THE CANADIAN BAR ASSOCIATION
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Draft Corporate Compliance Programs Bulletin

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section.

Draft Corporate Compliance Programs Bulletin

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the *Draft Corporate Compliance Programs Bulletin* (the Bulletin), issued by the Competition Bureau to outline its views on corporate compliance programs designed to ensure compliance with the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act* (collectively, the Acts). The CBA Section strongly supports the Bureau's continuing efforts to clarify its enforcement policy by publishing enforcement guidelines, information bulletins, speeches, press releases and other interpretive aids to the business community in Canada.

Overall, the CBA Section is generally supportive of the Bulletin and the efforts of the Commissioner of Competition and the Bureau to assist businesses in implementing effective compliance programs. As such, the CBA Section agrees with many of the positions and suggestions outlined in the Bulletin and commends the Bureau on its efforts. In this submission, we focus on aspects of the Bulletin where the CBA Section has suggestions for improvement.

II. GENERAL COMMENTS

A. Scope of the Bulletin

The CBA Section recognizes that the jurisdiction of the Bureau includes the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marketing Act* in addition to the *Competition Act*. The CBA Section feels, however, that the behaviours associated with breaches of the *Competition Act* are different from those associated with the other Acts, which are more technical in nature. The focus of the Bulletin is on behavioural elements, which may lead to the prohibited conduct outlined in the *Competition Act,* but which bears little relation to the prohibited actions under the other Acts. Measures such as "Fostering a Culture of Compliance"

are, in the CBA Section's view, mostly unrelated to the proper labelling of textiles or the appropriate marketing of precious metals. The CBA Section believes that separate guidance dealing with compliance considerations under the Acts other than the *Competition Act* would be less confusing, more effective and more appropriate.

B. Need for Flexibility in Designing Programs

The CBA Section unequivocally supports the Commissioner's view, as stated in the Preface to the Bulletin, that "businesses should recognize the value of a well-designed, credible and effective [corporate compliance] program."[1] The members of the CBA Section recognize the value of the Bulletin in encouraging corporate clients to establish and effectively maintain compliance programs. The Bulletin will be a helpful tool to demonstrate the importance of such programs. The CBA Section, though, believes that the Bulletin would benefit from certain measures to improve the practical utility for businesses in Canada, including:

Recognizing that competition law compliance is just one area within the broader field of compliance, and that a competition law compliance program may have to fit within a broader program dealing with a range of compliance issues (e.g., conflicts of interest, insider trading, health and safety, discrimination, gifts, dealings with public officials, etc.). Strict adherence to the recommendations in the Bulletin may not be possible in this broader context.

Recognizing the varying abilities of firms to implement some of the detailed and more costly measures recommended in the Bulletin, such as small group training sessions, or appointment of a compliance officer. While the Bulletin does recognize that corporate resources vary and that not all programs will be alike, there are certain instances where the Bulletin is silent on such variation, which might suggest that no, or little, flexibility will be recognized by the Bureau.

Ensuring that the Bulletin focuses on business people as its main readers.

The fundamental considerations in Part IV of the Bulletin provide a useful outline of the Bureau's focus when evaluating a corporate compliance program. The CBA Section agrees with the principles upon which a credible corporate compliance program is to be established, but is concerned that the title to Part IV, incorporating the term "basic requirements", suggests little flexibility in the discussion that follows. This is of particular concern with respect to the

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[1] Bulletin, p. 3.

'suggestions' for meeting the basic requirements. It is unclear whether these suggestions are the extent of possible measures in order for a program to be considered credible. It would be particularly troubling if these suggestions were regarded as being prescriptive of the content of a valid compliance program, such that firms that adopt programs that do not resemble, for example, Appendices A and B to the Bulletin would be found not to have valid programs in place.

The CBA Section recommends that the Bureau take a clearer position in the Bulletin that the basic requirements enumerated in Part IV are fundamental principles upon which to build a corporate compliance program and the means with which a company addresses such principles is in the discretion of the company, considering its resources and industry or business characteristics. This will allow the Bulletin, in the CBA Section's view, to be a more flexible guideline to a wide range of companies, while still preserving the discretion of the Bureau in evaluating programs.

C. Document Creation and Retention

The CBA Section has some concern about suggestions in the Bulletin to create or retain records of certain behaviour, such as documenting all compliance efforts in the monitoring, auditing and reporting mechanisms section. While documenting compliance efforts could assist a company in advancing a due diligence defence, there are instances where the creation of non-privileged records would not be recommended by legal counsel. In our view the Bulletin should not specify which records should be created or kept but perhaps only provide that "documented evidence of corporate compliance will assist a company in advancing a defence of due diligence, where available."

