

Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws

The Government of Canada and the Government of the United States of America (hereinafter referred to as "Parties");

Having regard to their close economic relations and cooperation within the framework of the North American Free Trade Agreement ("NAFTA");

Noting that the sound and effective enforcement of their competition laws is a matter of importance to the efficient operation of markets within the free trade area and to the economic welfare of the Parties' citizens;

Having regard to their commitment in Chapter 15 of NAFTA to the importance of cooperation and coordination among their competition authorities to further effective competition law enforcement in the free trade area;

Recognizing that coordination of enforcement activities may, in appropriate cases, result in a more effective resolution of the Parties' respective concerns than would be attained through independent action;

Having regard to the fact that the effective enforcement of their laws relating to deceptive marketing practices is also a matter of importance to the efficient operation of markets within the free trade area, and having regard to the potential benefits of increased cooperation between the Parties in the enforcement of those laws;

Noting that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate the important interests of both Parties;

Noting further their commitment to give careful consideration to each other's important interests in the application of their competition laws; and

Having regard to the long history of cooperation between the Parties in matters relating to competition law, including the bilateral Understandings of 1959, 1969 and 1984, as well as the 1986 Recommendation of the Council of the OECD Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade;

Have agreed as follows:

Article I

Purpose and definitions

1. The purpose of this Agreement is to promote cooperation and coordination between the competition authorities of the Parties, to avoid conflicts arising from the application of the Parties' competition laws and to minimize the impact of differences on their respective important interests, and, in addition, to establish a framework for cooperation and coordination with respect to enforcement of deceptive marketing practices laws.

2. For the purposes of this Agreement, the following terms shall have the following definitions:

(a) "Anticompetitive activity(ies)" means any conduct or transaction that may be subject to penalties or other relief under the competition laws of a Party;

(b) "Competition authority(ies)" means

(i) for Canada, the Director of Investigation and Research;

(ii) for the United States of America, the United States Department of Justice and the Federal Trade Commission;

(c) "Competition law(s)" means

(i) for Canada, the Competition Act, R.S.C. 1985, c. C-34, except sections 52 through 60 of that Act;

(ii) for the United States of America, the Sherman Act (15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C. §§ 12-27), the Wilson Tariff Act (15 U.S.C. §§ 8-11) and the Federal Trade Commission Act (15 U.S.C. §§ 41-58), to the extent that it applies to unfair methods of competition,

as well as any amendments thereto, and such other laws or regulations as the Parties may from time to time agree in writing to be a "competition law" for the purposes of this Agreement; and

(d) "Enforcement activity(ies)" means any investigation or proceeding conducted by a Party in relation to its competition laws.

3. Any reference in this Agreement to a specific provision in either Party's competition law shall be interpreted as referring to that provision as amended from time to time and to any successor provision thereof. Each Party shall promptly notify the other of any amendments to its competition laws.

Article II

Notification

1. Each Party shall, subject to Article X(1), notify the other Party in the manner provided by this Article and Article XII with respect to its enforcement activities that may affect important interests of the other Party.

2. Enforcement activities that may affect the important interests of the other Party and therefore ordinarily require notification include those that:

(a) are relevant to enforcement activities of the other Party;

(b) involve anticompetitive activities, other than mergers or acquisitions, carried out in whole or in part in the territory of the other Party, except where the activities occurring in the territory of the other Party are insubstantial;

(c) involve mergers or acquisitions in which

- ▶ one or more of the parties to the transaction, or
- ▶ a company controlling one or more of the parties to the transaction,

is a company incorporated or organized under the laws of the other Party or of one of its provinces or states;

(d) involve conduct believed to have been required, encouraged or approved by the other Party;

(e) involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in the territory of the other Party; or

(f) involve the seeking of information located in the territory of the other Party, whether by personal visit by officials of a Party to the territory of the other Party or otherwise.

3. Notification pursuant to this Article shall ordinarily be given as soon as a Party's competition authorities become aware that notifiable circumstances are present, and in any event in accordance with paragraphs 4 through 7 of this Article.

4. Where notifiable circumstances are present with respect to mergers or acquisitions, notification shall be given not later than

(a) in the case of the United States of America, the time its competition authorities seek information or documentary material concerning the proposed transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18a(e)), the Federal Trade Commission Act (15 U.S.C. 49, 57b-1) or the Antitrust Civil Process Act (15 U.S.C. 1312); and

(b) in the case of Canada, the time its competition authorities issue a written request for information under oath or affirmation, or obtain an order under section 11 of the Competition Act, with respect to the transaction.

