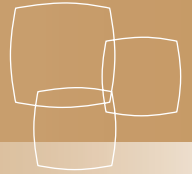




Competition Bureau
Canada

Bureau de la concurrence
Canada

Bulletin



**Corporate Compliance
Programs**

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

This publication replaces the following Competition Bureau publication:

Bulletin – *Corporate Compliance Programs*, September 10, 2008

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Cat. No. lu54-28/2010E-PDF

ISBN 978-1-100-14528-0

60704

2010-09-27

Aussi offert en français sous le titre Les programmes de conformité d'entreprise.

PREFACE

The Competition Bureau (the “Bureau”) is an independent agency that contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. This Bulletin provides guidance regarding credible and effective corporate compliance programs designed to ensure compliance with the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act* (“Acts”).

This Bulletin is being updated to reflect recent amendments to the *Competition Act*. On March 12, 2009, Bill C-10, the *Budget Implementation Act, 2009*, received Royal Assent. The *Budget Implementation Act, 2009* contained several amendments to the *Competition Act*. Most of the amendments came into force on the date of Royal Assent, except those related to sections 45, 45.1 and to the new section 90.1, which came into force on March 12, 2010.

This Bulletin describes measures that businesses¹ should consider in order to prevent or minimize their risk of contravening the Acts, and to detect contraventions, should they occur. The Bulletin also provides tools to help Canadian businesses develop their own compliance program. For example, a Framework of the essential components of a credible and effective program has been included with this publication as an appendix.²

Implementing a program is not required by the Acts, but can, in certain circumstances, be ordered by a court.³ Businesses should nonetheless take a proactive approach when promoting compliance. All businesses should recognize the value of a well-designed, credible and effective program. This Bulletin outlines the essential components of such a program. To be credible, a program must demonstrate the company’s commitment to conducting business in conformity with the law. To be effective, it needs to inform employees about their legal duties, the need for compliance with internal policies and procedures as well as the potential costs, actual and opportunity (*i.e.*, the cost of not complying with the law) of contravening the law and the harm it may cause to the Canadian economy.

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. Moreover, in some cases, courts have recognized a credible and effective compliance program as a mitigating factor when assessing remedies in the event of a breach.

The Bureau recognizes that certain 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.

1 For the purposes of this Bulletin, the terms “business” and “company” are used interchangeably and include all forms of business organization, whether or not incorporated.

2 See Appendix A - Corporate Compliance Program Framework.

3 For the purposes of this Bulletin, the term “court(s)” includes the Competition Tribunal.

The Bureau further recognizes that competition law compliance is just one area within the broader field of compliance. Such a program may be appropriately incorporated into a broader compliance program that deals with a range of compliance issues. Similarly, companies operating in multiple jurisdictions may prefer to implement a company-wide compliance program.

Although the Bureau will not sanction or approve such programs, it may, in certain circumstances, provide advice and guidance in developing an acceptable program. The goal of the Bureau's work in the area of in-house compliance programs is to promote compliance with the Acts.

Commissioner of Competition

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I. INTRODUCTION

The Bureau publishes various guidelines, bulletins and pamphlets to provide information and to promote compliance with the Acts.

The Bureau first issued its *Corporate Compliance Programs Bulletin* (“Bulletin”) in 1997. The Bulletin outlined the Bureau’s approach to corporate compliance programs (“program(s)”) designed to ensure compliance with the *Competition Act*.

This Bulletin has been updated to reflect amendments to the *Competition Act* and incorporates information from new Bureau publications. In addition, this Bulletin promotes compliance with the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. Our approach remains the same – to promote compliance with the law.⁴ To further this objective, the Bureau has expanded the Bulletin and provided more guidance to help Canadian businesses design their own program. The tools developed by the Bureau are incorporated in the Bulletin and in the attached Appendices. The Appendices provide general guidance to help businesses develop and implement effective and credible programs. They should not be seen as prescriptive tools, but rather as illustrative ones. Furthermore, the content of the Appendices is not intended to serve as legal advice. Readers should obtain independent legal advice when developing a corporate compliance program.

The decision to implement a program is generally voluntary. However, the Bureau will recommend or request, whenever appropriate, that a program be established in the context of a prohibition order obtained under section 34 of the *Competition Act*, a probation order,⁵ and a consent agreement under sections 74.12 and 105 of the *Competition Act*.

Each business is different and, as such, businesses must tailor their program to address the compliance issues specific to their industry or market. For example, an industry leader, a multinational, a regulated or a start-up business or one that has a history of contravening the law each could have different needs when establishing and implementing a credible and effective program. Accordingly, the relevant components described in this Bulletin are neither industry nor company-specific, and are recommended as the baseline for the development of any in-house program.

The views expressed herein 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 no substitute for the advice of counsel. Enforcement decisions and the ultimate resolution of any particular matter are based on the specific

4 For the purposes of this Bulletin, the terms “Acts” and “law” are used interchangeably.

5 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).

circumstances of the matter.⁶ Readers should refer to the specific Acts when questions of law arise and, if a particular situation gives rise to concerns, should obtain independent legal advice. They may also wish to consider requesting a binding written opinion from the Commissioner on proposed conduct or a proposed practice under section 124.1 of the *Competition Act*.⁷ The final interpretation of the Acts rests with the courts.

6 See the Competition Bureau's *Conformity Continuum Information Bulletin* (Ottawa, Industry Canada, 2000) available online at www.competitionbureau.gc.ca.

7 Pursuant to section 124.1 of the *Competition Act*, any person may apply to the Commissioner for a written binding opinion relating to the applicability of the *Competition Act*. The Commissioner also provides non-binding advice under the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. For more information on written binding opinions, refer to the Bureau's Web site at www.competitionbureau.gc.ca.



2. IMPORTANCE OF COMPLIANCE

2.1 Why is Compliance Important?

Every business and individual has a duty to act lawfully. The Bureau operates on the assumption that all businesses and their senior management wish to comply with the law. Compliance is important for all businesses, regardless of their size, for both legal and practical reasons.

