Voluntary Codes

A Guide for Their Development and Use

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A joint initiative of
the Office of Consumer Affairs,
Industry Canada, and
the Regulatory Affairs Division,
Treasury Board Secretariat

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Voluntary codes represent an innovative approach to addressing the concerns and needs of consumers, workers and citizens while at the same time helping Canadian companies to be more competitive. In essence, they are codes of practice that set benchmarks for behaviour in the marketplace. They encourage companies and organizations to conduct themselves in ways that benefit both themselves and the broader community. They can also serve as a sign to consumers that the organization's product, service or activity meets certain standards.

More and more firms and organizations are exploring the possibilities of voluntary codes. A supplement and, in some circumstances, an alternative to traditional regulatory approaches, voluntary codes can be inexpensive, effective, and flexible market instruments.

Partnership is a key theme underlying the Guide. Experience has shown that in many instances, the private sector can partner very effectively with consumer and other public interest groups and government to devise market-based tools for use in the knowledge-based economy. A joint initiative of Industry Canada and the Treasury Board Secretariat, the Guide is designed to help all parties better understand what voluntary codes are and how they can be developed. It was prepared by a multi-stakeholder working group, with valuable input and advice from many others.

The Guide is intended as a primer, a stimulus to action. It cannot possibly answer all of the questions that could arise in various circumstances. Nevertheless, we hope it will encourage members of the private sector, government and NGOs to take the initiative and develop voluntary codes where they are appropriate. Canadians stand to benefit a great deal.

John Manley
Minister of Industry

Marcel Massé
President of the Treasury Board

Preface

*V*oluntary codes that are well-designed and properly implemented can help to achieve public-interest goals, attract customers and minimize regulatory and taxpayer burdens to the benefit of everyone. However, a code that is poorly designed, improperly implemented, or used in inappropriate circumstances, can actually harm both its proponents and the public. The challenge is to know when voluntary codes are most likely to succeed and to establish solid development and implementation processes that are fair, effective and efficient. This Guide is intended to help individuals and organizations meet those challenges.

The first part of the Guide discusses the strengths, weaknesses and other characteristics of voluntary codes and the conditions in which they tend to be most successful. The second part presents suggestions for developing and implementing codes. Recognizing that readers may already be familiar with various aspects of voluntary codes, each section of the Guide is intended to stand on its own.

The Guide discusses several codes already in place, and highlights processes for developing and implementing codes. Readers should not interpret the mention of any particular code or process as endorsement of it by the federal government or by those who participated in the Guide's preparation.

David Cohen   Dean
University of Victoria Law School
Academic Advisor to the Voluntary Codes Project

Brian Glabb   Senior Project Officer
Regulatory Affairs Division
Treasury Board Secretariat

Ellen Lesiuk   Manager (Policy)
Standards Council of Canada

Marnie McCall   Director of Policy Research
(now Executive Director)
Consumers' Association of Canada

Ken Ogilvie   Executive Director
The Pollution Probe Foundation

Marie Vallée   Policy and Regulatory Analyst
Fédération nationale des associations
de consommateurs du Québec

Brian Wastle   Vice-president, Responsible Care® Program
Canadian Chemical Producers' Association

Kernaghan Webb   Working Group Chair
Senior Legal Policy Analyst
Office of Consumer Affairs
Industry Canada

Peter Woolford   Senior Vice-president, Policy
Retail Council of Canada

Suggestions for improving the Guide are welcome (see page 31). Based on this feedback and the practical experience of users, the Guide will be reviewed, updated and improved.

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About Voluntary Codes

What is a Voluntary Code?

Voluntary codes are codes of practice and other arrangements that influence, shape, control or set benchmarks for behaviour in the marketplace. They encourage companies and organizations to conduct themselves in ways that benefit both themselves and the community. They can also serve as a sign to consumers that the organization's product, service or activity meets certain standards.

Voluntary codes exist for a range of industries, products and services, and address many aspects of marketplace behaviour. Some have become so much a part of the culture that consumers may not recognize them as voluntary codes. The care tags on clothing, for example, are part of a familiar standard adopted voluntarily by the garment industry (see box, right).

Voluntary codes go by several names, including codes of conduct, codes of practice, voluntary initiatives, guidelines and non-regulatory agreements.* No matter what they are called, though, they have certain things in common:

➤ They are a set of non-legislatively required commitments.

➤ One or more individuals or organizations agree to them.

➤ They are designed to influence, shape, control or benchmark behaviour.

➤ They are to be applied in a consistent manner or to reach a consistent outcome.

A voluntary code may consist of several documents, including a general statement of principles and obligations, as well as technical agreements pertaining to specific operational aspects such as reporting requirements and dispute-resolution powers. In this Guide, all of these documents taken together comprise a code.

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* For discussion of the relationship between voluntary codes and the National Standards System, see page 19.

Examples of Voluntary Codes

➤ The GAP clothing chain Sourcing Code requires suppliers (many in Third World countries) to meet certain labour-related standards, and suppliers must follow the code to keep their contract with the company. Following pressure from consumers, labour and others, third party monitoring of code compliance is now taking place.

➤ Members of the Canadian Direct Marketing Association (CDMA) must meet the terms of several codes to remain members. For example, one code protects customer privacy and limits the sharing of customer information. Only CDMA members that comply with the codes can display the CDMA logo in their advertisements and on their products. CDMA members include companies, as well as charities and other non-profit organizations, that use direct marketing.

➤ Consumers International, a non-profit foundation linking the activities of some 200 consumer groups in over 80 countries, has developed *A Consumer Charter for Global Business*. The Charter obliges participating companies to meet standards pertaining to ethical conduct (e.g., bribery), competitiveness, marketing practices, guarantees, and complaints handling. Companies wishing to adhere to the Charter are subject to an initial investigation by Consumers International.

➤ The Canadian Chemical Producers' Association's (CCPA) Responsible Care® Program is a system of principles and rules to improve the safe, environmentally sound management of chemicals through their life cycle. More than 70 chemical companies participate in the program as a condition of CCPA membership. The program is subject to regular reviews and revisions, with input and advice from environmental and other advocacy groups. Participating companies must submit to regular compliance verification through a process that involves industry experts, advocates and community representatives. The Association makes monitoring results public.

