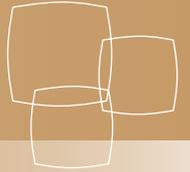




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Bulletin



Corporate Compliance Programs



Canada 

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The views expressed here are not intended to restate the law or to be a binding statement of how the Commissioner of Competition's ("Commissioner") discretion will be exercised in a particular situation. This bulletin is not a substitute for the advice of legal counsel and businesses should consider obtaining independent legal advice when developing a corporate compliance program. Enforcement decisions and the ultimate resolution of any particular matter are based on the specific circumstances of the matter.¹ Readers should refer to the specific laws when questions of law arise and, if a particular situation gives rise to concerns, should consider obtaining independent legal advice. The final interpretation of the law rests with the courts.

¹ See the Competition Bureau's [Conformity Continuum](#) bulletin.

PREFACE

A critical component of Canada's economic prosperity is a free market in which robust competition among market players determines prices, increases consumer choice and stimulates innovation. A complex network of laws, rules and practices developed and enforced at all levels of government safeguards the continued viability of Canada's free and competitive markets.

The Competition Bureau (the "Bureau") is an independent law enforcement agency that ensures Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices, business arrangements or agreements, and deceptive conduct, and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the "Act"), the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act* (collectively, the "Acts"). The Act includes amendments that came into force on July 1, 2014 as a result of Canada's Anti-Spam Legislation ("CASL").

Anti-competitive activities, deceptive conduct, and even otherwise legitimate business arrangements or agreements that raise competition issues harm Canada's economy. They can also be illegal. This bulletin provides guidance regarding credible and effective corporate compliance programs² designed to ensure compliance with the Acts. It does so in three parts, by:

- **first**, setting out measures that Canadian individuals and businesses³ should consider in order to minimize their risk of engaging in illegal anti-competitive activities and to detect any illegal activities;
- **second**, providing tools to help businesses develop compliance programs. A Corporate Compliance Program Framework setting out the essential components of a credible and effective program has been included with this publication as an appendix⁴; and
- **third**, examining hypothetical case studies illustrating how the Bureau may consider the credibility and effectiveness of a compliance program.⁵

A good corporate compliance program helps to identify the boundaries of permissible conduct, as well as identify situations where it would be advisable to seek legal advice. Implementing a corporate compliance program can, in certain circumstances, be ordered by a court⁶, agreed

2 The Bureau uses the term "compliance programs" throughout this bulletin but recognizes that often these programs are referred to in a broader sense as "compliance and ethics" programs. For added clarity, the term "compliance programs" in this bulletin refers specifically to corporate compliance programs designed to ensure compliance with the Acts.

3 For the purposes of this bulletin, the terms "business" and "company" are used interchangeably and include all forms of business entities, whether or not incorporated.

4 See Appendix A: Corporate Compliance Program Framework.

5 See Appendix D: Hypothetical Case Examples of Compliance Issues.

to in a consent agreement or required as part of an alternative case resolution (“ACR”) as a condition of the Bureau not pursuing enforcement action. However, as both the courts and the Bureau may (where appropriate) take the pre-existence of credible and effective compliance programs and/or a demonstration of some due diligence into account as a mitigating factor when assessing remedies in the event of a breach of the Acts, businesses should therefore take a proactive approach and recognize the value of a credible and effective program.

This bulletin sets out the Bureau’s view of the essential components of a credible and effective corporate compliance program. To be credible, at a minimum such a program must demonstrate the company’s commitment to conducting business in conformity with the Acts. To be effective, it needs to motivate and inform all those acting for the company, including executives, managers and employees⁷, about their legal duties, the need for compliance with internal policies and procedures, the potential costs to the business of contravening the Acts, and the harm to the Canadian economy caused by contraventions. It also needs to include tools for management to use to prevent and detect contraventions of the Acts.

A credible and effective corporate compliance program has three broad benefits for businesses:

- **first**, it signals an entity’s seriousness in tackling and addressing the legal obligations and ethical considerations facing businesses today;
- **second**, it reduces costs of compliance by helping to clarify, for business managers and officers, the boundaries of permissible conduct as well as situations that could put their business at risk of violating the Acts; and
- **third**, should there be any violations of the Acts, it provides a possibility for the business to mitigate the cost of non-compliance.

The Bureau recognizes that many businesses may already have a program in place and encourages them to take the opportunity to ensure that the essential components highlighted in this bulletin are reflected in their program.

The revisions to this bulletin reflect the importance that the Bureau places on corporate compliance programs as a means to facilitate broader compliance under the Acts.

6 For the purposes of this bulletin, the term “court” includes the Competition Tribunal (the “Tribunal”).

7 For the purposes of this bulletin, the terms “employees”, “staff” and “personnel” are used interchangeably.

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I. INTRODUCTION

I.1 General

Complying with the Acts is not optional; ignorance of the law is not a defence. By implementing credible and effective compliance programs, businesses can significantly reduce the risks of violating the Acts and help to avoid disruptive and costly investigations.

This updated bulletin sets out basic principles and provides general guidance for the development of an in-house compliance program. The Bureau encourages businesses to craft programs that reflect their specific circumstances. Some of the questions businesses may ask themselves in structuring their programs are:

- How familiar are the managers of the business with the requirements in the Acts and how they apply to the business?
- Does the business operate in multiple countries?
- Does the business have market power in the industry?
- Does the business, and/or the sector within which it operates, have a history of contraventions?
- Does the business make representations to the public to promote its products or business interests?
- What is the size of the business?

I.2 The Small and Medium-sized Enterprise (the “SME”) Sector

This bulletin seeks to help businesses of all sizes and configurations to develop credible and effective compliance programs. The Bureau recognizes that SMEs and larger businesses have different needs and concerns. As a result, each business should implement and follow a corporate compliance program that is commensurate with its size and business activities.

A compliance program helps SMEs in at least two ways. First, it enables SMEs to identify areas of high risk of contravention of the Acts. Second, it allows SMEs to determine circumstances where they may be the victim of anti-competitive conduct by other parties. In both instances, the policies and programs adopted by SMEs can be geared towards mitigating and managing areas of higher assessed risk.

The Bureau has developed fact sheets and a pamphlet on corporate compliance programs to assist SMEs in crafting credible and effective compliance programs to inform and facilitate their efforts to comply with the law, and will continue to develop further resources to assist SMEs in this regard.⁸

⁸ Additional resources to assist smaller businesses with the development of compliance programs are available through the Bureau’s [compliance web portal](#).

1.3 Implementation and Advice

The decision to implement a compliance program is generally voluntary. However, in certain circumstances, the Bureau will recommend or request that:

- a program be established in the context of a prohibition order obtained under section 34 of the Act, a probation order,⁹ a consent agreement under sections 74.12 or 105 of the Act, a contravention of subsection 114(1) of the Act,¹⁰ as well as in the context of ACRs; and
- an independent compliance monitor be appointed to monitor the implementation and operation of any such compliance program.

⁹ Section 732.1 of the *Criminal Code* provides that a court may prescribe, as a condition of a probation order, that the offender establish a program (i.e. policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence).

¹⁰ Subsection 65(2) of the Act provides that every person who, without good and sufficient cause, the proof of which lies on that person, contravenes subsection 114(1) is guilty of an offence and liable on conviction on indictment or on summary conviction to a fine not exceeding \$50,000.



2. THE IMPORTANCE OF COMPLIANCE

2.1 Why is Compliance Important?

Every individual and business, regardless of its size, has a duty to act lawfully. The Bureau operates on the assumption that all legitimate businesses and their management wish to comply with all applicable laws. The importance of a credible and effective compliance program in avoiding contraventions under the Acts, and in detecting and dealing with such behavior by the business or by its competitors, should not be underestimated.

Violating the Act could result in imprisonment, fines, administrative monetary penalties (“AMPs”), restitution, the obligation to publish notices, and the obligation to cease and desist—or a combination of these. As well, for a business, it will have reputation and market repercussions. For example, contravention of the Act, whether civil or criminal, can expose a business to significant fines or AMPs and recovery of damages by private parties.¹¹ In addition, most provinces have procedures in place to certify class action proceedings; it is not uncommon to see such actions filed when a criminal offence has been committed under the Act.

2.2 The Purpose of a Credible and Effective Compliance program

A compliance program has the following purposes:

- **first**, to inform businesses of how to minimize contraventions of the Acts, thereby avoiding the likely penalties and the costs associated in defending against the enforcement of the Acts;
- **second**, to detect at an early stage actions that may contravene the Acts, thereby allowing the company or individual to be the first-in to request immunity from prosecution or to be better placed to apply for lenient treatment in sentencing—it may also be taken into account in determining whether a matter will be pursued along a criminal or civil track where both options are available, and in assessing the magnitude of AMPs the Bureau may seek in a reviewable matter; and
- **third**, where possible, to identify circumstances where the company is potentially being affected by the anti-competitive conduct of other parties.

¹¹ Pursuant to section 36 of the Act, any person who has suffered loss or damage as a result of any offence under Part VI of the Act (such as conspiracy, bid-rigging, illegal trade practices, false or misleading representations and deceptive telemarketing) or as a result of a failure to comply with a court order may initiate legal proceedings for the recovery of damages.

2.3 The Benefits of a Credible and Effective Corporate Compliance Program

A well-structured compliance program provides a framework for compliance with the Acts. Some of the specific benefits of a credible and effective program may include the following:

- maintaining a good reputation;
- 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, AMPs, adverse publicity and the disruption to operations resulting from a Bureau investigation and/or proceedings before the court;¹²
- 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;
- assisting a business and its employees in their dealings with the Bureau—for example, by identifying contraventions of the Act early enough to request immunity or leniency; and
- increasing awareness of possible conduct in breach of the Act among competitors, suppliers and customers in the market.

¹² See section 3 of this bulletin – Consideration Given by the Bureau to a Corporate Compliance Program.



3. CONSIDERATION GIVEN BY THE BUREAU TO A CORPORATE COMPLIANCE PROGRAM

3.1 General

The existence of a compliance program does not immunize businesses or individuals from enforcement action by the Commissioner or from the Commissioner recommending to the Public Prosecution Service of Canada (“PPSC”) a prosecution. However, in determining the most appropriate means to resolve cases, including offences and contraventions where the exercise of due diligence is a defence, a credible and effective program may be considered by the Bureau in determining:

- how to proceed against companies and in making its recommendations to the PPSC, including recommendations on the fine that should be imposed;¹³ or
- the magnitude of remedy to seek with respect to non-merger reviewable matters.

Consideration, and therefore the potential benefits, will be greater in most circumstances for a company with a pre-existing credible and effective compliance program, than for a company that waits until it is investigated before implementing or enhancing a program.

A compliance program will be considered credible and effective when the company can demonstrate that it was reasonably designed, implemented and enforced in the circumstances. The burden of establishing this is always on the company. Companies that make such claims do so voluntarily and on the understanding that the Bureau will test the credibility and effectiveness of the compliance program. In these circumstances, the Bureau will expect timely access to relevant records and individuals to properly assess the company’s program.¹⁴

3.2 Specific Examples

3.2.1 Criminal Sentencing and Civil Remedies

Criminal Matters

A compliance program may assist a business in the early detection of a contravention of the criminal provisions of the Act, thereby allowing it to benefit from the advantages of being either an Immunity or Leniency Program applicant.

A business, after making an application for immunity or leniency, may choose to either implement a new corporate compliance program or make adjustments to a pre-existing program to better enable it to comply with the provisions of the Act. This will assist in ensuring

¹³ Including contraventions of subsection 114(1) of the Act.

¹⁴ The Bureau’s assessment will be based on the criteria set out in this bulletin, although it will be sufficiently flexible to incorporate the unique nature of the company in question. In that regard, the Bureau will consider such issues as the size of the company and any new or innovative features that the company employs to promote compliance with the law.

that it adopts policies and practices that conform with the law in the future. The Bureau may recommend that the PPSC require an applicant to implement a credible and effective program using this bulletin as a guide in conjunction with any grant of leniency.

The existence of a program, however, will not necessarily result in a favorable recommendation to the PPSC. When the Bureau is satisfied that a compliance program *in place at the time the offence occurred* was credible and effective, in keeping with the approach set out in this bulletin, the Bureau will treat the program as a mitigating factor when making recommendations to the PPSC in conjunction with an application under the Bureau's *Leniency Program*.¹⁵

The Compliance Unit (the "CU") of the Bureau will be responsible for the review of the credibility and effectiveness of a company's compliance program. The CU will conduct this review with the purpose of determining whether the compliance program meets the criteria set out in this bulletin. At the same time, information gathered during the investigative process that pertains to the credibility and effectiveness of a compliance program will be shared with the CU.¹⁶

If a leniency applicant requests fine mitigation on the basis of the company having a credible and effective corporate compliance program, the CU will require timely access to all appropriate corporate records and staff to make a determination. While such access is voluntary and the decision to grant access rests with the leniency applicant, an inability to properly assess the compliance program will affect the recommendation of the CU regarding any additional leniency considerations.