The legal, economic and reputational risks of non-compliance to companies and their directors and officers outweigh any advantages. For example, contravention of the *Competition Act*, whether civil or criminal, can expose a business to significant fines or administrative monetary penalties and recovery of damages by private parties under section 36 of the *Competition Act*.⁸ In addition, most provinces have procedures in place to certify class action proceedings; it is common to see such actions filed when an offence has been committed under the *Competition Act*.

Non-compliance can also result in negative publicity, loss of management time, significant legal costs and a prohibition from participating in government bidding processes. In addition to, or in lieu of, fines, individuals convicted of criminal offences may be sentenced to a period of imprisonment.

The importance of a compliance program in avoiding contraventions under the Acts, and in detecting and dealing with such behaviour, should not be underestimated. The procedures put in place as the result of a compliance program serve not only to identify unlawful or questionable conduct but also to promote awareness that will result in ethical standards of conduct.

2.2 The Benefits of a Credible and Effective Corporate Compliance Program

A credible and effective program is one that is designed to prevent contravention of the Acts, to detect at an early stage inadvertent or unauthorized actions and to identify contraventions committed by other companies that are affecting a business. Early detection may serve as a risk-management function by 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.

Having a credible and effective program in place also helps to ensure that a business is aware of the formal powers available to the Commissioner. Under the *Competition Act*, the Commissioner can apply to a judge to obtain court orders that allow Bureau staff to search

⁸ Pursuant to section 36, any person who has suffered loss or damage as a result of any offence under Part VI of the *Competition 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.

and seize records, compel oral examinations and produce records. In these circumstances, a business that fails to comply with a court order could face criminal sanctions. It is thus essential that a business respond to a court order obtained by the Commissioner under the *Competition Act*. In addition, it is important to note that, under the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*, Bureau employees are authorized to enter the business premises of a dealer without a warrant to inspect and ensure compliance with these Acts.⁹ A program should therefore provide tips for responding properly to court orders and inspections¹⁰ and for protecting businesses from charges of obstruction of justice.¹¹

A program also plays a crucial role for trade associations because trade associations face unique compliance issues. Given that an association provides a forum where competitors collaborate on association activities, trade associations are exposed to greater risks of anti-competitive conduct. A number of past Bureau cases have involved trade associations that were engaged in agreements to harm competition. It is therefore critical that trade associations implement credible and effective programs with strict codes of ethics and conduct. Such programs may allow trade associations and its members to avoid improper actions and to protect themselves from being used as a conduit for illegal activities. They may also allow trade association members to fully benefit from the association's activities while reducing the potential for inadvertent contraventions of the Acts.¹²

Some of the specific benefits of a credible and effective program may include the following:

- compliance with the law;
- reduce the risk of non-compliance;
- contribute to maintaining a good reputation;
- reduce costs related to litigation, fines, adverse publicity and the disruption to operations resulting from Bureau investigation and proceedings before the court;

9 Bureau officers can enter and inspect the business premises of a dealer of prepackaged products, consumer textile articles and precious metal articles without a search warrant. For more information, see the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

10 See Appendix A - Corporate Compliance Program Framework.

11 Obstruction of justice under the Acts amounts to any intentional action aimed at negatively affecting the Commissioner's functions. It includes any attempt to interfere with the work of Bureau officers, legal counsel, inspectors or other authorized representatives of the Commissioner. The most common types of obstruction in the competition law context are: (1) making false statements; (2) destroying, falsifying, concealing or withholding documents or information; (3) witness tampering (an act that attempts to influence a potential witness); and (4) removing records from premises without permission during the execution of a search warrant or when in the process of complying with a court order issued under section 11 of the *Competition Act*. With the amendments contained in Bill C-10, certain penalties were significantly increased to promote compliance with the *Competition Act* and to deter conduct that would compromise the effective enforcement of the Act, such as obstruction of an inquiry or examination, failure to comply with a section 11 or a section 15 order and destruction of evidence.

12 For more information on trade associations, see the *Draft Trade Association Bulletin* (Ottawa, Industry Canada, 2008) available online at www.competitionbureau.gc.ca.

- trigger give early warnings of potentially illegal conduct;
- reduce the exposure of employees, senior management and the corporation to criminal, civil or penal liability;
- increase awareness of possible conduct in breach of the Acts among competitors, suppliers and customers in the market;
- assist a company and its employees in assessing the competition risks they may face;
- assist a company and its staff in their dealings with the Bureau; for example, by identifying contraventions of the Acts early enough to request immunity or lenient treatment;
- improve a business' ability to recruit and retain staff - an ethical company is likely to attract higher-quality employees and have positive successful retention rates;
- improve a business' ability to attract and retain customers and suppliers who value companies that operate ethically; and
- assist a business to qualify, in certain circumstances, for a reduced sentence or other lenient treatment where a contravention of any of the Acts has occurred.¹³

¹³ See section 5 of this Bulletin – Consideration Given to Corporate Compliance Programs.



3. FOSTERING A CULTURE OF COMPLIANCE

Policies, procedures and training are, on their own, insufficient to ensure compliance. To be effective, all policies, procedures and training must be part of a larger culture that instills compliance as a fundamental value.

Fostering a culture of compliance must start at the top. Senior management must set the tone and recognize that it is part of their leadership role to ensure compliance with the law and with any court order imposed on their business.

While senior management is accountable for ensuring compliance, the responsibility may be delegated by designating a person or a group (compliance officer or other appropriately titled position(s)) to implement an effective and credible program (including training, monitoring and overseeing a reporting system for complaints and misconduct). Irrespective of the size and the resources of a particular business, the person or group responsible for compliance must be in a position to act effectively, in that there is independence, professionalism, empowerment, financial support and a solid understanding of what is taking place within the business. It is important to note that, while others may implement and operate a program, managers bear ultimate responsibility for actual compliance.

Employees also play a key role in the implementation of a successful program because they are, in effect, responsible for the day-to-day operations of the business. 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 understand the company's program, including its policies and procedures.¹⁴

As noted above, it is recognized that a credible and effective program must be tailored to a business' situation and may vary in its particulars according to, among other things, its resources. While a smaller business might not have the resources to implement an elaborate program, it can nonetheless foster a culture of compliance through less resource-intensive actions, for example, by educating its employees about the law and the consequences of non-compliance.