➤ The Canadian Care Labelling symbols on tags sewn on clothing indicate suggested care and cleaning procedures. The federal government initiated the standard and the garment industry voluntarily applies it. Although the law does not require companies to use the tags, the government does prosecute deceptive or misleading usage.

Features of Voluntary Codes

➤ Individual firms or industry associations, governments or other groups such as non-profit, public-interest and standards organizations can initiate, develop or adhere to voluntary codes. While one organization may initiate a code, others may help to develop and apply it.

➤ A voluntary code can apply to a single store or company, several firms or organizations, an entire sector or many sectors. A code can also be national or international in scope.

➤ Codes are usually initiated in response to consumer or competitive pressures, the real or perceived threat of a new law, regulation or trade sanctions, or a combination of these.

➤ While codes are voluntary (they are not legislatively required commitments), they operate within a legal environment that includes consumer, competition, health and safety, labour and environmental legislation and regulations, and contract and tort (personal injuries) law. Sometimes codes supplement legislation. Failure to adhere to the terms of voluntary codes may have legal implications, including regulatory or civil liability. In some cases, an individual or organization may use a voluntary code to help demonstrate or refute due diligence in prosecutions or establish reasonable care or negligence in civil litigation.

➤ Voluntary codes are flexible instruments to be refined and improved over time. The GAP Sourcing Code and the Canadian Chemical Producers' Association's Responsible Care® Program, for example, added the concept of third-party compliance monitoring after being in place for some time.

Benefits of Voluntary Codes

Voluntary codes offer several benefits to the public, employees and consumers:

➤ They encourage or discourage behaviours or activities.

➤ They stimulate public participation in the development and implementation of codes in important areas.

➤ They promote more informed and less costly interactions between code signatories and the public about such matters as product manufacturing, development or delivery that, in turn, advance public confidence and help safeguard the public interest.

➤ They address consumer concerns such as quality, price and choice, as well as broader matters such as privacy, the environment, health and safety, labour standards, human rights, advertising and public standards of decency.

For firms and organizations, voluntary codes can do many things:

➤ They can stimulate more efficient, effective operations that minimize negative social, environmental and economic impacts. This puts firms and organizations in a more favourable light with the public, customers, government and others, and may have the added benefit of reducing the pressure for new regulations.

➤ They can help maintain or improve market share.*

➤ They can maintain or improve public image, which can help to attract and retain highly qualified personnel, and lead to other benefits.

➤ They can help diffuse new technologies and best management practices within an industry, and provide feedback on consumer preferences and other market intelligence.

➤ They can complement existing laws, thereby improving relations with government agencies and regulatory bodies.

For government, voluntary codes can have several advantages:

➤ They can further public policy objectives through non-regulatory means.

➤ They can complement or expand traditional regulatory regimes.

➤ They can avoid jurisdictional and constitutional obstacles that are part of legislative development. (This may be particularly useful for multijurisdictional voluntary initiatives across provinces or countries.)

➤ They can assist in establishing the appropriate legal standard of care for an activity.

➤ They can go beyond the minimum standards set in law.

➤ They can set and adjust standards more quickly and less expensively than do laws and regulations.

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* When the objective of the code is to maintain or improve market position, parties must keep in mind that the methods employed must comply with the *Competition Act* and other legislation.

Potential Drawbacks of Voluntary Codes

While voluntary codes can have significant benefits, they can also have harmful effects when not properly developed and administered.

➤ Poorly designed or implemented codes can frustrate or mislead their intended audience. As well, codes not backed by action can have legal consequences under deceptive advertising regulations and through contract and tort law actions.

➤ Poorly designed or implemented codes can bring negative publicity and lead to loss of trust or business that can be difficult to recoup.

➤ Codes that raise expectations but do not deliver can slow or prevent needed laws. In the short term, this can harm the parties or interests that should have been protected. In the longer term, it can cause people or governments to mobilize against the organization in question.

➤ Codes can be anti-competitive and used to engage in collusive behaviour. Under the provisions of the *Competition Act*, voluntary codes or other arrangements cannot be used in a way that substantially reduces competition, prevents non-participating firms from entering the market or negatively affects consumers by significantly raising prices, reducing service or limiting product choice.

➤ Codes should not create barriers to interprovincial or international trade. A code that prevents firms from entering and competing in a market may attract the attention of national or international trade authorities.

➤ Codes can create an "uneven playing field." This may not necessarily be a bad thing, since codes can be developed to show leadership in a particular area or activity. However, non-participating firms can potentially enjoy a "free ride" on the positive image that a code helps create. Consumers can develop a false sense of security about the characteristics of a product, service or firm that is not actually the subject of a code. As well, firms that do conform may be penalized: they may have to bear unrecoverable costs associated with adhering to the codes and could be tainted by the non-compliance of others. The need for cooperation and agreement to make a code work and avoid free riders stands in contrast to laws that impose standards on all parties regardless of their individual consent.

➤ The development and implementation of voluntary codes may not be sufficiently transparent and inclusive. Compared to the well-established consultation and public review processes in place for developing and monitoring statutes and regulatory

regimes, voluntary codes may offer less opportunity for public participation and scrutiny that can lead to questions about the code's credibility.

➤ Voluntary approaches on their own may be insufficient when the consequences of non-compliance are serious (for example, harm to health, safety or the environment).

➤ Sometimes voluntary codes, as opposed to laws, attract scepticism and negative attention. For example, the Tobacco Industry Voluntary Packaging and Advertising Code developed by the Canadian Tobacco Manufacturers' Council has received considerable negative attention in the media.

As this list suggests, the potential drawbacks of poorly designed or implemented voluntary codes can be significant, so applying some healthy scepticism before actually developing a code might be beneficial. It takes considerable time, energy and resources to successfully develop and implement a voluntary code and even then it may not achieve the hoped-for results.

