

# **ADVERTISING COMPLIANCE PROGRAMS: WHAT CAN WORK?**

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**January 21-22, 2020  
Canadian Institute 26th Annual Advertising & Marketing Law  
Conference**

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## I. INTRODUCTION

A long time ago I wrote a paper called *How Can You Get Religion Without Going Through Hell*. That title was inspired by the observation that no matter how willing a company may be to commit to an effective compliance program, in practice it is hard to invest the significant energy and resources required, on an ongoing basis, to establish and maintain an effective compliance policy. Unless a firm has experienced an investigation or prosecution it can be difficult to do these things. Without actual experience of how disruptive and painful these proceedings are, it is hard to appreciate just how important avoiding them is. Even then, corporate memories are short. That is not to accuse anyone of cynicism, or simply paying lip service to compliance. It is, rather, to note that due to human nature being what it is, the important is often displaced by the urgent, absent some recent, direct experience which illustrates that antitrust compliance is not merely important but urgent and critical.

## II. RECENT DEVELOPMENTS

That earlier paper is now a decade old. In the last few years compliance has come a long way. With its 2015 Guidelines<sup>1</sup>, discussed below, the Canadian Competition Bureau has established itself as a leader in this area.

The goal of this paper is to provide a brief summary of the Canadian approach to compliance with the *Competition Act* (the “Act”), with some specific focus on Advertising and Marketing Law Claims, and some thoughts which may motivate a robust approach to compliance, and a few practical suggestions as to how firms may actually make it happen.

## III. COMPLIANCE PROGRAMS: THE BUREAU’S VIEW

In 2015, the Bureau released a revised Bulletin on Corporate Compliance Programs.<sup>2</sup>

The Bulletin sets out the Bureau’s view as to matters that should be contained in a competition law compliance program and the implications of having or not having such a program. It notes that firms can benefit by implementing internal mechanisms to assist them to comply with competition law. These mechanisms may also facilitate detection of problems and remedial action.

As the Bulletin points out, a corporate compliance program is not limited to ensuring that firms comply with the law and seek appropriate advice where questions may arise. Such a program may also assist firms in pursuing innovative and profitable business practices which are permitted by the law but which managers may previously have shied away from.

The Bureau notes that an effective compliance program will provide a number of benefits including:

- maintaining a good reputation;

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<sup>1</sup> See <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>.

<sup>2</sup> This Information Bulletin is available on the Competition Bureau website at: <http://www.competitionbureau.gc.ca>.

- improving a business' ability to recruit and retain staff (a business with a reputation for compliance is likely to attract higher-quality employees and have a better employee retention rate);
- improving a business' ability to attract and retain customers and suppliers who value companies that operate ethically;
- reducing the risk of non-compliance;
- triggering early warnings of potentially illegal conduct;
- allowing a business to qualify for favourable treatment in sentencing or reducing costs related to litigation, fines, administrative monetary penalties, adverse publicity, and the disruption to operations resulting from a Bureau investigation and/or proceedings before the court;
- reducing the exposure of employees, management, and the business to criminal or civil liability;
- educating employees as to the appropriate course of conduct if called upon to provide evidence in the course of an inquiry by the Bureau or if the company is the target of such an inquiry; and
- assisting a business and its employees in their dealings with the Bureau by, for example, identifying contraventions of the Act early enough to request immunity or leniency.

The Bureau notes that whether or not a firm has an effective compliance program may not have an impact as to whether the Commissioner of Competition (the "Commissioner") may bring an application to the Competition Tribunal or recommend that charges be laid against the firm, although it may increase the chances of a firm being considered for an alternative case resolution as opposed to facing criminal charges. Having an effective compliance program may also influence considerations as to whether firms or individuals should be granted immunity from prosecution, and may have an effect in influencing proposed sentencing, particularly if the program has caused the company to take remedial action.

The Bureau notes that in its view there are seven elements that are fundamental to the success of a corporate compliance program. These seven elements are described below.

**(a) Management Commitment and Support**

One of the foundations of a credible and effective corporate compliance program is management's clear, continuous and unequivocal commitment and support of a culture of compliance. Management must always exercise care, skill and diligence and act in the best interest of the business. Management must be able to identify and assess the principal compliance risks that a business face and implement appropriate systems to manage those risks in addition to traditional risks faced by the business.

The company's board of directors should appoint a Compliance Officer. The officer should be given the necessary financial and human resources to carry on his or her compliance functions and should be provided the opportunity to participate in senior management decision making.

The Bulletin takes the position that the Compliance Officer should report to the board of directors, or a committee of board of directors on compliance program matters.