¹⁴ See Appendix B – Certification Letter.



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

There are five elements that are fundamental to a proper compliance program regardless of the particular model adopted, its level of complexity or the size of a business. The five essential elements that should be incorporated in every program are:

- 4.1 Senior Management Involvement and Support
- 4.2 Corporate Compliance Policies and Procedures
- 4.3 Training and Education
- 4.4 Monitoring, Auditing and Reporting Mechanisms
- 4.5 Consistent Disciplinary Procedures and Incentives

Each of these elements is discussed below.

Given the differences in the objectives of the Acts, certain elements of a program must be different depending on the specific Act that is being discussed. The Bureau recognizes that businesses need to have the flexibility to adopt an integrated program encompassing all the Acts or separate programs for each individual Act, provided that the basic requirements of an effective and credible program are properly addressed.

4.1 Senior Management Involvement and Support

Senior management's clear and unequivocal support is the foundation of a credible and effective corporate compliance program.

Senior management, in the performance of their fiduciary duties, must always exercise care, skill and diligence and act in the best interests of the business, including compliance with the relevant statutes and regulations. They must identify and assess the principal risks faced by the business and implement appropriate systems to manage such risks.

Senior management must foster a culture of compliance within the business organization by playing an active and visible role in promoting its program. By demonstrating its commitment to compliance, senior management is conveying the message that contraventions of the Acts are not acceptable as legitimate business practices. To sustain a culture of compliance, senior management should periodically reinforce its message by actively enforcing the program. It is important to note that presenting values and principles but not acting upon them could render them useless. Failure to execute is the main reason programs fail.

Senior management should communicate with the board of directors and report on compliance program issues, such as progress and breaches. The board should also be involved in the appointment of the person or group responsible for compliance, the endorsement of the business' compliance program and any disciplinary actions resulting from a breach. The involvement of the board serves as an additional protection where senior managers may be the perpetrators of a contravention of the law.

Suggestions to help meet this basic requirement include the following:

- clearly promote compliance with the Acts as a fundamental part of the business policy;
- senior management should expressly commit to compliance;
- senior management should report to the board of directors on any compliance issues;
- senior management should conduct risk assessments annually to better assess compliance priorities;
- senior management should be accountable for promoting and complying with the Acts; and
- a member of senior management should be appointed as a compliance officer, responsible for ensuring compliance and for dealing with all questions and concerns pertaining to compliance with the Acts.

4.2 Corporate Compliance Policies and Procedures

The substantive content of a corporate compliance program is described in a company publication.

The development and documentation of compliance policies and procedures tailored to a business' operations are critical to the success of a program. Such policies and procedures should be updated when required to reflect material changes to the business, the law, the Bureau's enforcement policies, or to the industry (for instance, deregulation). Reasonable measures should be taken to promptly notify all employees of such changes. This documentation should also be widely available to all employees in a readily accessible format.

Examples should be included to demonstrate the relevance of the policies and procedures to the employees' daily activities. For example, if a business often submits bids, a list of DOs and DON'Ts when preparing a bid submission could be included in the policies and procedures.

Suggestions to help meet this basic requirement include the following:

- establish clear compliance policies and procedures and distribute to all relevant staff;*
- continuously assess compliance policies and procedures (for instance, based on a change in the industry, lessons learned, a Bureau investigation, or complaints) and take reasonable measures to promptly notify all employees of such changes;
- design policies and procedures for different business units based on the competition risks that may arise (for instance, a list of DOs and DON'Ts and "Red Flag" issues); and
- request employees to sign a certification letter (see sample at Appendix B) stating that they have read and understand the compliance program in place.

* 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.

4.3 Training and Education

A credible and effective corporate compliance program includes an ongoing training component focussing 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 Acts.

(a) Why Businesses Need to Conduct Training

A major objective of a program is to prevent contraventions of the Acts. Senior management and staff alike need to understand the parameters of acceptable behaviour. Training employees to be able to detect prohibited conduct and educating them about the range of penalties and remedies for non-compliance is essential. Given the unique characteristics of each industry, the Bureau recognizes that a business requires flexibility in designing effective compliance training and communication programs.

(b) How to Train Employees

Education and training should demonstrate to staff, in a practical way, how compliance policies and procedures affect their daily activities.¹⁵ Documents alone can only go so far in promoting compliance. The most important thing in this context is that a business chooses the most effective methods for training its employees. For example, a business can use small group seminars, manuals, email messages, online training or workshops to effectively educate staff. 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 could include descriptions of prohibited conduct and the issuance of regular bulletins that discuss current compliance issues that may affect the operations of the business.

A credible and effective program must be successful at training on the general principles and the specifics for individuals who deal with situations that could raise issues under 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.¹⁶

(c) Delivery of Training

Effective training is best delivered by experts (i.e., by knowledgeable legal counsel or a compliance officer) and should be given consistently throughout the business to avoid conflicting information. Regardless of the methods used, it is crucial to allow employees the opportunity for extensive discussions on questions and answers.

¹⁵ See Appendix C – Due Diligence Checklist.

¹⁶ These publications and tools include a series of pamphlets explaining various provisions of the Acts, multimedia tools as well as detailed guidelines and bulletins on various provisions of the Acts and are available on the Competition Bureau Web site at: www.competitionbureau.gc.ca. See also Appendix A – Corporate Compliance Program Framework and Appendix C – Due Diligence Checklist.

Senior management should also play an active role in delivering compliance messages to employees, reinforcing their support for the program, by undertaking the necessary compliance training, sending emails supporting the compliance program and referring to the program in presentations and during other speaking opportunities. As such, senior management may wish to capitalize on the information made available by the Bureau to train its employees and provide them with examples of how companies and individuals have been sanctioned for breaching the Acts.

(d) Evaluation of Training

The effectiveness of a compliance training program must be regularly evaluated by the business' compliance officer or its equivalent. One way is to regularly test the employees' knowledge of the law and the company's compliance policies and procedures to determine whether its program needs to be updated or modified.

