

COMMISSIONER OF COMPETITION INTRODUCES REVISED COMPLIANCE PROGRAMS BULLETIN AT MCMILLAN EVENT

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On June 3, 2015, the Commissioner of Competition, together with Senior Deputy Commissioner Matthew Boswell and Deputy Commissioner Rambod Behboodi, launched the [Competition Bureau's Corporate Compliance Programs Bulletin](#), in a presentation at McMillan's Toronto office. The Bulletin is based on a September 2014 Draft Bulletin, which was summarized in the September 2014 McMillan Competition Bulletin, [Canadian Competition Law Compliance: The Bureau Shows Us the Money](#).

While the finalized Bulletin differs in a number of respects from the original Draft Bulletin, it continues the key aspects.

- The Bulletin provides for reduced fines or penalties for firms with "credible and effective" compliance programs – even where such policies fail to entirely prevent improper conduct. While the existence of a policy will not automatically result in reduced fines or penalties, the existence of a credible and effective policy will be treated as a mitigating factor.
- It provides for the possibility of reduced fines or penalties (although to a lesser degree) for credible and effective compliance policies implemented or strengthened after an offence when firms seek credit for them. As a result, good records of the functioning of the program will be required.
- It provides that the existence of a credible and effective compliance program will increase the chances of alternate case resolutions (as opposed to criminal prosecutions) applying to the firm's conduct.
- It provides that the Competition Bureau's newly created Compliance Unit, led by Nadia Brault, will be responsible for reviewing the credibility and effectiveness of a company's compliance program.
- It adds two additional criteria to the existing five indicia of effective compliance programs. The existing indicia were: *Tone at the Top*; *Appropriate Policies and Procedures*; *Training and Education*; *Monitoring, Verification and Reporting Mechanisms*; and *Disciplinary Procedures and Incentives*. To these are added two additional indicia: *Appropriate Risk Assessment and Program Evaluation*.

With the issuance of this finalized Compliance Bulletin, the Competition Bureau confirms its leading place amongst competition and antitrust regulators with respect to compliance programs. In particular, it, unlike most other antitrust agencies thus far, will give credit for programs which have not prevented an offence, as

long as they are "credible and effective". This provides an additional tangible benefit for organizations for establishing compliance programs.

The issuance of this Bulletin confirms the importance for all firms – large and small – of having appropriate compliance policies. There may be a tangible benefit for firms with such policies, even if they get into trouble. More importantly, of course, are the conduct related benefits which a successful policy may achieve – either in preventing particular offences, significantly reducing their scope, or bringing them to light earlier.

Appropriate policies have to be tailored to the size and complexity of the business, and the types of risks which the particular business faces, but all businesses in Canada can and will benefit from establishing appropriate competition law compliance policies. They also, as the Bureau's Bulletin notes, assist in maintaining a good business reputation, provide early warning of potential problems, increase employees sensitivities to competition and antitrust concerns, and as a result, reduce the risks.

Should firms wish to establish appropriate compliance policies, the Competition Bureau website contains a number of [useful tools](#). As well, most law firms which practice in the area, including of course McMillan, are well placed to assist organizations in establishing such policies and programs.

If your organization has never had a competition law compliance policy program, the Bureau's renewed interest in the area is a good indication that you should consider establishing one. If you have a program that has not been reviewed for some time, the updated approach indicated by the Bureau's Bulletin, as well as the positive incentives available, provide a terrific opportunity to update your program.

by James Musgrove, Janine MacNeil, Casey Halladay, Jun Chao Meng and Joshua Chad

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.

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