The CU's recommendation will be communicated to the Senior Deputy Commissioner of Competition for the Cartels and Deceptive Marketing Practices Branch, who is ultimately responsible for making leniency recommendations to the PPSC. The PPSC has ultimate discretion whether to accept or reject the Bureau's recommendation, but the Bureau's recommendation is given due consideration by the PPSC.¹⁷

Civil Matters

In non-criminal matters, the Commissioner may apply to a court for a remedial order. In this regard, the existence of a credible and effective program at the time that the impugned conduct took place may be considered by the Bureau as mitigating the magnitude of an AMP, or other remedies sought by the Commissioner as they relate to deceptive marketing practices. This may be the case where there is evidence that the activity is contrary to a business' policies and the statements of its management, that those committing the contravention took steps to avoid detection from management, and that the conduct was terminated and disciplinary action was taken as soon as it became known to management. Except in the case of a consent

15 The Bureau will recommend immunity from prosecution for the business or individual involved in the offence that is first-in to make an application and meets all the requirements of the *Immunity Program*.

16 For example, comments from staff to investigating officers about their knowledge of the company's compliance program, corporate documents that indicate the level of management support for the program, etc.

17 See Section 3 of the [Memorandum of Understanding between the Commissioner and the PPSC](#).

agreement under s. 105 of the Act, the Tribunal or a court has discretion whether to accept, reject or modify the Commissioner's remedy recommendation, or order its own remedy.

3.2.2 The Choice to Pursue either a Civil or Criminal Track

In certain instances, the Bureau has the option to pursue a matter either under a civil or criminal track. For example, the false or misleading representations and deceptive marketing practices provisions of the Act, which prohibit making a materially false or misleading representation to the public for the purposes of promoting a product or a business interest, may be pursued either civilly, or criminally if there is clear and compelling evidence that the conduct was engaged in knowingly or recklessly.

The Bureau's decision to pursue a matter under the civil or criminal track also takes into consideration whether criminal prosecution is in the public interest. To determine whether it is in the public interest, among other things, the pre-existence of a credible and effective compliance program, is taken into account.

3.2.3 Due Diligence Defence

For certain false or misleading representations and deceptive marketing practices provisions under the Act,¹⁸ a company may argue that it had exercised due diligence to prevent the conduct.

The pre-existence of a program is not, in itself, a defence to allegations of wrongdoing under any of these provisions. At the same time, a credible and effective program may enable a business to demonstrate that it took reasonable steps to avoid contravening the law. Documented evidence of a credible and effective corporate compliance program will assist a company in advancing a defence of due diligence, where available.¹⁹

3.2.4 Consent Agreements and other Non-Contested Resolutions

Depending on the circumstances, conduct contravening the Acts may be resolved without fully-contested proceedings. For example, the Act allows for the registration of a consent agreement with the Tribunal under section 105 to address civil reviewable matters under Part VIII. Similarly, a consent agreement may be registered with a court under section 74.12. Section 34 provides that a court may, on application of the Attorney General of Canada, issue a consent prohibition order with or without an admission of guilt.²⁰ The Bureau's effort to increase compliance without the need for contested proceedings is also supported by the availability of ACRs, which may include, among other compliance instruments, undertakings, information meetings, information letters, warning letters and compliance meetings.

18 The following sections of the Act contain a due diligence defence: section 52.1, deceptive telemarketing; section 53, deceptive notice of winning a prize; and section 55, multi-level marketing plans.

19 Even if due diligence is not made out, the presence of a credible and effective compliance program may nevertheless be a mitigating factor considered by the court when determining the quantum of an AMP, for example.

20 Section 34 of the *Competition Act* allows for a court to impose prescriptive terms.

The Commissioner is generally open to settlement offers in all cases, provided that settling the matter by way of a consent agreement is more in the public interest than by litigating it. In certain circumstances, the Commissioner may be more inclined to consider an alternative form of resolution to litigation, including entering into a consent agreement, where the business can demonstrate that:

- the conduct was contrary to a credible and effective corporate compliance program in existence at the time of the contravention;
- it terminated the conduct in breach of one of the Acts as soon as it was detected;
- it was brought to the Commissioner’s attention;
- it attempted to remedy the adverse effects of the conduct;
- the conduct occurred at a lower level in the business;
- disciplinary action was taken by the company against the employee who engaged in the conduct; and
- the conduct was not carried out or endorsed by management.

A compliance program is not a prerequisite for ACRs or consent agreements, as appropriate, in either civil or criminal matters. The existence of a credible and effective program could, however, provide a business the tools through which it is able to satisfy the above-noted requirements.

If the Bureau determines that an alternative form of resolution is appropriate to resolve a matter, and a credible and effective program is not already in place, the Commissioner may, whenever appropriate, require the implementation of such a program as part of the resolution. Where a program is already in place, the Commissioner may, whenever appropriate, require the business to review its program to promote compliance with the Acts and possibly to revise or enhance its program.

Where the implementation of a program forms part of the resolution of a matter, the business may be required to demonstrate to the Commissioner that its program is likely to prevent conduct in breach of the Acts. As a starting point, businesses should refer to section 4 of this bulletin — Basic Requirements for a Credible and Effective Corporate Compliance Program to assess whether the proposed program is likely to be credible and effective.

3.2.5 Where Management is Involved in the Breach

When a company engages in conduct that breaches the Act, if one or more managers participated in, condoned or were willfully blind to that conduct, it may indicate to the Bureau that management’s commitment to compliance may not be serious and the company’s program was neither credible nor effective. In addition to the Bureau pursuing both the company and the individuals, knowingly contravening the law despite the existence of a program may be considered an aggravating factor.

However, the Commissioner may still give consideration to the company's program, if it provides evidence that it exercised due diligence to prevent the commission of the offence or contravention, and that the managers in question acted alone and hid the conduct from others in the company.

3.2.6 Third Party Corporate Compliance Programs

Competition law compliance risks can arise outside of the proprietary business activities of companies, such as through relationships with third parties. As part of their compliance program, companies should be aware of the risk posed to them by the third parties with whom they do business, or interact with in respect of their business.

For example, a company may determine that its participation in a trade association represents a significant risk relating to potential cartel behaviour, and may prohibit its representatives from participating unless the association implements a credible and effective competition law compliance program.²¹ In other situations, it may assist smaller companies, which are seeking to act as sales agents for the company, to implement a competition law compliance program.

21 Trade associations face unique compliance issues regarding competition law. Given that an association provides a forum where competitors collaborate on association activities, trade associations are exposed to greater risks of anti-competitive conduct. It is very important that trade associations implement credible and effective programs with strict codes of ethics and conduct and appropriate procedures and compliance steps to prevent improper conduct and to prevent the trade association and its members from being used as a conduit for illegal activities. These trade association compliance programs could also be used as a means to collectively train and update its members' employees on their common compliance risks, where each company doing so individually would be cost prohibitive. For more information on trade associations, see the Bureau's pamphlet entitled [Trade Associations and the Competition Act](#).



4. BASIC REQUIREMENTS FOR A CREDIBLE AND EFFECTIVE CORPORATE COMPLIANCE PROGRAM

A credible and effective compliance program is one that, within the resources of the company and in the light of its activities, addresses the risk profile of the business. However, in all instances, a credible and effective compliance program should have seven basic elements:

1. Management Commitment and Support
2. Risk-based Corporate Compliance Assessment
3. Corporate Compliance Policies and Procedures
4. Compliance Training and Communication
5. Monitoring, Verification and Reporting Mechanisms
6. Consistent Disciplinary Procedures and Incentives for Compliance
7. Compliance Program Evaluation

Each of these elements is discussed below.

4.1 Management Commitment and Support

Management's clear, continuous and unequivocal commitment and support is the foundation of a credible and effective corporate compliance program.

(a) Management Support

Fostering a culture of compliance starts at the top.

Management, in the performance of its fiduciary duties, must always exercise care, skill and diligence and act in the best interests of the business, including compliance with relevant legal requirements. In addition to the broad range of traditional risks faced by a business, management must also identify and assess the principal compliance risks that the business faces and implement appropriate systems to manage those risks.

Management fosters a culture of compliance within the business by both actively participating in the compliance program and assuming a highly visible role in its promotion on an on-going basis. By demonstrating its clear, continuous and unequivocal commitment to compliance, management conveys the message that contraventions of the law are not acceptable under any circumstances. Presenting values and principles, but not acting upon them, undermines the credibility of a program and reduces the potential benefits a company could otherwise attain as a result of its program. Failure to execute and a lack of management commitment are the main reasons compliance programs fail.

(b) The Compliance Officer

To ensure that a company meets its compliance objectives, the company should assign responsibility for its compliance program to a high level executive position. The position should have:

- high visibility in the organization through an appropriate title, such as “Compliance Officer”;
- independence, professionalism, and the authority to implement and enforce a credible and effective program across the company;
- the necessary financial and human resources relative to the company’s risk profile; and
- the opportunity to participate in senior management decision making and to develop a solid understanding of what is taking place within the business itself, the industry in which it operates and an ability to properly assess the potential non-compliance risks to the business.

(c) Involvement of the Board of Directors

The company’s board of directors²² should appoint the Compliance Officer²³ and endorse the company’s compliance program. The Compliance Officer should report to the board of directors, or a committee of the board of directors (such as the audit committee) on compliance program matters, such as the implementation and effectiveness of the program, disciplinary actions resulting from a breach of the program’s policies and procedures, as well as any allegations of contraventions of the Acts. The Compliance Officer should only be removable by the board of directors on terms set in advance by the board. The involvement of the board of directors, or even a committee of the board of directors, serves as an additional level of fiduciary protection where managers may be the perpetrators of a contravention of the law.

The board of directors and management must also commit to allocating the necessary financial, human resource and infrastructure support to ensure that the Compliance Officer is able to fully implement the program.

Suggestions to meet this requirement

- Management should be responsible for clearly promoting compliance with the Acts as a fundamental part of their business policy and their supervisory role, and be held accountable for their actions in this regard.
- Management should expressly commit to compliance, ensure that a credible and effective compliance program is established, actively participate in programs designed to educate and support compliance, and create incentives that promote adherence to the business’ compliance program.

22 While references are made in this bulletin to the roles and responsibilities of the board of directors, these comments apply equally to the owners of businesses that do not have a board, regardless of their size.

23 Reference is made in this bulletin to the role of the Compliance Officer or group of persons responsible for the compliance function in a business. In cases of smaller businesses that do not have the resources to appoint such an officer on a full-time basis, these comments are directed to the manager with ultimate responsibility for establishing and enforcing the company’s compliance program.

- A committed and capable member of management should be appointed as a Compliance Officer, responsible for the business' compliance program and for dealing with questions and concerns pertaining to compliance with the law.
- The board of directors should have full responsibility for the selection and the terms for dismissal of the Compliance Officer, and for the approval of an appropriate compliance program.
- The board of directors, or a committee of the board of directors, should be informed of any disciplinary actions resulting from breaches of the compliance program.
- The Compliance Officer should report at least quarterly to the board of directors on compliance matters.

4.2 Risk-based Corporate Compliance Assessment²⁴

A thorough assessment of the potential risks faced by a company will allow it to properly design compliance strategies that address those risks.

Non-compliance with the Acts exposes a business and its staff to civil and criminal penalties, the risk of private civil litigation and reputational damage, among other negative consequences. To prevent non-compliance, a business should:

- engage in a risk assessment to properly address the breadth of potential exposure to non-compliance risks;
- devise a corporate compliance program that addresses these risks; and
- foster a culture of compliance as a means of risk reduction/mitigation.

(a) Identify Areas of Risk

The Compliance Officer, in conjunction with management, must work to identify the key legal risks faced by the business. The business can then tailor its compliance program to the specific risks faced and to design proportionate compliance measures to meet the most likely and most serious of those risks.

A proportionate strategy provides the flexibility to incorporate specific approaches to compliance into a program based on, among other things, the size of the business, the nature of the industry, and the internal culture of the business. For example, all businesses, regardless of their size, should include measures that address their potential exposure to the criminal provisions of the Act relating to bid-rigging, price fixing and other cartel activities, as well as those provisions relating to deceptive marketing practices. The risks associated with other provisions of the Act, such as the abuse of dominance provisions, will depend upon the nature and size of the business.