Suggestions to help meet this basic requirement include the following:

- train all employees at an early stage (for instance, during an initial orientation session) regarding the importance and expectation of compliance;
- train senior management and staff as required in the particular circumstances to recognize and address compliance issues;
- regularly assess the employees' knowledge of compliance policies and procedures; and
- document all training sessions.

4.4 Monitoring, Auditing and Reporting Mechanisms

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

Effective monitoring, auditing and reporting mechanisms help prevent and detect misconduct, 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, auditing and reporting procedures are those that also enable companies to identify areas of risk, areas where additional specific training is required and areas where new compliance issues may require new policies to be developed. The format of this component will depend on the business' particular needs, such as the extent of its exposure to potential contraventions of the Acts. The Bureau does not endorse any particular procedure or combination of procedures; rather, a business should be satisfied that the measures it implements are generally effective to prevent breaches of the Acts and to detect and address them if and when they do occur.

While all such mechanisms are crucial to the success of any compliance program, senior management must investigate compliance issues raised and should take the necessary steps to stop ongoing and prevent future contraventions.

(a) Monitoring

Monitoring refers to the ongoing procedures implemented to prevent contravention of the Acts. Evidence of such efforts may also support a due diligence defence should litigation arise.¹⁷ Depending on the risks, periodic or continuous monitoring may be necessary. A business could take the opportunity to verify whether any of its internal or external practices may potentially contravene the Acts.

(b) Auditing

Audits may be periodic, *ad hoc* or event-triggered and are designed to determine whether a contravention has occurred. The way in which audits are conducted is likely to vary from one company to another depending on the specific risks faced. Audits are designed to identify whether a contravention of the law has occurred and, if so, to ensure that it has been dealt with appropriately.

(c) Reporting

An internal reporting procedure encourages employees to provide timely and reliable information that can be the basis for further investigation by the business. Employees must be encouraged to freely report conduct that they believe contravenes the Acts or company policy. The program should clearly identify which actions require reporting, and when 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, endorsing an open-door policy, promoting an anonymous hotline or by identifying legal counsel as compliance resources.

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 also educate employees who are in a position to engage in, or be exposed to, conduct in potential breach of the Acts on the Bureau's *Immunity Program* and the whistleblowing provisions (sections 66.1 and 66.2 of the *Competition Act*).¹⁸

¹⁷ See section 5 of this Bulletin – Consideration Given to Corporate Compliance Programs, which refers to the due diligence defence.

¹⁸ For more information on how to apply for immunity under the *Competition Act*, see the *Bureau's Immunity Program under the Competition Act* (Ottawa, Industry Canada, 2007), the *Adjustments to the Immunity Program* (Ottawa, Industry Canada, 2007) and the *Responses to Frequently Asked Questions* (Ottawa, Industry Canada, 2007). For the other three statutes enforced by the Commissioner, see *The Federal Prosecution Service Deskbook*, Part VII, Policy in Certain Types of Litigation, Chapter 35 – Immunity Agreements (Ottawa, Department of Justice Canada, 2005) available online at www.justice.gc.ca.

Suggestions to help meet this basic requirement include the following:

- monitor business activities continuously or periodically, as appropriate, to ensure compliance;
- review the program when issues arise or are detected;
- plan formal audits, either by appointment or unannounced, to check for actual contraventions;
- use surveys, focus groups and exit interviews to assess the effectiveness of your compliance program;
- conduct audits to confirm whether a business is fully complying with the Acts; an audit may include a review of paper and computer files (especially emails) of staff who are in a position to engage in, or be exposed to, conduct in potential breach of the Acts;
- take immediate action to stop any contravention of the Acts;
- cooperate with the government where a breach has occurred (which involves self-reporting);
- put in place a confidential reporting procedure (for instance, inform senior management when an incident occurs and report to legal counsel);
- identify employees who are exposed to a heightened risk (for instance, based on roles and responsibilities, previous issues and misconduct); and
- document all compliance efforts (this will also assist a company in advancing a defence of due diligence, where available).

4.5 Consistent Disciplinary Procedures and Incentives

Consistent disciplinary procedures and incentives demonstrate the seriousness with which the company views conduct in breach of the Acts.

A disciplinary code or policy addressing those who initiate or participate in conduct in breach of the Acts, or those who do not abide by a business' program, is important not only for deterrence purposes, but also as a reflection of the business' policy against such conduct. A credible and effective program should explicitly state that disciplinary actions (for example, suspension, demotion, dismissal and even legal action) will be taken where an employee contravenes the Acts.

Providing appropriate incentives (for instance, compliance could be considered for the purposes of employee evaluations, promotions and bonuses) for performing in accordance with the compliance program can play an important role in fostering a culture of compliance. Incentives can work as effective tools for a business that wishes to promote compliance by employing concrete actions.

All disciplinary actions and procedures should be recorded as proper documentation can support a claim of due diligence defence where a business is found to be in contravention of the Acts.¹⁹ Proper disciplinary actions should also be taken against managers who fail to take reasonable steps to prevent or detect misconduct.

¹⁹ See section 5 of this Bulletin – Consideration Given to Corporate Compliance Programs - which refers to the due diligence defence.

Suggestions to help meet this basic requirement include the following:

- take appropriate and consistent disciplinary action (up to and including dismissal) for failure to comply with the business' program or with the Acts; and
- create an incentive system for employees at all levels to adhere to the business' program.



5. CONSIDERATION GIVEN TO A CORPORATE COMPLIANCE PROGRAM

5.1 Generally

The existence of a program does not immunize businesses or individuals from enforcement action by the Commissioner or from prosecution by the DPP.²⁰ However, in determining the most appropriate means to resolve cases involving offences where the exercise of due diligence is a defence, the Commissioner may give weight to the pre-existence of a credible and effective program in making sentencing recommendations to the DPP. A program will be considered credible and effective where it can be demonstrated that it was reasonably designed, implemented and enforced in the circumstances. Establishing a credible and effective program, or taking verifiable steps to strengthen an existing program in response to a violation of the Act, can also have a positive impact on the Commissioner's sentencing recommendations or on the remedy sought by the Commissioner in civil reviewable matters.