Common Characteristics of Good Voluntary Codes

While codes can be highly diverse in terms of form, content, and purpose, most of the successful ones share certain characteristics.

Explicit commitment of the leaders — If the leaders of an organization or sector promote the use of voluntary codes, others are more likely to follow. These leaders should be identified early in the process so that they can champion the initiative and be visible during its development and implementation.

Rank-and-file buy-in — Often, it is the front-line workers (cashiers, factory workers, engineers and supervisors, for example) who translate the code's provisions into reality. To be able to give their full commitment and support, they must understand the code and its objectives, how it will work and their role in implementing it. This requires good internal communications, training and, in some cases, fundamental changes in corporate culture.

Clear statement of objectives, expectations, obligations and ground rules — While the need for a code and its initial development may evolve from a brainstorming session or similar free-flowing circumstances, the aims, roles and responsibilities must be clearly articulated early on. This helps to preclude problems such as participant withdrawal. On the other hand, the initial statement of purpose and ground rules should be flexible enough to allow the code to be changed to meet new circumstances and challenges.

Open, transparent development and implementation —
Codes are more likely to reflect broader socio-economic concerns
and be better received if they are developed and implemented openly
and with the participation of the larger community (that is, workers,
suppliers, competitors, consumers, public-interest groups, govern-
ments and neighbours). This enhances the credibility and effective-
ness of the code and its proponents and participants.

Regular flow of information — Everyone concerned must get
feedback on how the code is working and how others are responding
to it. This can be achieved through self-reporting, internal and third-
party monitoring, compliance verification, public reporting and sim-
ilar techniques.

An effective, transparent dispute-resolution system —
A dispute-resolution system that is inexpensive, fair, open, accessible
and consistent is often essential to a well-functioning code.

Meaningful inducements to participate — If a code makes
good business sense and offers meaningful inducements, firms will
want to participate. One such inducement might be access to infor-
mation, technology or marketing tools not available to others. For
example, real estate brokers who comply with their code have access
to the Multiple Listing Service, which lists properties for sale and
people looking for properties.

Negative repercussions for failure to join or comply —
Firms will be more enthusiastic about joining and complying to a
code if they discover that they could lose business if they do not. For
example, they might lose public credibility or customer loyalty.
Associations that publicize non-compliance and levy fines is an
example of negative sanctions that work with voluntary codes.

Conditions Conducive to Successful Code Development

Pressures for Code Development

While codes are voluntary — firms are not legislatively required to
develop or adhere to them — the term "voluntary" is something
of a misnomer. Voluntary codes are usually a response to the real or
perceived threat of a new law, regulation or trade sanctions, compet-
itive pressures or opportunities, or consumer and other market or
public pressures.

Often, codes are created in response to a combination of factors. In
fact, the more factors brought to bear, the greater the chances of a
code's success. The Canadian Chemical Producers' Association devel-
oped its Responsible Care® Program after a series of high-profile

chemical disasters eroded public confidence and raised the threat of tighter government regulation and controls.

It is worth noting that once a code is in place, the initial pressure that led to its creation may dissipate, which could cause compliance among adherents to taper off. It is important, therefore, to build into the code as many mechanisms as possible to sustain or renew the energies that led to its development.

Pressures to improve the quality of operations or access to capital and resources — Codes may be developed to attract new employees, raise money in markets based on a better environmental reputation or effect energy and material savings among other things.

The threat of a new law, regulation or trade sanctions — Some firms and organizations conclude that changing or controlling their own behaviour through voluntary measures, rather than in response to new or more onerous regulations, will be less expensive and allow a broader range of solutions. Government will sometimes allow them to do so if they can show that they can handle the responsibility effectively. Or, government may refrain from primary regulatory activity if a sector shows it is willing and able to manage its own activities. Several years ago, the Canadian Radio-Television and Telecommunications Commission (CRTC) gave the Canadian Cable Television Association (CCTA) lead responsibility for consumer service standards for cable television. CCTA developed its standards in accordance with CRTC guidelines. The standards are administered by the Cable Television Standards Council, which receives, reviews and responds to customer complaints regarding cable industry practices. Customers can still appeal to the CRTC but rarely do so.

Consumer and other market or public pressures — In many situations, market and public pressures are the main reason companies or organizations launch codes. For example, the Canadian Standards Association's Sustainable Forestry Management Certification System was driven largely by the fear of European boycotts of Canadian wood products. A firm or group of firms might also initiate a code to maintain or enhance its market share. For example, Australian fruit juice manufacturers have a code that ensures that the juices are, in fact, pure when they are so designated. The arrangement allows manufacturers to have a competitor's products tested by an independent laboratory if they suspect a false claim of purity. In this way, private sector competitive pressures help to ensure quality for consumers.

Sector-wide Codes

Special considerations arise when the codes apply to a group of firms or organizations that make similar products and serve similar markets. Pressure for such codes may come from a desire among competing firms to raise and standardize performance norms or from a particular group of firms that wants to set itself apart from others in the sector. An important concern is the possibility that issues may arise under the federal *Competition Act* (see box, below).

Possible Issues under the Competition Act

Voluntary arrangements that involve industry competitors can raise many of the same competition issues as mergers and strategic alliances do. Code proponents may wish, as a first reference, to read the Highlights page of the document *Strategic Alliances Under the Competition Act*, published in 1995 by the Director of Investigation and Research, Industry Canada. Briefly, the text states that most strategic alliances do not raise issues under the Act, and that vertical and conglomerate alliances are less likely than horizontal alliances to do so. The document points out that:

➤ the few strategic alliances that may raise competition issues are more likely to involve those sections of the Act that include a test of market power

➤ firms acting as sellers will hold market power when they have the ability to increase prices above competitive levels (or reduce output, quality or choice below competitive levels) for a sustained period of time

➤ when strategic alliances involve behaviour particularly injurious to competition, an inquiry under the conspiracy provisions of the Act may be initiated.

One point not addressed in this Guide is that involvement by consumer groups or others representing customers can reduce the danger of anti-competitive concerns, but only if these groups have access to the technical information and expertise needed to allow them to contribute effectively to code development and implementation.

