SUBMISSION OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW IN RESPONSE TO THE CANADIAN COMPETITION BUREAU'S REQUEST FOR COMMENTS ON ITS UPDATED DRAFT BULLETIN ON CORPORATE COMPLIANCE PROGRAMS

MAY 2008*

The Sections of Antitrust Law and International Law (the "Sections") of the American Bar Association ("ABA") welcome the opportunity to respond to the request for comments by the Canadian Competition Bureau (the "Bureau") on its *Draft Bulletin on Corporate Compliance Programs* (the "Draft Bulletin").[1] The views expressed in these comments ("Comments") are those of the Sections and have been approved by each Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

The Sections commend the Bureau for its continued efforts to increase the transparency and predictability of Canadian competition law enforcement. The Draft Bulletin represents important guidance to businesses in their efforts to comply with Canadian competition laws. The Draft Bulletin expands on the prior Bulletin on Corporate Compliance Programs issued by the Bureau in June 1997 (the "1997 Bulletin")[2] and demonstrates the Bureau's understanding of the importance of compliance programs to businesses. Clear and predictable enforcement guidance allows businesses to reduce the risk of contravening competition laws, and increases the chances of detecting contraventions when they occur. Corporate compliance programs also fulfill an important purpose in facilitating vigorous competition by assisting business people to become more educated and familiar with the applicable boundaries of the law.

Given the increasingly global nature of business, the continued importance of cross-border commerce involving firms in the United States, and Canada's international role in competition enforcement, the Sections have a strong interest in the Draft Bulletin. In offering comments on

---

* These Comments were drafted by a Working Group of the Section of Antitrust Law's Corporate Counseling and Ethics & Compliance Committees with input from the International Antitrust Law Committee of the Section of International Law. Members of the Working Group were Theodore Banks, Susan Boughs, Brian A. Facey, Susie L. Hoeller, Navin Joneja, Derek Ludwin, and Joseph Murphy, with comments from Adam Biegel, Janet E. Bolton, A. Neil Campbell, Peter Franklyn, Peter Glossop, Mark Katz, Elisa A. Kearney, and Geoffrey W. MacDonald. The views expressed herein do not necessarily reflect the views or opinions of any particular member of this Working Group, or of the professional organizations with which any of the members are affiliated.

1 Competition Bureau, Draft Bulletin on Corporate Compliance Programs (April 9, 2008), http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02618e.html; Competition Bureau, Information Bulletin, "Competition Bureau Invites Feedback on its Updated Draft Bulletin on Corporate Compliance Programs" (April 9, 2008), http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02648e.html.

2 Competition Bureau, Bulletin on Corporate Compliance Programs (June, 1997), http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01638e.html.

Canadian competition law issues in the past,[3] Sections of the ABA have sought to provide a perspective based on the experience of competition lawyers in the United States and internationally, while recognizing that there are differences across jurisdictions due to economic, historical and other factors. The Sections offer these Comments in the same spirit and with the same objective.

As explained in more detail in the balance of this submission, the Sections wish to comment principally on three main aspects of the Draft Bulletin:

- The Sections support an approach to setting out the requirements for credible and effective compliance programs that emphasizes general principles over specific prescriptions. A "principles-based approach" to compliance allows businesses the flexibility to structure their compliance programs in a way that is appropriate given the type and size of their organizations. At certain points in the Draft Bulletin, and in particular in the Appendices to the Draft Bulletin, the Bureau may wish to clarify that there is no "one size fits all" compliance formula, and that the specific compliance activities mentioned are merely exemplary of the types of activities suggested for an effective compliance program. This approach would also permit current, effective competition compliance programs to remain in place without concern that they do not comply precisely with the letter of the Draft Bulletin.

- Related to the point above, while supportive of the Bureau's efforts to provide guidance relating to acts other than the *Competition Act*, the Sections note that the other acts referred to in the Draft Bulletin differ significantly from the *Competition Act* both in terms of their substantive legal requirements and the compliance issues they raise. In this regard, the Bureau may wish to further separate the discussions of these different laws within the Draft Bulletin and confirm that businesses have the flexibility to adopt an integrated program encompassing all of these laws, or separate programs, provided the aforementioned general principles are adequately addressed.