5.2 Specifically

5.2.1 Immunity from Prosecution and Leniency

Businesses or individuals involved in activities that may violate the criminal provisions of the *Competition Act* can, in certain circumstances, approach the Bureau and request immunity from prosecution in return for co-operating with the Bureau's investigation and any ensuing prosecutions. Under the Bureau's *Immunity Program*, the Commissioner will recommend that the DPP grant immunity to the first party that comes forward and satisfies the identified criteria.²¹ The DPP however has ultimate discretion to accept or reject the Commissioner's recommendation.

Immunity from prosecution is only available to the company involved in the offence that is first-in to make an application. Subsequent parties to come forward are able to request other types of lenient treatment granted by the DPP, such as recommendations to the Court for reduced fines in return for co-operation with the Bureau and the DPP.²² The degree of lenient treatment offered by the DPP is generally reduced with each subsequent application.

20 On December 12, 2006, the Office of the Director of Public Prosecutions was created as part of the *Federal Accountability Act*. This Act gives the Director of Public Prosecutions jurisdiction to conduct prosecutions for offences under federal jurisdiction. This office is independent of the Department of Justice and has assumed the duties of the former Federal Prosecution Service.

21 *The Federal Prosecution Service Deskbook*, supra, note 19, provides the relevant information regarding immunity agreements granted following the violation of the other three statutes enforced by the Commissioner. Also see the Bureau's *Immunity Program*, supra, note 19.

22 For more information on how to apply for leniency, see the *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases* (Ottawa, Industry Canada, 2009).

Consequently, the timing of a request for lenient treatment is important. A program may assist a company in the early detection of a violation of the criminal provisions of the *Competition Act*, and thereby allow it to benefit from the advantages of being either the first-in immunity applicant or receiving a greater degree of leniency.

A company, 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 *Competition Act*. This will assist in ensuring that it adopts policies and practices that conform with the law in the future. The Bureau will strongly recommend that an immunity or a leniency applicant implement a credible and effective program using this Bulletin as a guide.

5.2.2 Sentencing and Civil Remedies

The mere pre-existence of a program will not be considered grounds to recommend favourable treatment in sentencing to the DPP for either corporations or individuals with respect to criminal offences under the Act. An exception to this principle can be made for criminal deceptive marketing practices offences where the exercise of due diligence is a defence.²³ In matters where a potential accused cannot establish a due diligence defence despite the presence of a credible and effective program because it all reasonable steps were not taken to prevent the commission of the offence, the program may, nonetheless, be seen as a mitigating factor warranting a reduction in the penalty that the Commissioner would otherwise recommend to the DPP for submission to the court. It is important to note that the DPP has ultimate discretion whether to accept or reject the Commissioner's recommendation.

In reviewable matters, with respect to deceptive marketing practices, the Commissioner may apply to the Tribunal or a court for a remedial order. In this regard, the pre-existence of a credible and effective program may enable a business to demonstrate mitigating conduct, including evidence that the anti-competitive activity is contrary to its policies and the statements of senior management, and that it was terminated as soon as it became known to senior management. Depending on the circumstances, the pre-existence of a credible and effective program may have a positive impact on the magnitude of the remedy sought by the Commissioner. For example, it may reduce the amount of the administrative monetary penalty and/or other remedy sought by the Commissioner in a case involving deceptive marketing practices. It is important to note that the Tribunal or court has discretion whether to accept, reject or modify the Commissioner's remedy recommendation.

²³ 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.

5.2.3 Impact on the Bureau's Decision to Pursue *Competition Act* Matters Under the Civil or the Criminal Regime

The false or misleading representations and deceptive marketing practices provisions of the *Competition Act*, which prohibit making a 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 evidence that the conduct was engaged in knowingly or recklessly. The Bureau's decision of whether to pursue a matter under the criminal or civil track may take into account, among other things, the pre-existence of a credible and effective program as well as whether it is in the public interest to recommend to the DPP to lay criminal charges against a company or an individual.

5.2.4 Due Diligence Defence

For certain false or misleading representations and deceptive marketing practices provisions under the *Competition Act* and certain provisions of the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*, a company may argue that it had exercised due diligence to prevent the conduct.

Although the pre-existence of a program is not, in and of itself, a defence to allegations of wrongdoing under any of the Acts, a credible and effective program may enable a business to demonstrate that it took reasonable steps to avoid contravening the law. In this regard, such a program may support a claim of due diligence. Documented evidence of corporate compliance will assist a company in advancing a defence of due diligence, where available.

5.2.5 Consent Orders and other Non-Contested Resolutions

Depending on the circumstances, conduct contravening the Acts may be resolved without fully contested proceedings. The Act contains provisions that provide the Tribunal with the power to issue consent agreements under section 105 to address civil reviewable matters under Part VIII of the *Competition Act*. The Tribunal also has the authority to issue consent orders, which may include the publication of corrective notices 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.²⁴ The Bureau's effort to increase compliance without the need for contested proceedings is also supported by the availability of alternative case resolutions ("ACRs"), which include, among other compliance instruments, undertakings, information contacts, information letters, warning letters and compliance meetings.

In certain circumstances, the Commissioner may be more inclined to consider an alternative form of resolution to litigation where the business can demonstrate that:

- it terminated the conduct in breach of the Acts as soon as it was detected;

²⁴ Section 34 of the *Competition Act* allows for a court to impose prescriptive terms.

- it attempted to remedy the adverse effects of the conduct;
- the conduct was contrary to corporate policy in existence at the time of the contravention; and
- the contravention occurred at a lower level in the business and was not carried out or endorsed by senior management.

Although an in-house program is not a prerequisite for ACRs in either civil or criminal matters, the existence of a credible and effective program may enable a company to satisfy the above-noted requirements.²⁵

If it is determined 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 will, whenever appropriate, require the implementation of such a program as part of the resolution. Where a program is already in place, the Commissioner will, whenever appropriate, require the business to review its program and to make the appropriate changes to prevent future repetitions of the conduct in question.

When 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 may wish to 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.

