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Competition Bureau's Corporate Compliance Bulletin

NATIONAL COMPETITION LAW SECTION
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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 of the Canadian Bar Association.

TABLE OF CONTENTS

Competition Bureau's Corporate Compliance Bulletin

I. INTRODUCTION 1

II. GENERAL COMMENTS 1

A. The Bulletin Should be More Flexible and Less Prescriptive 1
B. Scope and Length of the Bulletin 2
C. Penalties 3

III. SPECIFIC COMMENTS 4

A. Section 3: The Role of the Compliance Officer 4
B. Section 4.1: Management Commitment and Support 4
C. Section 4.3 and Appendix A: Involvement of Employees 5
D. Section 4.3 and Section 5.2.8: Third Party Corporate Compliance Programs 6
E. Section 4.5: Monitoring, Auditing and Reporting Mechanisms ... 7
F. Section 5.2.2: Criminal Sentencing and Civil Remedies 7
G. Section 5.2.6: Where Management is Involved in the Breach 8
H. Section 5.2.7: Corporate Compliance Programs Implemented for Appearances Only 8
I. Appendix A: Corporate Compliance Program Framework 9
J. Appendix C: Due Diligence Checklist 9
K. Hypotheticals 10

IV. CONCLUSION 11

Competition Bureau's Corporate Compliance Bulletin

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to comment on the *Draft Corporate Compliance Programs Bulletin* (the Bulletin) issued by the Competition Bureau (Bureau) on September 18, 2014. The CBA Section strongly supports the Bureau's continuing efforts to clarify its enforcement policy by publishing enforcement guidelines, information bulletins, position statements and other guidance.

The CBA Section recognizes the value of the Bulletin as a tool to encourage and assist Canadian businesses to establish and maintain "credible and effective" corporate compliance programs. We believe, however, that to achieve its objective of providing meaningful guidance to the business community, certain changes should be made to the Bulletin. As drafted, the Bulletin is overly prescriptive and establishes an inappropriately high standard for corporate compliance programs. This risks the Bulletin being ignored by a large segment of the Canadian business community, rather than relied upon as an important tool to promote compliance.

II. GENERAL COMMENTS

A. The Bulletin Should be More Flexible and Less Prescriptive

Effective guidance from the Bureau regarding corporate compliance programs should reflect the fact that most businesses approach compliance by assessing the risks of non-compliance and the costs of implementing a compliance program. If the perceived costs of "effective and credible" compliance programs - as described in the Bulletin - are high, and the perceived risks of non-compliance are low, there will not be strong incentives for businesses to implement such programs.

In our experience, for a great many Canadian businesses, competition law compliance is not a significant issue because the risks of a competition law violation (and, accordingly, of non–compliance) are relatively low.

We are concerned that while the Bulletin purports not to be prescriptive, it sends a contrary message. The scope of the Bulletin and the detailed requirements it imposes set a higher standard than necessary for a compliance program, or indeed practical, for the vast majority of Canadian businesses.

For example, we do not believe the Bulletin will provide effective guidance for most small and mid-size Canadian businesses (SMEs). While the Bulletin states that it is designed to provide a "comprehensive guide to assist *all* businesses in the development of a credible and effective compliance program" (emphasis added), and while the Bulletin acknowledges that corporate compliance programs "can be designed according to the scale and size of the business", much of the tone and language of the Bulletin is prescriptive. It reflects guidance (and, effectively, requirements) that would be appropriate only for the largest businesses, in the most high risk industries, that face more significant and regular competition law compliance issues. We believe that SMEs would benefit more from a user-friendly pamphlet and non-prescriptive checklists that more appropriately reflect their compliance risks and capabilities.

When evaluating a company's compliance program, the Bureau should clarify that its expectation is that the company will have a program appropriately suited to its particular risks and needs (which may be quite low). Effectiveness should not be assessed using near perfection as the standard – it is unnecessary in most instances and would require an over-commitment of limited resources. When assessing whether a particular program is credible and effective, the Bureau's focus (as described in the Bulletin) should be on whether the program was reasonable given the risk profile of the business in question. In addition, in an instance of non-compliance, the focus of the Bureau's assessment should be on the provisions of the compliance program relevant to the conduct at issue, as opposed to an overall assessment of the program.

