CANADIAN COMPETITION LAW COMPLIANCE: THE BUREAU SHOWS US THE MONEY

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Categories: Insights, Publications

I. Introduction

On September 18, 2014, the Commissioner of Competition released a Draft Updated Corporate Compliance Programs Bulletin (Draft Bulletin). The Competition Bureau's *Corporate Compliance Programs Bulletin* was first released in 1997 and most recently revised in 2010. The Draft Bulletin will be available for public comment until November 17, 2014.

The Draft Bulletin makes a number of notable changes to the Bureau's approach to corporate compliance programs, the most significant of which is the **creation of an incentive program—by way of reduced fines and other benefits—for leniency program participants who have a credible and effective corporate compliance program**.

Other less fundamental but nonetheless significant changes include the following:

- The addition of two new elements (risk assessment and compliance program evaluation) seen by the Bureau as essential to ensure that a compliance program is "credible and effective", and refinements to existing elements;
- Increased emphasis on the role of a company's compliance officer;
- The appointment of a Chief Compliance Officer (CCO) at the Bureau, whose role will be to assess corporate compliance programs in connection with applications for reduced penalty;[1] and
- Significant additional guidance provided by way of hypothetical examples.

The Draft Bulletin continues to emphasize the need to foster a culture of compliance, the fact that one-size-fits-all compliance does not work, and the importance of commitment from top management to corporate compliance.

II. Compliance is No Longer Just its Own Reward

We have previously indicated that a corporate compliance program can help ensure that companies comply with competition laws and facilitate detection of contraventions. The Bureau has noted that a credible and

effective program can provide a number of other benefits, including:

- Maintaining a good business reputation, and attracting customers and suppliers who value ethically-operated companies;
- Provision of early warning of potentially illegal conduct;
- Reduction of exposure of the company 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, prosecution and litigation;
- Reduction of uncertainty as to what is or is not legal, allowing both more aggressive competition where lawful and a reduction in the risk of contravention; and
- Increased sensitivity to potentially anti-competitive conduct by the company's competitors, suppliers or customers.

In addition, as noted at the outset, the Draft Bulletin also expressly proposes that a credible and effective corporate compliance program may qualify businesses for a reduced fine recommendation by the Bureau to the Public Prosecution Service of Canada (PPSC) in connection with an application under the Bureau's Leniency Program.[2] This represents a major departure from the current approach—and makes the Bureau one of the few competition/ antitrust enforcers willing to "put its money where its guidance is" and offer tangible incentives for effective compliance programs, even those which have failed.

Since the incentives will apply only to those who participate in the Leniency Program, any reduction will be on top of the already reduced fine under the Leniency Program guidelines. In his speech introducing the policy, the Commissioner was asked what level of reduction would be offered. He declined to note a particular figure, preferring to mention case-by-case flexibility, but suggested that the Bureau may consider something in the order of 5% to 10%.

The Bureau makes clear that the mere pre-existence of a compliance program will not automatically garner a company favourable treatment, but that a *credible and effective* program will be treated as a mitigating factor in the Bureau's recommendations to the PPSC under the Leniency Program, and also remedies sought by the Commissioner for contravention of the civil reviewable offences.

The pre-existence of a credible and effective compliance program will also increase the chances of a company receiving consideration for alternate case resolution. It may also determine whether the Bureau will pursue criminal or civil remedies for a matter that can be reviewed either criminally or civilly (such as the false or misleading representations and deceptive marketing practices provisions). In addition, it may support a due diligence defence where available under the legislation enforced by the Commissioner[3].

Implementing a credible and effective program, or strengthening an existing program, *after* the offence has been committed can also have a favourable impact on the Bureau's sentencing recommendations or remedies sought, though to a lesser degree than in a case of a credible and effective pre-existing program.

The Bureau notes that it may view compliance programs with suspicion where a manager participated in or condoned the contravention. That may indicate that management was not in fact committed to compliance, or cause the Bureau to view the program as a sham. The Bureau notes that contravention of the law despite the existence of a compliance program may be considered an aggravating factor for individuals. Similarly, a program implemented for appearances only, used to conceal evidence, or to obstruct justice, may also be considered an aggravating factor.

Finally, the Draft Bulletin highlights a new element that the Bureau will consider: third party corporate compliance programs. When determining the treatment of a particular compliance program, the Bureau will evaluate the extent to which the company encourages, requires and facilitates the implementation of credible and effective compliance programs with third parties.

The Bureau notes that companies applying for fine mitigation under the Leniency Program should be prepared to provide the Bureau with timely access to relevant records and employees, so that it may assess whether the compliance program is credible and effective. This suggests an active review of its procedures in order to, potentially, access a lower fine recommendation. Some companies may be concerned about the level of inspection that will be undertaken. There may be issues of privilege to consider as well.

III. Elements of a Credible and Effective Corporate Compliance Program

Another major area of change is the addition of two new elements fundamental to a credible and effective corporate compliance program: corporate compliance risk assessment and compliance program evaluation. Some of the existing elements have been enhanced as well. It is important to note that the Bureau has set the bar fairly high for qualifying as a "credible and effective" compliance program. As noted, it will effectively audit the program where companies seek favourable treatment.