²⁴ The United Kingdom's Office of Fair Trading, the predecessor to the Competition and Markets Authority ("CMA"), released a compliance guide "[How your business can achieve compliance with competition law](#)" that developed the area of risk-based corporate compliance. Many of these suggestions are drawn from that guide. Another useful reference regarding risk assessment is the *Framework Document on Anti-trust Compliance programmes* from France's Autorité de la concurrence.

However, businesses must be cognizant that risks may change as their business evolves and their compliance programs will need to be sufficiently flexible to allow them to adapt. For example, potential risks can arise in new or unusual circumstances, such as when a business becomes a party to a proposed merger, or enters a new product or geographic market.

(b) Identify Employees Exposed to Risk

One approach to identifying risks is to determine who in the business is most likely to contravene the Acts.²⁵ Individuals who are likely to have contact with competitors, such as those in sales and marketing roles, as well as participants in trade association activities, and trade show and conference attendees, are at a higher risk of engaging in cartel activities than individuals in manufacturing or financial positions. Similarly, everyone involved in making representations to the public to promote products or the interests of the business will need, at a minimum, guidance on the false and deceptive marketing provisions of the Act.

Further, all employees should be made aware of the compliance program, as a disaffected employee may be inclined to take some form of action that puts the business at risk. In those circumstances, tools that promote a positive employee environment throughout the organization, including in human resources, may help identify and prevent contraventions of the law. Furthermore, a business may consider asking employees who are in a position to potentially engage in, or be exposed to, conduct in breach of the Acts, to certify in writing that they have read and understood the company's program, including its policies and procedures.²⁶

(c) Identify Changes That Can Affect Risk Profiles

Where the duties associated with managers' and employees' positions are unlikely to change significantly from year to year, businesses should be able to incorporate a risk assessment and requisite mitigation plan into their job descriptions. At the same time, businesses must recognize that the assignment of new duties to specific positions may alter the existing risk profile and therefore ensure that the mitigation strategy is sufficient to address any new risks.

Significant changes to the business activities can also affect risk profiles. For example, a reduction in the business' workforce might create changes that undercut previously effective compliance controls. A decision to enter a new product²⁷ or geographic market can change the risk calculation. A merger or a new marketing campaign can change or add new risks that need to be considered.

Similarly, the business' on-going risk assessment must also be able to identify new risks that may arise from other sources, such as changes in the law and the associated jurisprudence, the Bureau's enforcement policies and in the industry (for example, the characteristics of the

25 Other approaches can include: benchmarking other businesses on compliance risk analysis; looking at the characteristics of the different markets where the company operates; and reviewing guides issued by the government and other agencies that work on compliance issues.

26 See Appendix B – Certification Letter.

27 The Act defines "product" to include an article or a service.

markets in which it operates, new products, new geographic markets, deregulation, changes among competitors, and changes in supply and demand levels and chains).

Suggestions to meet this requirement

- The Compliance Officer, in conjunction with management, should conduct risk assessments annually to better assess compliance issues and identify priority areas to be addressed.
- In addition, the Compliance Officer should ensure that new risks arising from changes both within and outside of the business are monitored and assessed and that strategies are developed on a timely basis to properly address those risks.
- The types of risk factors the Compliance Officer and management should consider include:
 - whether staff participate in trade associations in conjunction with their competitors;
 - whether the business regularly recruits employees from competitors (particularly managers, marketing executives and salespeople);
 - whether markets are characterized by a small number of competitors (for example, whether there are frequent occurrences where the same bidders compete on tenders);
 - whether it is common practice to have, or it is easy to gain, competitor intelligence within the sector;
 - whether it is common practice for competitors to form joint ventures with each other;
 - whether the business makes representations to the public to promote its products or business interests; and
 - whether it is common for competitors of the business to also be its customers or suppliers.
- The Compliance Officer can initially use existing job descriptions to identify risk factors associated with positions in the business and incorporate the appropriate mitigation strategies as part of the requirements of the position. The Compliance Officer should revisit job descriptions as they evolve over time, and speak with employees to ensure that the requirements of their job descriptions have not changed in a way that introduces new risk factors for the position.

4.3 Corporate Compliance 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.

The development and documentation of compliance policies and procedures tailored to the operations of a business are critical to the success of a program. Compliance policies and procedures should be designed in a manner most relevant to the business' operations and employees' daily activities, and scaled to its risk profile. For example, if a business often submits bids, a list of "dos and don'ts" when preparing a bid submission could be included in its policies and procedures. Similarly, it could be made clear that employees are not to engage in discussions with competitors about pricing, allocating markets or customers, or

limiting supply of any products, in any situation whether professional or social. Moreover, policies and procedures can be put in place to ensure that all advertising, pricing and any other representations made to the public are not deceptive.

Compliance policies and procedures should establish internal controls designed to prevent contraventions from happening, scaled to a company's risk profile. Examples of such internal controls may include:

- ensuring that employees who handle purchases from suppliers who are also competitors are distinct from employees responsible for sales and/or marketing;
- requiring that employees obtain prior approval and undergo compliance training before attending trade association meetings where competitors may be present;
- setting up systems to ensure that any savings claims made when pricing products are fully compliant with the law;
- ensuring adequate and proper testing is conducted on products before any performance claims are made to the public;
- reviewing all advertising copy to ensure that the general impression created is not false or misleading; and
- limiting employee participation in trade associations to those associations that have implemented their own credible and effective compliance programs.²⁸

Ideally, policies and procedures should be updated as the business' risk profile evolves, and the business' Compliance Officer should document efforts to promote and improve the program. Businesses could rely on trade associations to inform them of developments in this regard, to do so in a less resource-intensive manner. All staff should be promptly notified of any changes in the program, and the revised policies and procedures should be available to all employees and managers in a readily accessible, easy to understand format. Depending on the magnitude of the revisions, it would be advisable to promptly hold a training session focusing on these changes.

From a broader perspective, the company should encourage third parties, such as trade associations and those acting for the company, to address risks associated with their operations. This may include monitoring third parties' conduct and requiring that third parties acting for the company, or any trade associations that they are associated with, implement their own credible and effective compliance programs. Trade associations that are charged with keeping their members up-to-date on the latest compliance developments should be well positioned in this regard.

²⁸ Businesses may want to consider extending this to other third party entities with whom the company frequently interacts, such as suppliers and distributors.

Suggestions to meet this requirement

- Establish clearly written compliance policies and procedures and distribute them to at least all relevant staff or, ideally, all staff.²⁹
- Take reasonable measures to promptly notify staff of changes to these compliance policies that result from, among other things, changes to the business' compliance risks due to changes in business activities, the industry, the law and jurisprudence, and the Bureau's enforcement practices.
- Design policies and procedures for different business units based on the compliance risks that may arise (for instance, a list of “dos and don'ts” and “red flag” issues).
- Require employees to sign a certification letter (see sample at Appendix B) stating that they have read and understand the company's Code of Conduct and applicable compliance policies.

4.4 Training and Education

A credible and effective corporate compliance program includes on-going training and communications focusing on compliance issues for staff at all levels who are in a position to potentially engage in, or be exposed to, conduct in breach of the Act.

(a) The Importance of Compliance Training

The objective of a compliance program is to prevent contraventions of the Act. All staff members need to understand the parameters of acceptable behavior as it applies to their business activities. Training managers and employees to be able to detect prohibited conduct and educating them about the range of penalties and remedies for non-compliance is essential. Furthermore, given the unique characteristics of each business, the Bureau recognizes that a business requires flexibility in designing effective compliance training and communication programs.

(b) Design of Compliance Training and Communications Programs

A credible and effective program must provide training on the general principles and the business' specific policies for individuals who deal with situations that could raise issues under the Act. Training and communications programs should demonstrate, in a practical way, how compliance policies and procedures affect daily activities.³⁰ Case studies drawn from circumstances faced by the business or the industry can be particularly effective, including those where contraventions resulted in discipline. Bringing together employees who perform similar duties to present and discuss scenarios dealing with the specific realities of their work provides the link between the business' policies and procedures and the situations an employee may face. Additional training and communications could include descriptions of prohibited conduct and the issuance of bulletins that discuss current compliance issues that may affect the operations of the business.

²⁹ For the purposes of this document, “relevant staff” means 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.

³⁰ See Appendix C – Due Diligence Checklist, which is designed to help businesses comply with the Acts.

The Bureau offers a variety of [publications](#) and compliance tools that can be used in the training and education component of a business' program.³¹

(c) Delivery of Training

A business should choose the most effective methods for training and communicating to its employees based on the company's size and compliance risk assessment. For example, a business can use small group seminars, manuals, email messages, online training or workshops to effectively educate staff.

Effective courses are best delivered by experts (for example, by knowledgeable legal counsel or a Compliance Officer), where practicable, in addition to day-to-day compliance messages offered by managers, and should be delivered in a consistent manner throughout the business to avoid different employees receiving inconsistent levels of training and conflicting information. For example, businesses can use blended methods where online training is used to communicate a base level of information to a broader group, with additional live training that is focused on the highest risk staff or is targeted at specific circumstances that certain employees may encounter. Furthermore, where resources are scarce, smaller companies could pool their resources to deliver the requisite training through a trade association's compliance regime. Regardless of the methods used, it is crucial to provide opportunities for extensive discussions and time for questions in training sessions.

(d) The Need for Mandatory Training

The business should have mandatory compliance training as part of a compliance program framework for all staff in positions with identified risks for non-compliance. New appointments to these positions should be required to take training as part of assuming those duties. Incumbent managers and employees should be required to renew their training on a periodic basis, depending upon the risks associated with the position.³² To ensure all employees receive the training, the company should document attendance and consider it a factor in the employee's performance review for that time period.

Management should also play an active role in delivering compliance messages to employees, reinforcing their support for the program, by taking the necessary compliance training themselves, sending emails supporting the compliance program and referring to the program during meetings, presentations and other speaking opportunities. As such, management may wish to capitalize on the educational information from the Bureau to assist in training and reference examples of businesses and individuals that have been sanctioned for breaching the Act.

31 These include the Bureau's fact sheets and pamphlet on corporate compliance programs for small and medium-sized businesses, multimedia tools as well as detailed guidelines and bulletins on various provisions of the Act. They are available on the Bureau's [website](#). See also Appendix A – Corporate Compliance Program Framework and Appendix C – Due Diligence Checklist.

32 The frequency of training can be guided by evaluations of employees' awareness and understanding of the rules and the continuing impact of prior training, and by new risks arising from changes both within and outside of the business.

Suggestions to meet this requirement

- Train all relevant staff or, ideally, all staff as soon as possible (for instance, during an initial orientation session) regarding the importance and expectation of compliance.
- Tailor training to address particular real-life situations faced by the business.
- Make regular training a requirement of performance review for medium- and high-risk positions.
- Regularly assess the knowledge and attitudes of staff towards compliance policies and procedures.
- Document the content of all training sessions and record attendance.

4.5 Monitoring, Verification³³ and Reporting Mechanisms

Monitoring, verification and reporting mechanisms are vital to the success of any corporate compliance program.

To ensure that compliance programs are credible and effective, companies should:

1. monitor their programs on an on-going basis to ensure that their implementation is effective;
2. regularly verify whether contraventions of the Act have occurred and whether they have been dealt with appropriately; and
3. ensure that their staff can report contraventions of the compliance program or the Act confidentially and without the threat of retaliation.

Effective monitoring, verification and reporting mechanisms help prevent and detect contraventions and high-risk conduct, educate staff, provide both employees and managers with the knowledge that they are subject to oversight and determine the program's overall efficacy.

The most effective monitoring, verification and reporting procedures are those that also enable businesses to identify areas of risk, areas where additional specific training is required and areas where compliance issues may require new policies to be developed. This can be achieved in many ways and will depend on the business' particular needs, such as the extent of its exposure to potential contraventions of the Acts.

While all such mechanisms are fundamental to the success of any compliance program, it is crucial that a compliance program allows the Compliance Officer to conduct a detailed, professional investigation of compliance issues raised,³⁴ and to take all of the necessary steps to stop on-going, and prevent future, contraventions.

³³ "Verification", "verify", "audit" and "auditing" as used in this bulletin refer to "compliance auditing."

³⁴ This should include, where appropriate, the retention of those with the necessary expertise to enable a proper assessment of the circumstances.

(a) Monitoring

Monitoring refers to the on-going procedures that are implemented to prevent contravention of the Act. Evidence of such efforts may also support a due diligence defence, where applicable, should litigation arise.³⁵ Depending on the risks, periodic or continuous monitoring may be necessary. A business should take the opportunity to assess whether any of its internal or external practices may potentially contravene the Acts.