B. Scope and Length of the Bulletin

While the CBA Section appreciates the Bureau's efforts to provide comprehensive guidance, there is a trade-off between comprehensiveness and usefulness. We are concerned that an overly long and detailed document will not serve as a useful and practical tool for the business community. Assuming the Bureau wishes to reach an audience that extends beyond corporate

legal counsel and their external advisors (which we believe ought to be the intent), the Bureau should consider streamlining the Bulletin.

Suggestions for consideration include:

- Focusing on the *Competition Act* (the Act), and leaving compliance with the other statutes referenced in the Bulletin (*Consumer Packaging and Labelling Act, Textile Labelling Act and Precious Metals Marking Act*) to another publication.
- Eliminating overlap and duplication within the Bulletin. For example, Section 4.2 talks about businesses recognizing and updating their compliance programs to reflect any new risks that arise, as does Section 4.3 in two different places. The same subject is addressed again in detail in Section 4.7.
- Shortening certain sections. For example, the Bureau could shorten Section 5, which discusses at length the connection between a credible and effective compliance program and Bureau leniency, the criminal/civil track, the due diligence defence and alternative case resolution.

C. Penalties

The Bulletin outlines a variety of benefits of an effective compliance program, including the potential mitigation of penalties under the Act. While the mitigation of penalties should be an important incentive for businesses to "invest" in corporate compliance, the Bulletin is vague on the extent this will be recommended by the Bureau. Many of the references in the Bulletin to the mitigation of penalties are very conditional (using "may" rather than "will" to describe their availability), and there is no indication of the amount of the reduction in a fine or administrative monetary penalty (AMP) that the Bureau might recommend if a compliance program is found to be credible and effective. We encourage the Bureau to provide more specific guidance regarding its approach to mitigation assessment and recommendations.

The Bulletin should also clarify that non-eligibility for a reduction in punishment due to the lack of a credible and effective compliance program is a separate issue from reductions otherwise available under the Leniency Program.

Finally, the Bulletin notes that a compliance program may be taken into account in determining whether a matter will be pursued on a criminal or civil track when both options are available. How such a program will be taken into account, however, is not clear. For example, how would the existence of a credible and effective compliance program be taken into account by the Bureau in determining whether conduct should be pursued as a criminal offence? When would

a business have the opportunity to refer to its program in an attempt to influence such a decision? It would be useful for the Bureau to describe the standard and considerations that would apply in these circumstances.

Streamlining the penalties section to focus on the practical consequences of compliance (or non-compliance) would provide useful guidance and result in more enthusiasm for compliance programs within the business community.

III. SPECIFIC COMMENTS

A. Section 3: The Role of the Compliance Officer

As a general proposition, the Bulletin sets out an overly onerous standard for the role of the Compliance Officer (CO). For example:

- The Bulletin seems to assume, or is unclear, that the CO role will be the person's primary, if not sole, function. However, virtually all SMEs, and even many large companies, would not have the resources or the need to employ a full-time CO.
- The Bulletin indicates that the CO should have "independence", but it does not explain what this means or how the concept of "independence" applies to SMEs (which typically have very small management teams, often with each individual taking on multiple roles).
- Rather than use the potentially difficult concept of "independence", the CBA Section believes it should be sufficient that the person responsible for compliance has the appropriate mandate, resources and management support to operate effectively in that role.
- Suggestions for intricate management structures and reporting relationships of the CO are not backed up with applicable evidence-based research.

While the CBA Section agrees that the Bulletin should discuss the importance of assigning responsibility for ensuring compliance, as well as the need to provide appropriate resources, it is equally important to ensure that the requirements of the role are realistic and reflect business realities and competition law risks.

B. Section 4.1: Management Commitment and Support

The Bulletin states that "presenting values and principles, but not acting upon them undermines the credibility of a [compliance] program", but it does not provide any guidance when management might be considered to not be sufficiently "acting upon them". Replacing

potentially unclear general statements with clear guidance would enhance the accessibility and utility of the Bulletin.

While the Bulletin discusses the importance of establishing a compliance program, appointing a CO and devoting resources to compliance efforts, it provides little additional guidance as to what management can or should do to enhance a company's compliance efforts.