The Draft Bulletin points out that the need for corporate compliance applies across all sectors, including to small and medium enterprises (SMEs). A SME should develop a corporate compliance program that is commensurate with its size and the risks inherent in its business. The new hypothetical examples in the Appendices demonstrate that the Bureau will take into account SMEs' more limited resources and sophistication in evaluating the credibility and effectiveness of their corporate compliance programs. However, the Bureau also states that resource constraints "in no way negate the necessity for such [compliance] programs."

1. Compliance Program Evaluation

The first new element fundamental to a credible and effective compliance program—in the Bureau's view—involves the continuous evaluation of the program to ensure that it is achieving the goal of promoting compliance. It is necessary to monitor new developments in the law and the company's business so that the program captures new or emerging risks. Employees should be notified of any changes in the law or jurisprudence that impact the business' risk exposure.

In addition to substantive areas, the program's overall design, its implementation, and impact should also be assessed continuously. Regular evaluation also provides an opportunity to refresh the training material and presentation style to ensure that employees remain engaged and that the training methods are working (*e.g.*, whether employees are willing to use the reporting system, the written policies are easily understood, the auditing function able to detect illegal conduct, *etc.*). The Bureau notes that the evaluation should also extend to the resources provided to support the compliance program.

The Bureau recommends that a compliance officer regularly undertake review of the program and be given the authority to make any necessary changes. To evaluate the effectiveness of the existing program, the compliance officer could conduct surveys, informal post-training meetings, focus groups, and exit interviews. Testing employees' knowledge of the law and the program and their attitudes about compliance can also provide a measure of the effectiveness of existing programs.

2. Corporate Compliance Risk Assessment

The second new requirement outlined in the Draft Bulletin is the need for corporate compliance risk assessment by the compliance officer, in conjunction with management. A thorough assessment of the potential risks faced by a company will allow it to properly design compliance strategies that address those risks. One approach is to identify the individuals in the business who have the greatest opportunity to contravene the law—usually individuals who are likely to contact competitors, such as those in sales and marketing roles.

The Draft Bulletin highlights the need to tailor compliance programs to the specific risks faced, and to develop proportionate compliance measures to deal with those risks, taking into account things such as the size of the business, the nature of the industry, and internal culture. When conducting the risk assessment, the compliance officer and management should also consider risk factors such as:

- Whether employees participate in trade associations with competitors;
- Whether the business regularly recruits employees from competitors;
- Whether markets are characterized by a small number of competitors;

- Whether it is common practice to have, or it is easy to gain, competitor intelligence within the sector;
- Whether joint ventures among competitors are common; and
- Whether competitors of the business are also its customers.

The Bureau recommends that where duties associated with a particular position are unlikely to change significantly from year to year, a risk assessment and mitigation strategy can be incorporated into the job description. However, there should be ongoing risk assessment to identify any new risks that may arise from a variety of sources, such as changes in the law, Bureau enforcement policies, the industry or even changes to business activities.

3. Tone at the Top

The Bureau continues to emphasize that visible, clear and unequivocal support from senior management is essential to a credible and effective corporate compliance program. It must be clear that compliance with competition laws is fundamental to a company's policies in order for compliance to be taken seriously. In order for this to occur, and to create a climate of compliance, there needs to be true buy-in from management—right to the very top. The Bureau notes that the failure to execute is the main reason that compliance programs fail. Therefore, management must play an active and visible role, both at the time of the program's establishment and on an ongoing basis.

The Draft Bulletin recommends that a compliance officer be appointed within the company (with the involvement of the board of directors where one exists). It also notes that it is important for a compliance officer to be given sufficient authority and independence carry out the functions of that role. The Draft Bulletin indicates—somewhat controversially—that it is the Bureau's view that the compliance officer should report directly to the board on compliance issues, such as the implementation and effectiveness of the program, as well as any disciplinary actions or allegations of contraventions of the legislation enforced by the Commissioner. The compliance officer should be removable by the board. The Draft Bulletin also stresses that the board and management must commit sufficient financial, human resource and infrastructure resources to the compliance officer to ensure that the program can be fully implemented.

4. Corporate Compliance Policies and Procedures

The Draft Bulletin echoes its predecessor in emphasizing that, to be effective, compliance programs must be designed and tailored to each company's particular needs and operations. The content of a compliance program should be made widely accessible to all employees and in a readily accessible format. The content should also be regularly updated to reflect changes in the business, the industry, the law, and the Bureau's enforcement policies.

The Draft Bulletin goes on to provide examples of internal controls that should be incorporated into compliance policies. For example, it indicates the Bureau's view that employees who handle purchases from suppliers who are also competitors should be distinct from employees responsible for sales and marketing functions; employees should obtain prior approval, and receive compliance training, prior to attending trade association meetings; and employee participation in trade associations should be limited to those that have also implemented credible and effective compliance programs. The Bureau also suggests that companies encourage third parties, such as trade associations, to address risks associated with their businesses, for example, by implementing their own credible and effective compliance programs.