(b) Verification

Verification may be periodic, *ad hoc* or event-triggered and is designed to determine whether a contravention of the Acts has occurred and, if so, to ensure that it has been dealt with appropriately. Compliance verification practices are likely to vary from one business to another depending on the specific risks faced. They can also be used to examine the effective operation of the compliance program.³⁶

(c) Reporting

A confidential, internal reporting procedure encourages staff to provide timely and reliable information regarding potential contraventions of the compliance program or the Acts that can be the basis for further investigation by the Compliance Officer. Managers, employees and others acting for the business must be able to obtain advice and raise concerns without fear of retaliation and without first having to raise issues with their superiors or supervisors. Staff must be encouraged to freely report conduct that they believe contravenes the Acts and/or compliance policies. The program should clearly identify which actions require reporting, and when, how and to whom they should be reported.

An effective reporting system can be achieved in different ways, for example by implementing a confidential reporting system, promoting an anonymous hotline or by identifying legal counsel and/or the Compliance Officer as compliance resources. Anyone reporting a concern or cooperating in an investigation should be guaranteed the strongest of protections from retaliation by others in the business, including management.

While an internal reporting mechanism is important, there may be situations where the use of an external reporting mechanism would be more appropriate. A program should educate employees, who are in a position to engage in, or be exposed to, conduct in potential breach of the Act about the Bureau's Immunity Program, Leniency Program and whistleblowing provisions (sections 66.1 and 66.2 of the Act).³⁷

35 See section 3 of this bulletin – Consideration Given to Corporate Compliance Programs—which refers to the due diligence defence.

36 Monitoring and verification of the effectiveness of compliance programs can also identify the need for additional or new training.

37 For more information on how to apply for immunity, see the Bureau's [Immunity Program under the Competition Act](#) and [Immunity Program: Frequently Asked Questions](#).

Suggestions to meet this requirement

- Monitor business activities continuously or periodically, as appropriate, to ensure compliance.³⁸
- Identify employees who are exposed to a heightened risk (for instance, based on roles and responsibilities, being the target of previous investigations or having engaged in misconduct under the Acts or compliance policies) and ensure training is taken as a mandatory condition of performance review.
- Plan and conduct verification exercises, either by appointment or unannounced, to confirm whether a business, or area of a business, or staff, is or are fully complying with the Acts; these exercises may include a review of paper and computer files (especially emails and other electronic message systems) of staff who are in a position to engage in, or be exposed to, conduct in potential breach of the Acts.³⁹
- Take immediate action to stop any contravention of the Acts.
- Put in place a confidential reporting procedure (for instance, inform the Compliance Officer, and through that position the board of directors or a committee of the board of directors, when an incident occurs and report to legal counsel).
- Cooperate with the Bureau where a breach has occurred (which involves self-reporting).
- Document all compliance efforts (this will assist in advancing a defence of due diligence, where available).

4.6 Consistent Disciplinary Procedures and Incentives for Compliance

Consistent disciplinary actions as well as appropriate compliance-related incentive plans demonstrate the seriousness with which the business views conduct in breach of the Act and its commitment to compliance.

A disciplinary code or policy setting out the consequences for individuals who initiate or participate in conduct in breach of the Acts, or otherwise do not abide by a business' program, deters misconduct and reflects a commitment to compliance. A credible and effective program should explicitly state that disciplinary actions (for example, suspension, demotion, dismissal and even legal action) will be taken when a manager or an employee fails to comply with the compliance program and/or contravenes the Acts. It should also state that disciplinary actions will be taken when a manager fails to take reasonable steps to prevent or detect misconduct within the requirements of the compliance program, or does not initiate appropriate disciplinary action.

Providing appropriate incentives for performing in accordance with the compliance program can also play an important role in fostering a culture of compliance (for instance, compliance and active support of the program should be considered for the purposes of employee

³⁸ For example, continuous monitoring is required if the business regularly makes representations to the public, or if the business frequently bids on contracts.

³⁹ Companies need to be mindful of the requirements of the *Privacy Act* and consult with legal counsel prior to searching an employee's paper files or computer.

evaluations, promotions and bonuses). Incentives work as effective tools for a business that wishes to promote compliance by employing concrete actions.⁴⁰

All disciplinary actions and procedures involving specific individuals or groups in a business should be recorded, as proper documentation may be relevant in the context of a contravention of the Acts.⁴¹

Suggestions to meet this requirement

- Take appropriate and consistent disciplinary action (up to and including dismissal) for failure to comply with the business' compliance program and/or with the Acts.
- When a contravention occurs, examine whether management took reasonable steps that would have prevented or detected the contravention and hold managers accountable to that standard.
- Create an incentive system for staff at all levels to adhere to and actively support the business' compliance program.
- Have all staff sign a certification letter in the form attached as Appendix B of this bulletin.

4.7 Compliance Program Evaluation

A program's ability to deliver its core objective must continuously be assessed. It is also necessary to monitor new developments regarding the Acts and business activities to determine their impact on the program.

Evaluating a compliance program on a regular basis will ensure that it achieves its goal of promoting compliance. This also allows for an assessment of whether the program captures new or emerging risks.

The Compliance Officer should be given the responsibility and authority to undertake this review and to make the necessary changes to the compliance program. In situations where changes to the Acts or the jurisprudence have an immediate effect on the business' risk exposure, the Compliance Officer should take immediate steps to notify staff of what is required to remain compliant.

To evaluate the effectiveness of an existing program, the Compliance Officer could engage in the following:

- conduct surveys, informal post-training follow-up meetings, focus groups and exit interviews with key individuals;
- test knowledge of the Acts and compliance policies and procedures regularly, as well as attitudes and beliefs about compliance, to determine whether the program needs to be updated or modified; and
- monitor developments from areas of corporate compliance outside of competition law and, when appropriate, incorporate their best practices into the program.

40 J. Murphy, "[Using Incentives in Your Compliance and Ethics program](#)" (Society of Corporate Compliance and Ethics; 2012).

41 See section 3 of this bulletin – Consideration Given to Corporate Compliance Programs.

Regular evaluation also allows an opportunity to refresh the training material and the course presentation styles to ensure that staff remains engaged during the training process; repeated training with the same material or approach can quickly become stale and managers and employees can lose interest. Where resources are scarce, smaller companies could have updates disseminated to them collectively in the compliance training offered by a trade association.

There are a number of elements in a compliance program that can be assessed:

- The program's overall design;
- The approach used to implement the program to test whether all the elements have been effectively rolled out;
- The program's impact, to measure how well it is working and whether employees are retaining its core messages, whether training methods are working;
- Whether the written policies and procedures that are in place are resulting in compliance, such as ensuring that representations made to the public are not deceptive;
- Whether the program and associated policies and procedures reflect developments in the law;
- Whether those written policies and procedures are easily understood;
- Whether the verification function is properly designed to detect illegal conduct; and
- Whether the reporting system works as intended, are employees willing to use it, or whether there is a fear of retaliation.

The review should extend to include the resources provided by the business to support the compliance program. It is recognized that these programs are ancillary to a company's main business and that other demands will dictate where resources are directed. However, the risks associated with a contravention of the Acts are sufficiently high that the board of directors and managers cannot ignore the benefits of a properly resourced, credible and effective compliance program.

Suggestions to meet this requirement

- The Compliance Officer (in conjunction with legal counsel, when necessary) should regularly review all aspects of the compliance program, including associated policies and procedures, implementation, training, audit procedures and reporting systems, to ensure that it is accurate and reflects any recent legislative and jurisprudential developments.
- The Compliance Officer should, either immediately or at the end of the review, take the necessary steps to strengthen the program.
- The review should extend to the resources allocated to support the program to ensure that it is able to function properly.
- Various tools should be available to conduct a review, including individual and group interviews, focus groups, surveys and exit interviews.
- Companies should also consider having their compliance program reviewed by an independent third party.



5. CONCLUSION

A credible and effective compliance program is a valuable tool in safeguarding the reputation of a business and preventing and detecting contraventions of the Act, thus increasing a firm's likelihood of avoiding or mitigating criminal or civil consequences. Such a program will help to clarify the limits of legitimate business conduct and enhance the understanding of what is acceptable behavior, so that legitimate competitive practices can be vigorously pursued without contravening the law.

The success of Canadian competition law is largely attributed to compliance by business and individuals. Over and above the direct benefits to individual businesses, an effective compliance program can also make an important contribution to broader public knowledge and understanding of the Acts and the importance of free and fair competition. Credible and effective compliance programs thus serve a public purpose and make an important contribution to ensuring that Canadian businesses and consumers prosper in a competitive and innovative marketplace.



HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Website

[www.competitionbureau.gc.ca]

Address

[Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9]

Telephone

[Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired) 1-866-694-8389]

Facsimile

[819-997-0324]

Immunity & Leniency

Anyone wishing to apply under either the Commissioner's Immunity Program or the Commissioner's Leniency Program should contact:

[**Senior Deputy Commissioner,**
Cartels and Deceptive Marketing Practices Branch
819-997-1208]



APPENDIX A: CORPORATE COMPLIANCE PROGRAM FRAMEWORK

Preface

This Corporate Compliance Program Framework (“Framework”) was designed to help Canadian businesses design their own corporate compliance program in relation to one or more of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act* (“Acts”). It should be used in conjunction with the Competition Bureau’s (“Bureau”) *bulletin on Corporate Compliance Programs*. The Framework refers to Appendices (such as a Training and Education Program, Procedures for Monitoring, Verification and Reporting and a Disciplinary Code) to be drafted by businesses to suit their specific needs and the competition risks they may face.

The Framework is a flexible tool that should be adapted to the specific activities and resources of a particular business. The Framework is a general guide only and the Bureau will not deem a compliance program deficient or non-credible if a company deviates from the Framework, where the deviation is reasonable in the circumstances. The Bureau encourages any innovations that are designed to improve the effectiveness of the Framework.

The Framework is offered for the purpose of providing guidance. It is not to be taken as a substantial corporate compliance program and needs to be tailored to a business’ needs. Furthermore, the content of the Framework and accompanying Appendices are not intended to serve as legal advice. Readers should obtain independent legal advice when developing a corporate compliance program.

To be completed by the subject company:

[Company X] CORPORATE COMPLIANCE PROGRAM

I. Introduction

I.1 Purpose

This Corporate Compliance Program (“Program”) has been established so that our business complies with the competition and labelling laws that apply to our business.

It includes practical advice concerning rules of conduct that will help our business anticipate and prevent contraventions before they occur, and detect and report contraventions if they do occur. This program is for use in our daily business by all employees.

I.2 Commitment to Compliance

I.2.1 [Company X] is committed to complying with the law in letter and in spirit. There may be instances where this program sets standards that are higher than those required by the law. Nevertheless it is imperative that you follow the rules of conduct established by this program strictly.

[A personal statement by the chief executive officer or his/her equivalent stressing his/her personal commitment to the program, and his or her uncompromising adherence to the competition and labelling laws and the principle of competitive markets may be incorporated. This is more powerful if it is personal, rather than being written by company lawyers, and may include examples from the executive's experience.]

1.2.2 Our board of directors [or the business' highest appropriate governing authority] has designated a senior corporate officer responsible for the development, implementation and maintenance of the program. The [Compliance Officer or other appropriately titled position] may be contacted at: [Contact Information].

1.3 Employees' Responsibility for Compliance

1.3.1 While the [Compliance Officer or other appropriately titled position] manages the program, daily responsibility for compliance with the law rests with each and every officer, manager and employee of the business. Compliance with the law protects not only our business, but also each of us individually.

1.3.2 In addition, our business has developed Policies, Procedures and Practical Guides that are available [link to intranet, or indicate other readily accessible location], to assist you in recognizing improper conduct and knowing when and how to seek advice.

1.4 Canadian Competition Law

The purpose of Canadian competition law is to maintain and encourage effective competition in Canada. Effective competition benefits all of us by ensuring competitive prices, service and quality, and by encouraging greater innovation. The Acts maintain a competitive marketplace by prohibiting certain activities that might reduce or prevent competition or harm consumers. The Commissioner of Competition and staff of the Competition Bureau (the "Bureau") administer and enforce these Acts. A general description of each of these Acts is set out in the appendix attached to this program.

1.5 Penalties and Remedies under the Acts

1.5.1 A contravention of the Acts, whether civil or criminal, can have serious legal consequences for our business and our employees. For example, contraventions can:

- expose the business to significant criminal fines or civil administrative monetary penalties, restitution, orders from the courts or Competition Tribunal that prohibit the continuation of the practice and/or impose other obligations on the company, and the recovery of damages by private parties; and
- expose employees convicted of criminal offences to fines and imprisonment or to administrative monetary penalties.

