or amount by which prices are lowered, to eliminate or reduce promotional allowances and to

eliminate or reduce price concessions or other price-related advantages provided to customers.

- **Market Allocation**: Market allocation agreements are agreements not to compete for specific customers, groups or types of customers; in certain geographic regions or market segments; or in respect of certain types of transactions or products.
- **Output Restriction Agreements**: Output restriction agreements limit the quantity or quality of products supplied, reduce the quantity or quality of products supplied to specific customers or groups of customers, limit increases in the quantity of products supplied by a set amount or discontinue the supply of products to specific customers.

Below, we provide general guidelines on communications with competitors.

- **DO NOT** contact competitors without seeking legal advice.
- **DO** keep records of any contacts with competitors where concerns may arise, including trade association activities.
- **DO** confine all discussions with competitors to the immediate subjects for which a particular meeting is convened.
- **DO NOT** reach any agreement, including any tacit understanding or discussion with competitors about competitively sensitive matters including pricing, market or customer allocation, supply restrictions.
 - Discussion regarding pricing includes discussion regarding pricing methods, price trends, timing of price changes, cost of raw materials or supplies, margins, sale terms and conditions, discounts or rebates.
 - Discussion regarding market or customer allocation includes discussion regarding customers, distribution channels or sales strategies.
 - Discussion regarding supply restrictions include discussion regarding changes in industry production, capacity or inventories, production levels or production capacity.
- **DO** immediately and clearly terminate the communication if you suspect that it is inappropriate. Immediately contact Cosmetics Alliance's President and CEO.
- **DO** contact Cosmetics Alliance's President and CEO if you suspect that any inappropriate communication has taken place.

This policy applies at all times and all locations, including trade association activities, social events and "off the record" conversations.

Specific to the Association, the following situations can raise risk: 1) Association meetings without a clear and legitimate agenda; 2) the sharing of competitively sensitive information among members; 3) the implementation of voluntary codes; and 4) Association membership criteria. Each of these are discussed below. As well, guidelines on how to avoid these types of agreements are provided.

Association Meetings

Association meetings should have clear, specific agendas and comprehensive minutes. The meetings should not become a forum for discussing competitively sensitive information, such as pricing, costs, market allocation, production and market share.

- **DO** prepare a clear agenda for each meeting and circulate it to Association members prior to the meeting.
- **DO** ensure that the Association's meetings solely include discussion or information exchange that is absolutely necessary to achieve the pro-competitive objectives of the Association.
- **DO** keep minutes of all the Association's meetings.
- **DO** note the arrivals and departures of members in the minutes. The reason for the departure should also be noted if members express concern pertaining to any inappropriate communication.
- **DO** review minutes of the Association's meetings and report any errors.
- **DO** provide legal counsel with the agendas and minutes of all meetings for their review.
- **DO** have legal counsel attend all of the Association's meetings where there is potential for discussion of sensitive subjects.
- **DO** establish a document retention program which clearly sets out which records are to be kept and for what period of time in order to keep a history of previous meetings that have been held.

Information Sharing

An important goal of the Association is to provide its members with information relevant to their industry. The exchange of such information will not necessarily give rise to competition law issues in all contexts. At the same time, information exchanged among competitors can raise issues under the Act, depending upon the nature and timing of the information exchange. The exchange of competitively sensitive information, such as information regarding current or future prices, is most likely to be problematic. The Association should also exercise caution in collecting and disseminating information regarding market shares, costs, levels of output, strategic or marketing plans and similar types of information. As a

general matter, the exchange of competitively sensitive information should be avoided.

- **ALWAYS** seek legal counsel before engaging in any information exchange.
- **DO** collect only historical information that is more than three months old.
- **DO** use an independent data collection agency to gather data from industry participants. The anonymity of individual members and their data should be preserved throughout the collection and dissemination process.
- **DO** disseminate information only in aggregate form such that recipients cannot identify the information provided by any particular member.
- **DO NOT** use information gathered to engage in forecasting or analyzing future pricing or output decisions of industry participants. **DO NOT** provide judgment, commentary or recommendation regarding business conduct based on the information provided.
- **DO NOT** coerce members to provide data. Members of the Association should not be required to supply data.
- **DO** emphasize the pro-competitive purpose for the information exchange, such as a desire to realize efficiencies that benefit consumers. If the information is publicly available, articulate a legitimate purpose for the information exchange, such as timeliness, cost-effectiveness, or efficiency in collecting/distributing the information.