5.2.6 Where Senior Management is Involved in the Breach

If the senior management of a company either participated in or condoned conduct that breaches the Acts, it will be apparent to the Bureau that senior management's commitment to compliance was not serious and the program was neither credible nor effective. Knowingly contravening the law despite the existence of a program may be considered an aggravating factor for individuals involved in the offence when the Commissioner assesses whether to recommend that charges be laid against them. In such cases, the Commissioner would also recommend that charges be laid against the company, unless the company is able to demonstrate that it exercised due diligence to prevent the commission of the offence and a due diligence defence is available under the law.

5.2.7 Corporate Compliance Programs Implemented as a Sham

If a program is a sham and used only to conceal or deflect liability, this also may be considered an aggravating factor for sentencing purposes or any other form of a resolution, including administrative monetary penalties. In such circumstances, the conduct of the parties in a business will be closely examined.

²⁵ Other criteria will also be taken into account. For a more detailed discussion of the Bureau's approach regarding case resolution, see *supra*, note 6.



6. CONCLUSION

The success of Canadian competition laws is largely attributed to voluntary compliance by firms and individuals. An effective compliance program is a valuable tool in preventing and detecting competition law violators.

A compliance program educates company personnel about the basic features of competition law and the significant harm that may result from failing to comply.

As a result, it is important to have a credible and effective program that will help to clarify the limits of legitimate business conduct. A credible and effective program will enhance understanding of what is acceptable behaviour so that legitimate competitive practices can be vigorously pursued without contravening the law.



7. HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act*, 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:

Web site

[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) 1-800-642-3844]

Facsimile

[819-997-0324]



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, Auditing 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 Framework is not binding on the Commissioner of Competition (“Commissioner”). It is offered for the purpose of providing guidance. This Framework 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 (including Policies and Procedures) (“Program”) has been established so that our business complies with the [*Competition Act / Consumer Packaging and Labelling Act / Textile Labelling Act / Precious Metals Marking Act* (as appropriate)] while providing value to our customers and competing effectively in the Canadian and global economies.

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 [*Competition Act / Consumer Packaging and Labelling Act / Textile Labelling Act / Precious Metals Marking Act* (as appropriate)]. Nevertheless it is imperative that its requirements be complied with strictly.

[A personal statement by the chief executive officer or his/her equivalent stressing his/her commitment to the policies and procedures contained in the Program, and his/her uncompromising adherence to the Acts may be incorporated.]

I.2.2 Our business has designated a person responsible for the development, implementation and maintenance of the Program. The [Compliance Officer or other appropriately titled position] may be contacted at: [Contact Information].

I.3 Employees’ Responsibility for Compliance

I.3.1 Responsibility for compliance with the Acts also rests with each and every employee of the business. Compliance with the Acts protects not only our business, but also our employees.

I.3.2 In addition, our business has developed Policies and Procedures, attached at Appendix [], in order to assist employees in recognizing improper conduct and knowing when to seek advice.

I.4 Canadian Competition Law

The purpose of Canadian competition law is to maintain and encourage effective competition in Canada. The Acts maintain a competitive marketplace by prohibiting certain activities that might reduce or prevent competition or harm consumers. The Commissioner and the Competition Bureau (the “Bureau”) administer and enforce these Acts.

Overview of the Acts

What is 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, false or misleading representations, double ticketing, multi-level marketing and pyramid schemes, bait and switch selling, sale above advertised price, mergers, refusal to deal, price maintenance, exclusive dealing, tied selling, market restrictions and abuse of dominance.

What is the *Consumer Packaging and Labelling Act*?

The Consumer Packaging and Labelling Act is a regulatory statute 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.

What is the *Textile Labelling Act*?

The Textile Labelling Act is a regulatory statute 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.

What is the *Precious Metals Marking Act*?

The Precious Metals Marking Act is a regulatory statute relating to the marking of articles containing precious metals. It provides for the 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 Regulations.

1.5 Enforcement of the Acts

The Commissioner investigates complaints by business people and consumers. Under the *Competition Act*, the Commissioner's investigative powers include, among others, the ability to search offices, seize records and interview individual employees under oath. 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.

1.6 Penalties and Remedies under the Acts

1.6.1 A contravention of the Acts, whether civil or criminal, can result in 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, prohibition orders and recovery of damages by private parties; and
- expose employees convicted of criminal offences to criminal fines and imprisonment or to civil administrative monetary penalties.

1.6.2 [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.]

1.7 Subject Personnel

1.7.1 The Program applies to all employees, at all levels, who are in a position to potentially engage in, or be exposed to, illegal conduct (hereinafter referred to as "employees").

1.7.2 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 Acts. 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 Acts or this Program.

1.7.3 Anyone who engages in such conduct or who otherwise contravenes the Program or the Acts may be subject to appropriate disciplinary or corrective measures, up to and including dismissal.

1.8 Employee Acknowledgment

1.8.1 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. SENIOR MANAGEMENT INVOLVEMENT AND SUPPORT

2.1 "Senior management" is defined as [list the positions].

2.2 Our business recognizes that senior management's clear and unequivocal support is the foundation of a credible and effective program.

2.3 Senior management, in the performance of their fiduciary duties, must always exercise care, skill and diligence and act in the best interests of our business.

2.4 It is senior management's duty to promote and ensure compliance with the Acts. Senior management is accountable for promoting and complying with the Acts.

2.5 While senior management is accountable for compliance, the responsibility to promote and ensure compliance may be delegated to a specific individual or group.

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 Policies and Procedures pertaining to our business activities are attached at Appendix []. Appendix [] will be updated to reflect material 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 clear 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 guidelines on document retention, creation and management; define the notion of obstruction under the Acts;
- inform employees of the consequences of obstruction under the Acts;
- outline the possible consequences of breaching the Program and the Acts;
- inform employees regarding the provisions of the *Competition Act* that protect whistleblowers and the consequences of retaliation;
- inform employees about the Bureau's *Immunity Program under the Competition Act*; provide a code of conduct giving clear 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 clear 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 A Training and Education Program is attached at Appendix [] .