The Competition Bureau encourages any group developing a code that might raise issues under competition legislation to work with the Bureau at an early stage. As well, the Bureau provides both oral and written opinions on the applicability of the *Competition Act* to specific situations through its Program of Advisory Opinions.

Please be advised that a fee may apply to requests for a written opinion. For more information on how the *Competition Act* might apply to a proposed voluntary code, please contact the Competition Bureau at 1-800-348-5358.

Sector-wide codes work best when they have the same characteristics as those already listed. However, certain of these characteristics are especially pertinent in the case of sector-wide codes.

➤ A well-established association of firms and organizations can bring parties together, provide a forum for the exchange of ideas and group solutions, serve as an institutional base for developing and implementing codes and, in general, greatly facilitate code development and implementation.

➤ Leadership from key firms or individuals within firms is particularly valuable in a sector-wide context to persuade reluctant members to join.

➤ Well-understood, broadly supported inducements for compliance and sanctions for non-compliance are essential. Whether the code will apply to a single firm or organization or across a sector, proponents must carefully explore the incentives and disincentives for voluntary action. Explaining the code in terms of the personal or material advantages that might flow from it may have more impact than broad explanations of the benefits to the sector as a whole.

The Canadian Chemical Producers' Association has articulated eight "Ps" for encouraging compliance with its Responsible Care® Program:

➤ public involvement

➤ pulling together

➤ peer pressure

➤ performance measurement

➤ public accountability

➤ payback

➤ partnership

➤ pride.

Developing and Implementing Voluntary Codes

Processes for Developing Effective Codes

Because voluntary codes deal with so many subjects and are initiated for so many reasons, there is no single preferred approach to developing them. There is also no guarantee that any development process, no matter how complete and thorough, will result in a successful code. The model presented below is based on several case studies and shows one way a code could be developed (see also the chart on page 15).

An Eight-step Model for Developing Codes

1. Gather information

Ask and answer some basic questions:

➤ Have you identified all the people and organizations that could be involved or affected by the code and taken their interests or concerns into account?

➤ Have the key players clearly articulated and agreed to the issues surrounding the code?

➤ What are the objectives of the code and does everyone agree to them?

➤ How can the identified problem be resolved and what are the potential costs, drawbacks and benefits of each solution?

2. Preliminary discussions with major stakeholders

The objective of this stage is to test the tentative conclusions reached in the information-gathering phase and identify the partners willing to help develop the code. It can be useful to reach beyond like-minded colleagues, employees and other firms and organizations to include more broadly affected interests such as consumer, labour and environmental organizations, community groups* and governments. This

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*   Code developers may also find the Canadian Standards Association's *A Guide to Public Involvement* helpful.

can help to confirm initial perceptions of their interests and concerns, and could lead additional people and organizations to participate in code development. Focus groups, representing like-minded peers or a broad cross-section of interests, can also be useful for testing new ideas.

3. Create a working group

Having the right people on the working group is essential. They must be dependable, credible and knowledgeable, represent different elements of the affected community and have the necessary time and resources to commit. Frank discussion should take place at the outset about the group's objectives, members' responsibilities, anticipated workloads and outcomes, and the ground rules about how the group will operate (consensus, majority or rotating chairs, for example). Regular updates between the working group and the larger community are also useful.

4. Preliminary draft of the code

In preparing a preliminary draft, members will likely identify who (people, organizations and new groups, for instance) will be responsible for which specific aspects of implementation.* For example, certain employees may perform key functions, and a new agency or management structure may be created to assist in implementation. As far as possible, people who have been identified as performing key roles should be part of the working group discussions so that their ideas, capabilities and support or resistance can be factored into the terms of the draft code.

5. Consultations on preliminary draft

Thorough consultations at the beginning can prevent problems later. One good approach is to work outward — that is, to start with the people most likely to be directly affected by the code and who are already aware of it, and move to more formal information dissemination to and discussions with groups and people who may not yet know about the code. A consultation plan can be useful. It should include roles for high-profile officials with good communications skills to explain the code and receive feedback. This feedback will go to the working group, who will discuss how and to what extent the final draft will reflect the comments.

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* The next section of the Guide discusses the key components of a code.

6. Publication and dissemination of the code

A good communications plan is important. It should identify who must be made aware of the code, who should receive a copy and how the individuals and groups will be reached. The communications activities might include an awareness campaign addressing such matters as the use of a logo, publicity endeavours such as advertising and speeches, and a notice that firms and organizations can display in their premises.

7. Implementation

This step is discussed in detail later in the Guide (see page 25) but it is worth noting here that implementation is part of code development because codes are ongoing, flexible documents that should be updated to reflect new circumstances and perceptions. For example, when compliance data is collected and analyzed it might reveal that parts of the code should be changed.

8. Review

The code should include provision for regular review of its terms and operation. When and how often the reviews take place should be based in part on how long it will take to generate data on impacts, effects and objectives achieved. To measure the impact of a program, data is needed on the situation prior to the code being launched, and at frequent intervals afterward. This data can be used not only to determine weaknesses in code design and operation, but also to demonstrate results achieved (if any) and progress made through use of the code.

It may be helpful to use the initial code development process as a model for the review methodology — that is, information collection, identification of key stakeholders, establishing a working group. An independent third party who conducts parts or all of the assessment can provide a more detached perspective and perhaps lend more credibility to the process. With respect to review techniques, many of the tools the government uses to evaluate its programs and measure the impacts of regulatory schemes, and that businesses uses to analyze the benefits of strategic alliances and other corporate arrangements can be adapted for the review of voluntary codes.

