

Corporate Compliance Programs

Director of Investigation and Research
Competition Act

June 1997

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PREFACE

This Bulletin provides the Competition Bureau's views about corporate programs designed to ensure compliance with the *Competition Act*.

It is well recognized that most firms do comply with the law. Nonetheless, all firms can benefit by implementing internal mechanisms to assist them to remain in compliance with the law. Equally, as prevention mechanisms may not ensure perfect compliance, a corporate compliance program can also facilitate detection and remedial action by the firm in instances when anti-competitive conduct occurs.

The Bulletin outlines the components of a credible and effective program. To be credible, a compliance program must demonstrate the company's commitment to conducting business in conformity with the *Act*. To be effective, it needs to inform employees, officers and directors about the content of the *Act* as it affects the company's business.

It makes good business sense to implement an effective program that addresses both the criminal and civil reviewable provisions of the *Act*. A good corporate compliance program can help to identify the boundaries of permissible conduct, as well as identify situations where it would be advisable to seek legal advice. A pre-emptive identification of areas of potential risk can save time and money, preserve goodwill, and set a company on a good track for the future. Knowing the limits of illegal conduct can free a company and its employees to pursue innovative and profitable business practices.

Many firms have already developed comprehensive compliance programs. Still others have instituted some or all of the highlighted elements on an informal or ad hoc basis and, for them, it may simply be a question of supplementing or formalizing what already exists.

The decision to implement a compliance program is, of course, voluntary and the contents of a program are at the discretion of the firm implementing it.

The goal of the Competition Bureau's work in the area of in-house compliance programs is to contribute to a business culture of respect for, and compliance with, the *Competition Act*.

PREFACE

Konrad von Finckenstein, Q.C.
Director of Investigation and Research
Competition Act

INTRODUCTION

The Competition Bureau (the "Bureau") publishes bulletins, guidelines and pamphlets to explain the *Competition Act*¹ (the "Act") and Bureau enforcement policies, all with a view to promoting compliance with the *Act*. The purpose of this Bulletin is to provide guidance about measures that all businesses can take, through the implementation of internal corporate compliance programs, to prevent or minimize the risk of violations of the *Act*.

This Bulletin describes the elements that the Bureau considers to be essential in any compliance program, if it is to be effective in preventing and detecting anti-competitive conduct falling under either the criminal or civil reviewable provisions of the *Act*. They are also the evaluative criteria against which the Director of Investigation and Research (the "Director") makes assessments concerning the effectiveness of a particular compliance program for the purpose of alternate case resolutions and immunity and sentencing recommendations.

Because the Director often recommends the implementation of a compliance program as part of a criminal consent settlement or civil remedial order, it is also important that firms² have an understanding of the Director's expectations concerning the design of such programs.

The compliance program components described in this Bulletin are neither industry nor company specific. They are recommended as the baseline for the development of any effective in-house program. The Bureau also recognizes that compliance programs must be tailored to meet the specific needs of each firm, given the nature of its business and its organizational structure. Accordingly, where suggestions are included about the various ways in which the individual components can be implemented, they are provided merely as illustrations.

The views expressed herein are not a binding statement of the Director's position in any particular case. Individual enforcement decisions and alternate case resolutions are based upon the circumstances of each case.

This Bulletin does not give legal advice. Readers should refer to the *Act* when questions of law arise and, if a particular situation gives rise to concerns, should obtain legal advice.

INTRODUCTION

ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM

In the Bureau's view there are five elements that are fundamental to the success of any corporate compliance program and which should be incorporated in every program, regardless of the particular model adopted or its level of complexity. These five essential elements are:

- ! the involvement and support of senior management;
- ! the development of relevant policies and procedures;
- ! the ongoing education of management and employees;
- ! monitoring, auditing and reporting mechanisms; and
- ! disciplinary procedures.

Senior Management Support

Senior management's clear and unequivocal support is the foundation of an effective compliance program.

The message that compliance with the law is a fundamental part of company policy needs to be clearly promoted. Senior management can establish a climate of respect within the company towards the *Act* by playing an active and visible role in relation to the compliance program. By demonstrating its commitment and involvement, senior management will send the message that violations of the *Act* are not accepted as a legitimate business practice.

Subsequent periodic statements to sustain the initial message, and management conduct that reinforces the message, will establish a positive behavioural model for all employees.

Relevant Policies and Procedures

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The substantive content of a compliance program should be described in a company publication.

