

COMPETITION

LAW

GROUP

COMPETITION ACT COMPLIANCE:

A PRACTICAL GUIDE TO EFFECTIVE MANAGEMENT

One of today's key corporate governance questions concerns the extent of responsibility of officers and directors to organize and monitor corporate activity to ensure it functions within the law. Failure to take responsible action can result in liability for both the corporation and its directors and officers.

Having an "effective" competition law compliance program reduces the risk of the Competition Act being breached. And, it can provide management with early warning of questionable practices; provides positive business techniques; and, if inappropriate conduct occurs, it can result in lower fines/less intrusive remedies being sought by enforcement agencies.

NOT HAVING AN EFFECTIVE PROGRAM - THE UNACCEPTABLE RISKS OF INACTIVITY

The changing landscape of Competition Act enforcement during the past decade has made competition compliance programs increasingly important: Multi-million dollar fines for offences such as conspiracy and bid-rigging have been imposed; individuals have been fined and sentenced to jail; legislative changes have made it possible for private parties to initiate competition-related proceedings; and so-called "administrative monetary penalties" ("AMPs") have been introduced for some non-criminal reviewable practices (e.g. misleading advertising), with more and greater use of AMPS proposed by the Competition Bureau.

The importance of a compliance program in avoiding anti-competitive conduct under the *Competition Act* should not be underestimated.

COMPONENTS OF AN "EFFECTIVE" COMPLIANCE PROGRAM

The Competition Bureau has issued an Information Bulletin describing the elements it considers to be essential in any compliance program if it is to be effective in preventing and detecting anticompetitive conduct under the Act. These elements also constitute the evaluative criteria against which the Commissioner of Competition ("the Commissioner") makes assessments concerning the effectiveness of a particular compliance program for the purposes of alternative case resolutions and immunity and sentencing recommendations.

The Commissioner considers the following five elements to be essential to the creation of an effective compliance program:

- *Involvement and Support of Senior Management* – The message that compliance with the law is a fundamental part of company policy must be promoted clearly.
- *Developing Relevant Policies and Procedures* – Written compliance guidelines must be developed and updated regularly. Recognizing that the level of detail will vary among firms, the Information Bulletin lists eight items typically included in written guidelines, such as a general description of the Act, examples of prohibited conduct, and procedures to be followed when violation of the Competition Act is suspected.
- *On-going Education of Management and Employees* – An effective compliance program should include training for both senior management and other employees to ensure they understand the limits of acceptable behaviour. Seminars typically are the best means to educate; the Bureau's own training and educational publications may also be useful educational tools.

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- *Monitoring, Auditing and Reporting Mechanisms* – The compliance program should include mechanisms for monitoring, auditing and reporting. Monitoring contemplates an ongoing, systematic procedure to check against potential violations of the Competition Act (advertising is one area where continual monitoring is beneficial). Audits, which can be periodic, *ad hoc* or event-triggered, should be designed to identify whether a violation of the Competition Act has occurred. Reporting mechanisms permit employees to freely report conduct believed to be in contravention of the Act. The Commissioner does not advocate any particular combination of monitoring, auditing and reporting mechanisms – but the company must be satisfied that the procedures are effective to prevent anti-competitive conduct.
- *Disciplinary Procedures* - 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 are applied consistently.

THE BENEFITS OF AN “EFFECTIVE” COMPLIANCE PROGRAM

Apart from its fundamental importance to good corporate governance and the fulfilment of directors’ and officers’ fiduciary duties, an effective compliance program will:

- Educate employees, officers and directors about the requirements of the Competition Act and reduce uncertainty about whether conduct is illegal.
- Provide early warnings about potential illegal conduct.
- Reduce exposure of the corporation and its officers, directors and employees to criminal or civil liability.
- Reduce costs related to litigation, fines, disruption in operations and adverse publicity resulting from investigations and prosecution.
- Encourage innovative and pro-competitive behaviour.
- Increase awareness of anti-competitive conduct by competitors or suppliers.
- Assist the company in its dealings with the Competition Bureau.

An effective compliance program ... can also create an opportunity to take advantage of the Commissioner’s program of immunity which otherwise might not be available.

AN “EFFECTIVE” COMPLIANCE PROGRAM WILL HELP IN DEALING WITH THE BUREAU

Quite apart from the benefits listed above, an effective compliance program builds an essential base for special consideration by both the Commissioner and the Attorney General should grounds exist for enforcement action:

- *Immunity from Prosecution* - The Competition Bureau has a program of immunity whereby the Commissioner will recommend that the Attorney General grant immunity from prosecution in exchange for co-operation. An effective compliance program may result in the early detection of impugned conduct (being the first to report and cooperating with the Commissioner are necessary requisites to the Commissioner’s consideration about whether to recommend immunity).
- *Due Diligence Defences* - Some offences under the Competition Act are “strict liability offences”, where a defence may be established by evidence that the company took appropriate measures to prevent occurrence of the offence.
- *Alternative Case Resolution* - The Commissioner will be more amenable to alternative case resolutions (e.g., something less than fully contested proceedings such as an information visit or consent order) when a company can demonstrate that (i) it terminated the anti-competitive conduct as soon as it came to light; (ii) it attempted to remedy the adverse effects of the conduct; and (iii) the conduct was not in keeping with corporate policy.