Similarly, one of the DO's and DON'Ts in Appendix C states, "Do ensure that you keep your own records of any contact with competitors." With respect, this advice is unhelpful and may not foster compliance, since it presumes that employees will be in contact with their competitors without providing any guidance on the circumstances or subject matters in which contact with competitors is even appropriate. While there may certainly be benefits to documenting legitimate competitor contacts, in some cases it is preferable for an employee to seek legal advice prior to any contact and prior to creating any records.

The CBA Section is also concerned that broad recommendations relating to document retention are unrealistic in the modern corporate context. Many companies, as a document management

procedure, employ legitimate document destruction measures. In the CBA Section's view, no adverse inference should be drawn against a company for reasonable and legitimate destruction of records relating to compliance matters.

D. Accessibility to the Business Reader

In some instances the language of the Bulletin would benefit from better tailoring to business people. Those who run businesses would benefit most from the considerations raised in the Bulletin. On the whole, the Bulletin provides a useful and practical discussion of the legal impact of compliance programs. However, particularly in the Appendix C "DOs and DON'Ts", some language merely repeats the legislation or employs legal terminology, the meaning of which is likely unknown to the typical business reader. (Examples include: "*Don't attempt to influence upward, or to discourage the reduction of, the price* charged…" and "Don't agree with competitors on preventing other businesses from competing in a…*geographic market*.") The CBA Section recommends that the Bulletin employ, to the greatest possible degree, common terms that do not carry sophisticated legal connotations, to provide as useful a guide to business people as possible.

E. International Context of Corporate Compliance Programs

While the Commissioner, in the Preface to the Bulletin, acknowledges that businesses may already have compliance programs and that those programs be reviewed to "ensure that the essential components highlighted in [the] Bulletin are reflected in their program", the CBA Section feels that this does not sufficiently address the situation of multi-national or foreign companies operating in Canada. The clarifications for the "basic requirements" suggested in the previous section, and the resulting flexibility, would assist those companies in effectively adapting their programs to the Canadian standards.

III. SPECIFIC COMMENTS

A. Part II (B) – Benefits of a Credible and Effective Corporate Compliance Program and Trade Associations

As the Bulletin points out, trade associations face unique compliance issues and may be subject to heightened competition law risk. The Bulletin emphasizes that it is crucial that trade associations have a credible and effective compliance program in place with strict codes of ethics and conduct. However, the Bulletin provides no details as to what an effective compliance program would look like in the context of a trade association. Unlike a business, a trade association is a collection of individual and autonomous members. This fact clearly needs to be taken into account when designing an effective compliance program. In this regard, the CBA Section suggests that the following sentence be added to the end of the discussion of trade associations at the top of page 8:

> Having said that, certain aspects of the suggestions and recommendations in this Bulletin for corporate compliance policies will not apply or will have to be adapted in the context of compliance policies for trade associations. For example, it would not normally be appropriate for a trade association to audit its members for compliance with the trade association's compliance policy.

While the Bulletin advises that more information on trade associations may be obtained through the Bureau's website, a brief search turned up no specific information. Further, we understood that the Bureau hopes to release its Bulletin on Trade Associations by the summer. Without the benefit of knowing what will be in that document, it is difficult to comment on this section. As a result, the CBA Section recommends that the deadline for comments be extended until after the Trade Association Bulletin is made public or that the Bulletin be recirculated for comments once the Trade Association Bulletin is released.

B. Part IV (4) – Monitoring, Auditing and Reporting Mechanisms

While monitoring and auditing are indeed fundamental to an effective corporate compliance program, each arguably can be considerably straining on a business' (whether large or small) resources. In this vein, ongoing periodic or *ad hoc* auditing to identify infractions implies a very high standard that can impose significant burdens in terms of a business' costs and resources and

can be disruptive to its day-to-day operations.[2] Moreover, with a proper monitoring mechanism in place, it is unclear why a separate ongoing periodic or *ad hoc* "auditing" requirement is necessary.[3] Accordingly, the Bureau should seriously reconsider whether an auditing mechanism is more appropriately reserved for circumstances where an event has occurred warranting the invasive measure of auditing.