**(b) Risk-based Corporate Compliance Assessment**

A thorough assessment of the potential risks faced by a company will allow it to properly design compliance strategies that address those risks. As a first step, the compliance officer, in conjunction with management, must work to identify the key legal risks faced by the business. Some of the key legal risks come from individuals who are likely to contravene the Act, including those who are likely to have contact with competitors, participants in trade association activities, and those involved in making representations to the public to promote products or the interests of the business (emphasis added). Some changes can affect risk profiles, such as the assignment of new duties to specific positions, significant changes to the business activities, and new risk arising from other sources. The compliance officer, together with management, should conduct risk assessments annually to better assess compliance issues and identify priority areas. The compliance officer should also ensure that new risks arising from changes both within and outside of the business are monitored and assessed. Existing job descriptions may be a helpful starting point for the compliance officer to identify risk factors associated with positions in the business, with a view to incorporating appropriate mitigation strategies as part of the requirements of the position.

**(c) Tailored Policies and Procedures**

A corporate compliance program should be tailored to the operations of a business and establish internal controls that reflect its risk profile. Compliance policies and procedures should also establish internal controls designed to prevent contraventions from occurring, scaled to the company's risk profile. The Bureau suggests that best practices include updating policies and procedures as the business' risk profile evolves and the compliance officer documenting efforts to promote and improve the program.

**(d) Training and Education**

A credible and effective corporate compliance program must include ongoing training and communications focused on compliance issues for employees at all levels that may be in a position to engage in, or to be exposed to, conduct in breach of the Act. The corporate compliance program should focus training on the general principles and the business' specific policies for individuals who deal with situations that could raise issues under the Act. The company should also consider the most effective methods for training and communicating to its employees based on the company's size and compliance risk assessment. Importantly, compliance training should be mandatory for all staff in positions with identified risks for non-compliance. Best practice would mandate documenting employees' participation in compliance training sessions.

**(e) Monitoring, Verification, and Reporting Mechanisms**

Monitoring, verification, and reporting mechanisms are vital to the success of any corporate compliance program and can help prevent and detect contraventions and high-risk conduct.

These mechanisms can also educate staff, provide both employees and managers with the knowledge that they are subject to oversight, and determine the program's overall efficacy. An effective monitoring, verification, and reporting procedure would allow for the business to identify areas of risk, areas where additional specific training is required, and areas where compliance issues may require new policies to be developed.

Monitoring encompasses continuous efforts implemented to prevent potential breach of the Act. Evidence of monitoring may serve as evidence to support a due diligence defence, where applicable, should litigation arise. Compliance verification may vary depending on the business and specific risks faced by the business. Verification may be used to examine the effectiveness of the compliance program. A confidential, internal reporting process allows staff to provide timely and reliable information regarding potential breaches of the compliance program or the Act that can be the basis for further investigation by the Compliance Officer. An effective reporting system may be achieved in different ways, including by implementing a confidential reporting system, promoting an anonymous hotline or by identifying legal counsel and/or the Compliance Officer as compliance resources.

**(f) Consistent Disciplinary Procedures and Incentives for Compliance**

The Bureau notes that a disciplinary code or policy is important both for its deterrent effect and as a reflection of the firm's stance with respect to anti-competitive conduct.

The policy should clearly state that disciplinary consequences can and will result from willful breach of the policy and of the Act. Disciplinary measures such as suspensions, fines, or dismissals should be applied consistently in cases of violation of the policy or the Act.

**(g) Compliance Program Evaluation**

The company must continuously assess a program's ability to deliver its core objectives and monitor new developments regarding the Act and business activities to determine their impact on the program. The compliance officer should be tasked with the responsibility and authority to undertake the review of the program and to make changes to the program as necessary.

**IV. MAKING THE BUSINESS CASE FOR COMPLIANCE**

An effective compliance program has the potential to bring with it a wealth of benefits. Identifying potential areas of risk in advance can save an organization not only time and money but can also go a long way to preserve goodwill. In addition, when managers within an organization are made aware of the parameters of legal and illegal conduct under the Act, they become empowered to pursue legitimate, and profitable, business practices. The following represents a summary of some of the motivations for an effective compliance policy.

**(a) If You Find Out You Have A Problem, Fix It Fast**

A compliance program which requires regular monitoring and reports, especially one which provides for spot checks, is likely to identify issues before the government, a fellow actor, or a potential plaintiff will know there is a problem. If you find it first and fix it, it is less likely that

there will be any enforcement challenge. As well, if your firm discovers the conduct first, you are in the driver's seat to seek immunity. Canada, like many jurisdictions, offers immunity to "first in" firms. Further, the sooner the conduct is stopped, the lower the fines and damages will be.

**(b) Reduce The Chances Of Private Class Actions**

It is now a very likely certainty that Canadian government enforcement action against alleged misleading advertising will be followed, indeed perhaps paralleled, by a private damages class action. While no such class action has yet led to a final judgment, most settle, some for significant sums. A compliance policy that identifies and allows repair of a problem before potential plaintiffs come across it will pay for itself many times over. Even the legal fees associated with successfully defending a class action will make the costs of putting in place and enforcing a compliance program look laughably low.