Code Development Process*

Stages	**Tips**
Gather Information	■ Address and articulate problem clearly ■ Agree on objectives ■ Identify all stakeholders ■ Identify range of solutions, potential costs and benefits
Preliminary Discussions with Major Stakeholders	■ Test preliminary findings and options with major stakeholders
Create a Working Group	■ Select working group members, decide how group is to function
Preliminary Draft of the Code	■ Identify specific implementation functions, roles and responsibilities ■ Contact appropriate government authorities, including the Competition Bureau, to ensure conformity with relevant laws
Consultations on Preliminary Draft	■ Consult those most likely to be directly affected and already aware of initiative ■ Disseminate information to groups and members of the public with whom no previous contact was made
Publication and Dissemination of the Code	■ Develop communication plan to ensure all parties are aware and receive code
Implementation	■ Ensure effective code compliance by involving all code participants and stakeholders
Review	■ Build code review into initial conception and delivery

* While the process outlined here appears linear, in practice, there may be feedback from later to earlier stages.

Tips and Suggestions

Be flexible

Original conceptions of the problem and possible solutions will likely change as new information becomes available, better understanding of capabilities and difficulties develop, and circumstances change. Remaining flexible and alert to the need for change can make it easier to modify expectations and outcomes.

Be patient and be prepared to accept a less-than-perfect first try

Code development is essentially a learning process. Once a code is in place, trust, communication and experience can lead to the creation of more rigorous obligations, accountability structures and institutions being set out in the first round of code amendments. Building structured, regular reviews into a code's terms encourages a process of continuous improvement, and will help to make the code increasingly effective and credible.

Take advantage of existing institutional structures

For many firms and organizations, industry associations represent known quantities — trusted intermediaries with the profile and experience to bring parties together and broker differences. Associations can provide forums for discussion and serve as a basic institutional structure for moving codes from the concept stage to implementation. However, for many associations, developing and implementing codes may represent new territory, a step away from simply promoting a sector's interest toward actually supervising and even disciplining member organizations. This can be a fundamental change in orientation for the association and it should be undertaken only with the full cooperation of its members.

Get input and advice from employees

When a code particularly affects employees or is of special interest to them, they or their representatives should be invited to participate in its development and implementation (see box, right). In the case of The GAP Sourcing Code, for example, labour organizations played a key role in disseminating information about incidents of code non-compliance that led to changes in the code and its implementation, including the use of third-party monitoring. Standards developed by organizations such as the International Labour Organization can form the basis for voluntary codes initiated by individual firms or groups of firms.

Draw on the credibility and expertise of non-governmental organizations (NGOs)

Consumer, environment, health, human rights and other public interest NGOs represent a wealth of information and valuable perspectives, and their input can give the code additional legitimacy in the public eye (see box, next page). For marketplace-oriented codes, consumer groups in particular represent an excellent "hands-on" source of market intelligence about customer preferences, experiences and attitudes. NGO participation can take several forms, including a "one-off" advisory role, ongoing input through a formal panel, or direct involvement in implementation, monitoring and dispute resolution. Even when NGOs do not participate in actual compliance verification, they may endorse processes others carry out. Unless they prefer otherwise, NGOs should be paid for their services and expenses (for research, consultations with members and attending meetings, for example) just as consultants are. NGOs and code proponents should work together to maintain the credibility and independence of the participating NGOs. Regular communication with the full NGO community
is also useful.

Labour and Voluntary Codes

Meaningful, effective employee participation in voluntary code development and implementation depends on such factors as the following:

➤ early agreement by all parties on the roles to be played by employees in developing and implementing the code

➤ complete, accurate information so that employees and their representatives can contribute useful input from the outset and carry out their full role in the code's development, implementation and verification

➤ trained employees to help implement the code

➤ effective involvement of employees and their representatives in compliance verification

➤ incentives to encourage employee buy-in and the removal of any barriers to such buy-in

➤ protection for employees in "watchdog" or "whistle-blowing" roles.

Select NGOs and their representatives with care

A good fit is important. Select carefully which NGOs — and which individuals within those organizations — to invite. Discuss with them the code's goals, the development and implementation processes and the roles and responsibilities of NGOs. This ensures mutual understanding, builds trust and sets the groundwork for a good working relationship.

Key Questions to Guide NGO Participation*

Are all of the major players — including customers, key suppliers and NGOs — at the table? Is there meaningful participation by government at all stages? Is a strong industry association in place to manage code development and implementation?

Does the industry have a good record of similar initiatives in the past? Are the industry leaders demonstrating strong commitment? Have the background conditions and motivations been clearly identified?

Are the proponents inviting meaningful third-party representation and involvement by consumer groups, other NGOs and standard-setting bodies, and are they prepared to pay for this involvement?

Are the processes for developing and implementing the code open and transparent? Is there a clear articulation and understanding of the rights and responsibilities of all stakeholders?

Is there clear evidence that the code will promote the public interest in areas such as health, safety, and the environment, and address consumer concerns?

Does the code include effective complaints-handling and redress mechanisms accessible to everyone, effective programs to inform consumers and the public, and an evaluation framework to track progress and provide credible evidence of success and failure? Will a reputable third party regularly monitor the code?

Does the code have the capacity to mature through time and respond to new learning and developments?

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*   This material is drawn extensively from the Consumers' Association of Canada's *Consumer Interest Test for Alternatives to Regulation* and discussions with other non-governmental organizations.

Solicit input from community representatives early and often

In a fundamental sense, industry is a guest of the community and, as such, has an obligation to respect community norms and values. While community representatives often do not have the same degree of expertise as NGO participants, they can help gauge the community's concerns and perspectives and ensure support of the industry's endeavours.

*Explore the feasibility of using the National Standards System (NSS)**

NSS standards are developed through a consensus process involving teams of volunteers representing many stakeholders (see box, next page). Standards development organizations (SDOs) have a pre-established, credible approach to developing standards. In addition, certification organizations and accredited testing laboratories can test and audit compliance with standards.

No clear dividing line exists between voluntary codes developed through SDOs and those created outside the SDO system. However, the SDO network of rule-making and implementation expertise may make this approach particularly appropriate for broad, nation-wide and international standards. For example, a diverse group of industry, government, consumer and other representatives developed a multisector national standard for the protection of personal information under the auspices of the Canadian Standards Association (CSA). The CSA Model Privacy Code represents the only existing national consensus standard on personal information protection.

Approach relevant government agencies for input and advice as early in the process as possible

Even when government does not act as a catalyst, relevant departments and agencies should be notified as soon as possible of the intention to create a voluntary code. Once a code is in operation, government officials should be kept informed of any changes or developments.