1.5.2 [Discuss the penalties and remedies for both the company and employees that are associated with the provisions of the Acts that are the most likely to apply to the business' activities based on the risks you may face.]

1.6 Subject Personnel

1.6.1 The program applies to all of us, at all levels of the business; this is important for anyone in a position to potentially engage in, or be exposed to, illegal conduct. When we refer to “employees”, we mean it in the broadest of terms, including officers, managers, employees and anyone else acting for our company.

1.6.2 It is the personal responsibility of all employees to conduct their activities on behalf of our business in compliance with both the letter and the spirit of the law. No one who is employed by our company has the authority to engage in any conduct, or knowingly permit a subordinate to engage in any conduct, that contravenes the law or this program.

1.6.3 Anyone who engages in such conduct or who otherwise contravenes the program or the law may be subject to appropriate disciplinary or corrective measures, up to and including dismissal. Any manager or supervisor who fails to take reasonable steps to prevent or detect contraventions will also be subject to discipline. This is in addition to any criminal or civil liability that may be imposed on the individual as a result of a finding of the courts or the Competition Tribunal.

1.7 Employee Acknowledgment

1.7.1 Each employee is required to acknowledge that he/she has read and understands this program and that he/she understands his/her obligations under it. Such an acknowledgement will also be sought in the event that significant changes to the program take place.

2. Management Involvement and Support

2.1 Our business recognizes that management’s clear and unequivocal support is the foundation of a credible and effective compliance program.

2.2 As part of acting in the best interests of our business, management must always demonstrate leadership and a commitment to legal and ethical conduct.

2.3 It is management’s duty to promote and ensure compliance with the law. Management is accountable for promoting and complying with the law.

2.4 While management is accountable for compliance, the responsibility to manage the program is delegated by the board of directors [or the highest governing authority] to the [Compliance Officer or other appropriately titled position].

3. Corporate Compliance Policies and Procedures

3.1 The business recognizes that strong compliance policies and procedures are critical to the success of the program.

3.2 Our company’s Compliance Policies, Procedures and Practical Guides are available at [either an attached hyperlink or attached in Appendix []], whichever is appropriate]. These policies and procedures will be updated to reflect changes in the business, the law, the Bureau’s

enforcement policies, or the industry. Reasonable measures will be taken to promptly notify all employees of such changes.

Policies and procedures shall:

- be written in plain language and made available to all employees;
 - identify activities that are illegal or questionable and the consequences for contravention under the Acts;
 - provide examples to illustrate the specific practices that are prohibited, so that employees can easily understand how the application of the Acts may impact on their own duties and responsibilities;
- provide guidance on the company's policies regarding the creation and management of corporate documents;
- provide guidance to employees on the criminal risks of obstructing an inquiry by the Commissioner, including providing examples of the types of activities that may constitute obstruction;
- outline the possible consequences of breaching the program and the law;
- inform employees about the provisions of the *Competition Act* that protect whistleblowers, including a discussion of the consequences of any retaliation against whistleblowers for the company;
- inform employees about the Bureau's Immunity and Leniency Programs;
- provide a code of conduct giving instructions on how to respond when a search warrant is executed or when an inspection is being conducted by the Bureau;
- provide a code of conduct giving instructions on how to respond when a court order compelling the production of records or oral testimony is served; and
- provide a code of conduct regarding the participation of its employees to any trade association activities.

4. Training and Education

4.1 Our business recognizes that to be effective, the program must include an ongoing training component that addresses compliance issues for all employees.

4.2 An outline of our company's Training and Education Program is attached at Appendix [].

The Training and Education Program shall:

- require each employee to participate in appropriate ongoing training provided by our business;
- require all new employees to participate in training as soon as practicable after the commencement of their employment, but prior to being put in position where they might violate the law;

- cover all compliance issues the company may face that are relevant to the duties of that employee;
- provide employees that face particular exposure to compliance risks with more in-depth training;
- provide guidance on specific business conduct that should be avoided;
- ensure that all relevant training materials are available;
- allow sufficient opportunity for questions and discussion during training sessions;
- ensure that training is delivered by experts and that it is consistent throughout the company; and
- be evaluated regularly to make sure it is working and reflects the business activities and the state of the law.

4.3 A copy of the company’s appropriate guidance materials relating to this program will be distributed to all employees upon commencement of their employment.

5. Monitoring, Verification⁴² and Reporting Mechanisms

5.1 Monitoring

5.1.1 The [Compliance Officer or other appropriately titled position] shall ensure that the program provides for monitoring of business activities continuously or periodically, as appropriate based on the risk assessment associated with those activities, to ensure compliance; and

5.1.2 The [Compliance Officer or other appropriately titled position] shall ensure that the program is reviewed and evaluated periodically, and that the program is updated when issues arise, when there are new developments in the law or the business activities of our company, and when opportunities for improvement are detected.

5.2 Verification

5.2.1 The [Compliance Officer or other appropriately titled position] shall conduct periodic, *ad hoc* compliance audits, or event-triggered investigations, as appropriate, to confirm whether our business is fully complying with the Acts and whether our program is being implemented properly and operating effectively;

5.2.2 The [Compliance Officer or other appropriately titled position] shall review and update this program when issues are detected; and

5.2.3 Procedures for Verification are attached at Appendix [].

42 “Verification” refers to “compliance auditing.”

5.3 Reporting

5.3.1 All instances of non-compliance with the program or the law shall be reported and communicated to the [Compliance Officer or other appropriately titled position], who shall regularly report to [the highest governing authority] in our company;

5.3.2 The program is intended to help employees comply with the requirements of the law, recognize improper conduct, understand how you must behave because of the law, and know when to seek advice;

5.3.3 If employees have any questions concerning the program or the law, they should contact the [Compliance Officer or other appropriately titled position] and/or company legal counsel [for companies that have one];

5.3.4 If employees become aware of a breach or possible breach of the program or the law, they must report it to the [Compliance Officer or other appropriately titled position] immediately;

5.3.5 No employees shall suffer any adverse employment consequences for reporting a possible contravention of the program or the law. In that regard, the company undertakes to guarantee the employee's [pay level, employment level; promotion opportunities, etc.] and guarantees that in circumstances where there are *bona fide* grounds for concern, regardless of whether in the end it proves to be a contravention of a law, that the employee will not be demoted or suffer any other form of punishment; and

5.3.6 Procedures for Reporting are attached at Appendix [].

6. Disciplinary Procedures and Incentives

6.1 The business is strongly committed to compliance with this program and the law. We take non-compliance very seriously.

6.2 Each employee's commitment to this program is taken into account as part of our incentive program, and in decisions about advancement and promotion in our company. [Provide further details here].

6.3 Any breach of this program and/or the Acts will result in disciplinary action, as described in the Disciplinary Code.

6.4 A Disciplinary Code is attached at Appendix [].

[Signature of management]

APPENDIX A – OVERVIEW OF THE LAWS ENFORCED BY THE COMMISSIONER OF COMPETITION

The Competition Act

Canadian competition law is contained in the *Competition Act*, a federal law governing most business conduct in Canada. It contains both criminal and civil provisions aimed at preventing certain advertising practices and sets out certain prohibitions on how competitors may deal with each other, as well as how businesses treat their suppliers and customers. Specifically, the *Competition Act* addresses, among other things, conspiracy (such as price-fixing, market allocation and output restriction), bid-rigging, merger review, abuse of dominance, false or misleading representations, double ticketing, multi-level marketing and pyramid schemes, bait and switch selling, sale above advertised price, refusal to deal, price maintenance, exclusive dealing, tied-selling, and market restrictions. The most recent amendments to the *Competition Act* came into effect on July 1, 2014, as a part of Canada's Anti-Spam Legislation.

The Consumer Packaging and Labelling Act

The *Consumer Packaging and Labelling Act* is a law that establishes the requirements relating to the packaging, labelling, sale, importation and advertising of pre-packaged products. It requires that pre-packaged consumer products bear accurate and meaningful labelling information to help consumers make informed purchasing decisions. The *Consumer Packaging and Labelling Act* prohibits false or misleading representations and sets out specifications for mandatory label information, such as the product's name, net quantity and dealer identity.

The Textile Labelling Act

The *Textile Labelling Act* is a law relating to the labelling, sale, importation and advertising of consumer textile articles. It requires that textile articles bear accurate and meaningful labelling information to help consumers make informed purchasing decisions. The *Textile Labelling Act* prohibits false or misleading representations and sets out specifications for mandatory label information, such as the generic name of each fibre present and the dealer's full name and postal address or a CA identification number.

The Precious Metals Marking Act

The *Precious Metals Marking Act* is a law relating to the marking of articles containing precious metals. It provides for uniform description and quality markings of articles made with gold, silver, platinum or palladium to help consumers make informed purchasing decisions. The *Precious Metals Marking Act* prohibits the making of false or misleading representations related to precious metal articles. It also requires that dealers who choose to mark their articles with representations related to the precious metal quality, do so as described by the Act and accompanying regulations.

Enforcement of the Acts

The Commissioner investigates matters under the *Competition Act* through the use of investigative powers set out in the Act. These include, among others, the ability to search offices, seize records and interview individual employees under oath. In situations involving the criminal provisions of the Act, the Commissioner refers the case to the Public Prosecution Service of Canada, which assumes responsibility for laying charges and pursuing the case in the courts. In situations involving the civil provisions of the Act, the Commissioner will pursue the matter directly by filing an application with the Competition Tribunal or, in certain cases, the courts.

Under the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*, inspectors can enter and inspect business premises of a dealer of pre-packaged products, textile fibre products or precious metal articles, and seize such products and articles.



APPENDIX B: CERTIFICATION LETTER

A business may consider asking all employees, including all levels of management, who are in a position to potentially engage in, or be exposed to, conduct in breach of the Acts to certify in writing that they have read and understand the company’s compliance program and their obligations under it. The business should make it known that this is a requirement for all employees at risk, so that it is clear that everyone in such a position is required to adhere to the policy. This Certification Letter is intended to be adapted by each business prior to being signed by employees. Readers may wish to obtain independent legal advice regarding this Certification Letter.

Employee’s Letter

I, _____ of the City of _____, am employed by [Company X] in the capacity of [job description or title]. I acknowledge that I am subject to and am required to comply with [Company X]’s Corporate Compliance Program, including its Code of Conduct (the “Program”).

This is to advise that I have read and understand [Company X]’s Code of Conduct, the goal of which is to promote ethical conduct and compliance with the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act*.

I understand that compliance with [Company X]’s program is a condition of my continued employment with [Company X] and that failure to comply with the program may result in disciplinary action, including termination of employment. I also understand that this certification letter is not a guarantee of continued employment with [Company X].

Company X

Date:

Signature:

Witness name:

Signature:

WITNESSED THIS _____ DAY OF _____, _____.



APPENDIX C: DUE DILIGENCE CHECKLIST

The following Due Diligence Checklist is designed to help businesses comply with the *Competition Act* (the “Act”), the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act* (collectively, the “Acts”).⁴³ The checklist provides examples only and is not exhaustive. This checklist is intended for Compliance Officers or other compliance experts within a business, and to assist in drafting guidance for the business’ employees as part of a broader compliance program. These examples are meant to be adapted by each business as a starting point and should be tailored to a business’ compliance risk profile prior to being distributed to employees. Readers may wish to obtain independent legal advice, if a particular situation gives rise to concerns.

Competition Act

General

- Ensure that any wrongdoing is promptly reported to your business’ legal counsel, management or Compliance Officer.
- Ensure that the identity of the Compliance Officer and how to contact this officer is known to all employees.
- Ensure that any potential issues of compliance with the Act are considered when preparing documents, presentations or training.
- Ensure that the Competition Bureau (“Bureau”) is contacted if you suspect or have information that the company, competitors or suppliers are breaching or have breached the Act.
- Ensure that legal advice is sought, if a particular situation gives rise to concerns.
- Ensure that all employees are familiar with the compliance program and have access to the business’ corporate Compliance Officer.
- Ensure that policies and procedures are in place to ensure compliance with the Act.
- Ensure that all employees acknowledge that they have read and understood the compliance program and that they understand their obligations.
- Know that businesses may be held responsible for the actions of their employees.
- Know that management will be held accountable first and foremost.
- Consider requesting a written opinion from the Commissioner prior to engaging in business activities that may raise concerns under the Act.
- Know that the Bureau has Immunity and Leniency Programs under which parties can self-report their involvement in criminal activities in return for immunity or favourable treatment in criminal prosecutions.

⁴³ For more information on specific provisions of the Act, see the Bureau’s [website](#).

