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COMPETITION COMPLIANCE IN CANADA

By Mark Katz

Introduction

The Canadian Competition Bureau has long promoted the implementation of competition compliance programs. In June 1997, the Bureau issued an Information Bulletin on Corporate Compliance Programs (the "Compliance Bulletin") to provide companies with a clear understanding of the Bureau's views on the topic.[1] More recently, the Bureau commenced a consultation process to assess whether certain aspects of its approach to compliance programs ought to be modified given the passage of time since the Compliance Bulletin was first published.[2]

In this article, we briefly summarize some of the key aspects of the Bureau's approach to competition compliance, including the reasons for implementing a Canadian compliance program and the elements of an effective program. We then discuss the Bureau's consultation process on possible changes to the Compliance Bulletin referred to above.

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MESSAGE FROM THE CHAIR

Ray V. Hartwell, III

It is an honor and pleasure to serve as Chair of a Committee that is active and growing. I want to thank our four vice chairs, our counsel liaison, Brian Henry, and the many members whose interest and involvement have contributed to the Committee's accomplishments. And, of course, we all invite our Committee members not only to get involved in ongoing projects, but also to help shape our future by proposing ways in which the Committee should commit its resources going forward.

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BENEFITS OF A COMPETITION LAW COMPLIANCE PROGRAM

The Compliance Bulletin sets out several benefits of adopting a compliance program. These can be grouped into three principal categories:

- reduces the risk of breaching the *Competition Act* (the "Act");
- increases the likelihood of mitigating consequences if breaches do occur; and
- encourages pro-competitive marketplace behaviour.

(i) Reduces the Risk of Breaching the Competition Act

One of the main – and obvious – benefits of a compliance program is that it can help prevent employees from contravening the Act and thus avoid exposing the company and themselves to potential liability.

The need for prevention is acute because the costs of contravention are so high. As in the United States, the penalties imposed in Canada for violations of the Act have escalated in recent years. This is especially true of the conspiracy offence, which continues to be one of the Competition Bureau's key enforcement priorities. Many of these convictions have involved international cartels; however, the Bureau is now focusing its enforcement efforts on domestic cartel conduct as well. The Bureau is also seeking ways to shift more of the liability for penalties onto corporate officers and employees, based on the premise that this will enhance deterrence.

Exposure to official proceedings is not the only concern under the Act. There is also the real threat of private civil actions. For example, criminal conduct is now increasingly likely to lead to claims for civil damages under section 36 of the Act (these are limited to single damages). In the past few years, an unprecedented number of these claims has been initiated under provincial class action legislation.

(ii) Increases the Likelihood of Mitigating Penalties if Breaches Occur

An effective competition compliance program also may lead to the early detection – and cessation of – questionable (if not illegal) conduct. This is of critical importance in light of the manner in which the Competition Bureau deals with claims for amnesty (called "immunity" in Canada). As in the United States, the Bureau operates a "first in" policy, which limits grants of immunity to those parties that are the first to approach it with evidence of a hitherto undisclosed offence.[3] In addition, even if a party does not qualify for complete immunity, it still may be able to obtain a lesser penalty ("leniency") by virtue of relatively timely cooperation. Early detection thus affords senior management with the necessary information to decide in a timely fashion whether or not to take advantage of the "immunity/leniency" opportunity.

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The fact that a company has an effective compliance program also may, in and of itself, be relevant in determining whether it is entitled to more lenient treatment from the Competition Bureau. As set out in the Compliance Bulletin, the simple fact that a company has a compliance program will not preclude enforcement action by the Bureau. However, the Bureau may be more willing to consider alternative forms of case resolution that fall short of fully contested proceedings (criminal or civil), or a reduction in sentence, where an effective compliance program is in place. Conversely, a compliance program will be of little help, and in fact may work against a company, where (i) senior personnel either participated in or condoned the improper conduct that conflicted with the direction of the program, or (ii) the compliance program is a "sham" used to conceal or deflect liability.