In the short term, government agencies can provide important expertise and advice (see box, page 21). In the longer term, failure to inform them could leave the code and its proponents open to regulatory enforcement actions.

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*   The NSS includes standards development organizations, certification and testing organizations, and registration organizations.

Standards Development Organizations and Voluntary Codes

Voluntary codes and the voluntary standards developed by standards development organizations (SDOs) can share common elements. SDOs use formal, open, transparent development processes that are intended to ensure a matrix of representation from affected interests. SDOs are accredited and have a reputation as knowledgeable, but neutral, standards experts.

Creating a standard through an SDO can be the first step toward developing an international standard with the Standards Council of Canada, which can then be adopted by Canada and its major trading partners. Standards developed by SDOs within the National Standards System (NSS) may be applied to goods and services that can be assessed for conformity by NSS organizations.

Canada, through the Standards Council of Canada, a Crown corporation, is a member of the International Organization for Standardization (ISO) and the International Electrotechnical Commission, the two primary international standards organizations.

As an ISO member, the development, certification, testing and registration of voluntary standards in Canada is governed by internationally determined protocols. These protocols allow countries to compare goods and services using a mutually recognized standards system that, in turn, facilitates the flow of goods and services across borders.

At the time this Guide was published (March 1998), the Standards Initiatives Program, chaired by Industry Canada, was preparing a handbook on the use of standards and associated conformity assessment procedures.

The Role of Government in Code Initiation and Development

Government departments and agencies can contribute to the initiation, development and implementation of voluntary codes in many ways. However, government's role must be defined at the beginning to prevent confusion on the part of the public about the code's status, frustration on the part of the code developers and government liability in non-compliance situations.

Catalyst — Government representatives can encourage parties to explore voluntary approaches even if laws or regulations are not imminent. Government research, analysis and consultations can reveal concerns that stimulate action.

Facilitator — Governments can provide meeting rooms, teleconference facilities, information (for example, reports and case studies), advice — and, in some cases, financial assistance — in the early stages of code development.

Endorser — In some circumstances, government departments or agencies can explicitly endorse a particular code or association that satisfies the provisions of a code. However, it is important that clear legal authority for such endorsements exists.

Provider of framework rules and regulatory support — Although voluntary codes may not be required by legislation, the existence of such codes may help to achieve regulatory objectives and could have regulatory implications. For example, in a regulatory enforcement action a company could point to its adherence to a voluntary code to help establish "due diligence." Conversely, failure to adhere to a voluntary code may assist in prosecutions. In some circumstances, a regulatory authority could insist on adherence to voluntary codes as a condition of issuing a licence, and enforcement and procurement policies can encourage voluntary code compliance. Consistent, rigorous law enforcement is an essential backdrop to the effective development and use of voluntary codes.

Government officials must assess their involvement in relation to the broader public interest. They must also be scrupulously open, fair and consistent in their dealings with all parties. Governments must not condone any activity that would lessen competition or otherwise contravene the *Competition Act* or other statute. Governments must also ensure that voluntary codes do not act as barriers to trade. Given that it could cost a department considerable money to help develop and monitor a voluntary code, it may want to conduct at least a notional cost-benefit analysis of the initiative along the lines of the federal Regulatory Impact Assessment Statement.

As the code is developed, governments must remain flexible and willing to shift approaches if necessary. If evidence surfaces that a voluntary initiative is not working as intended, or that the public interest is at risk, governments should be prepared to act, taking legislative or enforcement actions if necessary.

Components of Effective Codes

Effective codes vary significantly but most contain the following key attributes.

A "plain language" statement of code objectives — Ideally, the entire code will be written in plain language so that everyone can read and understand it. However, in some cases — for example, when the code addresses highly technical matters and is intended for specialists – it may be impossible to avoid technical language. In all cases though, the objectives, at least, should be written in a simple, straightforward manner. A code that is scrutinized by a plain-language editor should be reviewed carefully to ensure that the final product retains the original meaning and key terms.
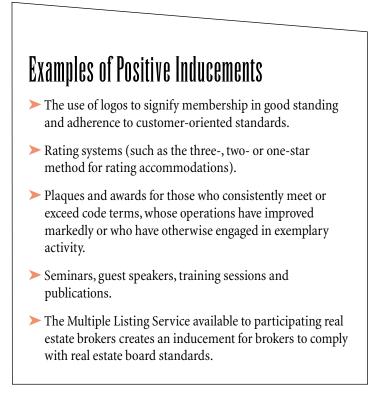
Clear, concise obligations — The heart of the code is the statement of commitments or standards that participants must meet. These obligations must be written in precise, unambiguous language so that they deliver the guidance required at the operational level. Otherwise, people may interpret them differently, which can frustrate those who apply the code, the intended beneficiaries and the individuals responsible for evaluating compliance. However, there is also value in writing obligations in a way that promotes operational flexibility. For example, rather than setting out in detail how an obligation should be met, the code should specify the performance result to be achieved.

A range of information-oriented provisions governing compliance — For fairness and credibility, the parties themselves and the greater affected community must have information about the state of compliance with code provisions and how non-compliance is being addressed. The code's information-related provisions should include some combination of self-reporting obligations for adherents, powers of monitoring, compliance verification or auditing, impact assessments and the ability to publicize data on compliance and non-compliance.

To ensure openness, fairness and honesty, it may be best to have community and NGO representatives involved in compliance verification. From the public's perspective, third-party verification offers more credibility than does self-reporting. Under the Responsible Care® Program of the Canadian Chemical Producers' Association, a combination of competitors, community and NGO representatives verify compliance. Meaningful compliance verification and auditing can take considerable time and energy on the part of third-party experts. For National Standards System standards, third parties such as certification organizations, quality registrars and testing laboratories accredited by the Standards Council of Canada can undertake compliance auditing.

Provisions creating positive inducements for parties to comply — Businesses are more likely to comply when adherence to codes attracts customers or offers privileges not available to others (see box, below).