- The Sections believe that the Draft Bulletin could provide greater clarity about the consideration the Bureau will give to a compliance program in the resolution of its

3 For example, *see* American Bar Association Sections of Antitrust Law and International Law, Joint Comments in Response to the Canadian Competition Bureau's Request for Public Comment on Abuse of Dominance Provisions as Applied to the Telecommunications Industry (December 2006), http://www.abanet.org/antitrust/at-comments/2006/12-06/Comm-Telecom-Industry.pdf; American Bar Association Section of Antitrust Law, Comments in Response to the Canadian Competition Bureau Request for Public Comments Regarding Immunity Program Review (May 2006), http://www.abanet.org/antitrust/at-comments/2006/05-06/com-canadian-leniency.pdf; American Bar Association Sections of Antitrust Law and International Law, Joint Comments on the Competition Bureau (Canada) Information Bulletin on the Communication and Treatment of Information under the Competition Act (Draft for Consultation August 2005) (April 2006), http://www.abanet.org/antitrust/at-comments/2006/04-06/comm-treatment-info-com.pdf; and American Bar Association Sections of Antitrust Law and International Law, Joint Comments on the Competition Bureau (Canada) Draft Information Bulletin on Merger Remedies in Canada (February 2006), http://www.abanet.org/antitrust/at-comments/2006/03-06/ABAcanadamergerremediescomments.pdf.

investigations, and that the Bureau provide a clear statement that the Commissioner will (rather than may) give weight to the existence of a valid compliance program in its enforcement decisions. The Sections also believe that the prosecution of a company should not be automatic upon a finding of wrongdoing by a rogue element within management. In that regard, the Bureau may wish to further define when a program will be considered a "sham."

1. Requirements for a Credible and Effective Compliance Program

A. Emphasis on a Principles-Based Approach to Compliance Programs

The Sections advocate that the Bureau avoid a "one size fits all" framework in which the practices and procedures set out in the Draft Bulletin become the standard against which all compliance programs are measured, irrespective of the nature of the business in question. As the Draft Bulletin states, "a credible and effective program must be tailored to a business' situation and may vary according to its resources."[4] Such a principles-based approach provides businesses flexibility to adopt compliance programs that are suited to their own circumstances. The *Competition Act* itself covers a wide array of business activities, only some of which may apply to a particular business.[5] In addition, a particular business' compliance program will likely vary according to the number of employees, location of employees, nature of the industry, as well as a number of other circumstances.

Part IV of the Draft Bulletin sets out principles that delineate what the Bureau considers to be the basic requirements for a credible and effective compliance program: (i) senior management involvement and support; (ii) compliance policies and procedures; (iii) training and education; (iv) monitoring, auditing and reporting mechanisms; and (v) consistent disciplinary procedures. These principles are broadly consistent with the compliance principles emphasized by other countries. The United States Sentencing Guidelines, for example, prescribe similar requirements in evaluating whether a compliance program was effective.[6] For companies operating in

---

4 *See* Draft Bulletin, Part III, p. 9.

5 For example, provisions dealing with abuse of dominance, tied selling, market restrictions or exclusive dealing (ss. 77 -79 of the *Competition Act*) would not apply to an entity that is not a significant player in the marketplace, and the provision dealing with price discrimination (paragraph 50(1)(a) of the *Competition Act*) would not apply to an entity that provides services rather than articles (i.e., goods).

6 U.S. Sentencing Commission, Guidelines Manual § 8B2.1. In broad terms, the Sentencing Guidelines require that a company exercise due diligence to detect and prevent criminal conduct and promote an organizational culture that encourages ethical conduct and compliance with the law. To meet that standard, a compliance program must (1) have clearly established compliance standards; (2) assign overall responsibility to oversee compliance to high-level personnel within the company; (3) exercise due care not to delegate responsibility to employees who have a propensity to engage in illegal conduct; (4) take reasonable steps to communicate standards and procedures effectively to all employees; (5) take reasonable steps to achieve compliance with standards; (6) provide consistent enforcement of standards through appropriate incentives and disciplinary mechanisms; and (7) take reasonable steps when an offense occurs to respond and to prevent future violations.

multiple jurisdictions, such a common set of principles is highly beneficial. It permits, for example, management to implement a global compliance policy that can be promoted by the most senior executives at the company.

The Bureau may wish to further emphasize the principles-based approach to compliance programs in the Draft Bulletin. In its detailed explanation of the basic principles in Part IV, and again in describing the consideration given to a compliance program in the context of enforcement proceedings in Part V, the Draft Bulletin could be read to prescribe specific measures and to imply that compliance programs that use a different approach may be viewed as ineffective. Indeed, by suggesting that the monitoring, auditing and reporting requirements "depend on the business' particular needs" and that the Bureau does not "endorse any particular procedure or combination of procedures" in that context, the Draft Bulletin could be read to imply that the remaining specific activities contained in Part IV(B) are in fact prescriptive. It would be helpful for the Bureau to confirm that organizations are free to tailor their programs, and to incorporate innovative approaches, as long as those programs effectively address the basic principles espoused by the Bureau in Part IV(A).