The requirement to implement a compliance program also may form part of a company's resolution with the authorities. Recently, this requirement has extended beyond the simple obligation to adopt a compliance program to more intrusive measures such as allowing the Bureau to review the policy before adoption and providing written confirmation to the Bureau that training sessions have taken place.

(iii) Encourages Pro-competitive Behaviour

Uncertainty about what is and is not permissible under the Act can lead to situations where legitimate methods of competition are not pursued out of concern that they may be illegal. A compliance program can help reduce these uncertainties and give companies the comfort to pursue competitive strategies more aggressively in certain situations. Knowledge of the law will also alert employees to possible violations of the Act by other parties (competitors, suppliers, customers) and provide an opportunity to use that awareness to obtain redress in the market or through legal avenues.

(iv) Importance for Multinational Corporations

Although not addressed by the Compliance Bulletin, focusing on Canadian compliance issues is of particular importance for multinational corporations with operations in Canada. All too often, the assumption is made that Canadian law is the same as that of the corporation's home jurisdiction and that, accordingly, no specific Canadian policy is necessary. While it is true that many of the principles of Canadian competition law are similar to those of foreign laws, there can be important differences in the details. For example, the Canadian law relating to price maintenance is in some ways stricter than U.S. law, while Canadian conspiracy law may allow more flexibility than U.S. law. It is important that a company and its employees be made aware of these differences so as not to unknowingly overstep the bounds of Canadian competition law or avoid conduct that may be legal.

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COMPONENTS OF AN EFFECTIVE COMPETITION COMPLIANCE PROGRAM

The Compliance Bulletin identifies five elements that the Bureau considers to be fundamental to the success of any competition compliance program: (i) the involvement and support of senior management; (ii) the development of relevant policies and procedures; (iii) the ongoing education of management and employees; (iv) monitoring, auditing and reporting mechanisms; and (v) disciplinary procedures.[4]

(i) Senior Management Support

The Bureau regards senior management's clear and unequivocal support to be the foundation of an effective compliance program. This would seem to be a trite proposition in many ways. The fact is, however, that members of senior management are often at the centre of the offending conduct that gives rise to liability. Accordingly, senior management support should be evident from the outset and should be reinforced and demonstrated at regular intervals thereafter.

(ii) Relevant Policies and Procedures

The Bureau suggests that the substantive aspects of a compliance program should be set out in a written document. While the content and form may vary, typical components of a written program include: (i) a statement by the chief executive officer stressing the company's commitment to its compliance program and to adherence to the Act; (ii) a reference to the purpose of the Act; (iii) a general description of the Act and its enforcement, penalty and remedy provisions, with emphasis on those provisions that are most relevant to the company; (iv) clear examples to illustrate the specific practices that are prohibited, so that employees at all levels can easily understand the potential application of the Act to their duties; (v) a practical code of conduct that identifies activities that are illegal or open to question; (vi) a statement outlining the consequences of breaching corporate policies; (vii) procedures that explain in detail what an employee should do when concerns arise or when possible violations of the Act are suspected; and (viii) an acknowledgement signed by employees that they have read, understood and will adhere to the compliance program.

(iii) Training and Education

An effective compliance program also must have an ongoing training and education component that reaches all personnel who are in a position to engage in, or be exposed to, anti-competitive conduct. There are many tools available to provide training in a relatively inexpensive and easy-to-use fashion, including materials made available by the Bureau.

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(iv) Monitoring, Auditing and Reporting Mechanisms

Even the best compliance program will not prevent some employees from breaking the rules. Accordingly, it is important to have in place a system for regular review and maintenance to ensure that adherence to the compliance program is effectively monitored and that the program is functioning as designed. Employees also must be encouraged to report potential wrongdoing and have an unfettered ability to do so without fear of retaliation. Although the Bureau does not endorse any particular procedure or combination of procedures to carry out these monitoring/auditing/reporting functions, it insists that the company must be satisfied that whatever practices it adopts are effective to prevent, detect and address anti-competitive conduct.