Examples of Positive Inducements

➤ The use of logos to signify membership in good standing and adherence to customer-oriented standards.

➤ Rating systems (such as the three-, two- or one-star method for rating accommodations).

➤ Plaques and awards for those who consistently meet or exceed code terms, whose operations have improved markedly or who have otherwise engaged in exemplary activity.

➤ Seminars, guest speakers, training sessions and publications.

➤ The Multiple Listing Service available to participating real estate brokers creates an inducement for brokers to comply with real estate board standards.

Provisions creating penalties for non-compliance — The ability to respond to non-compliance with appropriate penalties can induce compliance on the part of all adherents, instil notions of fairness, and enhance the credibility of the code in the eyes of the public. For penalties to work, the code should set out procedures for identifying breaches and hearing cases and opportunities to respond. Graded responses are also appropriate as they allow administrators to tailor the sanctions to the seriousness of the non-compliance.

Penalties can include negative publicity, fines, suspension or revocation of membership and withdrawal of certain privileges. The Ontario Press Council, for example, requires that decisions concerning complaints be published in the newspapers against which the complaints was made. The Ontario Real Estate Association levies fines. The Canadian Direct Marketing Association and the Canadian Chemical Producers' Association revoke membership. In Australia, consumers who have been overcharged due to incorrect bar coding can get the product for free.

Dispute-resolution provisions — The ability to resolve complaints and respond appropriately to non-compliance in a fair, transparent, consistent manner will help to maintain and enhance the reputation and credibility of a code and its administrators. Effective dispute-resolution techniques can often help to preclude bad publicity and costly court cases. Graded responses — starting with, for example, low-profile attempts to resolve matters internally, moving to mediation (when a mutually selected third party helps disputing parties find a non-binding solution) and finally to arbitration (a binding third-party solution) — give parties the opportunity to avoid costly and adversarial public approaches. Litigation is a last resort.

Disputes tend to happen in two areas: between code adherents and code administrators, and between code adherents and the public. Different resolution approaches work best for different types of disputes. For example, if the dispute involves two code adherents or code adherents and administrators, an internal approach such as mediation might be best because both parties know the code well and mediation requires this level of knowledge. Disputes involving the public (for example, consumer complaints) might benefit from the involvement of an ombudsperson because these individuals have the knowledge and ability to investigate and resolve complaints on behalf of the public.

The Canadian Competitive Telecommunication Association's customer service standards set out the role of an ombudsperson to address customer disputes. Formal decision-making tribunals are another option. This is the last resort mechanism provided by the Cable Television Standards Council. The tribunal consists of a neutral chair with tribunal experience, a cable television industry representative and a consumer representative. The judgments of each tribunal member are published and available to the public.

Whatever approach is adopted, the powers, duties and administrative structures underlying the dispute-resolution techniques should be fully set out in the code or in a subsidiary agreement to the code.

Periodic review and amendment — By building in progress reviews at predetermined intervals (for example, after two years and every three years thereafter) and the authority to amend terms, adherents and the public will see that the code's administrators are willing to improve the code as required. As everyone concerned becomes familiar with how a code works — or does not work — in practice and, as circumstances change, periodic reviews provide the opportunity to revise and strengthen the code to reflect the needs and concerns of affected parties. Depending on the code and the circumstances surrounding it, it is usually preferable that third parties, such as consumer groups, NGOs, outside auditors and evaluators, participate in the review.

Financing and commitment of key human resources — Administering the code — whether it be monitoring, reporting, publicity, dispute resolution or sanctioning — costs money. The code must explicitly set out adequate resources to carry out these tasks. Such provisions should authorize payment of NGOs and other outside parties that participate in code development and implementation and describe possible self-financing approaches such as levying dues and charging for the use of logos and materials, and for inspections, testing and training.

Effective Implementation of Voluntary Codes

A code must be properly implemented to influence behaviour as intended, to have the sought-after market and community impact, and to safeguard the reputations of participants and those who support it or contributed to its development. A poorly implemented code can prevent or delay necessary legislation. If necessary legislation is put off too long, deficient code implementation could lead to a public crisis that can result in quickly — and poorly — drafted statutes.

Poorly implemented codes can also confuse and frustrate the public, government officials, the community, clients and customers. A bad impression, once made, can be difficult to dispel. This can jeopardize later attempts to correct the code and could even affect new, unrelated measures. Codes that are not complied with can also have legal implications for code adherents and others. This section discusses the roles of code adherents, associations, affected parties, NGOs and government in implementation.

Phased-in Compliance

Ideally, everyone will eventually commit to the terms and conditions of the code. However, 100 percent sign-on at the beginning is usually not feasible and may not even be the best approach. Compelling all members of an association to comply immediately can result in the adoption of "lowest-common-denominator" terms and conditions. It is often useful to allow a transition or phase-in period in which only those members who want to sign on voluntarily, and have the required implementation capacity, adhere to the initial code. Once implementation experience and a critical mass are achieved, commitment can be made mandatory. This allows sector leaders to forge the way and the rest to follow when success and benefits have been demonstrated.

Implementation Roles

Code adherents

The main responsibility for the successful implementation of a code lies with the individual adherents. Several techniques are available to ensure that firms or organizations can achieve an appropriate level of implementation. One is to assign a senior manager to be responsible for developing a compliance plan. Another is to provide training and orientation to employees so that they know and carry out their responsibilities. As well, spot checks and audits can reveal problem areas before serious non-compliance occurs.

In the case of sector-wide codes, participating firms and organizations can notify each other of incidents of non-compliance. It is in their best interests to do so because the reputation of the entire sector can be at stake and notification of non-compliance helps keep the playing field even. The code for Australian fruit juice manufacturers, which allows firms to test competitors' claims of juice purity, is an example of a for-malized system that, in effect, encourages companies to check up on the activities of their competitors. Peer pressure can also be exerted in the form of frank discussions among parties during which the reasons for non-compliance and possible solutions are explored.