Conspiracy and Bid-rigging

- Ensure that all pricing decisions are made without coordinating with competitors or others outside of your company.
- Ensure that legal advice is sought before contacting competitors, as contact with competitors may result in concerns under the Act.
- Ensure that records of any contacts with competitors are kept where concerns may arise.
- Ensure that legal advice is sought before entering into any agreement with a competitor.
- Know that reaching an agreement, including through any informal understanding or discussion, with competitors about pricing, market or customer allocation, production levels, bid rigging or other agreements dealing with an element of competitive rivalry contravenes the Act.
- Know the compliance risks that can arise when a competitor is a customer and/or a supplier or joint venture partner, and seek legal assistance as appropriate.
- Know that agreeing with competitors not to compete for certain customers or in a particular product or geographic market contravenes the Act.
- Know that agreeing with competitors to prevent other businesses from competing in a particular product or geographic market contravenes the Act.
- Know that discussing prices, changes in industry production, capacity or inventories could contravene the Act.
- Avoid pre-announcing prices or price lists, or engaging in any behaviour that could increase one's ability to coordinate pricing, market allocation, production levels or any other element of competition.
- Avoid making any comments that could be viewed as signaling to competitors any intentions or expectations regarding price, trade terms or other elements of competition.
- Avoid making any comments that can be perceived as threats or promises to competitors regarding pricing, market share or any other element of competition.
- Know that discussing pricing, market allocation, production levels or another element of competitive rivalry in "informal meetings" or "off-the-record" conversations at the business' functions, through social media, or as a component of any electronic information package, could contravene the Act. If improper discussions arise, business representatives should leave the meeting and have their departure recognized. The incident should be reported immediately to the Compliance Officer and appropriate authorities or legal counsel.
- Ensure that you adhere to a clear and written agenda prior to meeting with competitors. Ensure that all discussions with competitors are confined to the immediate subjects for which the meeting was convened. If you have questions about the topics to be discussed and the topics to be avoided, consult your business' Compliance Officer and/or legal counsel in advance. You may wish to have legal counsel attend the meeting to provide guidance during the course of the meeting.

- Ensure that you consult with your business' legal counsel any time there are concerns about discussions that took place at a meeting or function or elsewhere with competitors.
- Ensure that the Bureau is contacted where suspicions of bid-rigging exist (for example, a business is a victim of bid-rigging or has information about a bid-rigging scheme).
- Know that agreeing with a person to submit prearranged bids without prior notice of the agreement to the tendering authority is a criminal offence.
- Know that agreeing with a person not to submit a bid without prior notice of the agreement to the tendering authority is a criminal offence.
- Know that agreeing with a person to withdraw a bid without prior notice of the agreement to the tendering authority is a criminal offence.

Restrictive Trade Practices: Abuse of Dominance⁴⁴, Exclusive Dealing, Tied-Selling, Market Restriction, Price Maintenance and Civil Agreements⁴⁵

Ensure that, where questions arise, legal advice is sought or that the Bureau is contacted before engaging in practices that may affect the state of competition (this can be heightened in circumstances where you may be considered a leader in a market⁴⁶ or have some degree of market power, or where you are considering an agreement with a competitor that may significantly lessen competition in a market). Caution should be exercised in the following situations:

- Before implementing a loyalty program or an exclusivity agreement with your customers;
- When using one of your products as leverage to force or induce a customer to purchase another product;
- Before selling articles at a price lower than your cost;
- Before penalizing a customer that supplies a product outside a defined market;
- When refusing to supply a product to a would-be customer if this would-be customer may be substantially affected or precluded from carrying on business because of the refusal;
- When entering into agreements with, or making promises or threats to, resellers of products to influence upward, or discourage the reduction of, the price at which they sell or advertise a product within Canada;
- Suggesting retail prices—in such a case, ensure that it is clearly stated that suggested retail prices are provided as guidelines only and that producers or suppliers have no obligation to charge the suggested prices;

⁴⁴ See the Bureau's Enforcement Guidelines on [The Abuse of Dominance Provisions](#) of the *Competition Act* (sections 78 and 79 of the Act).

⁴⁵ See the Bureau's [Competitor Collaboration Guidelines](#).

⁴⁶ For the purpose of this Appendix, a "leader" is a business whose actions are taken to have an appreciable or significant impact in a market. Market share is a good indication to determine if a business is a leader in a market. The Bureau's general approach with regard to market share is that a market share of less than 35 percent will generally not give rise to concerns. See the Bureau's Enforcement Guidelines on [The Abuse of Dominance Provisions](#) of the *Competition Act* (sections 78 and 79 of the Act).

- Refusing to supply a product to, or discriminating against, another business because of its low pricing policy; and
- When entering into, among other things, information-sharing agreements, research and development agreements or joint production agreements.

Mergers

- Before closing, ensure that legal advice is sought or that the Bureau is contacted when in doubt regarding the requirement to notify the Commissioner of a merger.
- Ensure that all appropriate documents are produced as part of any required notification to the Commissioner.
- Before closing, beware of taking steps to coordinate with an acquisition target before the Bureau has provided its advice regarding the potential impact of the merger.
- Consider a due diligence exercise before any merger to determine if there are likely competition law issues arising as a result of any proposed merger and whether the merger target has a compliance program.
- Plan for updating compliance program and compliance training after an acquisition occurs.

False or Misleading Representations and Deceptive Marketing Practices

- Ensure that no representations are made to the public to promote a product or business interest if those representations create a false or misleading general impression or otherwise contravene the provisions of the Act prohibiting misleading representations and deceptive marketing practices.
- Know the amendments to the Act that came into effect on July 1, 2014 as a result of Canada's Anti-Spam Legislation.
- Ensure that no electronic message contains false or misleading representations, including in the sender information or subject matter information.
- Ensure that no false or misleading representations are made in locators (for example, a URL or metadata).
- Ensure that, when engaging in telemarketing, the following is disclosed at the beginning of every communication:
 - (1) the name of the company or person the communicator is working for;
 - (2) the type of product or business interest the communicator is promoting;
 - (3) the purpose of the communication,
 - (4) the price of any product being sold, and
 - (5) any restrictions or conditions that must be met before the product will be delivered

- Ensure that, when engaging in telemarketing, the following is disclosed at some time during every communication:
 - (1) the price of any product being promoted; and
 - (2) any restrictions or conditions that must be met before the product is delivered.
- Know that telemarketers are forbidden to:
 - make any representation that is false or misleading;
 - conduct a contest, lottery or other game where delivery of the prize is conditional on payment in advance, or where the approximate value of the prizes and other facts that affect the chances of winning are not fairly disclosed;
 - offer a free gift or a product at minimal cost as an inducement to buy a second product (this is acceptable if they disclose the approximate value of the gift or premium); and
 - require payment in advance where the price of the product upon delivery is found to be significantly in excess of the fair market value of that product.
- Ensure that fine-print disclaimers are avoided. If used, ensure that the overall general impression created by an advertisement is not false or misleading.
- Know that the provisions regarding false or misleading representations and the deceptive marketing practices apply whether the representations are disseminated to the public in Canada or abroad.
- Know that the provisions regarding false or misleading representations and the deceptive marketing practices apply whether the representations are made in a place accessible to the public or not.
- Ensure that the overall general impression created by a representation, as well as the literal meaning, is not false or misleading.
- Know that no one actually needs to be misled for a court to find that an advertisement is false or misleading.
- Ensure that the lowest price appearing on a product is charged.
- Ensure that reasonable quantities of a product advertised at a bargain price are available for sale.
- Ensure that contest rules are disclosed in a reasonably conspicuous manner prior to a potential contest participant being inconvenienced in some way or committed to the advertiser's product or to the contest.
- Ensure that the distribution of prizes when conducting a contest is not unduly delayed.
- Ensure that the term "regular price" is not used in an advertisement unless the product has been offered in good faith for sale at that price for a substantial period of time, or a substantial volume of the product has been sold at that price within a reasonable period of time.
- Ensure that the price of a product is not increased to cover the cost of a free product.

- Ensure that the illustrations used are not different from the product being sold.
- Ensure that a performance claim is not made unless it was based on adequate and proper testing conducted before the claim is made, even if a business believes the claim is accurate.
- Ensure that a product is not sold above the advertised price.
- Ensure that legal advice is sought when in doubt as to the legality of any representation made to the public when promoting a product or business interest.

Trade Associations⁴⁷

- Ensure that legal advice is sought before joining or renewing membership in a trade association.
- Ensure that no company representative participates in a trade association or attends any trade association function unless he/she has competition law compliance training.
- Ensure that the trade association has its own competition law compliance program supported by knowledgeable legal counsel.
- Ensure that a clear copy of the agenda for all trade association meetings is obtained prior to a meeting. Competing firms should not participate in a meeting where such an agenda is not provided.
- Ensure that the trade association minutes are reviewed and that mistakes are reported.
- Ensure that representatives use caution when participating in trade association events and are alert to the types of discussions that may raise concerns. If improper discussions arise, he/she should leave and have his/her departure recognized (for example, in the minutes). The incident should immediately be reported to the Compliance Officer, legal counsel or any other appropriate individual identified in the business' corporate compliance program.
- Never participate in any trade association activities that are “off the record”.
- Ensure that legal advice is sought if a particular situation gives rise to concerns.
- Know that discussing sensitive competition issues with other association members that relate to pricing, markets, production levels, customers, bidding situations and other competitive information may be anti-competitive and possibly illegal.
- Review all standard-setting activities with legal counsel.
- Seek legal advice before discussing agreements on sensitive competition issues.

47 The Bureau has published a set of “dos and don’ts” specifically designed for trade associations in its [“Trade Associations and the Competition Act”](#) pamphlet.

Consumer Packaging and Labelling Act

- Ensure that the requirements of the *Consumer Packaging and Labelling Act* are complied with if the business is a retailer, manufacturer, producer, importer packer or seller of any prepackaged product sold to consumers.

Textile Labelling Act

- Ensure the requirements of the *Textile Labelling Act* are complied with if the business is a manufacturer, processor, finisher, importer or seller of any textile fibre product used in consumer articles.

Precious Metals Marking Act

- Ensure the requirements of the *Precious Metals Marking Act* are complied with if the business is the manufacturer or importer of any precious metal article.



APPENDIX D: HYPOTHETICAL CASE EXAMPLES OF COMPLIANCE ISSUES

The following hypothetical examples are intended to illustrate the analytical framework that the Competition Bureau (the “Bureau”) will generally apply in considering a pre-existing competition law compliance program. The Bureau’s analysis in the hypothetical examples below does not replace the advice of legal counsel and is not intended to restate the law or to constitute a binding statement of how the Commissioner of Competition (the “Commissioner”) will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question.

The Bureau cannot guarantee specific sentencing outcomes in cartel cases. The Public Prosecutions Service of Canada (“PPSC”) has independent discretion to consider the Bureau’s sentencing recommendations. The Competition Tribunal (the “Tribunal”) and the courts are ultimately responsible for imposing civil remedies and criminal penalties.

Hypothetical I – Ineffective Compliance program

Company A is a large, publicly-owned Canadian manufacturer of widgets. Company A has operations throughout Canada and the United States. Five years ago, there was a change in ownership at Company A. New management was brought in and several directors were replaced. Compensation for the new management team was heavily tied to Company A’s stock market performance.

Three months ago, after officers from the Bureau conducted searches of several of Company A’s offices, lawyers for the company contacted the Senior Deputy Commissioner of Competition for the Cartels and Deceptive Marketing Practices Branch and obtained a first-in marker under the Bureau’s Leniency Program.

Company A proffered that for two years prior to the searches, staff from its sales department, including regional sales directors, met with their counterparts from companies B and C, after annual trade association meetings and at social occasions, such as customer-sponsored social events, to agree on price increases and not to solicit each other’s long-standing customers. These meetings were followed by telephone conversations to implement the agreements or, on a few occasions, to correct “mistakes” when one of the co-conspirators failed to adhere to an agreement.

In discussions with the Bureau’s investigative team and PPSC counsel regarding the potential fine that the Crown and Company A would submit in a joint sentencing submission to the court, lawyers for Company A argued that the potential fine should be reduced on the basis that: it had a pre-existing corporate compliance program; the illegal conduct was contrary to Company A’s corporate policy to comply with the *Competition Act* (the “Act”); and the illegal conduct did not involve executive level officers or Board members. In addition, Company A took several measures to strengthen its corporate compliance program since its admission to the Leniency Program.

Company A's Compliance program

The program was introduced 10 years earlier with the strong support of the former President of Company A and its then board of directors. Working with outside legal counsel, the former President realized the significant risk of cartel activities given the highly concentrated nature of the widget industry.

