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Submission on The Future of Competition Policy Consultation

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Introduction and context

The Canadian Marketing Association (CMA) is the voice of the marketing profession. Our corporate, not-for-profit, public, and post-secondary members represent virtually all of Canada's major business sectors, and all marketing disciplines, channels and technologies. We help our members maintain high standards of professional conduct through our [Canadian Marketing Code of Ethics & Standards](#), our series of [compliance and best practices guides](#), and [training and professional development offerings](#). In addition, we provide [resources to educate consumers](#) about their rights and obligations, and we respond to inquiries, and work to resolve complaints from consumers.

We are pleased to respond to the federal government's consultation paper: *The Future of Competition Policy in Canada*. Consistent with our role to facilitate the highest standards of honesty, transparency, truth, accuracy, fairness and professionalism among our members, our comments are focused on the implications of new technology and business practices for the deceptive marketing provisions in the Competition Act, as presented in the consultation paper.

Deceptive marketing practices

The CMA believes that the Act's deceptive marketing prohibitions – both the general prohibition and the specific prohibited practices – have generally worked well in addressing current and evolving misleading or fraudulent marketing practices.

The enactment of specific practices and refinement of the prohibitions where needed for clarity as well as enforceability (e.g., ordinary price claims) when such practices were recognized as requiring focussed response, has been appropriate and largely successful. The recent amendment addressing drip pricing is a further example. Clarification of the provision's applicability to drip pricing as recommended by the Bureau in its submission makes sense to address an identified area of concern.

Appropriate consumer standard

In the spirit of consumer protection and alignment with the principles in our Code, the CMA supports the Bureau's recommendation that the appropriate consumer standard be amended to the "credulous and inexperienced consumer", to ensure that representations are not false or misleading.

Building and maintaining strong relationships with consumers is key to business success, and one important way to achieve this is through clear, transparent communications. The [CMA Guide on Transparency for Consumers](#) provides a framework to help organizations provide clear, user-friendly information about how their personal information is collected, used and shared. The principles in this guide could be applied to other types of information that is sent to consumers.

Build out the Bureau's guidance program

The Bureau has established an excellent track record of addressing evolving practices and providing compliance guidance through its Deceptive Marketing Practices Digest and online. To support enhanced compliance and responding to new and evolving marketing practices, the CMA recommends that additional focus and resources should be oriented to building out the Bureau's guidance and compliance program for marketing practices. Ways to implement this could be gleaned from the Federal Trade Commission's robust guidance library that is regularly updated to support compliance with the law and provides further clarity and guidance for any specialized products or services where additional rules may apply.

Additional benefits of building out a more developed guidance/compliance program is that it can make clear the intention of the Bureau to pursue remedies for specific practices under one or more of the Act's existing prohibitions. This allows the Bureau to meet compliance goals in a more focused manner and to be more agile in responding to marketplace activities than through statutory amendments.

As the Competition Bureau knows, the CMA has extensive experience in providing training on marketing rules, and developing user-friendly guides with real-world examples of existing and evolving practices to help marketers, and those in their ecosystem, better understand and comply with laws and best practices. Our extensive series of guides cover topics such as promotional contests and performance claims, and complement the Canadian Marketing Code of Ethics and Standards, which is the foundation of the marketing community's self-regulation and commitment to maintain the highest standards of honesty, truth, accuracy, fairness and professionalism.

The CMA appreciates the Competition Bureau's feedback on many of these materials, and we look forward to continuing to collaborate in providing information to members and the wider marketing community to support compliance on current and emerging areas.

Criteria for adopting new specific prohibitions

Adding new categories of deceptive marketing into the Act is not generally required. As noted above, the Act's general prohibitions are broad and flexible enough to address current and evolving practices that might potentially be misleading or fraudulent.

At the same time, we recognize that there may be very limited instances where it may be reasonable to consider adopting additional specific prohibitions. In doing so, criteria should be identified, with consultation from stakeholders, to determine when it is appropriate to adopt new specific prohibitions. Such criteria could include, for example:

- The current and anticipated circumstances of a particular practice including the incidence and harms;
- Whether or not the practice can be successfully addressed under the general prohibition, including with appropriate guidance/enforcement directions by the Bureau;
- The potential and value of added deterrent effect of enacting a specific prohibition;
- Whether or not enacting a specific prohibition materially enhances enforcement; and
- Whether the practice in question lends to being defined sufficiently to enable enforcement.

In identifying criteria, consideration also should be given to whether any additional prohibited practices should be added as stand-alone prohibitions as under s. 74.01(1) /s. 52 (1), or by way of stipulating "for greater clarity" to constitute false or misleading representation (as was done with respect to drip pricing under s. 74(1.1)).

Demonstrating that discounts are genuine

We support the Competition Bureau's recommendation that advertisers be required to demonstrate that their statements about discounts are genuine and accurate.

Remedies to address deceptive conduct

In cases where an organization engages in systemic deceptive or misleading conduct, we support in principle the Bureau's desire to have a wider range of remedies.

Deceptive design patterns

An area that should be considered for specific prohibitions is deceptive design patterns, which are primarily used by offshore websites and apps who are interested in one-off transactions and not in building long-term relationships with customers. Deceptive design patterns (meaning misleading interface techniques) may include marketing representations that may not be understood to fall within the general prohibition or may not clearly fall within it. Consequently, there may be scope for adopting specific prohibition to address these practices.

Recent actions taken by the Federal Trade Commission to address this type of activity as well as the European Data Protection Board's deceptive design patterns in social media interfaces guidelines can help inform guidance in this area.

Transitional provision for major changes/amendments

Should new prohibitions be introduced, transitional periods may be required. Determination of whether a transition period is required, or if required for what length of period, should be based on relevant considerations including the degree of urgency and whether the practices intended to be addressed, as currently evident, are clearly unacceptable from an ethical perspective either under an existing prohibition or under principles in the evolving marketplace.

In closing

The general prohibitions of the Competition Act have stood the test of time and have been exercised effectively against deceptive marketing practices in the marketplace. To support adherence with the law, resources should be focused on building up compliance guidance and enforcement of the Act. These efforts will yield the most positive outcomes.

To support compliance goals, the CMA is interested in ongoing collaboration with the Bureau to assist with, and provide input into, the development of a guidance program as recommended in this submission.

For questions or to discuss our submission, contact:

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About the CMA

The CMA's purpose is to embolden Canadian marketers to make a powerful impact on business in Canada. We provide opportunities for our members from coast to coast to develop professionally, to contribute to marketing thought leadership, to build strong networks, and to strengthen the regulatory climate for business success. Our Chartered Marketer (CM) designation signifies that recipients are highly qualified and up to date with best practices, as reflected in the Canadian Marketing Code of Ethics and Standards. We represent virtually all of Canada's major business sectors, and all marketing disciplines, channels and technologies. Our Consumer Centre helps Canadians better understand their rights and obligations. For more information, visit thecma.ca.