

2006

# Report on the Activities of the Advisory Committee on Fair Competition with Private Enterprise

Advisory Committee on Fair Competition with Private Enterprise

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**REPORT  
ON THE  
ACTIVITIES OF THE  
ADVISORY COMMITTEE  
ON  
FAIR COMPETITION WITH PRIVATE ENTERPRISE  
JANUARY 15, 2006**

**Prepared for: John Elias Baldacci, Governor  
Joint Standing Committee on State and Local Government**

**Prepared by: Advisory Committee on Competition with Private Enterprise**

**Printed on Recycled Paper**

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## TABLE OF CONTENTS

<b>Report of the Advisory Committee</b>	<b>3</b>
<b>Committee Members</b>	<b>4</b>
<b>Complaint Process (MRSA Title 5, Section 55)</b>	<b>5</b>
<b>Agency Request for Approval of Services/Goods (MRSA Title 5, Section 55-A)</b>	<b>6</b>
<b>Appendix A: Complaint Form for Section 55</b>	<b>7</b>
<b>Appendix B: Government Agency Response Form for Section 55 Complaint</b>	<b>9</b>
<b>Appendix C: Criteria for Evaluation of Title 5, Section 55 Complaint</b>	<b>11</b>
<b>Appendix D: Agency Request Form for Approval of Services/Goods (Section 55-A)</b>	<b>12</b>
<b>Appendix E: Criteria for Review of Section 55-A Request</b>	<b>15</b>

**The forms in the Appendices can be found online at [www.maine.gov/dafs/advcom](http://www.maine.gov/dafs/advcom).**

## **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 from government agencies, a state employee and private sector representatives who meet 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, which perceived unfair competition by government agencies. Since its inception, it has reviewed a number of complaints of unfair competition by government with private enterprise in a variety of areas including, water testing, printing, and textbook sales. During calendar year 2005, the Committee received no formal complaints of unfair competition.

The Advisory Committee's responsibilities were expanded during the first regular session of the 121<sup>st</sup> Maine Legislature with the enactment of Title 5, Section 55-A (Public Law 2003, Chap. 238). The Committee's responsibilities under Section 55-A are to approve the provision of services and goods by state agencies that are not otherwise allowed by law, and may compete with private enterprise. The Committee has developed a process for reviewing these types of requests from agencies. During calendar year 2005, the Committee received no requests from state agencies to approve the provision of goods or services.

Despite the newly added scope for this Advisory Committee, it has had far less activity than in prior years. This may be attributed to the exposure and increased scrutiny that the Advisory Committee has brought to the issue of public and private competition, as well as the initial areas of concern that resulted in the Committee's establishment. The long term impact on the private/public relationship is likely a better measure of the Committee's value than the number of complaints received.

In other activities, the Advisory Committee also discussed ways to increase awareness of the Committee's functions. Legislative outreach was continued and an improved web site and web presence on the State's website was established. More remains to be completed to target information to business groups, trade associations and media outlets.

## COMMITTEE MEMBERS

Domna Giatas	Department of Administrative and Financial Services
Richard Thompson	Representing the Public
Appointment Pending	Representing State Employees
Stephen W. Cole, P.E.	Representing Private Enterprise
Diana George Chapin	Representing Private Enterprise
David McCausland	Representing Private Enterprise
David Wilson	University of Maine System
Brian Dancause	Department of Economic and Community Development
Christine Burke	Representing the Public

The Committee is staffed by Betty Lamoreau, Director, Division of Purchases.

## **COMPLAINT PROCESS**

**(Under MRSA Title 5, Section 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. (See 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. (See 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 asks 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/Goods**  
**(Under MRSA Title 5, Section 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/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/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/good is provided with a form that requests information about the services/goods to assist the Committee in evaluating the request. (See Appendix D) It also may request information from other sources, as applicable. The Advisory Committee has also established criteria for this review process. (See 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 Title 5 MRSA Section 55-A does not preclude a complaint from being filed by an affected business under Title 5 MRSA Section 55 should authorization be granted. 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)**

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- **Support – facts/proof**

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**Requested resolution**

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

**Government Agency Information  
Upon Receipt of 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**

\_\_\_\_\_

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

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- **Pending Rulemaking – (if any)**

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- **Suggested Resolutions**

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**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 directly 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 Governor/Legislature

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

**Agency Request Form for Approval of Services/Goods  
(Pursuant to MRSA Title 5, Section 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/Regulations/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)**

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

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

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

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**10. Where are these private businesses located?**

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**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)**

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

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

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**14. Has Agency approached private enterprise to deliver Service/Goods? Who was approached? What was response?**

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

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

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

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

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**Criteria for Review of Title 5, Section 55-A Request**

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?