Company A's General Counsel was appointed as the Compliance Officer by the board of directors, and for several years the program appeared to work well with regular training sessions, updates to reflect changes in the law and periodic unannounced compliance audits, particularly in the sales department, which posed the greatest risk of cartel contraventions. One employee was disciplined by being ruled ineligible for promotion for a year for not reporting an unauthorized discussion with a competing sales representative about industry prices. The General Counsel always attended trade association meetings and provided warnings to Company A's attendees to respect policies in the compliance program regarding interactions with competitors.

Five years ago, both demand and prices fell for widgets as a result of a recession. Company A's legal department and budget for outside counsel were cut in half, and employee training was severely cut back. The new President of Company A stressed the importance of cutting "red tape" and empowering managers and employees to be action oriented and to take risks to improve results.

Against the advice of Company A's General Counsel, compliance reports were no longer provided directly to the board of directors; the employee hotline was eliminated; and in-person training was replaced by on-line texts and tests to cut costs. Responsibility for administering and enforcing the corporate compliance program was transferred to a junior lawyer in the legal department with no prior training or experience in corporate compliance. The annual certification of compliance letters continued to be nominally required from key officers, supervisors and employees, but the rate of delinquency increased significantly, particularly outside of Company A's head office. Finally, there was less oversight and monitoring of trade association activities.

Analysis

The Bureau conducted an examination of the corporate compliance program in effect prior to Company A's leniency application. In addition to reviewing the written content of the program, record keeping, reporting, compliance audit records, incentives, training content and attendance were evaluated. Key individuals were also interviewed by staff from the Bureau's Compliance Unit ("CU").

At the completion of the examination, the CU provided a report to the Senior Deputy Commissioner of Competition for the Cartels and Deceptive Marketing Practices Branch recommending that the fine for Company A not be reduced because it did not meet the Bureau's standard of having a credible and effective program at the time the illegal conduct occurred. The report concluded that despite the existence of the program and the fact that no senior officers or Directors were involved in the illegal conduct, a combination of negligence and the imposition of a "win-at-all-costs" culture by Company A's management helped to

create a climate susceptible to the illegal conduct in the sales department. Similarly, the report concluded that Company A's board did not provide adequate oversight of management or the competition law compliance program.

Over the past five years, management of Company A significantly reduced its commitment to its corporate compliance program, resulting in it losing its credibility and effectiveness. Interviews with key sales department staff revealed that by the time the illegal conduct occurred, most employees felt that the corporate compliance program was just a bureaucratic exercise that could be ignored owing to pressure to improve Company A's results and stock market performance. They indicated that managers and supervisors in the sales department never mentioned the program and that it was not a factor in annual evaluations.

Reducing the influence and independence of the Compliance Officer was a clear signal to staff that competition law compliance had become less of a priority. Another signal was the elimination of the employee hotline, thereby reducing the ability of employees to anonymously ask questions and report suspect behaviour while heightening employee concerns about possible retaliation for blowing the whistle. Eliminating the employee hotline also reduced the ability of the Compliance Officer to monitor adherence to the program. Company A's new Compliance Officer admitted spending more time on business matters than competition compliance, and was under pressure not to discipline sales staff beyond issuing warnings that communicating with competitors could lead to an investigation by the Bureau.

In interviews, most sales department staff could not remember any details of the online compliance training. One sales representative recalled receiving a warning not to discuss business issues with competitors at a customer sponsored social event, but his manager said that lawyers were always exaggerating the risk.

Finally, the CU recommended that Company A's recent efforts to strengthen its competition law compliance program did not merit reducing Company A's potential fine because it merely brought the program back to a state where it could potentially be effective in the future.

Hypothetical 2 – Senior Management Involvement

Company B was a co-conspirator in the widget manufacturers conspiracy described in Hypothetical 1 above. Like Company A, Company B has operations throughout North America. It's a privately-owned company headquartered in Asia controlled by a family that lives outside Canada.

Six years ago, Company B was convicted of price-fixing with competitors in the United States and paid a considerable fine. The former Vice-President of Sales and Marketing, along with a junior executive in the Sales and Marketing Department, were also convicted and sentenced to imprisonment. Both individuals returned to administrative positions at Company B after serving their prison terms. After a year, the former Vice-President of Sales and Marketing was transferred to Montreal to become the new president of Company B's Canadian subsidiary. The President of the parent company wanted to dismiss the former Vice-President of Sales and Marketing, but felt that this step would have jeopardized his own position at Company B

because the former Vice-President of Sales and Marketing was married to a member of Company B's founding family.

With the recession, there was more and more discussion at trade association meetings and customer-sponsored social events of how distressed the industry had become and the need to maintain prices and protect each other's traditional customers. The new President of Company B's Canadian subsidiary encouraged sales representatives to develop competitor contacts. Eventually, discussions led to agreements and arrangements among the widget manufacturers to fix prices and allocate customers in the Canadian market.

After the searches, Company B decided to participate in the Bureau's Leniency Program. Company B's lawyers argued that the potential fine should be reduced on the basis that Company B had a pre-existing corporate compliance program.

Company B's Compliance program

Company B's corporate compliance program was introduced on the heels of its conviction for price-fixing in the United States. The President of Company B was very concerned with the damage that accrued from the investigation and conviction. With the help of an outside law firm, Company B implemented a competition law compliance program with the General Counsel appointed as Company B's Compliance Officer. Although he would have preferred to dismiss the former Vice-President of Sales and Marketing had it not been for the family connection, the President believed that implementing a compliance program and transferring the former Vice-President of Sales and Marketing to Canada would keep Company B out of trouble in the future.

Company B's General Counsel had very limited knowledge of competition laws and retained the services of the above mentioned law firm to provide training to sales staff. In its first year of operation, in-person compliance training was limited to employees in the United States, while sales staff abroad was linked into the training sessions by teleconference. No specific training was provided to the executive team of Company B, although the General Counsel did provide a report along with a video of the training session to the President. Sales representatives were required to provide an attestation that they attended the training sessions and would abide by Company B's compliance program.

Once the recession struck, compliance training was limited to rebroadcasting the video of the training session. Sales staff was still required to provide annual attestations but Company B's General Counsel did not monitor or verify adherence to the compliance program.

Analysis

The Bureau's CU conducted an examination of Company B's corporate compliance program in effect prior to Company B's leniency application.

At the completion of the examination, the CU provided a report to the Senior Deputy Commissioner of Competition for the Cartels and Deceptive Marketing Practices Branch recommending that the fine for Company B not be reduced, on the basis that it did not have a credible and effective program at the time the illegal conduct occurred. The report

concluded that Company B's "paper and preach" approach reflected a lack of commitment to compliance by senior management. The fact that the President of Company B's Canadian subsidiary encouraged representatives to develop competitor contacts amply demonstrated that management's commitment to compliance was not serious and that the program was neither credible nor effective.

The President of the Canadian subsidiary admitted that socializing with competitors and encouraging sales staff to develop competitor contacts was risky. This serious problem might have been prevented by providing training to Company B executives and by making compliance part of their evaluations and promotion criteria. Several Canadian employees noted that the family connection of the President of Company B's Canadian subsidiary to the owners of Company B, and the general lack of policies and procedures to report actual or suspected misconduct, created a concern about possible retaliation, if they reported concerns about inappropriate interactions with competitors. They also reported that they had no confidence that their concerns would be taken seriously.

Other issues identified in the Bureau's examination included:

- the program did not address Canadian competition law requirements;
- there had been no risk assessment;
- the Compliance Officer failed to monitor the activities of the President of Company B's Canadian subsidiary, an individual with a conviction for illegal conduct;
- there were no incentives to promote the compliance program;
- staff did not have the ability to report any actual or suspected misconduct through an employee hotline or other similar means;
- training, record-keeping relating to who had attended training fell well short of best compliance practices;
- the effectiveness of the Compliance Officer, given both his other responsibilities at Company B and lack of training in compliance issues, was insufficient;
- a lack of program monitoring and verification also fell well short of best compliance practices; and
- there had been no internal evaluation of the program, which would have disclosed the weaknesses identified above.

Finally, the CU recommended that the implementation of a credible and effective corporate compliance program as part of a prohibition order granted under section 34 of the Act, should be included in the Bureau's leniency recommendations to the PPSC. Given the company's lack of commitment to its previous program, the Bureau also recommended to the PPSC that the company be required to appoint an independent compliance monitor to ensure that it implement the compliance program pursuant to the court's instructions.

Hypothetical 3 - Effective Compliance program

Company X is a multinational parts manufacturer. Its primary customers are multinational original equipment manufacturers. Only well-financed, technically sophisticated parts suppliers with manufacturing plants located in close proximity to the equipment manufacturers' assembly operations are qualified to supply the equipment manufacturers.

After several years operating in intensely competitive market conditions, a number of parts manufacturers resorted to price-fixing. Unbeknownst to Company X, one of the parts manufacturers decided to cooperate with the authorities by applying for immunity from prosecution in Canada, the United States and the European Union. As a result, the Bureau and the authorities in the United States and the European Union conducted simultaneous searches of several parts manufacturers, including Company X.

Company X decided to cooperate with the Bureau and obtained a marker under the Bureau's Leniency Program for a specific part sold to certain original equipment manufacturers. Company X proffered that an account manager who had transferred to Company X's North American subsidiary in the United States two years earlier had entered into two price-fixing agreements for parts supply contracts. The investigation revealed that the agreements were prompted by the account manager's personal relationship with a former supervisor now working for a competitor.

In discussions with the Bureau's investigative team and PPSC counsel regarding the potential fine that Crown and Company X would submit in a joint sentencing submission to the court, lawyers for Company X argued that the potential fine should be reduced on the basis that Company X had a pre-existing corporate compliance program.

Company X's Compliance program

Company X's competition law compliance program was introduced in the early 1990s and was administered by its legal department with the occasional assistance of outside counsel.

In the mid-1990s, Company X established manufacturing and sales subsidiaries in North America, South America and Asia, and its compliance obligations became more complex. The board of Company X decided to appoint a Compliance and Ethics Officer who could only be removed by the board and would periodically report to the Board. Competition compliance manuals were updated and included country-specific requirements, an employee hotline was installed, and the President issued an annual reminder of the importance of competition law compliance. Business units each had a representative with responsibility for promoting and administering the compliance program in that unit. Mandatory training for executives and sales and marketing staff was held each year. Records of attendance at training seminars and attestations of compliance were rigorously maintained by the Compliance Officer. Importantly, a number of rules and controls were tightened. Attendance at trade association meetings required pre-clearance by the Compliance Officer. The compliance manual explicitly stated that participating in, encouraging or condoning illegal conduct was subject to disciplinary procedures, including loss of employment. Finally, adherence to Company's X's compliance program was made one of the factors the board considered in determining executive compensation.

Analysis

The Bureau's CU conducted an examination of Company X's corporate compliance program in effect prior to Company X's leniency application.

At the completion of the examination, the CU provided a report to the Senior Deputy Commissioner of Competition of the Cartels and Deceptive Marketing Practices Branch recommending that the fine for Company X should be reduced on the basis that it had a credible and effective program at the time the illegal conduct occurred. Company X's program addressed each of the seven key elements in the Bureau's *Corporate Compliance Programs* bulletin. The report concluded that the two instances of price-fixing were the result of the account manager's actions, which were clearly in contravention of Company X's compliance program, and that the account manager had, in fact, taken steps to avoid detection by managers at the company. Company X's Compliance Officer was able to provide documentation proving that the account manager attended annual training sessions and signed attestations of compliance. In this case, the price-fixing offences clearly resulted from the unethical behaviour of one individual with responsibility for pricing and bidding transactions.

Other findings in the CU's report supporting possible fine mitigation for Company X included:

- the leadership of Company X provided strong support for the compliance program;
- Company X's board provided adequate oversight of management insofar as competition law compliance was concerned;
- the Compliance Officer had sufficient authority and operating and reporting independence to overcome any potential internal pressures at Company X to engage in non-compliant conduct. The Compliance Officer also participated in senior management decision-making meetings;
- there had been thorough and on-going compliance risk assessment. Compliance audits were targeted at higher risk points, including senior management;
- staff had the ability to report any actual or suspected misconduct through Company X's employee hotline. There were strong safeguards against retaliation, including follow up with staff that had raised issues, and disciplinary measures were taken against managers who engaged in, or threatened, retaliation;
- the compliance program had been evaluated from time-to-time, and measures to improve the program were implemented on a timely basis;
- disciplinary measures were taken against managers who had failed to ensure that all necessary employees had taken compliance training; and
- Company X's compliance program met the Bureau's best practices in terms of compliance policies and procedures, training, reporting mechanisms and disciplinary and incentive procedures.

