



September 22, 2006

Annie Galipeau
Competition Bureau
Place du Portage 1
50 Victoria Street
Gatineau, Québec K1A 0C9

Dear Ms. Galipeau:

Re: Update of Bulletin on Corporate Compliance Programs

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to respond to the Competition Bureau's invitation to provide feedback to update its Bulletin on Corporate Compliance Programs (the Bulletin).

The CBA Section recognizes the value of corporate competition compliance programs, as an important component in the promotion of a broad public understanding of the *Competition Act* and its application to corporate conduct. The Section supports the wide use of these programs to highlight the application of the Act to particular economic sectors and individual industries and to assist corporate decision-makers to recognize and respect the requirements of this complex area of the law.

The CBA Section believes that the current Bulletin continues to highlight the relevant considerations which must be taken into account in the preparation of compliance programs and that no substantial change in the Bulletin is needed. The major objective of the Bureau and the CBA Section should be the promotion of competition compliance programs by more companies and industry associations. It is not clear what prompted the Bureau to pose the questions it has raised, and how these possible approaches would help advance that objective. The CBA Section would appreciate any further information on these issues that would help focus its response.

However, in response to the Bureau's questions in its call for comments of June 30, 2006, the CBA Section's general views are as follows:

1. The need for corporate compliance training tools

Training tools are an important part of any ongoing program, and there are many examples of available tools. The CBA Section welcomes the Bureau's continuing commitment to transparency and the materials it has developed to assist public understanding of the Act. The Bureau's publications are recognized as valuable compliance tools and are widely used in Canadian compliance programs. Several film presentations are readily available in the private sector. Online self-testing programs have been developed for individual clients, and "off the shelf" compliance training programs that may be adapted for particular industries. Most law firms that practice extensively in this area have developed programs that have been prepared with a careful focus on the Bulletin. It is not clear that the creation of further tools would contribute to the wider institution of compliance programs in Canada.

2. The need for templates of corporate compliance programs

The CBA Section does not believe that there is a pronounced need for such templates, and perhaps some drawbacks. Clearly, there are common elements to an effective corporate compliance program, most of which are clear from the Bulletin, and a template might be thought to contribute to greater ease of adoption of such programs. However, like a "form will" that has not been prepared for an individual testator, compliance templates may be used without being individualized and give rise to ambiguity and after-the-fact difficulty. Moreover, a "standard form" template may not resonate well with individuals in the company that may be most exposed to the risk of non-compliance. Secondly, if the Competition Bureau prepared the template, lawyers and their clients might hesitate to use a "tailor-made" program that deviated from the government "format", however appropriate the deviation might be in the circumstances of the particular corporation or industry. Failure to follow the format might raise questions about the Bureau's perception of the effectiveness of a particular program, in the event of future concerns about corporate conduct. Finally, if the process is too formalized, smaller corporations may be discouraged from adopting a compliance policy. Rigidity and inflexibility, and an undesirable lack of individualization, might be the unintended result. If the objectives of competition compliance are effectiveness and widespread adoption, templates may not advance either.

3. Bureau monitoring or approval of corporate compliance programs

The CBA Section considers that in some contexts the participation of Bureau representatives in a corporate training program may be desirable. However, it does not believe there is a need for approval or monitoring of corporate compliance programs. That is not a function of competition agencies in any other jurisdiction with which the CBA Section is familiar. Approval or monitoring might be construed as a pre-determination that the program was "effective," if that issue should have to be assessed in the case of subsequent allegations of misconduct. Lack of approval or monitoring might suggest deficiency, or non-effectiveness, of the program. For these reasons, risk-averse corporate counsel might be expected to seek approval for their clients' compliance programs with considerable frequency, if the Bureau offered or required approval or monitoring. That could create a demand for scarce resources that would be better allocated to other Bureau responsibilities. It could generate delay in launching a program, while awaiting Bureau approval. And once again, an approval or monitoring function might tend towards standardization, with a resulting reduction of flexibility, individualization and effectiveness.

Conclusion

The Section appreciates the opportunity to provide its views on the desirability of updating the Bulletin and we hope that the views expressed in this submission will be taken into account.

Yours truly,

Original signed by Tamra Thomson for James Musgrove

James Musgrove
Chair, National Competition Law Section