The development and documentation of compliance policies and procedures tailored to the firm's business operations are critical to the success of the program, as is the need to regularly update such policies and procedures to reflect changes in company operations and developments in competition law and policy. While the required detail and form may vary from firm to firm, some typical items include:

- ! a statement by the chief executive officer stressing the company's commitment to the policies and procedures contained therein, and its uncompromising adherence to the *Act*;
- ! a reference to the purpose of the *Act*;
- ! a general description of the *Act* and its enforcement, penalty and remedy provisions, with emphasis on those provisions of the *Act* that are most relevant to the company;
- ! clear examples to illustrate the specific practices that are prohibited, so that managers and staff at all levels can easily understand the potential application of the *Act* to their own duties;
- ! a practical code of conduct that identifies activities that are illegal or open to question;
- ! a statement outlining the consequences of breaching corporate policies;
- ! procedures that detail exactly what an employee should do when concerns arise out of certain situations, or when possible violations of the *Act* are suspected;
- ! an acknowledgement, signed by each employee, indicating they have read, understood, and will adhere to the policy.

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Training and Education

An effective compliance program will include a training component that targets personnel at all levels who are in a position to engage in, or be exposed to, anti-competitive conduct.

Senior management and staff alike need to understand the limits of acceptable behaviour, both within the firm and on the part of other players in the industry and the marketplace.

The Bureau has a variety of publications that can be used in the training and education component of a firm's compliance program. Appendix 1 lists various of these publications, including a series of plain language pamphlets explaining various provisions of the *Act*, and some detailed guidelines which address both technical details of the *Act* and Bureau enforcement policy concerning various provisions. In addition, there are periodical publications such as the *Misleading Advertising Bulletin*, *Competition Communiqué*, *CompAct* and the *Annual Report*, and speeches, news releases and other occasional papers which deal with current issues. The Bureau can also provide speakers on various topics.³ Selected publications are available at the Bureau's website. Readers can also obtain copies of any Bureau publications by contacting the Bureau directly. The Bureau's postal address, telephone number, and website are listed in Appendix 2.

Monitoring, Auditing and Reporting Mechanisms

Monitoring, auditing and reporting mechanisms are vital to the success of any compliance program.

A credible review and assessment component is fundamental to an effective compliance program. Monitoring, auditing and reporting mechanisms function to prevent and detect anti-competitive conduct. They provide both employees and managers with tangible evidence that there is indeed a check on their activities. They can also be a means to measure how well the compliance program is being observed and to identify whether adjustments are needed in the program.

The format of this component will depend on the company's particular needs, given its line of business and the extent of its exposure to potential violations of the *Act*. The

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Bureau does not endorse any particular procedure or combination of procedures; rather, a company should be satisfied that the measures it implements are generally effective to prevent anti-competitive conduct, and to detect and address it if it does occur.

Monitoring is preventive in nature, being a continuous, systematic procedure implemented to check against potential violations of the *Act*. Monitoring can be valuable to support a due diligence defence. Advertising is an example of one area where continual monitoring could benefit many companies. For example, prior to being signed off, a company could require that all its advertisements, regardless of their form, be checked against a predetermined list of requirements for compliance with the *Act*.

Audits are designed to identify whether a violation of the *Act* has occurred and, if one has, that it is dealt with appropriately. Whether companies institute periodic, ad hoc, or event-triggered audits, or a combination of them, the aim is the same -- to ensure that problems are identified and resolved and that the company and its employees are in compliance with the law. The choice of audit approach likely will be determined according to what activities the individual firm considers will raise the greatest risk of violation of the *Act*. The company should also consider whether any of its internal activities, or external practices in the industry in which it operates, give rise to uncertainty about the law.

An internal reporting procedure -- that is, an unfettered ability to report conduct that is reasonably believed to be a contravention of the *Act* -- encourages employees to provide timely, reliable information that can be the basis for further investigation by the company. If the steps to be followed and the information required are clearly defined, the reporting procedure can identify existing or potential problems in order that timely remedial action can be taken.

Disciplinary Procedures

Disciplinary measures demonstrate the seriousness with which the company views anti-competitive conduct.

A disciplinary code or policy relating to individuals who initiate or participate in anti-competitive conduct is important not only for its deterrent effect, but also as a

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reflection of the firm's policy against such conduct. A compliance program should ensure that employees involved in anti-competitive activity are made aware of the consequences of their behaviour, and that disciplinary measures (e.g. suspension, fines, dismissal) are consistently applied.

Compliance Program Benefits

An effective program will:

- ! educate employees, directors and officers about the requirements of the *Act* and the current enforcement policies of the Bureau and reduce uncertainty about what is or is not legal conduct;
- ! give early warnings of potentially illegal conduct;
- ! reduce the exposure of corporate officers, directors and employees, and the corporation itself, to criminal and civil liability;
- ! reduce costs related to litigation, fines, adverse publicity, and the disruption to operations resulting from investigations and prosecutions before the Court or hearings before the Competition Tribunal;
- ! encourage innovative and pro-competitive marketplace behaviour as a means to effective participation in changing markets;
- ! increase the awareness of possible anti-competitive conduct by competitors, suppliers, or customers and thereby increase the likelihood of achieving an appropriate remedy, either in the market or by appropriate legal recourse, possibly under section 36 of the *Act*; and
- ! assist a company in its dealings with the Bureau, for example, by identifying violations of the *Act* early enough to allow the firm the opportunity to make a request for immunity in a criminal matter.