Hypothetical 4 – Alternative Case Resolution

123 Service Co. is a sole proprietorship with 30 employees. It provides maintenance services in a city in Canada for parks, sports fields and the grounds surrounding public and private buildings. Acme Maintenance Ltd. is a small, family-owned and operated business providing similar services in the city in question.

Recently, the Bureau received a complaint from purchasing officials and the city manager implicating 123 Service Co. and Acme Maintenance Ltd. in a bid-rigging scheme for maintenance services, possibly contrary to section 47 of the Act. Bureau officers met with the city purchasing officials to obtain information regarding the alleged conduct and the two implicated companies.

The examination revealed that potentially two contracts were subject to bid “rotation” agreements over the past six months. Bureau officers learned that both companies were small businesses and the two contracts in question were of relatively modest value. City officials indicated that up until this time both companies enjoyed favourable business reputations. The Bureau did not have any record of prior complaints against either company.

As a result of its examination of the matter, the Bureau decided to approach the respective owners of 123 Service Co. and Acme Maintenance Ltd.

At the meeting with 123 Service Co, the proprietor indicated that since being contacted by the Bureau, the company’s Compliance Officer and lawyer looked into the allegations. It seems that a new employee responsible for sales and developing quotes and submitting bids who had joined 123 Service Co. earlier that year from Acme Maintenance Ltd. had met with his counterpart in coffee shops and at social gatherings to exchange pricing information and reveal bidding intentions. The proprietor for 123 Service Co. indicated that the company has a “zero tolerance” policy for illegal conduct, and that the company had fired the sales representative in question. The lawyer also indicated that the company had begun implementing a corporate compliance program a year ago and wanted to resolve the matter explaining that it had contacted the city manager to apologize and pay back the overcharge on one of the contracts in question.

At the meeting with Acme Maintenance Ltd., the President of the company told Bureau officers that he trusts his employees and could not believe that they would break the law. The President said that he was not involved in any improper communications with 123 Service Co. The President indicated that the company did not have a competition law compliance program and admitted signing the bid documents that were sent to the city without asking the sales representative any questions about the prices in the quotes. Bureau officers then explained the requirements to resolve the matter through an Alternative Case Resolution (“ACR”), without recommending charges.

123 Service Co.’s Compliance program

A year earlier, a number of companies in the maintenance services industry in another city in Canada were convicted for bid-rigging. The proprietor of 123 Service Co. read about this in the newspaper. The newspaper article described how government purchasing agencies were getting tougher on companies by barring convicted companies from bidding on future contracts for periods as long as five years and how the Bureau and the PPSC were seeking more jail terms

for individuals involved in bid-rigging. Given that I 23 Service Co. bids for most of its business, the proprietor realized that involvement in bid-rigging could destroy the company and land individuals in jail. Meeting with the three other managers and the supervisors of the two maintenance crews, the proprietor handed out the newspaper article and stated a “zero tolerance” policy for illegal conduct. The business manager for I 23 Service Co. was asked to update the company’s Code of Conduct and take on the role of Compliance Officer.

The business manager did an online search of compliance programs and watched the compliance video on the Bureau’s website. Using the Bureau’s *Corporate Compliance Programs* bulletin as a guide, the business manager developed a competition law “dos and don’ts” document focusing on the highest risk area for the company, cartel activity. In addition to the “dos and don’ts”, the company’s Code of Conduct was updated so that staff were advised that they could ask questions and report potentially illegal behaviour and set out disciplinary measures up to loss of employment. The company’s law firm was also informed about the compliance program. The proprietor of I 23 Service Co. held a meeting with managers, supervisors and sales representatives to explain the reasons for implementing the program and set out how it would work. A wallet sized “dos and don’ts” card was handed out, and the Code of Conduct and key compliance program reminders were emailed to all staff and posted on the company’s intranet. The company’s website was updated to reflect its commitment to fair and ethical business practices. During management meetings, the proprietor would also ask about contacts with competitors and issue the occasional reminder about the dangers of bid-rigging. The Compliance Officer also made a point of examining some of the bidding files to see if there were any signs of questionable conduct.

Analysis

In this hypothetical scenario, the Bureau would be prepared to resolve the matter with I 23 Service Co. using an ACR because the affected volume of commerce and duration of the illegal conduct were relatively modest, there were no prior complaints or convictions, the offence appeared to have taken place at a lower level in the company, the company took steps to payback the overcharge on one of the city contracts and the company fully cooperated with the Bureau.

Many aspects of I 23 Service Co.’s compliance program meet the Bureau’s criteria for a credible and effective corporate compliance program given the relatively small size of the company. The company’s actions in the areas of management involvement and support, risk assessment, communications, monitoring, auditing and reporting mechanisms, and disciplinary procedures collectively represented a serious effort to prevent contraventions. The company’s program could have been better in the area of training, incentives and controls over hiring and pricing, but these issues in this scenario would not disqualify the company from the option of an ACR.

If Acme Maintenance Ltd. wanted to resolve the matter with an ACR, the Bureau would insist on any ACR being conditional on Acme Maintenance Ltd. admitting responsibility for the illegal conduct, implementing a credible and effective compliance program, and taking steps to pay back the city for the overcharge on the contract it won through bid-rigging.

Hypothetical 5 – Failure to Notify a Merger

Corporations A and B are each Canadian publicly-traded companies with assets in Canada in excess of \$400M. Corporation B owns shares of Corporation A and until recently, its shareholding has never exceeded 18%. Last month, Corporation B bought additional voting shares of Corporation A on the open market, as the Director of Corporation B's Trading Department felt that Corporation A's shares were currently undervalued, increasing Corporation B's voting interest in Corporation A to 21%.

A week following the acquisition, the transaction is briefly mentioned at a board meeting of Corporation B. Corporation B's General Counsel asked the Director whether anyone had checked with the Legal Department, prior to making the acquisition, to ensure that no pre-merger notification filing was required under the Act. The Director replied that he thought this was not necessary as this acquisition of shares was made for investment purposes and that Corporation B was not acquiring control of Corporation A. General Counsel said that the Act does not require that control be acquired to trigger a notification obligation, adding that given the size of Corporations A and B, a filing was likely required and that their failure to notify prior to the acquisition may well be an offence under the Act. It was decided that external competition counsel should be retained.

Competition counsel confirmed that under the Act, a filing is required in respect of an acquisition of voting shares that are publicly-traded if the proposed acquisition results in the acquiring party, together with its affiliates, holding in excess of 20% of the target corporation's voting interests, and if certain financial thresholds are exceeded. Corporations A and B have sufficient assets and/or revenues to exceed those financial thresholds, and Competition counsel concluded that there had been a failure to notify and that corrective measures should be taken immediately.

Competition counsel also pointed out that although Corporation A's shares were acquired on the open market, rather than pursuant to an agreement between Corporations A and B, Corporation A still had a notification obligation. He recommended that Corporation A be contacted without delay and that notification filings be prepared by both parties and submitted as soon as possible to the Bureau, together with the applicable filing fee and a letter explaining the circumstances of the failure to notify, stressing that both parties acted diligently as soon as they became aware of the issue and are in the process of implementing measures to prevent future notification failures.

Corporation B's Compliance program

Corporation B has a competition law compliance program, but it had not been updated recently. Competition counsel recommended that Corporation B's competition law compliance program be updated immediately; in particular to cover the pre-merger notification requirements of the Act, along with supplemental compliance training for Corporation B's managers and directors.

All of competition counsel's recommendations were accepted and a corrective merger filing was submitted to the Bureau three weeks after the acquisition was completed.

Analysis

Parties that complete a notifiable transaction without submitting a notification under subsection 114(1) of the Act may have committed a criminal offence under subsection 65(2) of the Act, and may be liable to a maximum fine of \$50,000.

As stated in the Bureau's *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act* where a transaction has been completed in contravention of the Act, it is important to bring the matter to the attention of the Merger Notification Unit and submit a notification, together with the applicable filing fee and an explanation for the failure to notify, as soon as possible. The explanation should be submitted by an officer or director of the company, setting out the reasons why the notification was not filed in a timely manner, how and when the failure was discovered, and what steps have been taken to prevent future contraventions of the Act.

In the present case, once the corrective filing was received, the Bureau assessed the transaction to determine whether it was likely to result in a substantial lessening or prevention of competition, as the Bureau would normally do in respect of any proposed transaction that is brought to its attention by way of a pre-merger notification. While the specific facts are not discussed here, for the purposes of this hypothetical scenario it is assumed that the transaction did not raise any substantive competition issues and that the Bureau decided not to challenge the transaction under section 92 of the Act. Consequently, the Bureau informed the parties that the Commissioner did not, at this time, intend to make an application under section 92 of the Act in respect of the transaction.

With respect to the failure to comply with Part IX of the Act, given that the parties voluntarily reported the failure immediately and complied with all corrective measures, as outlined in the Bureau's policy, and Corporation B had a compliance program and appropriately upgraded it, the parties were informed that, in this case, the Commissioner was of the view that there was no need to commence an inquiry under section 10 of the Act or to refer this matter to the PPSC for prosecution.

Hypothetical 6 – Limited Consideration of Program/Digital Economy

Company Y is a popular consumer electronics retailer with 15 stores across Canada that planned a back-to-school promotional event that would run from mid-August to the end of August. The promotion offered 40% off all laptops with the purchase of an all-in-one printer. Company Y's marketing department decided to promote the event via the company's website, emails and text messages.

To promote the back-to-school event on its website, Company Y created a new webpage. Near the top of the page were the words "Back-to-School Sale: 40% off all laptops!" and immediately underneath was text stating, "Requires minimum \$100 purchase of an all-in-one printer", which text was equally prominent. Beside the text were images showing a laptop beside a printer.

Company Y also prepared promotional emails. The emails were sent to members of Company Y's frequent shoppers club and other consumers who signed up to Company Y's email list. The subject line stated "Back-to School Sale: 40% off all laptops!" The body of the email encouraged consumers to come down to the store while supplies lasted, and featured images of various laptop computers.

Text messages are also sent to consumers. The text messages all stated, "Back-to-School Sale: 40% off all laptops!" and invited consumers to hurry in to the store.

No mention was made of the requirement to buy a printer to qualify for the discount on the laptop in either the emails or the text messages sent to consumers.

Company Y's Compliance program

Company Y's Compliance program was created in 1997 and had not been updated since. It stated that prior to launching a promotional campaign, marketing materials had to be reviewed by senior management of the company and in-house counsel to ensure the materials comply with the Act. A meeting was always arranged for such review.

For the back-to-school event, the marketing department arranged a meeting with senior management and counsel. At the meeting, the Director of Marketing explained the plan for the back-to-school campaign, but presented only a mock-up of the proposed new webpage. Detailed notes taken during the meeting indicate that senior management and counsel conducted a diligent review of the website mock-up. One senior manager noted that the sentence "Requires minimum \$100 purchase of an all-in-one printer" and the sentence "40% off all laptops," both are in the main part of the representation, and the nearby graphics of the laptop and printer together created the general impression that receiving the 40% discount was conditional upon purchasing an all-in-one printer. The Director of Marketing also satisfied senior management and counsel that that the laptops in question were offered in good faith for a substantial period of time prior to the promotional period, and therefore raised no compliance issues under the ordinary selling price provisions of the Act.

Senior management and counsel approved the back-to-school campaign on the strength of the meeting, without ever reviewing the marketing materials to be sent via email and text.

Analysis

Following complaints about the text message and email advertisements, the Bureau examined the marketing campaign under the misleading advertising and deceptive marketing practices provisions of the Act, including the provisions of Canada's Anti-Spam Legislation ("CASL") that apply to the sending of electronic messages.

In this hypothetical analysis, the business failed to ensure that each version of the promotion was reviewed to ensure compliance with the Act. While the webpage did not appear to raise issues under the Act, the representations in emails and texts could create the false or misleading general impression that all laptops were eligible for the 40% discount, when in fact the discount was conditional on purchasing a printer.

In its case assessment, the Bureau recognized that Company Y had made efforts to establish a credible and effective program, and to apply it to the back-to-school event. However, the application of Company Y's Compliance program to the back-to-school sale was only partially effective, in that it did not address all the representations being made, and it failed to take into account amendments to the Act, including those made under CASL. Furthermore, addressing only the use of websites without considering the use of email, texting, smartphones and other electronic media alternatives reflected a failure to conduct a current risk assessment, and a failure to have appropriate controls in place.

While the compliance efforts fell well short of establishing that Company Y exercised due diligence, the Bureau gave some consideration to the program as a mitigating factor when determining the magnitude of administrative monetary penalties it would seek as a remedy. The level of mitigation was limited because the program was deficient, dated and only partially effective.