5. When the competition authorities of a Party request that a person provide information, documents or other records located in the territory of the other Party, or request oral testimony in a proceeding or participation in a personal interview by a person located in the territory of the other Party, notification shall be given:

(a) if compliance with a request for written information, documents or other records is voluntary, at or before the time that the request is made;

(b) if compliance with a request for written information, documents or other records is compulsory, at least seven (7) days prior to the request, (or, when seven (7) days' notice cannot be given, as promptly as circumstances permit); and

(c) in the case of oral testimony or personal interviews, at or before the time arrangements for the interview or testimony are made.

Notification is not required with respect to telephone contacts with a person in the territory of the other Party where (i) that person is not the subject of an investigation, (ii) the contact seeks only an oral response on a voluntary basis (although the availability and possible voluntary provision of documents may be discussed) and (iii) the other Party's important interests do not appear to be otherwise implicated, unless the other Party requests otherwise in relation to a particular matter.

Notification is not required for each subsequent request for information in relation to the same matter unless the Party seeking information becomes aware of new issues bearing on the important interests of the other Party, or the other Party requests otherwise in relation to a particular matter.

6. The Parties acknowledge that officials of either Party may visit the territory of the other Party in the course of conducting investigations pursuant to their respective competition laws. Such visits shall be subject to notification pursuant to this Article and the consent of the notified Party.

7. Notification shall also be given at least seven (7) days in advance of each of the following where notifiable circumstances are present:

- (a)
- (i) in the case of the United States of America, the issuance of a complaint, the filing of a civil action seeking a temporary restraining order or preliminary injunction or the initiation of criminal proceedings;
 - (ii) in the case of Canada, the filing of an application with the Competition Tribunal, an application under Part IV of the Competition Act or the initiation of criminal proceedings;
- (b) the settlement of a matter by way of an undertaking, an application for a consent order or the filing or issuance of a proposed consent order or decree; and
- (c) the issuance of a business review or advisory opinion that will ultimately be made public by the competition authorities.

When seven (7) days' notice cannot be given, notice shall be given as promptly as circumstances permit.

8. Each Party shall also notify the other whenever its competition authorities intervene or otherwise publicly participate in a regulatory or judicial proceeding that is not initiated by the competition authorities if the issue addressed in the intervention or participation may affect the other Party's important interests. Such notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

9. Notifications shall be sufficiently detailed to enable the notified Party to make an initial evaluation of the effect of the enforcement activity on its own important interests, and shall include the nature of the activities under investigation and the legal provisions concerned. Where possible, notifications shall include the names and locations of the persons involved.

Notifications concerning a proposed undertaking, consent order or decree shall either include or, as soon as practicable be followed by, copies of the proposed undertaking, order or decree and any competitive impact statement or agreed statement of facts relating to the matter.

Article III

Enforcement cooperation

1. (a) The Parties acknowledge that it is in their common interest to cooperate in the detection of anticompetitive activities and the enforcement of their competition laws to the extent compatible with their respective laws and important interests, and within their reasonably available resources.

- (b) The Parties further acknowledge that it is in their common interest to share information which will facilitate the effective application of their competition laws and promote better understanding of each other's enforcement policies and activities.
2. The Parties will consider adopting such further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of their competition laws.
3. Each Party's competition authorities will, to the extent compatible with that Party's laws, enforcement policies and other important interests,
- (a) assist the other Party's competition authorities, upon request, in locating and securing evidence and witnesses, and in securing voluntary compliance with requests for information, in the requested Party's territory;
 - (b) inform the other Party's competition authorities with respect to enforcement activities involving conduct that may also have an adverse effect on competition within the territory of the other Party;
 - (c) provide to the other Party's competition authorities, upon request, such information within its possession as the requesting Party's competition authorities may specify that is relevant to the requesting Party's enforcement activities; and
 - (d) provide the other Party's competition authorities with any significant information that comes to their attention about anticompetitive activities that may be relevant to, or may warrant, enforcement activity by the other Party's competition authorities.
4. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements or practices between them.

Article IV

Coordination with regard to related matters

1. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities. In such matters, the Parties may invoke such mutual assistance arrangements as may be in force from time to time.

2. In considering whether particular enforcement activities should be coordinated, either in whole or in part, the Parties' competition authorities shall take into account the following factors, among others:

(a) the effect of such coordination on the ability of both Parties to achieve their respective enforcement objectives;

(b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;

(c) the extent to which either Party's competition authorities can secure effective relief against the anticompetitive activities involved;

(d) the possible reduction of cost to the Parties and to the persons subject to enforcement activities; and

(e) the potential advantages of coordinated remedies to the Parties and to the persons subject to the enforcement activities.

3. In any coordination arrangement, each Party's competition authorities shall seek to conduct their enforcement activities consistently with the enforcement objectives of the other Party's competition authorities.