In particular, some recommended elements of an effective compliance program may be inappropriate for smaller businesses. For example, while issuing regular bulletins and promoting a hotline[7] may be useful and appropriate for large enterprises, those same activities may be less effective, or even ineffective, for smaller businesses. Moreover, other recommended elements, such as the monitoring, auditing and reporting mechanisms proposed in Part IV(B)(4), may be unwieldy and beyond the reasonable capacities of many businesses. In these respects, the U.S. Sentencing Guidelines recognize that "formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization." The Bureau may wish to adopt a similar approach -- and include a comparable statement -- in the Draft Bulletin.[8]

For similar reasons, the Bureau may wish to consider reducing the specificity of its guidance on employee training.[9] Based on experience in the United States, the Sections believe that there are a wide variety of effective training and communications methods, and that the effectiveness of any given regime will depend on a variety of factors, including the responsibilities of the employee, the experience of the employee, the location of the employee, and the existing programs of the company. Indicating that the company is expected to have a training and communication program that is effective will give each business the flexibility to implement training that reflects its particular needs, and will permit innovation in the area of training.[10]

---

7 Draft Bulletin, at pages 13-14.

8 2007 Guidelines Manual § 8B2.1, Application Note 2(C).

9 *See* Draft Bulletin, at pages 12-13, ¶¶ (ii-iv).

10 Like the Bureau, the Sections recognize the importance of in-person compliance training, but also recognize that other tools, including web-based training and videos, may serve as a useful complement or substitute for in-person training in appropriate circumstances. *See also* William J. Kolasky, "Antitrust Compliance Programs: The Government Perspective", Address to the PLI

From the Sections' perspective, to the extent that the Draft Bulletin highlights specific facets of an acceptable compliance program, the Bureau should clarify that the highlighted activities are merely exemplary of the types of activities that would be likely to lead to an effective compliance program. Consistent with that approach, neither the Bureau, the Competition Tribunal, nor the courts should make presumptions that a compliance program that varies from the approach highlighted in the Draft Bulletin is for that reason not credible or effective. Such clarity in the Draft Bulletin is particularly warranted given that, in a number of cases, the Competition Tribunal and the courts have given significant consideration to other Bureau guidelines as interpretative aids, even though those guidelines, like the Draft Bulletin, do not have the force of law.[11] The Sections recognize that the Bureau does not intend the Draft Bulletin to restate the law or substitute for advice of counsel.[12] It would be helpful, however, if the Bureau stated more clearly, as it has done in other publications,[13] that the Draft Bulletin does not reflect statements of law, and that questions of law are the responsibility of the courts and the Competition Tribunal.

Finally, the Bureau may wish to reconsider how it describes the mechanics for encouraging compliance with a program. Part IV(5) currently discusses only disciplinary consequences of a compliance policy breach, which is inconsistent with both the "Suggestions" box that follows Part IV(5) and with what the Sections view as best practices in this area. In the Sections' experience, providing appropriate incentives can play an important role in fostering a culture of compliance. The Bureau may wish to consider incorporating the equal treatment of incentives and discipline contained in the "Suggestions" into the text of Part IV(5) itself.[14]

Corporate Compliance 2002 Conference (San Francisco, CA, July 12, 2002) ("The company should have an active training program that includes in-person instruction by knowledgeable counsel. The in-person training sessions can be supplemented by video and Internet training tools, but these are no replacement for some personal instruction.").

11 See, for example, *Canada (Commission of Competition) v. Canada Pipe Co*. (2004) 29 C.P.R. (4th) 530, (F.C.A.) where significant mention was made of the Competition Bureau's Abuse of Dominance Guidelines, and *Apotex Inc. v. Eli Lilly & Co.* (2005), 40 C.P.R. (4th) 289 (F.C.A.) where significant weight was given to the Competition Bureau's Intellectual Property Enforcement Guidelines. *Commissioner of Competition v. Labatt Brewing Co. Ltd. et al*, 2007 Comp. Trib. 9, however, demonstrates that such Bureau publications do not have the force of law; see also *Canada (Commissioner of Competition) v. Superior Propane Inc.* [2003] F.C.J. No. 151 (F.C.A.) where the Court gave no weight to the Bureau's Merger Enforcement Guidelines.

12 *See* Draft Bulletin, at page 5.

