

**COMMENT OF THE BUREAUS OF COMPETITION AND CONSUMER  
PROTECTION OF THE UNITED STATES FEDERAL TRADE COMMISSION<sup>1</sup> AND  
THE ANTITRUST DIVISION OF THE U.S. DEPARTMENT OF JUSTICE  
ON THE  
INFORMATION BULLETIN ON THE COMMUNICATION AND TREATMENT OF  
INFORMATION UNDER THE COMPETITION ACT  
(Draft for Consultation, August 2005)**

At the request of Competition Bureau Canada, the Bureaus of Competition and Consumer Protection of the United States Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice are pleased to submit their views on the Information Bulletin on the Communication and Treatment of Information Under the Competition Act.

The laws of both the United States and Canada impose stringent confidentiality requirements on their respective competition agencies. This is entirely appropriate because competition agencies are required to analyze confidential commercial information and trade secrets in order to draw conclusions about market definition, competitive effects, entry, and other elements that must be considered under our respective competition and deceptive marketing practices laws. Not only is it essential that business information of this sort be maintained in confidence, but also that businesses have confidence that this will be done.

At the same time, it is obvious that the effects of commercial practices do not necessarily stop at national borders. The United States and Canada are each other's largest trading partners. Anticompetitive or deceptive conduct undertaken in the United States can impact Canada, just as anticompetitive or deceptive conduct taking place in Canada can impact the United States. Competition authorities in both nations are charged with addressing anticompetitive and deceptive practices that affect the commerce of their own jurisdictions, regardless of where such conduct occurs or the nationality of the parties involved. When authorities are unable to investigate such conduct because the necessary evidence is located across the border, their ability to do this is stymied.

Competition agencies in both countries thus need to find ways to work together, consistent with their own confidentiality obligations, to fulfill their responsibilities in their own jurisdictions, to ensure consistent outcomes in cases that affect both countries, and to prevent either country from becoming a haven for cross-border fraud and deception.<sup>2</sup> The United States

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<sup>1</sup> The views expressed herein are those of the Bureaus of Competition and Consumer Protection of the United States Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioner.

<sup>2</sup> The operation of the Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, the U.S. International Antitrust Enforcement Assistance Act, 15 U.S.C. § 6201 *et seq.*, the Canadian Competition Act, Part III, R.S., 1985, c. C-34, s. 30, and traditional letters rogatory are beyond the scope of this comment.

and Canada are parties to a cooperation agreement covering competition and deceptive marketing practices.<sup>3</sup> Building upon the foundation of that agreement, our enforcement agencies have developed effective formal and informal cooperative relationships.

The approach described to communicating information with foreign competition agencies in Section 4.2 of the Information Bulletin has enabled the FTC and the Antitrust Division to develop an effective and cooperative working relationship with the Competition Bureau that protects the citizens of both countries, protects confidential information on both sides of the border, and has prevented inconsistent results that would burden both businesses and consumers who take advantage of our open markets to conduct business on both sides of our shared border.

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<sup>3</sup> Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (1995), [http://www.ftc.gov/bc/international/docs/agree\\_canada.pdf](http://www.ftc.gov/bc/international/docs/agree_canada.pdf). *See also* the Agreement Between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of Their Competition Laws (2004), <http://www.ftc.gov/os/2004/10/0410comityagreenglish.pdf>. The two nations are also adherents to the OECD Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade (1995), <http://www.oecd.org/dataoecd/60/42/21570317.pdf>, and the OECD Guidelines on Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders (2003), <http://www.oecd.org/dataoecd/24/33/2956464.pdf>.