

## Competition Bureau Releases Draft Bulletin on Corporate Compliance Programs

April 25, 2008

On April 8, 2008, the Competition Bureau released its Draft Bulletin on Corporate Compliance Programs (available online at: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02618e.html>), updating the Bureau's original Compliance Bulletin, released in 1997. Public comments on the document are being requested through May 26, 2008.

Much of the content of the original policy is found in the revised draft, although there are some new aspects as well. The new bulletin goes into greater detail on the importance and benefits of competition law compliance. The new bulletin also includes user-friendly suggestions throughout for business policies and procedures that meet the Bureau's requirements, and a basic Corporate Compliance Program template. Overall however, **the document represents a refinement, but not a change in Bureau policy.**

Like its predecessor, the Draft Bulletin sets out the Competition Bureau's view as to elements which should be contained in a Corporate Compliance Program, designed to minimize a firm's risk of violations of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act* (the "Acts") and discusses the implications of having or not having such a program.

### Compliance Program Benefits

As the bulletin points out, a Corporate Compliance Program can assist in ensuring that firms comply with competition law and facilitates detection of anti-competitive conduct. It notes that **implementing internal compliance mechanisms allows firms to seek appropriate advice when questions arise, prior to contravention**, thus reducing or avoiding the legal, economic and reputational risks associated with non-compliance.

In a new departure for the 2008 bulletin, it highlights that **trade associations**, specifically, are exposed to greater anticompetitive risks and can thus benefit even more from the implementation of a compliance policy.

The Bureau notes that an effective compliance program will provide a number of benefits including:

- maintaining a **good business reputation**, and attracting customers and suppliers who value ethically-operated companies;
- provision of **early warning** respecting potentially illegal conduct;
- **reduction of the exposure** of the corporation and its officers, directors and employees to **criminal, civil or penal liability**;
- **reduction of the risk of adverse publicity** or fines, and the disruption resulting from investigation, prosecutions and litigation;
- **reduction of uncertainty** about what is or is not legal (so as to permit aggressive, yet lawful, competition) and a reduction in the risk of contravention;
- **increased sensitivity** to potentially anti-competitive conduct by the firm's competitors, suppliers or customers; and
- assisting a business, in certain circumstances, in **obtaining a reduced fine or sentence** should a breach of the Acts occur.

### Elements of a Compliance Program

The Bulletin sets out the five elements which are, according to the Bureau, fundamental to the success

of any Corporate Compliance Program. The five elements are:

1. **Involvement and support of senior management;**
2. **Development of relevant policies and procedures;**
3. **Ongoing training and education of management and employees;**
4. **Monitoring, auditing and reporting mechanisms; and**
5. **Consistent disciplinary procedures.**

## Senior Management Involvement and Support

The Bureau notes that without the visible, clear and unequivocal support of senior management, compliance programs will not succeed. It must be clear that compliance with competition laws is fundamental to a firm's policies in order that such compliance be taken seriously, and in order that there be a climate of compliance established within the firm. **Unless there is true buy-in from senior management, the line business people will not take the policy seriously.** Consequently, in the Bureau's view, senior management must play an active and visible role, both at the time of a compliance program's establishment, and on an ongoing basis.

## Relevant Policies and Procedures

The Bureau notes that to make compliance programs effective they must be developed and **tailored to each firm's particular needs** and operations. The content of a compliance program should be conveyed to employees through an accessible company publication, regularly updated to reflect both changes within the business and in the law.

## Training and Education

The Bureau notes that an effective compliance program will include ongoing training for all personnel who are in a position to engage in or be exposed to anti-competitive conduct. Such training will assist management and staff in understanding sensitive issues in competition law and in identifying the limits of acceptable business conduct.

Training and education is best achieved by demonstrating how compliance policies affect employees' daily activities. A **training manual** should be provided; however, effective training also includes **small group seminars and workshops**, ideally delivered by experts and senior management. There should be opportunity for discussion and questions from employees. To ensure understanding, the Bureau recommends regular evaluations of the training program, such as by testing employees' knowledge of the law and of the compliance program.