The discussion of the role of the board of directors in connection with a company's compliance efforts suggests a significantly greater level of involvement by the board in areas that typically would be associated with the day-to-day management of the business, which may be neither appropriate nor necessary. For example:

- The development and implementation of a corporate compliance program is typically an operational matter that is appropriate for the board of directors to delegate to the compliance officer and senior management.
- The Bulletin is overly prescriptive in the requirement that "the CO should only be removable by the board of directors on the terms set in advance by the board".
- While it may be appropriate for the board to endorse the company's overall compliance regime (which often will not be limited to competition law compliance), it may not be necessary or appropriate for the board to review in detail all components of the company's competition law compliance program or its implementation.
- While the CBA Section agrees that the board should be informed of material compliance issues that could have a significant impact on the company (for example, where management reasonably believes significant criminal conduct may have occurred), it is unnecessary and poor governance for the board of directors to be apprised of "any allegations of contraventions of the Act" or "any disciplinary actions resulting from breaches of the compliance program".
- The CBA Section agrees that the CO should have the ability, as necessary, to communicate with the board of directors regarding significant compliance matters, in particular if senior management may be involved in the conduct at issue. The Bulletin should not, however, require that the CO communicate with the board in all circumstances.

C. Section 4.3 and Appendix A: Involvement of Employees

The Bulletin should more clearly recognize that not all employees are engaged in activities that give rise to exposure to competition law risk. This should include consistently distinguishing between those employees for whom competition law training is clearly relevant to their duties

(*e.g.,* sales personnel and those in regular contact with rivals) and those employees who should be aware of company policies but do not require specific training (*e.g.,* warehouse or delivery employees).

This distinction is currently made only in certain sections of the Bulletin. For example, in section 4.3, the Bulletin suggests that companies should "establish clear, written compliance policies and procedures and distribute them to all relevant staff." The term "relevant staff" is defined as "those who could be in a position to potentially engage in, or be exposed to, conduct in breach of the Acts and therefore are in the best position to challenge the conduct and/or report it to the compliance officer." In contrast, Appendix A fails to adequately make this distinction in suggesting that training and education programs must "require each employee to participate in appropriate ongoing training".

D. Section 4.3 and Section 5.2.8: Third Party Corporate Compliance Programs

The CBA Section agrees that companies should be mindful of the competition law risks associated with participation in trade associations, and that trade associations should take appropriate steps to address such risks. The Bulletin, however, provides no details as to what a credible and 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 needs to be taken into account when designing and assessing a credible and effective compliance program for a trade association. The Bulletin should recognize that some of its recommendations will not apply or will have to be adapted in the context of trade association compliance programs. For example, it would not generally be appropriate or realistic for a trade association to monitor or audit its members for compliance.

The Bulletin also should not be overly prescriptive in what it requires companies to do to satisfy themselves that the trade associations in which they participate, or third parties with whom they do business (including suppliers and distributors), have credible and effective compliance programs. In most cases, it should be sufficient that companies impose a contractual requirement on third parties with whom they have contractual arrangements to abide by all applicable laws. Anything more intrusive than this, including any ongoing obligation to evaluate or assess the credibility or effectiveness of third party (including trade association) programs, or monitoring or auditing a third party's compliance, would be unrealistic, impracticable, and, in most cases, inappropriate. Companies lack the authority and

competence (not to mention the financial resources) to assess third parties' competition law risk profiles and the adequacy of their efforts to address those risks. Additionally, it may not be possible to assess the credibility or effectiveness of a third party's corporate compliance program without obtaining access to confidential and/or privileged records and other information that third parties would be unwilling to disclose for a variety of legitimate reasons.

E. Section 4.5: Monitoring, Auditing and Reporting Mechanisms

The Bulletin fails to appropriately reflect the balance that companies can and should be expected to strike between potentially costly and intrusive preventative measures and the likelihood of and risk associated with non-compliance.

While the CBA Section agrees that effective monitoring may be an important part of a compliance program, the Bulletin provides no practical guidance on how monitoring can be implemented. Also, it does not distinguish monitoring from an audit, other than by a vague reference to "sophisticated screening techniques which incorporate the use of econometric tools to detect the existence of cartels" – which would be neither appropriate nor necessary for the vast majority of businesses in Canada. Given the potentially high cost of monitoring and auditing, the Bureau should clarify its expectations, including specific examples of how "monitoring" and "auditing" can be implemented in a credible, effective and proportionate manner for SMEs, as well as large companies with relatively low competition law risk.