Additionally, determining the appropriate frequency and methods of monitoring and auditing (in the event ongoing periodic or *ad hoc* auditing is kept in the Bulletin) to detect or discourage potentially anti-competitive conduct is a challenge for both businesses and legal counsel advising them. Although the Bureau does not endorse any particular monitoring or auditing procedures, having regard to the specific objectives of monitoring – including detecting acts carrying anti-competitive risk, reinforcing the knowledge among employees and managers that their compliance is being monitored, and assessing areas of additional risks to inform whether further policies are necessary – it would be helpful for the Bulletin to identify examples of what the Bureau considers to be effective monitoring mechanisms in light of these objectives and discuss how these mechanisms might be instituted. In any event, both the frequency and basic measures to be taken in conducting the audit ought to be assessed in light of the particular context.

The CBA Section also has a concern about the reporting mechanism stipulated in the Bulletin, in particular, the external reporting mechanism. Informing employees of the Bureau's *Immunity Program and the Competition Act'*s whistle-blowing provisions (i.e. sections 66.1 and 66.2) arguably has a place in a corporate compliance program. At the same time, however, stipulating that "a program should also educate employees at all levels" on the Bureau's *Immunity Program* and whistle-blowing provisions of the *Competition Act* is excessive given the relative complexity of the *Immunity Program* and whistle-blowing provisions and the questionable need to have employees know the particulars of each as a matter of course.

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2 P. Glossop & J. Pratt, "Recent Developments in Competition Bureau Enforcement Guidelines and Policies" (Canadian Bar Association Fall Conference on Competition Law, Gatineau, Quebec, 11 &12 October 2007 [unpublished] at 18.

3 *Ibid.*

C. Part IV (5) – Disciplinary Procedures

The CBA Section recognizes the value of effective disciplinary measures to reinforce the importance of compliance with a company's policies and procedure. The CBA Section suggests, however, that the Bulletin reflect the Bureau's recognition, as has been the experience of some CBA Section members, of the need in certain circumstances to delay or alter disciplinary procedures. This is particularly true, for example, in the case of immunity or leniency applicants or in the course of an internal investigation where there is a need to ensure continuing cooperation by a key employee. The person subject to the discipline may provide valuable information in advance of any disciplinary action, which may not be the case post-disciplinary action. A more nuanced or flexible discussion regarding the use of discipline would be favourable.

D. Part V – Consideration Given to a Corporate Compliance Program

A. Generally

The CBA Section commends the Bureau on discussing the practical effects of establishing a compliance program. This candour will certainly assist in educating Canadian businesses to establish or enhance their compliance programs. To further enhance the educational value of this part, we recommend that the Bureau provide concrete examples of actual cases where a credible corporate compliance program was considered and the benefit it afforded the company.

B. 1. Where Senior Management is Involved in the Breach

The Bulletin provides that a senior manager knowingly contravening the law, will be considered an aggravating factor in the Commissioner's determination on recommending that charges be laid against the individual. The CBA Section views this as a reasonable exercise of discretion on the part of the Commissioner. However, the CBA Section is concerned about the Bulletin's related statement that "[i]n such cases [of senior manager wrongdoing], the Commissioner would also recommend that charges be laid against the company." The presumption that a compliance program is deficient where a member of senior management is knowingly involved in criminal behaviour is troubling. The presumption fails to consider cases where a company's program has been generally successful at ensuring compliance but where a senior manager knowingly acts contrary to the compliance program. Where this is the case, it may be inappropriate to commence

proceedings against the company which as a whole has successfully worked towards compliance, but for the actions of the rogue manager.

If the Bulletin is to comment on corporate liability for the acts of senior management, it would be useful for it to comment as well on the legal requirements of section 22.2 of the *Criminal Code* and the common law cases (e.g. *Canadian Dredge & Dock*).

B. 2. Sham Compliance Programs

The CBA Section is not aware of any situation where a compliance program was adopted as a "sham". While it does not disagree that a sham program should be treated as an aggravating factor, surely this is a very rare occurrence that does not merit specific mention in this Bulletin.

E. Appendix A – Corporate Compliance Program Framework

There are many ways to design and draft an effective compliance program. We question whether the Framework Program in Appendix A is helpful. A firm, or a Court, might conclude that a program that does not resemble Appendix A is insufficient or ineffective. This could lead to additional costs for businesses as they try to fit otherwise effective programs into the template in Appendix A. The CBA Section recommends that, if the framework is retained, the Bulletin state that it is a general guide only and that the Bureau will not deem a program deficient or non-credible if a company deviates from the framework, where the deviation is reasonable in the circumstances.

Further, if the framework is retained, the Bureau should consider segregating the parts dealing with the different Acts, as those other than the *Competition Act* tend to apply to only certain businesses.