4. In the case of concurrent or coordinated enforcement activities, the competition authorities of each Party shall consider, upon request by the competition authorities of the other Party and where consistent with the requested Party's enforcement interests, ascertaining whether persons that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Parties' competition authorities.

5. Either Party's competition authorities may at any time notify the other Party's competition authorities that they intend to limit or terminate coordinated enforcement and pursue their enforcement activities independently and subject to the other provisions of this Agreement.

Article V

Cooperation regarding anticompetitive activities in the territory of one party that adversely affect the interests of the other party

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect [Page 16] important interests of the other Party. The Parties agree that it is in their common interest to seek relief against anticompetitive activities of this nature.

2. If a Party believes that anticompetitive activities carried out in the territory of the other Party adversely affect its important interests, the first Party may request that the other Party's competition authorities initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the Party, and shall include an offer of such further information and other cooperation as the requesting Party's competition authorities are able to provide.

3. The requested Party's competition authorities shall carefully consider whether to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the request. The requested Party's competition authorities shall promptly inform the requesting Party of its decision. If enforcement activities are initiated, the requested Party's competition authorities shall advise the requesting Party of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the requested Party's competition authorities under its competition laws and enforcement policies as to whether to undertake enforcement activities with respect to the anticompetitive activities identified in a request, or precludes the requesting Party's competition authorities from undertaking enforcement activities with respect to such anticompetitive activities.

Article VI

Avoidance of conflicts

1. Within the framework of its own laws and to the extent compatible with its important interests, each Party shall, having regard to the purpose of this Agreement as set out in Article I, give careful consideration to the other Party's important interests throughout all phases of its enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding and the nature of the remedies or penalties sought in each case.

2. When a Party informs the other that a specific enforcement activity may affect the first Party's important interests, the second Party shall provide timely notice of developments of significance to those interests.

3. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interest would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.

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4. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize the desirability of minimizing any adverse effects of their enforcement activities on each other's important interests, particularly in the choice of remedies. Typically, the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.

5. Where it appears that one Party's enforcement activities may adversely affect the important interests of the other Party, each Party shall, in assessing what measures it will take, consider all appropriate factors, which may include but are not limited to:

(i) the relative significance to the anticompetitive activities involved of conduct occurring within one Party's territory as compared to conduct occurring within that of the other;

(ii) the relative significance and foreseeability of the effects of the anticompetitive activities on one Party's important interests as compared to the effects on the other Party's important interests;

(iii) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing Party's territory;

(iv) the degree of conflict or consistency between the first Party's enforcement activities (including remedies) and the other Party's laws or other important interests;

(v) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;

(vi) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

(vii) the location of relevant assets;

(viii) the degree to which a remedy, in order to be effective, must be carried out within the other Party's territory; and

(ix) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, would be affected.

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Article VII

Cooperation and coordination with respect to enforcement of deceptive marketing practices laws

1. For the purposes of this Agreement, "deceptive marketing practices law(s)" means:

(a) for Canada, sections 52 through 60 of the Competition Act,

(b) for the United States of America, the Federal Trade Commission Act (15 U.S.C. §§ 41-58), to the extent that it applies to unfair or deceptive acts or practices;

as well as any amendments thereto, and such other laws or regulations as the Parties may from time to time agree in writing to be a "deceptive marketing practices law" for purposes of this Agreement. Each Party shall promptly notify the other of any amendments to its deceptive marketing practices laws.

2. The Parties note that conduct occurring in the territory of one Party may contribute to violations of the deceptive marketing practices laws of the other Party and that it is in their common interest for the Director of Investigation and Research and the Federal Trade Commission to cooperate in the enforcement of those laws. The Parties further note that the Director of Investigation and Research and the Federal Trade Commission have in the past cooperated with each other and coordinated their activities with respect to deceptive marketing practices matters on an informal basis. The Parties wish to establish a more formal framework for continuing and broadening such cooperation and coordination.

3. The Director of Investigation and Research and the Federal Trade Commission shall, to the extent compatible with their laws, enforcement policies and other important interests:

- (a) use their best efforts to cooperate in the detection of deceptive marketing practices;
- (b) inform each other as soon as practicable of investigations and proceedings involving deceptive marketing practices occurring or originating in the territory of the other Party, or that affect consumers or markets in the territory of the other Party;
- (c) share information relating to the enforcement of their deceptive marketing practices laws; and
- (d) in appropriate cases, coordinate their enforcement against deceptive marketing practices with a transborder dimension.

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4. In furtherance of these objectives, the Director of Investigation and Research and the Federal Trade Commission shall jointly study further measures to enhance the scope and effectiveness of information sharing, cooperation and coordination in the enforcement of deceptive marketing practices laws.