(v) Discipline

The Bureau requires that a compliance program set out a disciplinary code or policy for company personnel who initiate or participate in anti-competitive conduct. According to the Bureau, establishing these disciplinary measures demonstrates the seriousness with which the company views breaches of its program and the law.

CONSULTATION PROCESS ON COMPLIANCE BULLETIN

As mentioned above, the Competition Bureau announced on June 30, 2006 that it intended to update the Compliance Bulletin and that it was seeking the views of the business and legal communities on the following three specific points:

- whether there is a need for the Bureau to develop corporate compliance training tools;
- whether there is a need for the Bureau to develop templates for corporate compliance programs; and
- whether there is a need for the Bureau to monitor and/or approve corporate compliance programs.

The Bureau's consultation period closed on September 22, 2006. It would be fair to say that the responses were underwhelming in terms of numbers and skeptical in terms of tone. All of the respondents voiced their strong support for competition compliance programs and for the Bureau's role in supporting these programs. However, they queried whether the Compliance Bulletin is truly in need of amendment. They also expressed doubts as to how the questions posed by the Bureau would help advance the goal of promoting the wider use of compliance programs.[5]

For example, no pressing need was identified for the Bureau to develop additional compliance tools. The point was made that there are already many options available from both law firms and companies specializing in compliance programs.

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There was also no support for Bureau templates. Concern was expressed that companies might be reluctant to deviate from the Bureau's format, which would detract from the basic principle (echoed in the Compliance Bulletin) that an effective compliance program ought to be tailored specifically to a company's situation rather than consist only of boilerplate. At most, the suggestion was made that the Bureau might publish "examples" of written guidelines that it considers to be particularly appropriate.

The responses also dismissed the suggestion that the Bureau monitor or approve compliance programs as a general matter. While there is always room for individual companies to approach the Bureau to review a proposed program, it was thought that a more comprehensive form of approval/monitoring would be a waste of Bureau resources and increase the regulatory burden on the private sector. It was also noted that other competition enforcement agencies do not appear to include monitoring/approving compliance programs among their responsibilities.

It remains to be seen whether the Bureau will press ahead with its proposed changes to the Compliance Bulletin or will accept the verdict of respondents to its consultation process that no changes are required.

CONCLUSION

An effective competition compliance program is a necessary pro-active and preventive measure for businesses operating in Canada. It is in many respects an "insurance policy" for the company and an indispensable management tool. If a company does not have a compliance program in place, it should consider implementing one as soon as is feasible. The costs of a program are relatively small, and the benefits are substantial, especially in comparison to the potential risks of not having one.

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1 See Competition Bureau, Information Bulletin, "Corporate Compliance Bulletin" (June 1997), http://www.competitionbureau.gc.ca/PDFs/corp-prog_e.pdf.

2 Competition Bureau, Information Notice, "Competition Bureau Invites Feedback to Update its Bulletin on Corporate Compliance Programs" (June 20, 2006), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2142&lg=e

3 See the Competition Bureau's Information Bulletin entitled *Immunity Program under the Competition Act* (2000) (the "Immunity Bulletin"), http://www.competitionbureau.gc.ca/PDFs/immunitye.pdf; see also *Immunity Program – Responses to Frequently Asked Questions*, http://www.competitionbureau.gc.ca/PDFs/eng_faqs_oct17-05.pdf.

4 These elements are similar to the minimum requirements set out in the U.S. Sentencing Guidelines as necessary to qualify for sentence mitigation. They are also consistent with the components recommended by other competition authorities, such as the U.K. Office of Fair Trading and the Australian Competition and Consumer Commission.

5 Comments were submitted by the Canadian Bar Association, the Canadian Chamber of Commerce and The Bank of Nova Scotia (on behalf of itself, the Royal Bank of Canada, Toronto-Dominion Bank and Canadian Imperial Bank of Commerce). The comments are available at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2199&lg=e.

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