It may also be impractical for many businesses to require employees to acknowledge reading and understanding the corporate compliance program annually, as the framework suggests. This is particularly so where the program has not changed in any meaningful way. The ongoing training component of a meaningful compliance program should be more effective in promoting continuing knowledge of compliance matters. In contrast, the Bureau may wish to recommend that management require employees to acknowledge reading and understanding a pre-existing corporate compliance program that has undergone significant changes.

F. Appendix C – DOs and DON'Ts

The CBA Section has serious concerns about the content of some of the DOs and DON'Ts in the Bulletin. There are divergent views in the CBA Section on whether the DOs and DON'Ts are helpful or should be removed from the Bulletin. In any event, the DOs and DON'Ts do not provide an accurate statement of the law in many instances, and do not provide useful guidance to employees in others. In some cases they are overly proscriptive, or could be read that way. While the CBA Section agrees that a firm or function-specific list of DOs and DON'Ts can be a useful component of an effective compliance program, a list cannot be drafted in general terms. There is a serious risk that businesses may elect simply to adopt the list of DOs and DON'Ts from Appendix C and later find themselves offside the *Competition Act* because the DOs and DON'Ts failed to provide useful guidance on practical situations of concern to a particular business.

Assuming that the DOs and DON'Ts are retained in the Bulletin, we have the following comments:

General

The DOs and DON'Ts appear aimed at both employees (including managers) and individuals charged with advising on courses of action in response to competition issues (i.e., legal counsel or compliance officers). The CBA Section believes that Appendix C should be revised to fit its target audience of employees. In this vein, "DOs" recommending direct contact with the Bureau are strongly opposed by the CBA Section, as in most cases, direct contact should not be undertaken by employees (including managers) without first consulting with a compliance officer (who may seek legal advice where appropriate) or obtaining legal advice.

Some redundancy in the DOs and DON'Ts lists should be removed, for example, repetition of subject-matter between DOs and DON'Ts.

Conspiracy, price fixing, price maintenance and bid-rigging

A number of the points under this heading are deficient as they presume contact with competitors but fail to explain that contact is permissible only in certain circumstances. As noted above, the DOs and DON'Ts also counsel the creation of records when the better approach may be to seek legal advice prior to creating records. They also presume that individual employees have access to their firm's legal counsel, which is not inevitably the case. In addition, terms like "arrangement",

"tacit understanding", "other competitive information", "geographic market" are not necessarily understood or accessible to typical employees.

The bullet points on bid-rigging and price maintenance simply repeat the language of the *Competition Act*. However, without industry-specific context and an understanding of the case law in this area, this does not provide sufficient guidance. For example, the word "tender" may be interpreted more narrowly (or broadly) by a business person than by a Court.

Restrictive Trade Practices: Abuse of Dominance, Exclusive Dealing, Tied-Selling and Market Restrictions

The Bureau should reconsider whether a compliance program should include a DOs and DON'Ts list for Restrictive Trade Practices only where management has determined that its business is, or is becoming, a market leader, in consultation with legal counsel who can assist in properly defining the "market" in which a firm competes. In other words, the determination of whether a business is a market leader should not be left to individual employees (excluding management) referencing a DOs and DON'Ts list, as may be implied from the Bulletin. Moreover, the reviewable practices area is highly complex and it is difficult to distinguish conduct which could provide grounds for an order under the Act. Any list of DOs and DON'Ts can only be aimed at risk mitigation in the particular industry. Again, many of the terms in this list are not necessarily accessible to employees, for example pricing below "cost", when the cost methodology is not clear, and "substantially affected or precluded from carrying on business" in relation to the refusal to deal provisions. The bullet point relating to price pre-announcements is also troubling, since it may be difficult for a firm to assess whether a unilateral pre-announcement will lead its competitors to respond in a manner that might be seen as coordination.

False or Misleading Representations and Deceptive Marketing Practices

The DOs and DON'Ts list for False or Misleading Representations and Deceptive Marketing Practices should include a statement that legal advice should be sought where there is doubt as to legality of a proposed advertisement, price disclosure or contest.

Again, this list seems to provide only partial guidance on a number of points and belies the complexity of concepts such as "adequate and proper testing", "general impression", "material details" and others.

IV. CONCLUSION

The CBA Section thanks the Bureau for the opportunity to submit these comments, and commends the Bureau on its ongoing efforts to promote compliance and a full understanding of the Bureau's approach to compliance. The CBA Section would be pleased to discuss these comments with the Bureau in greater detail if that would be helpful.