The requirement in section 4.5(b) of ongoing periodic or *ad hoc* auditing to identify infractions implies a very high standard that could impose significant and disproportionate cost and resource burdens, particularly in the case of SMEs and businesses operating in highly competitive industries. Audits should be limited to circumstances where an event has occurred that warrants such an invasive measure.

F. Section 5.2.2: Criminal Sentencing and Civil Remedies

The Bulletin states that responsibility for determining whether a company's compliance program is sufficiently credible and effective to be treated as a mitigating factor will rest with the Bureau's Chief Compliance Officer (CCO).

Given the potential significance of the CCO's role, the criteria for appointment to this position should include an understanding of the practical realities of developing and implementing a compliance program in a business context and an appreciation that the credibility or

effectiveness of a compliance program is highly contextual involving factors such as the size, resources, sophistication and compliance-risk profile of the business in question.

While the CCO will need access to certain corporate records to assess whether a company's compliance program is credible and effective, it would be helpful for the Bulletin to provide guidance regarding the type of information the CCO would likely seek in connection with such an assessment. Such requirements should be reasonable and be mindful of privilege issues.

G. Section 5.2.6: Where Management is Involved in the Breach

The fact that one or more managers participated or condoned conduct that breaches the law should not, absent other evidence, be treated as proof that the company's compliance program was neither credible nor effective.

When determining whether a company's compliance program is sufficiently credible and effective to be treated as a mitigating factor, the CCO should take a principled approach that considers all relevant factors, with no single factor being determinative.

While the CBA Section does not believe it is appropriate to reach any conclusion regarding the credibility or effectiveness of a company's compliance efforts based on the conduct of a single individual or small group of individuals, to the extent the Bureau maintains this enforcement approach, it should be limited to circumstances involving a senior officer. Current references to managers are problematic, because it is unclear what is meant by a "manager", and also because this designation can apply to lower level employees who may not be responsible for directing the company (and whose conduct may not be sufficient to impose criminal liability on the company).[1]

H. Section 5.2.7: Corporate Compliance Programs Implemented for Appearances Only

The CBA Section believes that it would be an extraordinarily rare situation where a corporate compliance program was adopted "for appearances only." While we do not disagree that such a program should be treated as an aggravating factor, this would be such a rare occurrence that it does not merit specific mention in the Bulletin. We recommend deleting section 5.2.7 and

[1] Under s. 22.2 of the *Criminal Code*, for an organization to be a party to an offence, the individual involved in the conduct must be a "senior officer," which is defined under s. 2 of the *Criminal Code* as requiring the individual to have an "important role" or responsibility for managing an "important aspect" of a company's activities.

hypothetical example 4, which are unnecessary because it is obvious that a sham program is neither credible nor effective.

I. Appendix A: Corporate Compliance Program Framework

The Corporate Compliance Program Framework is a useful tool for designing and implementing a compliance program. To maximize use of this framework, we suggest the Bureau make it available as a standalone document on the Bureau's website so it is more easily accessible to businesses.

As noted above, given that the *Consumer Packaging and Labelling Act*, *Textile Labelling Act* and *Precious Metals Marking Act* are very specific statutes only applicable to certain industries, it would be helpful if the framework were limited to the *Competition Act*.

J. Appendix C: Due Diligence Checklist

The Due Diligence Checklist will assist businesses seeking further clarity on activities that may increase their potential competition law risk. Some businesses, however, may seek to use the Due Diligence Checklist as a quick reference tool. Therefore, it would be helpful if the introductory paragraph specifically stated that the checklist is intended to be used to draft guidance for the company's employees as part of a broader compliance program, rather than as a standalone, unmodified document. The Bureau should also clarify that the use of the term "employees" refers to those employees whose activities give rise to potential competition law risks, so as to permit the checklist to be shortened.

The CBA Section recommends that duplication of topics between bullets be minimized. We also suggest that the bullets on the Act's merger provisions be removed, since these provisions raise issues that are different from the day-to-day compliance issues that are the focus of the Bulletin.