BUREAU'S CONSIDERATION OF COMPLIANCE PROGRAMS

This Bulletin does not alter existing Bureau policies concerning enforcement, alternate case resolution, or immunity and sentencing recommendations.⁴

The existence of a corporate compliance program does not immunize firms or individuals from enforcement action by the Director or from prosecution by the Attorney General of Canada. Whether or not a company has a compliance program will, of itself, play a limited role in any decisions by the Director to bring applications to the Competition Tribunal or to recommend to the Attorney General that charges be laid. Neither the Director nor the Attorney General can fetter their responsibilities when there is evidence of an offence.

However, an effective compliance program may better situate a company which has violated the *Act* to receive consideration for alternate case resolutions or favourable treatment. In determining the most appropriate means to resolve cases, the Director's position about alternate case resolution, immunity and sentencing recommendations may be influenced by the existence of an effective corporate compliance program if it causes the company to take remedial action.

For the Director to take account of a corporate compliance program in deliberations on a particular matter, there must be an affirmative answer to the question "Is this program effective and appropriate for this particular business?"

Exception for Senior Management Involvement

The existence of a compliance program will not influence the Director's deliberations about immunity or alternate case resolution if senior personnel -- the "directing minds" of the corporation -- either participated in or condoned the anti-competitive conduct. In this situation, it will be apparent that management's commitment to compliance was not serious and the program was neither effective nor meaningful.

Moreover, if a compliance program is a sham used to conceal or deflect liability, it could

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be considered an aggravating factor in any sentence that the Director suggests the Attorney General recommend to the Court.

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Due Diligence Defence

For certain misleading advertising offences under the *Act* it is open to the accused to raise the fact that it exercised due diligence to prevent the offence. Although an in-house compliance program is not, of itself, a defence to conduct that contravenes the *Act*, an effective program may enable a company to demonstrate that it took reasonable steps to avoid the commission of the offence. In this way, a compliance program can be beneficial to a claim of due diligence.

Alternative Case Resolution

Depending on the circumstances, both criminal conduct and reviewable practices may be resolved by something less than fully contested proceedings. Available measures include information visits and orders on consent. The Director will be more willing to consider an alternate form of resolution to that of contested proceedings if the company can demonstrate that:

- ! it terminated the anti-competitive conduct as soon as it came to light;
- ! it attempted to remedy the adverse effects of the conduct; and
- ! the conduct was not in keeping with corporate policy.

Although an in-house compliance program is not a prerequisite for alternative case resolution in either civil or criminal matters, the existence of an effective program may enable a company to satisfy these requirements and to demonstrate that it has done so. Other criteria will also be taken into account.⁵

If it is determined that an alternative form of resolution is appropriate to settle a matter, and an effective corporate compliance program is not already in place, the Director may require the implementation of such a program as part of the resolution. Corporate compliance programs could be integrated into the settlement of matters in the following

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manner:

- ! The Director may resolve both civil and criminal cases following an information visit if it is found that no further inquiry is warranted due to the company's voluntary corrective action. Such corrective action may include the implementation of a compliance program that is appropriate for the particular company, given the circumstances of the alleged contravention.

- ! In respect of consent orders negotiated in reviewable matters or prohibition orders negotiated on consent in criminal matters, the Director will assess whether a compliance program would help to prevent future repetitions of the conduct in question, with a view to including a program as part of the resolution of the case.

When implementation of a compliance program forms part of the resolution of a matter, the company may be required to demonstrate that its program is likely to prevent anti-competitive conduct. Parties may wish to refer to the five compliance program components outlined earlier to evaluate whether their proposed program is likely to be effective.

Immunity from Prosecution

Those involved in activities that may violate the criminal law provisions of the *Act* can approach the Bureau for immunity consideration. Pursuant to the Bureau's policy on immunity, in some instances the Director will recommend that the Attorney General of Canada grant immunity in exchange for a party's disclosure of information and its co-operation during any investigation, prosecution or other legal proceedings.

Amongst other things, the Bureau's policy on immunity requires evidence confirming that, upon its discovery, the company took immediate steps to terminate the activity and report it to the Director.⁶ An effective compliance program will improve the company's ability to demonstrate that it satisfies this particular criterion.

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An effective compliance program that identifies possible violations of the *Act* can also create an opportunity to take advantage of the Director's program of immunity which otherwise might not be available. Although a compliance program is not a prerequisite to a request for immunity, without it the impugned conduct might not be detected early enough to enable the company to report it to the Bureau for the purpose of making the request. Because the timeliness of the provision of evidence is relevant to the Director's deliberations concerning immunity recommendations, the absence of a quick response capacity may compromise a firm's request.

