

## ACSESS GENERAL GUIDELINES FOR COMPLIANCE WITH CANADA'S COMPETITION ACT

### PREAMBLE

The Association of Canadian Search, Employment and Staffing Services also referred to as ACSESS recognizes that its members operate in a competitive business environment, and cautions that any and all discussions held at ACSESS meetings or events need to be conducted in strict compliance with the *Competition Act*. Not for profit associations, by their very nature, can present competition law problems, given that they often bring competitors together into the association, thus potentially and/or inadvertently permitting the occurrence of collusive action(s) to occur. Only the action to restrain trade must occur for they're to be an encroachment of competition law(s). We require that all ACSESS meeting participants avoid any tendency to attempt even tacit agreements about joint activity, which could violate Canadian competition laws, or could lead observers to suspect such violation.

Associations such as ACSESS perform many valuable and legitimate functions with benefits to industry, governments and the general public / employers / clients / or job-seekers and candidates. Associations provide valuable services with benefits to their members including: certification, education and training, public, self-regulation activities, government and collection/distribution of industry statistics in partnership with SIA. Such association programs can touch on sensitive subjects that can be construed as violating competition laws. Examples of competition law compliance risks include:

- The topic of conversation may turn to matters that competitors would normally keep secret (i.e., price information);
- The rules of the association may disadvantage particular competitors, which an enforcement body may consider as anti competitive;
- An enforcement official may use industry association meetings to demonstrate, along with other factors, that collusion has taken place.

Extreme caution should be applied to avoid any topics that relate to or affect competition in the sector. Association members should refrain from any discussion that could provide the basis for an inference that the members agreed to take any action that might restrain trade, or other restraints on freedom to act independently. An "agreement" among association members in competition law terms is a broad concept – it may be oral or written, formal or informal, expressed or implied. A "gentleman's agreement" to "hold the line" on prices is more than sufficient to establish an unlawful conspiracy to fix prices.

The basic principle to avoid competition law violations via your association's activities is: Ensure that no illegal agreements, express or implied, are reached or carried out through the association.

The best vehicle for enjoying the benefit of permitted contacts among competitors while avoiding the pitfalls of legal arrangements is by belonging to a trade association or professional society that takes its obligations in this regards very seriously.

**The Competition Act (“Act”)** is the federal statute of general application with criminal and administrative provisions whose general purpose is to maintain and encourage effective competition in Canada and it addresses three categories of conduct: Criminal Enforcement (e.g., price-fixing, bid-rigging, misleading advertising); Reviewable Trade Practices (e.g., abuse of dominance, price maintenance, tied selling, exclusive dealing); and Merger Reviews, Advertising and Marketing (these matters are dealt with by the Competition tribunal that can issue temporary or permanent orders prohibiting such practices and ensuring that competition is restored. They can also levy financial penalties).

The *Competition Act* is administered and enforced by the Competition Bureau, and is the sole source of competition law in Canada. The Act seeks to accomplish this by prohibiting certain activities that might reduce or prevent competition or harm consumers. It contains both criminal and civil provisions. It sets out certain prohibitions on how competitors may deal with each other, as well as how businesses treat their customers. It prohibits certain pricing, marketing and advertising practices. This *General Guideline* document addresses the *Competition Act* directly and how it applies to events that could occur under the auspices of ACSESS. All associations must act carefully and cautiously to in the conduct of their activities to ensure that they do not create situations that could be construed a violation of the *Competition Act*.

Violating the *Competition Act* has significant legal, financial and reputational consequences for associations and their members. In addition to resulting in injurious publicity, loss of management time and significant legal costs, violation can expose the participants and their respective directors and officers to significant fines, liability for damages to private parties, class action litigation, criminal sanctions and even imprisonment.

Associations should avoid the exchange of competitively sensitive information through their association, adopting an effective competition law compliance program, and get legal advice around issues that may raise completion issues.

## **Basic Competition Law Best Practices for Associations:**

1. Adopt and maintain a credible and effective compliance program.
2. Adopt agendas and minutes for all association meetings.
3. Use conduct of meeting guidelines.
4. Perform periodic *Competition Act* compliance audits or reviews.
5. Conduct competition compliance orientations for new association staff.
6. Get legal advice for initiatives that may raise competition issues.
7. Avoid informal or “off the record” meetings.
8. Generally review all association activities through a “competition lens”.
9. Prior to Association meetings and events, members and any other participants will be reminded of the need to abide by the terms of our general guidelines.

## **Kinds of Conduct Presumed to be Unreasonable and Therefore Unlawful:**

Certain kinds of conduct are exclusively presumed to be unreasonable and as a result, unlawful. Such unlawful conduct per se involves any practices that clearly restrain competition and have no other redeeming benefits. Examples of such conduct include:

- Price fixing;
- Boycotts (refusing to deal with third parties) or organizing a group boycott of any customer or supplier;
- Attempts to allocate markets or limit production;
- Tie-in sales requiring the purchase of an unwanted item in order to purchase the item wanted;
- Research project terms of reference should be appropriately scrutinised to ensure that no competition law infractions could occur.

Benchmarking groups also known as “performance groups”, which study Best Practices in a particular area, cannot involve competitors.

