



THE CANADIAN CHAMBER OF COMMERCE

LA CHAMBRE DE COMMERCE DU CANADA

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*The Voice of Canadian Business™*  
*Le porte-parole des entreprises canadiennes<sup>MD</sup>*

# **Submission to the Competition Bureau**

## **Corporate Compliance Programs**

**June 2008**



The Canadian Chamber welcomes the Bureau's efforts to assist Canadian businesses in effecting compliance by providing guidelines and tools to help design effective compliance programs. The Draft Bulletin represents a commendable step forward in providing this type of assistance to businesses.

The following are our specific comments on the Draft Bulletin.

## I. GENERAL

The Canadian Chamber is of the view that the proper focus of the Bulletin should be on general principles of corporate compliance, which principles would be broadly applicable to companies of all sizes – small, medium and large. The Draft Bulletin eschews a principled approach, however, in favour of an overly prescriptive approach that includes a rather exhaustive overview of the required elements of a "credible and effective" program and a detailed "Framework" to be used by companies.

This lengthy directive may be intimidating for those who are reading the Draft Bulletin with a view to implementing or revising their own compliance programs. In particular, there is such a liberal use of terms such as *should*, *critical*, *must*, *fundamental* and *essential* and the recommendations in the Draft Bulletin are so numerous and detailed that small or medium-sized businesses may not have sufficient resources to implement many of the required or suggested elements. Indeed, the Draft Bulletin describes the relevant components of a compliance program identified in the bulletin as a "baseline" for development of a program.

In particular, for small and certain medium-sized businesses with limited employee resources it will be difficult to create an ongoing compliance function (e.g., compliance officer) to develop compliance programs and materials, regularly update these when there are changes in the law or Bureau policies, and carry out regular compliance training for employees. The mandatory requirement to institute monitoring, auditing and reporting mechanisms will also be an onerous requirement for many such businesses – this is addressed in Part II below.

Ultimately, the reader is left with the impression that a very high bar is being set by the Draft Bulletin and the mandatory-type language used in many areas does not suggest as much latitude or flexibility as may have been intended.

## II. MONITORING/AUDITING/REPORTING

One of the Draft Bulletin's five essential elements of a credible and effective compliance program is the implementation of monitoring, auditing and reporting mechanisms. The Draft Bulletin indicates that the existence of an effective monitoring mechanism may support a due diligence defence. There is very little guidance provided, however, on what might be considered an effective monitoring mechanism or how to develop such a



function. Further guidance on this would be valuable for businesses who may wish to avail themselves of a due diligence defence.

The Draft Bulletin also calls for corporate compliance audit function, which is not practical for many small and medium-sized businesses due to the cost and required resources. In addition, if a principled approach to compliance was strongly emphasized in the Draft Bulletin, an audit function might well prove to be unnecessary.

### III. COMPLIANCE PROGRAM AS AGGRAVATING FACTOR

The Draft Bulletin asserts that the Bureau would recommend that charges be laid against the company when a senior manager knowingly contravened the law despite the presence of a compliance program. This uncompromising language does not allow for the relatively common situation where one member of senior management independently violates the law and, in so doing, ignores the corporate compliance program. The Canadian Chamber hopes that the Bureau would not be so inflexible in such a case as to entirely dismiss all the compliance efforts of a business because of the acts of a single violator acting without the explicit or implicit authorization of the company.

### IV. TEMPLATES

The Draft Bulletin provides a Framework, at Appendix A, which "ties together the essential components of a credible and effective program", and which is intended to serve as a sample or precedent framework for businesses.

Commendably, the Bureau has, stated in the Preface to Appendix A that the Framework is a "flexible tool that could be adapted to the specific activities and resources of a particular business". Ostensibly, therefore, there remains scope for some individuality in the development of compliance programs based on the Framework.

The Framework itself, however, contains lengthy prescriptive-sounding lists of compliance program elements. In particular, the Framework states that compliance program policies and procedures *shall* provide guidelines on document retention, creation and management; define the notion of obstruction of justice; inform employees regarding the whistleblowers provision; provide a code of conduct for search warrants, *etc.* Similarly, the Framework states that training and education programs *shall* require ongoing training for each employee; provide more in-depth training for at-risk employees; ensure that training is delivered by experts; provide a method of evaluation, *etc.*

The list of requirements is, in some cases, quite long, and it is not clear that the language (*e.g.*, "shall provide", "shall require") reflects the level of flexibility that is suggested by the Preface. The Canadian Chamber is concerned that the prescriptive and detailed language of the Framework itself may result in an unintended "cookie-cutter" approach to the creation of compliance programs, which may not be desirable in view of the unique



characteristics of the various businesses and employees for whom the programs are developed.

The Canadian Chamber believes that the best frameworks and compliance guidelines are those that are tailored to fit the particular nature and structure of an individual business. The Bureau might consider making it clearer that the lists of program elements contained in the Framework are "examples" that may be effective in many, but not necessarily all, circumstances, and that a compliance program may be credible and effective even if it does not contain all listed elements.

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The Canadian Chamber looks forward to the final version of the Bureau's Bulletin on Corporate Compliance Programs.

All of which is respectfully submitted by The Canadian Chamber of Commerce.