Certain statements are either potentially misleading or incorrect, and changes should be made to accurately reflect the substance of the Act and the Bureau's current approach to enforcement. As examples:

- A bullet counselling companies to request written opinions or seek advice of the Bureau prior to engaging in business activities that may affect competition creates the erroneous impression that the Bureau is able (and willing) to provide timely written advisory opinions upon which a business can rely or to otherwise provide advice on compliance with the Act.

- A bullet suggesting that employees call the Bureau where there are suspicions of bid-rigging presumes that employees will be clear as to what constitutes bid-rigging from a legal perspective. Companies need the ability to assess risks and potential wrongdoing internally before the Bureau is contacted in order to determine whether a violation may have occurred. Moreover, any such contact should be preceded by legal advice, particularly if the employee has been involved in such activity.
- The bullets addressing conspiracy and bid-rigging are too simplistic in requiring that all pricing decisions be made independently of competitors and that legal advice be sought before any contact with a competitor. These bullets do not account for joint ventures or other legitimate contacts between competitors. The same is true of statements to the effect that agreeing with competitors not to compete for certain customers or in a particular product or geographic market contravenes the Act, because such conduct may not violate the Act if it is engaged in as part of a legitimate competitor collaboration and not as a naked restraint on competition. Finally, the assertion that discussing prices, changes in industry production, capacity or inventories contravenes the Act is inaccurate. While such conduct may be viewed as circumstantial evidence of an agreement between competitors in violation of the Act, the conduct itself is not contrary to Section 45.

Accordingly, we recommend that all bullets within the Due Diligence Checklist be reviewed for accuracy.

K. Hypotheticals

The inclusion of hypotheticals in the Bulletin is very helpful, as they will allow business people and counsel to better understand how the Bureau's compliance policy might be applied in practice.

While there is a limit to the number of hypotheticals that can reasonably be included, the Bureau should strive to include hypotheticals that address a broader range of scenarios having regard to factors such as: business size; ownership (*e.g.*, public or private; subsidiary or parent); national or multinational status; industry (*e.g.*, highly concentrated and commodity product or highly-competitive and fragmented with non-homogeneous products); type of improper behaviour (cartel, abuse of dominance, vertical restraints, etc.); and, most importantly, appropriateness of compliance program.

While the Bureau appears to have made efforts to address a broad range of factors, improvements could be made. For example, with few exceptions, the hypotheticals in the Bulletin tend to present rather obvious outcomes. Hypotheticals 1, 2 and 3 are cases in point, in that they present rather extreme examples. While they might be helpful for the novice, further

guidance regarding potential grey or non-obvious areas would be more helpful to the business community.

The CBA Section is also concerned that many of the hypotheticals reflect a prescriptive tone. For example, Hypothetical 2 states that Company B's compliance program "fell well short of best compliance practices". Also, the implied criticism that the company's Compliance Officer is spending more time on labour and work-place issues than competition law compliance is inappropriate. Such prioritizing may be entirely appropriate for that business and does not necessarily imply an inadequate competition law compliance program. Hypothetical 3 involves a compliance program that is so complete that the implied message is that the standard for a credible and effective program is, if not one of perfection, extremely high. Again, this may not be appropriate for most businesses.

In contrast, Hypothetical 5 is useful because it provides an illustration of flexibility and facts that could arise in the real world. It would be helpful, however, to be more specific as to the types of alternative case resolution that might be available. For example, is it possible for a company to avoid a criminal conviction by pro-actively bringing a matter to the attention of the Bureau? The statement that the offence took place at a "lower level in the company" should be reconsidered as the employee may not qualify as a "senior officer" for purposes of section 22.2 of the *Criminal Code*, in which case charges should not be laid against the corporation.

Hypothetical 6 should be deleted, as even small merger transactions will involve legal counsel. In our view, the hypothetical is too technical to include in general guidance.

Finally, Hypothetical 7 has the Bureau giving "moderate consideration" to a compliance program because it was out of date and ineffective in some areas. It is not clear from the hypothetical, however, that such deficiencies contributed to the alleged violations. If they did not, it would be inappropriate for the Bureau to minimize its consideration of the program.

IV. CONCLUSION

We commend the Bureau on its initiative to update its guidance on corporate compliance programs. We would be pleased to discuss these comments with the Bureau in more detail at its convenience.