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**REPORT ON THE ACTIVITIES OF
THE ADVISORY COMMITTEE ON
FAIR COMPETITION WITH PRIVATE ENTERPRISE**

JANUARY 15, 2014

Prepared for: Paul R. LePage, Governor
Joint Standing Committee on State and Local Government

Prepared by: Advisory Committee on Fair Competition with Private Enterprise

<http://www.maine.gov/dafs/advcom>

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The forms in the appendices can be found online at www.maine.gov/dafs/advcom.

COMMITTEE MEMBERS

Mr. Jim Smith, Chair	Department of Administrative and Financial Services
Mr. Donald McIntire, Vice-Chair	Representing Private Enterprise
Mr. Doug Ray	Department of Economic and Community Development
Mr. Dirk Dehann	Maine Community College System
Mr. Tim Poulin	Representing State Employees
Ms. Jane Bickford	Representing Private Enterprise
Mr. Derek Volk	Representing Private Enterprise
Mr. Joseph Pietroski, Jr.	Representing the Public
Mr. Neil Martin	Representing the Public

The Committee is staffed by David Heidrich, Jr., assistant director of communications for the Department of Administrative and Financial Services.

Report of the Advisory Committee on Fair Competition with Private Enterprise

Government entities provide a wide variety of goods and services to their constituencies. From time to time, some of those functions may adversely affect private enterprise. In 2000, the Maine Legislature created the Advisory Committee on Fair Competition with Private Enterprise to review complaints where competition with private enterprise is potentially unfair.

The Advisory Committee consists of members appointed by the governor and consists of individuals representing government agencies, a state employee and private sector representatives. These individuals meet as needed, but no less than once a year, to review complaints on government competition with private enterprise.

The Committee began its work shortly after appointment in the fall of 2000. It took several steps to organize a thoughtful process for interaction with persons or businesses who perceive unfair competition by government agencies. The Advisory Committee's responsibilities were expanded during the first regular session of the 121st Maine Legislature to approve the provision of services and goods by state agencies that are not otherwise allowed by law and may compete with private enterprise.

Since its inception, The Committee has reviewed a number of complaints of unfair competition by government with private enterprise in a variety of areas including water testing, printing, and child development services.

After meeting five times in 2012, the Advisory Committee had far less activity during calendar year 2013. The Committee received no formal complaints of unfair competition or requests from state agencies to approve the provision of goods or services. This may be attributed, in part, to the increased scrutiny that the Committee has brought to the issue of public and private competition over the years.

At its October 2013 meeting, the Advisory Committee had a lengthy discussion on ways to increase awareness of the Committee's functions. Outreach to both the legislative and executive branches was discussed, and it is generally agreed that efforts should be made to better publicize the work of the Committee. In addition to increased government outreach, it is the intention of the Committee to provide information on the function and purpose of the Advisory Committee on Fair Competition with Private Enterprise to business groups, trade associations and media outlets.

Complaint Process

5 M.R.S. § 55

The committee has developed a process to allow sharing of information between the complainant, the government agency and the Committee when a complaint of unfair competition is alleged. To avoid unspecific or frivolous complaints, the Committee requires a written complaint procedure.

A complainant must complete a form disclosing information about itself, the government agency (to the extent that information is known), the type and duration of the impact caused by the potentially unfair competition and a requested resolution. Additional documentation may be submitted, as appropriate (**Appendix A**).

Upon receipt of a complaint, the complaint information is forwarded to the affected government agency for written response. A form must be completed that requests (in addition to detailed agency information) a reason for the activity or business, the impact if the activity is altered or curtailed, and any statutory authorization for the practice (**Appendix B**).

The Committee believes strongly that each complainant have an opportunity to state its case to the decision makers. Therefore, all parties are invited to a Committee meeting where each party is given up to fifteen minutes to present evidence and information related to the complaint, after which the Committee may ask questions without time limit.

The Committee has established five basic criteria to evaluate the information obtained regarding each complaint:

- Is there competition?
- Why is the Government Agency engaged in this activity?
- Are there prohibitions to this activity?
- Is there a valid reason for the competition?
- Recommendations and Report to Governor/Legislature

This orderly decision process (**Appendix C**) allows for careful consideration of a number of factors in determining if competition exists, why it exists and the threshold question: is it unfair? The Committee analyzes the information presented by the parties in making its determinations.

Agency Request for Approval of Services and Goods **5 M.R.S. § 55-A**

In reviewing requests for the sale of services/goods from departments, the Advisory Committee has established a number of criteria to assist in its evaluation and analysis. These criteria begin with an examination of whether the activity is allowed by statute and if the services or goods are to be offered for sale to the public. These requirements are specifically outlined in Section 55-A.

If this initial inquiry finds that there is no statutory authority and the services or goods will be sold to the public, then the Advisory Committee will determine if this activity will result in unfair competition. An Agency seeking to sell a service or good is provided with a form that requests information about the services or goods to assist the Committee in evaluating the request (**Appendix D**). It also may request information from other sources, as applicable.

The Advisory Committee has also established criteria for this review process (**Appendix E**). These criteria weigh the agency's request for the sale of services/goods against the potential impact on private enterprise.