A note of caution: The Commissioner generally will not take the existence of a compliance program into account in deliberating about immunity or alternative dispute resolution in cases where the “directing minds” of the company either participated in or condoned the anticompetitive conduct. The Commissioner’s view is that in such cases management’s commitment to the compliance program is not serious, and the program is neither effective nor meaningful.

A COMPLIANCE AUDIT

Monitoring, auditing and reporting mechanisms function to prevent and detect anti-competitive conduct. They also go to the satisfaction of board governance obligations and provide both employees and managers with tangible evidence that there is a check on their activities.

A compliance audit, if undertaken in conjunction with the design or tune-up of a corporation's compliance program, provides an opportunity to conduct a comprehensive examination of a corporation's competition record, past and present. An audit is also an effective means of understanding a corporation's competition law concerns and risks, particularly if it is contemplating the inauguration of a Competition Act compliance program.

The audit team's attitude is that every piece of paper reviewed may some day turn up in adverse hands.

The compliance audit should begin by defining the scope of investigation, identifying the audit team and be followed by a review of the company's pertinent corporate records. The audit team will approach the job with the attitude that every piece of paper reviewed may some day turn up in adverse hands, and this may happen years after it was originally created. For this reason, all potentially relevant files and documents should be made available to the audit team for review.

Among the records that can be considered for review are:

- The files of policy-making executives, particularly in sales and marketing.
- Files bearing the name of a competitor.
- All competition related files, including any directives or guides on competition related topics and complaints or litigation threats from suppliers, customers and competitors.
- Sales and marketing department files, including reports from the field.
- Trade association files, including reports from those attending trade association meetings and any price-reporting or cost reporting systems, lobbying or other joint or common activity.
- In general, files of departments that deal with customers, suppliers or competitors; any trade relations or similarly designated files.
- Other correspondence, inter-office memoranda and documents relating to activities and dealings with competitors, and on a selective basis, with customers and suppliers.
- Personal files relating to any competition - relevant subject.

The document review may reveal potential competition law problems and will give the audit team the necessary background to determine whether to conduct interviews of employees who deal with competitors, customers or suppliers, and the scope of those interviews. If interviewed, employees should be asked to supply full information about questionable documents and about sensitive areas of operations. Whether interviews are necessary in any case depends in large part on the results of the document review.

SHOULD IN-HOUSE OR OUTSIDE COUNSEL CONDUCT THE COMPLIANCE AUDIT?

While inside counsel know most about a company's operations and have an existing rapport with company managers, their position of trust and confidence within the company may be compromised if they become involved in reviewing employees' personal and business files. For this reason, the investigative activities contemplated by a compliance audit are often undertaken by outside counsel, with the active involvement of in-house counsel in the design of the audit and post-audit evaluation process.

Following completion of the document review and if conducted, employee interviews, the audit team will report on any competition law problem areas that were identified by the audit and recommend changes in the company's operations. Lawful alternatives (when available) will be suggested to accomplish objectives that might be found to be questionable or risky. We typically first discuss the results of our investigation and recommendations with in-house counsel (and in some cases, senior executives) before a written report is prepared and perhaps more widely disseminated.

DOCUMENT MANAGEMENT PROGRAMS

Although not mentioned in the Bureau's Information Bulletin, the existence and observation of a document retention (management is a better label) policy can play an important role in managing a corporation's Competition Act compliance risks.

To retain records beyond their period of usefulness can be both costly and a needless source of future competition law difficulty if retention is not required by law. Accordingly, a well designed and uniformly implemented and enforced document management policy is an important aspect of a properly designed and implemented compliance program, the aim of which is to reduce a corporation's exposure to liability under the Competition Act. However, under certain conditions, destruction of documents can constitute an offence under the Competition Act. Thus, while a corporation should have a document management policy, the policy should be even-handed and non-discriminatory, and in no event should documents be destroyed in order to frustrate a judicial proceeding or Competition Bureau investigation.

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McMILLAN BINCH'S APPROACH TO MANAGING OVERSIGHT AND COMPLIANCE

McMillan Binch's competition law group has more than 30 years experience in assisting clients with all aspects of the design and implementation of effective compliance programs - everything from tuning-up existing programs to developing a new program from the ground up. While compliance programs are always customized to the needs of the client, we are always willing to quote a cost effective fixed fee to create a program which includes each of the *essential* elements identified by the Commissioner as predicates to an effective program.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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