

PRIVILEGED & CONFIDENTIAL

Toronto Memorandum

To: Canadian Association of Financial Institutions in Insurance
From: Michael Kilby / (416) 869-5282
Victoria Hale / (416) 869-5553
Re: CAFII Competition Policies
Date: May 29, 2019

We have carried out a review of CAFII's policies and practices in relation to competition law matters, most notably its Competition Law Policy (the "**Policy**"), its by-laws, and sample meeting agendas and minutes.

By way of background, the Competition Act contains important prohibitions which prevent competitors from agreeing to fix prices, control output, or allocate markets. The Competition Bureau has published *Competitor Collaboration Guidelines* setting out its approach to enforcing these aspects of the Competition Act. Additionally, while the Competition Bureau has not published a formal and final policy for trade associations, in 2008 it published a draft bulletin and in 2015 a list of do's and don'ts, which represent its most up-to-date public statements on best practices for trade associations. The Competition Bureau's basic position is that while trade associations are not inherently problematic under competition law, meetings that facilitate relationships between competitors create the forum, opportunity and temptation to engage in anti-competitive behaviour, and therefore it is appropriate for a trade association to put in place policies and practices to ensure this does not occur.

In short, our view is that CAFII's policies and practices are consistent in all material respects with the Competition Act and with applicable Competition Bureau guidance for trade associations.

With this said, we do note the following the recommendations/suggestions which are intended to further confirm and strengthen CAFII's compliance with the Competition Bureau's guidance for trade associations. These are based also on our experience working with trade associations across various industries. We acknowledge that many of these policies are already practised by CAFII, but we recommend that CAFII consider formally codifying them in the Policy:

- Agendas – An agenda for all meetings among CAFII members (including committee meetings) must be circulated in advance of the meeting, and members must be given an opportunity to defer or "protest" any agenda items that they believe may give rise to competition law concerns. Meetings must be conducted in a manner consistent with the agenda.
- Meeting minutes – Reasonably detailed meeting minutes, including a note of all participants, arrivals and departures, shall be kept at all meetings among CAFII members. Meeting attendees will be given an opportunity to correct meeting minutes once they are prepared.
- Competition guidance – If a CAFII member expresses concern about an agenda item from a competition law perspective, that member is entitled to seek guidance from its own counsel before the discussion proceeds and members may raise any such concerns with CAFII's competition counsel.

- Collection of information – All information collected to facilitate research conducted by CAFII must be collected on a voluntary basis and no unreasonable disciplinary measures may be used to coerce members to exchange information. If the information required for research is at all competitively sensitive, it should be collected by a third party and should only be shared with CAFII members in an aggregated form, or otherwise be appropriately redacted or anonymized, with input from legal counsel.
- Misleading statements – CAFII, and members on behalf of CAFII, must avoid making misleading statements to the public, as the Competition Act also contains provisions relating to such matters. If research results or policy positions are communicated to the public, they must be communicated in a fair and balanced way.
- Membership and meetings – CAFII membership shall not be unreasonably withheld, and eligibility for membership is based on clear criteria that are aligned with the legitimate objectives of CAFII. No member shall be unreasonably excluded from a CAFII meeting.
- Prioritization of members – None of CAFII’s activities will be used to advantage the competitive position of certain members, classes of members, or potential market entrants. All CAFII members, regardless of membership class, will have the same access to all outputs of all CAFII projects (including research, papers, etc.), unless the member was given the opportunity to participate in the project and opted out.
- Discipline of members – No CAFII member shall have their membership terminated for anti-competitive reasons (e.g. for competing vigorously on price or coming up with a product that is disruptive to traditional markets). We note that this provision may be better suited for inclusion in the by-laws.
- Section 2 of the Policy related to permissible activities should be revised. This section is based upon a section of the *Competition Act* which was amended several years ago, and the language should be updated to reflect the current s.45 of the *Competition Act*.

In addition to the procedures suggested above, we also recommend including CAFII’s statement of objectives (a summary of Schedule A to the Certificate of Continuance would suffice) and the location of dispute resolution mechanisms in the preamble to the Policy.