5. Nothing in this Article shall prevent the Parties from seeking or providing assistance to one another with respect to the enforcement of their deceptive marketing practices laws pursuant to other agreements, treaties, arrangements or practices between them.

6. Articles II, III, IV, V and VI shall not apply to deceptive marketing practices.

Article VIII

Consultations

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.
2. Consultations under this Article shall take place at the appropriate level as determined by each Party.
3. During consultations under this Article, each Party shall provide to the other as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of the matter that is the subject of consultations. Each Party shall , carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain the specific results of its application of those principles to the matter that is the subject of consultations.

Article IX

Semi-annual meetings

Officials of the Parties' competition authorities shall meet at least twice a year to:

- (a) exchange information on their current enforcement efforts and priorities in relation to their competition and deceptive marketing practices laws;
- (b) exchange information on economic sectors of common interest;

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- (c) discuss policy changes that they are considering; and
- (d) discuss other matters of mutual interest relating to the application of their competition and deceptive marketing practices laws and the operation of this Agreement.

Article X

Confidentiality of information

1. Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws of the Party possessing the information or would be incompatible with that Party's important interests.

2. Unless otherwise agreed by the Parties, each Party shall, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other Party under this Agreement. Each Party shall oppose, to the fullest extent possible consistent with that Party's laws, any application by a third party for disclosure of such confidential information.

3. The degree to which either Party communicates information to the other pursuant to this Agreement may be subject to and dependent upon the acceptability of the assurances given by the other Party with respect to confidentiality and with respect to the purposes for which the information will be used.

4.

(a) Notifications and consultations pursuant to Articles 11 and VIII of this Agreement and other communications between the Parties in relation thereto shall be deemed to be confidential.

(b) Party may not, without the consent of the other Party, communicate to its state or provincial authorities information received from the other Party pursuant to notifications or consultations under this Agreement. The Party providing the information shall consider requests for consent sympathetically, taking into account the other Party's reasons for seeking disclosure, the risk, if any, that disclosure would pose for its enforcement activities, and any other relevant considerations.

(c) The notified Party may, after the notifying Party's competition authorities have advised a person who is the subject of a notification of the enforcement activities referred to in the notification, communicate the fact of the notification to, and consult with that person concerning the subject of the notification. The notifying Party shall, upon request,

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promptly inform the notified Party of the time at which the person has, or will be, advised of the enforcement activities in question.

5. Subject to paragraph 2, information communicated in confidence by a Party's competition authorities to the competition authorities of the other Party in the context of enforcement cooperation or coordination pursuant to Articles III, IV or V of this Agreement shall not be communicated to third parties or to other agencies of the receiving competition authorities' government, without the consent of the competition authorities that provided the information. A Party's competition authorities may, however, communicate such information to the Party's law enforcement officials for the purpose of competition law enforcement

6. Information communicated in confidence by a Party's competition authorities to the competition authorities of the other Party in the context of enforcement cooperation or coordination pursuant to Articles III, IV or V of this Agreement shall not be used for purposes

other than competition law enforcement, without the consent of the competition authorities that provided the information.

7. Subject to paragraph 2, information communicated in confidence between the Director of Investigation and Research and the Federal Trade Commission in the context of enforcement cooperation or coordination pursuant to Article VII of this Agreement shall not be communicated to third parties or to other agencies of the receiving agency's government, without the consent of the agency that provided the information. The receiving agency of a Party may, however, communicate such information to the Party's law enforcement officials for the purpose of enforcement of deceptive marketing practices laws.

8. Information communicated in confidence between the Director of Investigation and Research and the Federal Trade Commission in the context of enforcement cooperation or coordination pursuant to Article VII of this Agreement shall not be used for purposes other than enforcement of deceptive marketing practices laws, without the consent of the agency that provided the information.

Article XI

Existing laws

Nothing in this Agreement shall require a Party to take any action, or to refrain from acting, in a manner that is inconsistent with its existing laws, or require any change in the laws of the Parties or of their respective provinces or states.

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Article XII

Communications under this agreement

Communications under this Agreement may be carried out by direct communication between the competition authorities of the Parties. Notifications under Article II and requests under Articles V(2) and VIII(1) shall, however, be confirmed promptly in writing through customary diplomatic channels and shall refer to the initial communication between the competition authorities and repeat the information supplied therein.

Article XIII

Entry into force and termination

1. This Agreement shall enter into force upon signature.
2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

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IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at Washington, in duplicate, this 1st day of August, 1995, and at Ottawa, this 3rd day of August, 1995, in the English and French languages, each text being equally authentic.

FOR THE GOVERNMENT OF CANADA:

John Manley

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

Janet Reno

Robert Pitofsky