Voluntary Codes

Voluntary codes (also known as codes of conduct, codes of practice, voluntary initiatives, guidelines and non-regulatory agreements) are sometimes used by trade associations to influence, shape, control or set benchmarks for members' behaviour in the marketplace. Codes should not be used in a way that decreases competition, prevents non-participating firms from entering the market, or negatively affects consumers by, for example, significantly raising prices or limiting product choice.

- **DO** ensure that any code is voluntary and achieves the objectives of the Association through the willing cooperation of members. **DO NOT** impose sanctions aimed at forcing members to obey a code that may have anti-competitive effects.
- **DO** ensure that codes include a clear statement of objectives and expectations. **DO NOT** include statements regarding prices or fees that members charge for services, mandating levels or types of services, restricting business relationships, restricting the supply of a product, or restricting legitimate advertising by members.
- **DO NOT** use the code to encourage or mandate certain prices or fees, prescribe types or levels of service, restrict business relationships, restrict the supply of a product, restrict advertising, restrict competitive bidding or impose association membership criteria.

- **DO NOT** discriminate between members in enforcing code compliance.

Criteria for Association Membership

In some instances, membership in the Association can raise competition law issues if, for example, membership requirements, exclusions or expulsions impair a business's or person's ability to compete. For example, excluding a potential member because of that member's refusal to adhere to certain pricing or service policies may raise anti-competitive concerns.

- **DO** ensure that membership in the Association is voluntary and based on clear, transparent and objective criteria that are reasonably related to the legitimate function of the Association.
 - Criteria should not be susceptible to subjective or discriminatory application. Apply membership criteria consistently to prospective and existing members.
 - If the Association prohibits the membership of certain groups that would otherwise qualify for membership, the Association should have a legitimate, pro-competitive reason for doing so.
- **DO** provide applicants who are not granted membership the reasons for refusal and allow an appeal process.
- **DO** provide products or services of the Association that are essential to effective competition to non-members. A reasonable fee may be charged for the service.

(B) Misleading Advertising

Association activities relating to advertising typically fall into two categories: advertising conducted by the Association itself and guidelines or rules adopted by the Association for its members in relation to advertising. The Association and its members cannot make representations to the public which are false or misleading.

The Act contains both criminal and civil provisions that address false or misleading representations and deceptive marketing practices in promoting the supply or use of a product or any business interest. Under the criminal regime, the Act prohibits firms from knowingly or recklessly making representations to the public which are false or misleading in a material respect. It is not necessary for anyone to actually be deceived or misled by the representations in order to contravene the Act. The penalty for contravention of the criminal provisions is a fine in the discretion of the court and/or up to 14 years imprisonment.

Under the civil regime, misleading advertising or misleading representations to the public regarding the performance, efficacy or length of life of a product, which are not based on an adequate and proper test, may be subject to an order prohibiting the representation and

imposing administrative monetary penalties for corporations of up to \$10 million for the first contravention and \$15 million for every subsequent contravention, and for individuals of up to \$750,000 for the first contravention and \$1 million for every subsequent contravention. In addition, any person who makes a misrepresentation to the public may be ordered to pay an amount equal to what it received from the sale of the product about which the misrepresentation was made.

Below are general guidelines regarding advertising. These guidelines do not cover specific aspects of advertising, such as the requirements for claims substantiation. As well, the Bureau administers other laws that regulate labeling, which are not discussed in this Guide. If you require information regarding a specific aspect of advertising or labeling, please contact Cosmetics Alliance's President and CEO.

- **DO** have legal counsel review advertising conducted by the Association to promote the products, services or views of the industry to ensure that it is not false or misleading.
- **DO** have legal counsel review any proposed restrictions or prohibitions on advertising conducted by the Association's members in order to ensure that it does not affect members' ability to compete in the market.
- **DO** not restrict truthful advertising by members that provides consumers with important information about prices, quality, and availability, among other factors, of a product that consumers consider in their purchasing decisions.

The Act also contains provisions relating to price maintenance, restrictive trade practices, and abuse of dominance. These provisions are not considered in this Guide. If you require further information, please contact Cosmetics Alliance's President and CEO.

IV. Basics of Competition Law Compliance

In addition to the above, the following is a list of other general guidelines for ensuring competition law compliance.

- **Promptly report contraventions to Cosmetics Alliance's President and CEO.**
 - **Seek legal advice if a situation gives rise to concerns.**
 - **Be aware that senior management will be held accountable first and foremost.**
-