**(c) Reduce Securities Law Risks**

One of the key difficulties associated with potential antitrust liability, for public companies, has become the question of the necessary securities law disclosures. Fail to disclose a material fact and be sued by your shareholders. Disclose it, and be sued by your customers. It is a Hobson's Choice that a compliance system may help avoid.

**(d) Reduce Customer/Consumer Ill-Will**

For a consumer products firm, the damage to the brand may be the largest cost of a misleading advertising case. A compliance system may avoid the problem.

**(e) Reduce Key Employee Issues**

An important problem associated with investigations and prosecutions is the loss – or disruption – of key management personnel. An effective compliance policy may help managers recognize the issue, protect themselves, and minimize the damage to the firm once they become aware of the problem.

**(f) Provide a Competitive Advantage**

As well as keeping the firm clear of risk, an effective compliance policy may well give the firm's managers better tools to compete aggressively. A better sense of the rules surrounding will equip the firm to act more aggressively in the marketplace.

**(g) Obtain Beneficial Treatment in an Investigation**

A firm with a functioning compliance program that nevertheless violates the antitrust laws may still be in a better position to obtain some form of more lenient treatment compared to a firm that has ignored compliance completely.

**(h) Make Out a Due Diligence Defence**

Under Section 71.1(3) of the *Competition Act*, if you can show that you exercised due diligence to avoid a problem, even if there was misleading advertising the remedy is, essentially, a cease and desist order, not an AMP, or publicity, or consumer redress remedies.<sup>3</sup>

**(i) Avoid Increased AMPs**

Under Section 74.1(1)(c) of the *Competition Act*, AMPs for individuals can increase from \$750,000 to \$1 million for individuals, and from \$10 million to \$15 million for corporations, if there is a second occurrence.

**(j) Avoid Criminal vs Civil Misleading Advertising Challenge**

Section 52 and Section 74.01 define, essentially, the same misleading advertising conduct (making a representation to the public that is false or misleading in a material respect), but Section 52 adds the requirement that the conduct be knowing or reckless in order to be criminally prosecuted. Having a compliance policy can assist in defending against an allegation of recklessness.

**V. A TOP 9 LIST TO MAKE COMPLIANCE POLICIES HAPPEN**

As noted at the outset, while everyone knows that compliance programs are a good idea, it can be difficult to invest the energy and money into taking them beyond the page, or the annual compliance seminar, unless or until disaster strikes. This paper has outlined some of the reasons one should pursue compliance, and the collected international wisdom on what a good Compliance Program should include. The question, then, is how to achieve the necessary motivation to make it happen. The logic of doing so is outlined above, but logic isn't everything. Making it happen is really a management task; it has to be valued the way other important matters are valued, it has to be monitored and measured, and it has to be a significant aspect of someone's job. Some suggestions to achieve the desired result include:

1. Ensure compliance policies are an important feature of a single senior manager's responsibilities. The compliance role needs to be a significant aspect of the job of the compliance officer.
2. The responsibility should generally not be that of the General Counsel. More urgent issues will always win out for the attention of the General Counsel. Ideally, the responsible compliance officer should be a senior lawyer in the legal department who knows how the firm operates, who the main personalities are, and where the issues lie.
3. The compliance officer should have authority to report directly to both the General Counsel and the CEO. The Bureau also takes the view that there be a right to report directly to the Board.

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<sup>3</sup> See *R v Wholesale Travel Group Inc.* [1991] 3 S.C.R. 154 for a discussion of due diligence.



4. The compliance officer needs to develop, annually, a plan for training and for monitoring, which plan is approved in advance, and in accordance with which he or she is evaluated. The plan needs to consider the specific risks faced by the business and needs to be re-thought each year as operations and risks change.
5. The compliance officer should make regular, pre-scheduled reports to the CEO/General Counsel on progress against the plan throughout the year.
6. There needs to be a budget to hire outside firms and consultants as necessary. The compliance officer needs to explain, at year end, why he or she did not spend the budget.
7. The compliance officer may need the ability to access documents and e-mails without advance permission.
8. There should generally be a review of a possible issue (i.e. a mock investigation of a possible violation or some similar effort) at least once per year.
9. Particularly in a public company, plans need to be put in place, in advance, as to the course of action to be followed when conduct is discovered which is in violation of the antitrust laws. This will not eliminate the panic such a discovery inevitably gives rise to, but it helps.

## **VI. CONCLUSION**

The legal and financial consequences of non-compliance with competition and advertising laws are becoming more severe every day. Individuals as well as organizations are at serious risk. Public companies face dual risks, under securities laws for failing to disclose problems, and under antitrust laws when they do. Compliance systems form an integral part of an individual or organization's ability to avoid such issues. This is no longer a matter that can be left to once-a-year seminars or outside counsel; it is a critical in-house function for any sizeable corporation. The trick is to find ways to make these systems work, and this paper offers some suggestions as to both motivation and mechanisms in that regard.