Sentencing and Remedial Orders

Immunity from prosecution is but one form of favourable treatment. Favourable treatment means any penalty or obligation that is less severe than that which would be sought in the absence of disclosure and co-operation from the party who may be in contravention of a criminal provision of the *Act*.

When a guilty plea is entered, an effective compliance program may lend support to a reduction in the sentence that the Director would otherwise suggest to the Attorney General for recommendation to the Court. The existence of an effective program may enable a firm to demonstrate mitigating conduct for sentencing purposes, including evidence that the activity for which it was convicted was contrary to company policy and to the actions and statements of management, and was terminated as soon as it became known to the company.

In reviewable matters involving abuse of dominant position, exclusive dealing, and tied selling, the Director may apply to the Competition Tribunal for a remedial order. These orders can encompass any term necessary to overcome the effects of the conduct in the market. The Director will seek a term requiring the implementation of a compliance program, or modifications to an existing program, if the circumstances of the case suggest it could prevent future recurrence.

CONCLUSION

The importance of a compliance program in avoiding anti-competitive conduct under the *Act*, and in detecting and dealing with such behaviour, should not be underestimated. The procedures put in place as the result of a compliance program serve not only to identify unlawful or questionable conduct, but also to promote awareness that will result in ethical standards of conduct.

Implementing an effective compliance program which addresses both criminal behaviour

and civil reviewable conduct is good business. It can help a company avoid the adverse publicity and financial costs associated with contraventions of the *Act*. A compliance program will also enhance understanding of what is acceptable behaviour so that legitimate competitive practices can be vigorously pursued without unwarranted concerns of contravening the *Act*.

Appendix 1: Selected Competition Bureau Publications

An Overview of Canada's *Competition Act* (1993)

Merger Enforcement Guidelines (1991)

Misleading Advertising Guidelines (1991)

Predatory Pricing Enforcement Guidelines (1992)

Price Discrimination Enforcement Guidelines (1992)

Program of Compliance (1993)

Strategic Alliances under the *Competition Act* (1995)

Pamphlets:

- ! An Overview [of the *Competition Act*]
- ! Reaching an Agreement with Competitors
- ! Misleading Advertising and Deceptive Marketing Practices
- ! Pyramid Selling and Multi-level Marketing
- ! Refusal to Supply
- ! When a Company Abuses its Dominant Position
- ! Bid-rigging
- ! The Bureau
- ! Deceptive Telemarketing
- ! Restricting the Supply and Use of Products
- ! Setting Your Own Price

Appendix 2: How To Contact the Competition Bureau

Many of the Competition Bureau's publications are accessible on the Internet. The Bureau's Homepage address is listed below. You can also contact the Director or a member of the Bureau at the address and telephone numbers below to obtain general information, make a complaint under the provisions of the *Competition Act*, or request an advisory opinion:

Complaints & Public Enquiries Centre
Competition Bureau
Industry Canada
50 Victoria Street
Hull, Québec
K1A 0C9

Telephone:

National Capital Region: (819) 997-4282
Long distance (toll free): 1-800-348-5358
TDD service: 1-800-642-3844

Facsimile: (819) 997-0324

FAX-on-demand: (819) 997-2869

Homepage: <http://strategis.ic.gc.ca/competition>

1

End Notes

Competition Act, R.S.C. 1985, c. C-34.

2

For the purposes of this Bulletin, the terms "firm" and "company" are used interchangeably and include all forms of business organizations, whether or not incorporated.

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Companies are encouraged to contact the Bureau's Complaints and Public Enquiries Centre to obtain information about Bureau publications, mailing lists, and the Fax-on-Demand and other services. The Centre's address and phone number are listed in Appendix 2.

4

Bureau enforcement policies are outlined in the guidelines listed in Appendix 1. For the Bureau's policy on immunity see H. Chandler, Deputy Director of Investigation and Research, *Getting Down to Business: The Strategic Direction of Criminal Competition Law Enforcement in Canada*, March 10, 1994 (speech). Bureau policy relating to matters touching upon prosecutorial discretion should be read in the broader context of the policies of the Attorney General of Canada and, in this regard, readers are referred to the *Crown Counsel Policy Manual*, Department of Justice, January 1993.

5

For a more detailed discussion of the Bureau's policy on alternative case resolution, see the Director of Investigation and Research's *Program of Compliance*, Information Bulletin No. 3 (Revised), March 1993.

6

A more complete discussion about the Bureau's criteria for immunity recommendations is contained in Chandler, *supra*, note 4. For the Attorney General of Canada's policy on immunity, see "Witness Immunity" in *Crown Counsel Policy Manual*, *supra*, note 4.