A review and decision by the Advisory Committee under 5 M.R.S. § 55-A does not preclude a complaint from being filed by an affected business under 5 M.R.S. § 55. Any request under Section 55 by a business claiming unfair competition would warrant further review by the Committee using the criteria outlined for an unfair competition complaint.

**ADVISORY COMMITTEE ON FAIR COMPETITION WITH
PRIVATE ENTERPRISE**

**Complaint Form Under Title 5, Section 55
Required Information**

- **Contact person for Private Enterprise**

Name: _____

Address: _____

Telephone: _____ **e-mail** _____

- **Private Enterprise(s) impacted (one entity, group, statewide impact)**

Business/Group Name _____

Address: _____

Telephone: _____

- **Government Agency causing impact**

Agency Name: _____

Address (if known): _____

Location of activity (if different): _____

Contact Person (if known): _____

- **Type of Impact (loss of work, market fluctuation, etc.)**

- **Duration of impact (start date if known, end date if known)**

▪ **Support – facts/proof**

Requested resolution

**ADVISORY COMMITTEE ON FAIR COMPETITION WITH
PRIVATE ENTERPRISE**

**Government Agency Information
Upon Receipt Title 5, Section 55 Complaint**

- **Contact person for Government Agency**

Name: _____

Address: _____

Telephone: _____ **E-mail** _____

- **Location(s)**

- **Type of government activity**

- **Duration (start date, end date if known)**

- **Reason for activity/business**

- **Impact if activity altered or curtailed**

- **Identify all Applicable Statutes/Regulatory/Policies that Authorize the Activity**

- **Pending Rulemaking – (if any)**

- **Suggested Resolutions**

**ADVISORY COMMITTEE ON FAIR COMPETITION WITH
PRIVATE ENTERPRISE**

Criteria for Evaluation of Title 5, Section 55 Complaint

- Step 1. Is there competition?
- A. What is the direct competing function?
 - B. What is the impact on private enterprise?
- Step 2. Why is the Government Agency engaged in this activity?
- A. Statutory/Regulatory
 - B. Health and Safety
 - C. Educational Value (Students)
 - D. Staff Development
 - E. Cost Effectiveness
 - F. Duration
- Step 3. Are there prohibitions to this activity?
- A. Statutory
 - B. Regulatory
 - C. Other
- Step 4. Is there a valid reason for the competition?
- Fair market price?
- Is it subsidized?
- Are taxes/benefits/overhead paid?
- Step 5. Recommendations and Report to General/Legislature

**ADVISORY COMMITTEE ON FAIR COMPETITION WITH
PRIVATE ENTERPRISE**

Agency Request Form for Approval of Services/Goods
(Pursuant to 5 M.R.S. § 55-A)

Contact person for Agency

Name: _____

Address: _____

Telephone: _____ **E-mail** _____

Information about Proposed Services/Goods

1. Describe Services/Goods seeking approval pursuant to MRSA Title 5, Section 55-A

2. Identify any Applicable Statutes/Regulatory/Policies that Authorize the Activity

3. Will the Services/Goods be offered for sale to the Public?

4. Explain reason for offering Services/Goods

5. Explain Services/Goods connection with Agency's governmental purpose

6. Duration for sale of Services/Goods (start and end dates)

7. Locations or market areas where Services/Goods will be offered

8. Identify any potential private business/industry to be impacted by the Services/Goods

9. Anticipated impact of Services/Goods on private enterprise/industry (Please be as specific as possible)

10. Where are these private businesses located?

11. Are the Services/Goods currently offered by any private enterprise located within the State of Maine? Outside of the State of Maine? (Please list any applicable businesses)

12. Could private enterprise offer the Services/Goods in the near future?

13. Describe any similar Services/Goods offered by any private enterprise and explain how it differs from Services/Goods contemplated for sale by Agency.

14. Has Agency approached private enterprise to deliver Services/Goods? What was response?

15. What will be the cost to the Public of the Services/Goods offered? How was this determined?

16. Can the Services/Goods be offered at market value? If not, why not?

17. Is there a public policy purpose in offering the Services/Goods for sale to the Public?

18. Please provide any additional information that would be helpful to the Advisory Committee in evaluating this request.

Criteria for Review of Section 55-A Requests

1. (a) Is the requested activity allowed by statute?
(b) Is there any prohibition to this activity?
2. Will the goods/services be offered for sale to the public?
 - (a) If goods, how will they be distributed?
 - (b) If services, how will they be offered for sale?
3. Why is the agency engaged in this activity?
 - (a) Statutory/Regulatory
 - (b) Health and Safety
 - (c) Educational Value (Students)
 - (d) Staff Development
 - (e) Cost Effectiveness
 - (f) Duration
 - (g) Informational Education (Public)
 - (h) Raise Funds
 - (i) Other
4. (a) Will there be a direct competition with private enterprise?
(b) If yes, with whom? (Identify private enterprise affected)
5. What is impact on private enterprise?
6. Are there economic factors that give the activity an unfair competitive advantage over private enterprise?
 - (a) Is the product sold at fair market price?
 - (b) Is it subsidized?
 - (c) Are taxes/benefits/overhead paid?
 - (d) Does the distribution system of the product/activity pose an imbalance in competition?
 - (e) What is the effect/economic magnitude of the activity on private enterprise?