Industry associations

An industry association involved in a code's implementation might consider developing a compliance policy that explains how, when and why it will carry out its responsibilities. The policy should be drafted in close consultation with all concerned to help preclude misunderstandings or surprises later. Associations might also develop separate but affiliated bodies to undertake specialized tasks.

NGOs, other affected parties and the public

NGOs, employees, clients, customers and members of the commu-nity can all play important roles in implementation. In many ways, these groups and individuals represent an extra set of "eyes and ears" for code participants, alerting them to incidents of non-compliance and even taking part in monitoring, compliance auditing and verifi-cation, and dispute resolution. This kind of involvement can enhance a code's credibility.

Third-party compliance verification is increasingly common in multi-jurisdictional codes pertaining to the treatment of workers. For input from NGOs, community representatives and others to work, code adherents must respect the expertise and perspectives provided (for

example, taking appropriate action in response to concerns), giving credit when it is due (and not overstating it for public relations purposes), and remunerating investments of time, energy and resources.

Government

Governments can play an important role in code implementation. In some instances, non-compliance with codes may constitute a breach of federal or provincial law. For example, a firm that falsely claims to adhere to certain standards could be subject to enforcement actions under federal or provincial law. Failure to comply with codes pertaining to environmental, health and safety, consumer or labour protection laws could be factors in convicting organizations under regulatory laws if the non-compliance is based on a lack of due diligence.

The government's role also extends beyond the legal arena. For example, government officials can share their experiences and information concerning the implementation of other codes or how related regulatory schemes could be applied to improve the effectiveness of a voluntary instrument. Governments can also encourage compliance by recognizing code efforts in licences, compliance and enforcement policies, and procurement activities.

Private Law Implications

Non-compliance with voluntary codes may also have implications in terms of private law such as in actions in contract and tort. Private law suits can be brought by other firms or organizations, consumers or other members of the community. Failure to comply with a voluntary code can be taken as evidence that a firm or organization is not meeting industry standards and is therefore not exercising reasonable care or due diligence. In some circumstances non-compliance may also constitute evidence of breach of contract.

Summary of Key Points

1 Codes may be initiated for a variety of reasons but should not delay needed laws. Research suggests that codes are typically developed in response to consumer and competitive pressures, the threat of a law or regulation, or an opportunity for social improvement. While voluntary codes can be useful supplements and forerunners to statutes and regulations, and may have significant legal implications, they should not delay needed laws.

2 Look before leaping. Before initiating or participating in a code initiative, all parties should thoroughly investigate the advantages and disadvantages of involvement. They should explore, at a minimum, the likelihood of the code's success, financial and other benefits, costs, the time and energy required to make the code work, and the potential results if the code fails.

3 Be clear about objectives and roles from the outset. To prevent problems arising later, proponents should articulate as early in the code development process as possible a clear statement of the code's objectives and the roles, rights and responsibilities of all parties.

4 Involve all affected interests. Early, regular consultation with all potentially affected parties and the meaningful involvement of key stakeholders can increase the likelihood of a code's success. The credibility and legitimacy of a code may be enhanced by the meaningful participation of non-governmental organizations (NGOs) in the development, implementation and review stages. Proponents should be prepared for the possibility of having to pay NGOs for their expertise and time. Government agencies should also be consulted as early as possible, since codes frequently have regulatory implications (for example, in the areas of consumer, competition and corporate law, workplace health and safety, and the environment).

5 Be sure the code addresses all aspects necessary to ensure compliance. The code should address monitoring and reporting requirements, dispute-resolution mechanisms, incentives for code compliance and sanctions for non-compliance, and review and amendment procedures.

6 Emphasize fair, consistent and transparent implementation. A code must be implemented in a fair, consistent, transparent manner to achieve maximum buy-in from all parties, deliver maximum benefits and protect the reputations of everyone concerned. Each code adherent should designate officials within its ranks to be responsible for compliance, and train and educate field-level employees so that they can carry out their responsibilities. Industry associations, NGOs, affected parties, the general public and government agencies can all play important roles.

7 Be patient and flexible. Rigorous terms, 100 percent buy-in and full compliance may not be feasible at the outset. Rather, an incremental approach may be necessary, which involves leading by example, transition periods and phased-in commitments over time.

Where Can I Get More Help?

*T*his Guide is intended to be a source of information and encouragement for those interested in developing and implementing voluntary codes. To explore the subject in more depth, several source exist:

➤ For more information on the Voluntary Codes Project, including summaries of research papers and case studies, interactive conferencing and an inventory of voluntary codes, visit the voluntary codes section of *Consumer Connection*, the Web site of the Office of Consumer Affairs, Industry Canada (*http://strategis.ic.gc.ca/volcodes*), or phone 1-800-328-6189.

➤ For further information on regulatory alternatives, visit the Treasury Board Secretariat's Web site (*http://www.tbs-sct.gc.ca/tb/home-eng.html*) or phone (613) 957-2400.

➤ For information regarding standards and standards organizations, visit the Standards Council of Canada Web site (*http://www.scc.ca/*) or phone 1-800-267-8220.

➤ For information on the *Competition Act*, visit the Competition Bureau Web site (*http://strategis.ic.gc.ca/competition*) or phone 1-800-348-5358.

➤ For research studies on non-regulatory approaches, including voluntary codes prepared by non-governmental organizations, contact the Consumers' Association of Canada by telephone at (613) 238-2533, visit the Web site of the Public Interest Advocacy Centre (*http:// www.web.net/piac/*) or phone the Centre at (613) 562-4002.

➤ For information on consumer attitudes to voluntary codes, and on partnerships between consumer groups and business, contact the Consumers' Council of Canada by telephone at (905) 713-2740 or by e-mail at *CCC@tvo.org*

Comments

*I*f you have suggestions for improving this Guide, or any questions or comments, please send them to:

Kernaghan Webb
Senior Legal Policy Analyst
Office of Consumer Affairs
Industry Canada
Room 965A, East Tower
235 Queen Street
Ottawa ON K1A 0H5

Tel.:   (613) 952-2534
Fax: (613) 952-6927
E-mail: *webb.kernaghan@ic.gc.ca*

Thank you. Your assistance is appreciated.