[The Training and Education Program shall:

- require each employee to participate in ongoing training provided by our business;
- require all new employees to participate in training as soon as practicable after the commencement of their employment;
- cover all compliance issues the business may face;
- highlight the general legal principles under the Acts;
- provide employees that face particular exposure to the Acts 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 consistently given throughout the company to avoid conflicting information;
- provide a method of evaluation as well as its frequency; and
- be evaluated regularly to make sure it reflects the business activities and the state of the law.]

4.3 A copy of this Program will be distributed to all employees upon commencement of their employment.

4.4 The Program can be found on [list: Intranet, Internet Web site, etc.].

5. MONITORING, AUDITING AND REPORTING MECHANISMS

5.1 Monitoring

- 5.1.1 The [compliance officer or other appropriately titled position] shall monitor all business activities continuously or periodically, as appropriate, to ensure compliance;
- 5.1.2 The compliance officer [or other appropriately titled position] shall review and update this Program when issues are detected; and
- 5.1.3 Procedures for Monitoring are attached at Appendix [] .

5.2 Auditing

- 5.2.1 The [compliance officer or other appropriately titled position] shall conduct periodic, *ad hoc* or event-triggered audits, as appropriate, to confirm whether our business is fully complying with the Acts;
- 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 Auditing are attached at Appendix [] .

5.3 Reporting

- 5.3.1 All instances of non-compliance with the Program or the Acts shall be reported and communicated to the [compliance officer or other appropriately titled position] who shall regularly report to Senior Management;

- 5.3.2 The Program is intended to help employees comply with the requirements of the Acts, recognize improper conduct and know when to seek advice;
- 5.3.3 If employees have any questions concerning the Program or the Acts, they are strongly encouraged to contact the [compliance officer or other appropriately titled position];
- 5.3.4 If employees become aware of a breach or possible breach of the Program or the Acts, 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 Acts; 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 Acts. We take non-compliance very seriously.
- 6.2 Any breach of this Program and/or the Acts will result in disciplinary action.
- 6.3 A Disciplinary Code, including incentives, is attached at Appendix [] .

[Signature of senior management]



APPENDIX B: CERTIFICATION LETTER

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 understand the company's compliance program and their obligations under it. This Certification Letter is intended to be adapted by each business prior to being signed by employees. Readers should obtain independent legal advice regarding this Certification Letter.

I, _____ of the City of _____, am employed by [Company X] in the capacity of _____. I acknowledge that I am subject to and am required to comply with [Company X]'s Corporate Compliance Program, including its Policies and Procedures (the "Program").

This is to advise that I have read and understand [Company X]'s Program, the goal of which is to promote compliance with the [specify: the *Competition Act / Consumer Packaging and Labelling Act / Textile Labelling Act / Precious Metals Marking Act*] generally and [list specific sections of the *Competition Act / Consumer Packaging and Labelling Act / Textile Labelling Act / Precious Metals Marking Act* that are relevant to the business].

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].

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 Acts.²⁶ The Checklist provides examples only and is not exhaustive. This Checklist is intended for compliance officers or other compliance experts within a business. These examples are meant to be adapted by each business as a starting point and should be tailored prior to being distributed to employees. Readers should 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 [or other appropriately titled position] is known to all employees.
- Ensure that any potential issues of compliance with the Acts is considered when preparing documents or presentations.
- Ensure that the Competition Bureau is contacted if you suspect or have information that competitors or suppliers are breaching or have breached the Acts.
- Ensure that legal advice is sought if a particular situation gives rise to concerns.
- Ensure that all employees have access to the business' corporate compliance program.
- Ensure that all employees acknowledge that they have read and understood the program and that they understand their obligations.
- Be aware that businesses may be held responsible for representations made by employees.
- Be aware that senior management will be held accountable first and foremost.
- Consider requesting a written binding opinion from the Competition Bureau prior to engaging in business activities that may raise concerns under the *Competition Act*. Advice can also be sought under the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.
- Be aware that the Bureau has Immunity and Leniency Programs where parties can self-report their involvement in criminal activities in return for immunity or favourable treatment in criminal prosecutions.

²⁶ For more information on specific provisions of the Acts, see www.competitionbureau.gc.ca.



CONSPIRACY AND BID-RIGGING

- Ensure that all pricing decisions are made independently of 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 *Competition 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.
- Be aware that reaching an agreement, including any tacit understanding or discussion, with competitors about pricing, market or customer allocation, production levels or other agreements dealing with an element of competitive rivalry contravenes the *Competition Act*.
- Be aware that agreeing with competitors not to compete for certain customers or in a particular product or geographic market contravenes the *Competition Act*.
- Be aware that agreeing with competitors on preventing other businesses from competing in a particular product or geographic market contravenes the *Competition Act*.
- Be aware that discussing prices, changes in industry production, capacity or inventories contravenes the *Competition Act*.
- Be aware 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, or as a component of any electronic information package, contravenes the *Competition Act*. If improper discussions arise, business representatives should leave the meeting and have their departure recognized. The incident should be reported immediately to the appropriate authorities or legal counsel.
- 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’ legal counsel in advance.
- Ensure that you adhere to a clear and written agenda prior to meeting with competitors.
- 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 Competition Bureau is contacted where suspicions of bid-rigging exist (e.g. a business is a victim of bid-rigging or have information about a bid-rigging scheme).
- Be aware that agreeing to submit prearranged bids without prior notice to the tendering authority is a criminal offence.
- Be aware that agreeing not to submit a bid without prior notice to the tendering authority is a criminal offence.
- Be aware that agreeing to withdraw a bid without prior notice to the tendering authority is a criminal offence.



RESTRICTIVE TRADE PRACTICES: ABUSE OF DOMINANCE, EXCLUSIVE DEALING, TIED-SELLING, MARKET RESTRICTIONS, PRICE MAINTENANCE AND CIVIL AGREEMENTS

Ensure that, where questions arise, legal advice is sought or that the Bureau is contacted before engaging in practices that may impact the state of competition (if you are a leader in a market.²⁷) For example, exercise caution in the following situations:

- before implementing a loyalty program or an exclusivity agreement with your customers;
- when using one product 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 pre-announcing prices, 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;
- when making any comments that could be viewed as signalling to competitors any intentions or expectations regarding price, trade terms or other elements of competition;
- when making any threats or promises to competitors regarding pricing, market share, or any other element of competition;
- 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; or
- refusing to supply a product to, or discriminate against, another business because of its low pricing policy;
- when entering into, among other things, information sharing agreements, research and development agreements or joint production agreements.