5. Training and Education

Both the Bureau's current *Corporate Compliance Programs Bulletin* and the updated Draft Bulletin note that an effective compliance program includes ongoing compliance training for all employees in a position to potentially engage in, or be exposed to, anti-competitive conduct. This goal is best achieved by demonstrating how compliance policies affect employees' daily activities. The Bureau does recognize that given the unique characteristics of each business, flexibility is required in the design and communication of compliance training and programs.

In general, training materials should include a manual, but small group seminars, workshops, and online training can also be effective methods. Effective training is ideally delivered by experts, such as a compliance officer or legal counsel, and should be delivered in a consistent manner throughout the organization. Opportunity for discussion and questions should be provided. Regular evaluation of the training program is also recommended, such as by testing employees' knowledge of the law and compliance policies.

The new Draft Bulletin also suggests making regular compliance training a performance review requirement for employees in medium and high-risk positions.

6. Monitoring, Auditing, and Reporting Mechanisms

The Draft Bulletin indicates that monitoring, auditing, and reporting mechanisms are key to the success of any corporate compliance program. In our experience, this is frequently the most difficult element to implement.

Monitoring is preventative in nature and involves ongoing efforts to check against contraventions. Evidence of effective monitoring may provide a company with a due diligence defence, where available.

Audits are designed to determine whether a contravention has occurred and, if so, to ensure that it has been dealt with appropriately. The exact procedure will vary depending on the company and its specific risks, but audits may be triggered by a particular event, or undertaken on a periodic or ad hoc basis.

An effective internal reporting mechanism should encourage employees to provide timely and reliable information so further investigation can be undertaken where necessary. Compliance programs should clearly identify the types of conduct that should be reported, and to whom. Employees in a position to engage in, or be exposed to, potential contraventions should also be educated on the Bureau's Immunity Program, Leniency Program and whistleblowing provisions. The new Draft Bulletin underscores the importance of guaranteeing any whistleblower strong protections against retaliation, including from management.

While the Bureau had previously indicated that senior management should investigate any compliance issues raised and take any necessary steps to prevent future contraventions, the Draft Bulletin instead stresses need for an *independent compliance officer*, who has access to the necessary resources to perform his/her duties, including conducting investigations, as management may be involved in the possible contravention or complicit through lack of action.

7. Consistent Disciplinary Procedures and Incentives

Consistent disciplinary procedures and incentives demonstrate the company's commitment to compliance and the seriousness with which it views contraventions.

The Bureau recommends that a disciplinary code or policy clearly set out the consequences for breaches of the legislation enforced by the Commissioner or the compliance program, for example, suspension, demotion, dismissal, and even legal action—including where a manager fails to take reasonable steps to prevent or detect misconduct.

To further foster a culture of compliance, the Bureau suggests offering incentives to employees for performing in accordance with the compliance program.

All such policies, disciplinary or incentivizing, should be applied consistently. Any disciplinary action should also be properly documented, as it may be relevant to supporting a claim of due diligence.

IV. Hypothetical Examples

In the Draft Bulletin, the Bureau provides significant new guidance through a number of hypothetical examples, outlining its approach to assessing the credibility and effectiveness of corporate compliance programs. Though the sample scenarios are fairly uncontroversial, they do provide insight into the Bureau's analytical approach and its priorities. These examples demonstrate the importance of commitment from senior management and a culture of compliance. "Paper and preach" approaches, or compliance programs for appearances only, will not benefit from any potentially lenient treatment described in the Draft Bulletin. The hypothetical examples also illustrate the Bureau's approach to assessing the conduct and compliance programs of SMEs and indicate an understanding that they typically have more limited resources than large

companies.

V. Conclusion

The updates set out in the Draft Bulletin signal the continuing importance of, and increasing Bureau attention to, corporate compliance programs. The references to favourable treatment that can potentially result from having a credible and effective compliance program, and the creation of a new incentive program, are both positive developments. As noted previously, the Bureau is a true trailblazer in this area amongst major competition/antitrust jurisdictions, and deserves credit for this courageous stance.

On the other hand, this draft guidance does create some potentially onerous requirements for companies seeking to ensure their compliance programs are up to the recommended standards, or those seeking to benefit from the incentive program. Companies should bear in mind that it is not sufficient to simply develop a corporate compliance program—a well designed program must be tailored, monitored, and updated continuously to ensure its continuing credibility and effectiveness.

This Bulletin is, if nothing else, an important signal that businesses need to review existing compliance programs—now and on an ongoing basis. For those which do not yet have programs, the Bulletin provides both encouragement and incentives to establish one.

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[1] The Commissioner of Competition noted in an accompanying speech on September 18, 2014 that the role of the CCO is still being determined.

[2] It should be noted that the PPSC, and ultimately, the courts, have discretion whether to accept or reject the Bureau's recommendation, although the recommendation is usually determinative.

[3] The *Competition Act, Consumer Packaging and Labelling Act* (except as it relates to food), *Textile Labelling Act*, and *Precious Metals Marketing Act*.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.