## **GENERAL GUIDELINES for ACSESS**

### **Associations Members may:**

1. Cooperate in lobbying governments to change laws or policies, and should avoid discussions about the specific impact that government measures will have on pricing or output. Lobbying, including by an industry association or jointly by its members, is a permissible activity under the *Competition Act*.
2. Cooperate in encouraging the development of training programs.
3. Cooperate on research and development for the benefit of the sector, which may result in the development of industry standards, best practices and benchmarks available to the sector at large (legal advice should first be obtained).
4. Cooperate on measures to protect the environment, consumers at larger a specific segment of the population such as seniors (legal advice should first be obtained).

### **ACSESS By-laws:**

ACSESS By-laws and rules must be applied in a consistent, non-discriminatory way.

### **ACSESS Membership:**

No membership rules that result in the constraint of competition will be allowed. Denial and/or expulsion of membership to a qualified applicant are not permitted.

### **Association Activities & Programs:**

Participation in statistical reporting programs should be voluntary. Non-members should be permitted to participate in the program, however their participation need not be solicited. All participants should have access to the aggregate data prepared.

It is not advisable to collect and report on historical price information, and certainly current and future price information sharing is prohibited by law.

Only aggregate data (three or more inputs) should be reported and shared, without any reference whatsoever to individual submissions which must never be revealed. Individual data should not be revealed or discernible from the final report. When sharing such data, it is advisable to clarify that the information is not to be discussed among competitors. It is advisable to use independent third parties to collect, analyse and distribute appropriate data; this may include the association.

Standardization and certification programs and joint / cooperative research programs are also permitted, provided they do not in any way violent the *Competition Act*.

Codes of practice, and Codes of conduct are also tools available to associations such as ACSESS, and we do enforce our **Code of Ethics**.

### **ACSESS Leaders' Responsibilities:**

The Executive Director will be tasked with communicating ACSESS's anti-competition policy statement to all members. This responsibility may be delegated to other staff or volunteers representing the organization at ACSESS meetings, and of course legal counsel. The fact that a staff member is present at a meeting, however, should not invite probing to determine how far a discussion can proceed before it becomes apparent that the discussion is improper and it cut off. It is the responsibility of each member in the first instances to avoid raising improper subjects for discussion.

## Do's and Do Not's:

The following guidelines are intended to clarify how individuals involved in ACSESS ought to conduct themselves when participating in ACSESS activities.

- DO NOT discuss current or future prices, fees or rates, or features that can impact (raise, lower or stabilize) prices such as discounts, costs, rebates, surcharges, payment or credit terms, or terms and conditions of sale including prices paid, warranties, sector capacity changes including elimination of products or services, marketing practices, bids or contract, what constitutes "a fair" profit level, or profit margins. Note that a price-fixing violation may be inferred from price-related discussions followed by parallel decisions on pricing by association members, even in the absence of an oral or written agreement.
- DO NOT discuss whether or not the pricing practices of any sector member are unethical or otherwise inappropriate.
- DO NOT exchange data concerning fees, prices, production, sales, bids, costs, customer credit or other business policies or practices unless the exchange is made pursuant to a well-considered plan that has been approved by the organization's legal counsel.
- DO NOT agree with competitors to divide up customers, markets or territories.
- DO NOT agree with competitors not to deal with certain suppliers or others.
- DO NOT try to prevent an actual or potential supplier from selling to your competitor(s).
- DO NOT discuss your customers with your competitors, including the rejection of customers, or restrictive terms used with customers.
- DO NOT agree to any membership restrictions, standard setting, certification, accreditation, or self-regulation programs without the restrictions or programs having been approved by the company's legal counsel.
- DO familiarize yourself with competition law and how it could be violated by your participation in our Association; visit [www.cb-bc.gc.ca](http://www.cb-bc.gc.ca)
- DO insist that all ACSESS meetings (including sub-committees, task forces, advisory teams, etc.) have agendas that are circulated in advance, and DO adhere to prepared agendas.
- DO require that minutes recorded of all meetings properly reflect the actions taken at the meeting and list participants, and DO object if you do not believe they accurately reflect the matters which transpired. Keep a copy of these minutes.

- DO announce if you believe any discussion or activity appears to violate the Competition Act and if it persists, leave the meeting and insist that your departure be recorded in the meeting minutes; make a written record of your dissent.
- DO leave any meeting (formal or informal, which includes social gatherings incidental to any meetings) where improper subjects are being discussed or referred to even jokingly. Tell everyone why you are leaving.
- DO ensure you understand the purpose and authority of each Association group you participate in.
- DO ensure that if questions arise about the legal aspects of ACSESS's activities or your individual responsibilities under the competition laws, you seek advice and counsel from your own counsel or from staff. Any questions about ACSESS's competition statement should be directed to ACSESS's Executive Director.

#### **Useful links:**

The Competition Act: [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca)

The Competition Bureau: [www.cb-bc.gc.ca](http://www.cb-bc.gc.ca)

## **IN CLOSING**

Canada's Commission of Competition, John Pecman, mentioned in a talk he delivered in October 2013 that three issues would likely pique the Competition Bureau's interest in relation to associations and competition/antitrust issues:

1. Sanctioning or discriminating against members that do not adhere to recommended fee guidelines or other respect to competitively important considerations;
2. Using association rules to establish prices, mandate levels of service, restrict advertising or the exclude competitors from the market;
3. Making materially false or misleading representations to the public in promoting the business inter association's members.