²⁷ 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 *Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions of the Competition Act* (sections 78 and 79) (Ottawa, Industry Canada, 2009).

MERGERS

- Ensure that legal advice is sought or that the Bureau is contacted when in doubt on the requirement to notify the Commissioner of a merger.

FALSE OR MISLEADING REPRESENTATIONS AND DECEPTIVE MARKETING PRACTICES

- Ensure that, when engaging in telemarketing, (1) the name of the company or person the caller is working for; (2) the type of product or business interest the caller is promoting; and (3) the purpose of the call are disclosed at the beginning of each call.
- Ensure that, when engaging in telemarketing, (1) the price of any product or service being promoted and; (2) any restrictions or conditions that must be met before the product is delivered are disclosed at some time during each call.
- Be aware that telemarketers are forbidden to:
 - make any representation that is false or misleading in a material respect;
 - 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 grossly 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 and a disclaimer are not false or misleading.
- Ensure that all material information in an advertisement is fully and clearly disclosed.
- Ensure that the terms or phrases used in an advertisement are meaningful and clear to the ordinary person.
- Be aware that the False or Misleading Representations and the Deceptive Marketing Practices provisions apply whether the target of the representations is in Canada or not.
- Be aware that the False or Misleading Representations and the Deceptive Marketing Practices provisions 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, are not false or misleading in a material respect.
- 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. If a business runs out of a product, a raincheck should be offered and honored.
- Ensure that, when conducting a contest, all material details required by the *Competition Act* are disclosed before potential participants are committed to the contest.

- 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 promotional contest participants are provided with a short list of the contest rules on the outside of each package if in-store displays promoting the contest are not permitted.
- Ensure that legal advice is sought when in doubt as to the legality of a proposed advertisement, price disclosure or contest.
- Ensure that the terms "regular price" or "ordinary price" are not confused with "manufacturer's suggested list price" or a like term. They are often not the same.
- 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 words "sale" or "special" are not used in relation to the price of a product unless a significant price reduction has occurred.
- Ensure that a "sale" is not held for a long period or is not repeated every week.
- Ensure that the price of a product or service is not increased to cover the cost of a free product or service.
- Ensure that the illustrations used are not different from the product being sold.
- Ensure that a performance claim is not made unless it can be proven, even if a business believes it is accurate. Testimonials usually do not amount to adequate proof.
- Ensure that a product is not sold above the advertised price.
- Ensure that the distribution of prizes when conducting a contest is not unduly delayed.
- Ensure that information that may alter the principal representation when promoting a product or service is not placed in a disclaimer.
- Be aware that no one actually needs to be misled for a court to find that an advertisement is false or misleading.



TRADE ASSOCIATIONS

- Ensure that legal advice is sought before joining or renewing membership in a trade association.
- 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. Ensure that representatives 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. The incident should immediately be reported to the compliance officer, legal counsel or any other individual identified in the business' corporate compliance program.
- Ensure that legal advice is sought if a particular situation gives rise to concerns.
- Be aware that discussing sensitive competition issues with other members that relate to pricing, markets, production levels, customers and other competitive information may be anti-competitive.
- Ensure to seek legal advice before reaching agreements on sensitive competition issues.

CONSUMER PACKAGING AND LABELLING ACT, TEXTILE LABELLING ACT AND PRECIOUS METALS MARKING ACT

GENERAL

- Consider requesting advice from the Competition Bureau prior to engaging in business activities that may raise concerns under the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

CHECKLIST FOR THE CONSUMER PACKAGING AND LABELLING ACT

- Ensure that prepackaged consumer products conform with claims made on their labels relating, for example, to type, quality, performance, function, origin and method of manufacture.
- Ensure that the container for a product is constructed, filled and displayed so that consumers are not misled about either the quality or quantity of the product.
- Ensure that all prepackaged consumer products for sale meet the specifications set out in the *Consumer Packaging and Labelling Act* and *Regulations* for mandatory label information such as product identity, net quantity, dealer's name and principal place of business and bilingual requirements.
- Ensure that all offered prepackaged consumer products bear accurate and meaningful labelling information to help consumers make informed purchasing decisions.
- Be aware that making any false or misleading representations to the public by any means for the purpose of promoting directly or indirectly the sale of prepackaged consumer products is illegal.

CHECKLIST FOR THE TEXTILE LABELLING ACT

- Ensure that the textile articles to be offered for sale bear accurate and meaningful labelling information to help consumers make informed purchasing decisions.
- Ensure that all fibre content information on the label of textile articles is bilingual.
- Ensure that all textile articles for sale meet the specifications set out in the *Textile Labelling Act* and *Textiles Labelling and Advertising Regulations* 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.
- Be aware that making any false or misleading representations to the public by any means for the purpose of promoting directly or indirectly the sale of textile fibre products is illegal.



CHECKLIST FOR THE *PRECIOUS METALS MARKING ACT*

- Ensure that when a precious metal article is quality marked, a valid registered Canadian trade-mark is also applied on the article or that an application for registration has been made with the Canadian Intellectual Property Office. The trade-mark must be applied by the same method as the quality mark.
- Ensure that the quality of a precious metal article is factual and in the manner prescribed by the *Precious Metals Marking Act* and *Regulations* before marking or advertising a precious metal article for quality (for example, “14K” for gold or “sterling silver”).
- Ensure that the quality difference is discernible by colour when applying dual markings on precious metal articles (for example, “14K – 18K” or “10K – STERLING”). The quality making up the greater proportion in the article must appear first.
- Ensure not to make any guarantee with respect to the durability or wearability of the precious metal plating of the articles for sale.
- Be aware that making any false or misleading representations to the public by any means for the purpose of promoting directly or indirectly the sale of precious metal articles is illegal.