## Monitoring, Auditing and Reporting Mechanisms

The Bureau notes that a credible review and assessment component is fundamental to an effective compliance program. This is the **most difficult element** to successfully implement, at least for most companies.

Monitoring and auditing not only helps firms confirm that they are (or are not) in compliance with the Acts, they also provide tangible evidence that competition law compliance is a fundamental corporate policy. The Bureau notes that although no particular auditing or monitoring mechanism is perfect for all companies, such mechanisms should be **designated on a firm-specific basis** so as to prevent anti-competitive conduct or detect and address it if and when it does occur.

Monitoring is preventive in nature, and typically involves ongoing procedures to check against potential Competition Act violations. An effective monitoring program may provide a firm with a due diligence defence to violations.

By contrast, auditing is designed to be a review of a firm's specific activity, to determine whether a Competition Act violation has occurred and, if so, the best way to address the situation. Auditing may be undertaken on a periodic or ad hoc basis, or triggered by particular events; as with monitoring, the

procedure will vary given a firm's specific risks.

Finally, the Bureau notes that firms should have internal reporting procedures in respect of activity which raises concerns under the Act. The procedure should encourage employees to provide timely and reliable information, and encourage external reporting where applicable. The steps to be followed and the information required of employees should be clearly set out, including information about the Bureau's *Immunity Program* and the *Competition Act's* whistle blowing provisions.

## Consistent Disciplinary Procedures

The Bureau notes that a disciplinary code or policy is important, both for its deterrent effect and also as a reflection of the firm's stance with respect to anti-competitive conduct. The policy should clearly state that disciplinary consequences, **such as suspensions, demotions or dismissals**, can and will result from willful breach of the policy and the Acts.

To best implement a compliance policy, the Bureau suggests offering incentives to employees, in order to encourage adherence to the policy. Any disciplinary measures which are instituted should be applied consistently. The Bureau also notes that any disciplinary action taken should be properly documented and can be used to support a claim of due diligence.

## Bureau's Approach to Firms with Effective Compliance Programs

The Bureau notes that whether or not a firm has an effective compliance program will not likely have a significant impact as to whether the Commissioner may proceed against the firm. Nevertheless, it may increase the chances of a firm receiving consideration for an alternate case resolution, rather than criminal charges. It may also influence considerations as to whether firms or individuals should be granted immunity from prosecution, and may have an effect in influencing proposed sentencing, particularly if the presence of a compliance program has caused the company to take remedial action.

A compliance program will not have an influence on the Commissioner's views if senior personnel of the firm participated in or condoned the conduct. That would indicate that senior personnel were not in fact committed to compliance with the Acts. In fact, somewhat peculiarly, the Bureau states that "if a program is a sham and used only to conceal or deflect liability, this also may be considered an aggravating factor for sentencing purposes or...administrative monetary penalties." We are concerned that this statement may have the effect, at least in some cases, of discouraging firms from establishing a policy.

As noted above, an effective compliance program may provide the basis for a due diligence defence – i.e., that the firm took all reasonable steps to avoid the commission of the offence. It may also be relevant to resolving disputes via an alternate case resolution, thus avoiding fully contested proceedings. Alternative forms of resolution will be more readily available if the firm can demonstrate that it terminated any anti-competitive conduct as soon as it came to light, that it attempted to remedy the adverse effects of the conduct, that the conduct was not in keeping with the firm's basic corporate policy and that the infringement was not carried out or approved by senior management.

The Bulletin includes a basic Corporate Compliance Program Framework, to provide guidance for businesses seeking to implement a compliance program, as well as sample "Do's and Don'ts" lists for each Act. The Bureau stresses, however, that each business should consult legal counsel for assistance in adapting these frameworks to their specific situation.

*This article appeared in the Competition and Antitrust Alert issued on April 25, 2008. To subscribe to the Competition and Antitrust publication, please visit our Publications Request page.*