13 *See, e.g.*, the Bureau's *Information Bulletin on Merger Remedies* at footnote 1, http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02170e.html.

14 Consistent with this proposed approach, the U.S. Sentencing Guidelines combine both incentives and discipline in a single element of its requirements: "The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.." Guidelines Manual, § 8B2.1(b)(6).

B. The Draft Bulletin Appendices

The Sections recognize the importance of providing concrete guidance to businesses, and note the Bureau's efforts to meet this need by including a compliance program framework (Appendix A), a certification letter (Appendix B), and a list of Do's and Don'ts (Appendix C) in the Draft Bulletin. These materials are generally considered important elements of an effective compliance program, and having available well-drafted models could assist all businesses, and in particular smaller businesses, in incorporating these elements into their programs.

Nevertheless, the Sections believe that there are potential risks associated with this approach. In particular, the Appendices could be seen as prescriptive instead of illustrative. The Bureau appears to have recognized this risk, at least with respect to the model Framework (Appendix A). The preface to the Framework contains a clear statement that it is not intended as a "one-size-fits-all" prescriptive model: "the Framework is a flexible tool that could be adapted to the specific activities and resources of a particular business." Given the enormous differences among the thousands of companies subject to the *Competition Act*, the Bureau appropriately recognizes that it would be impossible to draft a single framework suitable for all companies.

Because of the inevitable, and indeed desirable, variations that will occur among competition compliance programs, the Sections believe that variations between a company's compliance materials and the models found in the Draft Bulletin Appendices should not be taken as evidence of that company's failure to implement an effective policy, and that the Appendices should not be used as a checklist for proper behavior in future enforcement decisions and prosecutions. In that context, the statement in the preface to the Framework seems insufficient to avoid those risks. Similarly, the Bureau's statement that these components are "recommended as the baseline for the development of any in-house program" could be understood to suggest that the specific elements contained in the Appendices reflect minimum content that must be included in any compliance program.[15] The Bureau should consider further emphasis in all three Appendices of the inherent need for flexibility in designing and implementing compliance programs, and that a principles-based approach will be used by the Bureau in evaluating compliance programs.

For example, the inclusion of a draft Certification Letter (Appendix B) in the Draft Bulletin, if it is understood to mean that such a letter is required as part of any credible and effective compliance program, may place an unnecessary burden on businesses in implementing effective compliance programs. There may be other equally or more effective, or more effective, means of ensuring and demonstrating that employees were properly trained in compliance matters, including signed attendance records, electronic records of the completion of online training, or copies of correspondence. For that reason, while a certification letter may be appropriate in many circumstances, the absence of such a process should not be held against a company whose compliance policy is otherwise effective.

Similarly, the Sections believe that it is important that the "do's and don'ts" list provided in Appendix C be seen only as a starting point for businesses to use as they craft guidelines that most effectively provide advice to their employees. The Sections recognize the value of

---

15 *See* Draft Bulletin, at page 5.

including a “do’s and don’ts” list in many compliance programs.[16] But an effective “do’s and don’ts” list, at least as much as the compliance program itself, must reflect each company’s particular circumstances; in the Sections’ experience, “do’s and don’ts” lists vary widely among companies for that reason. Accordingly, the Sections believe that if the specific “do’s and don’ts” included in Appendix C are seen as reflecting mandatory benchmarks, companies that made the effort to create effective lists for their employees would ironically face more risk than those that implemented the Bureau’s own model verbatim, even if less effective guidance in the company's circumstances.

In addition, the Bureau may wish to further consider ways to focus the model list contained in Appendix C. An important attribute of an effective “do’s and don’ts” list is that it contains items that are written in plain language so that every employee can understand them.[17] To the extent that some of the items in Appendix C restate complicated legal tests set out in the *Competition Act*, they may be less accessible, and thus less valuable, to business people. For example, the Bureau may wish to modify the guidance on restrictive trade practices,[18] given that the applicability of these practices depends on a number of factors (including economic concepts such as market power and a substantial lessening or prevention of competition) that typically are beyond the purview of a business person. Instead, the Bureau may wish simply to encourage business people to consult counsel when questions arise in these areas.[19]

---

16 A senior U.S. Department of Justice Antitrust Division official took a stronger position, stating that “[e]very compliance program should . . . [be] accompanied by a set of practical do’s and don’ts . . .” *See* Kolasky, supra n. 10.

17 *Id.*

18 See Draft Bulletin, at page 31, which deals with the restrictive trade practices of abuse of dominance, exclusive dealing, tied selling and market restrictions.

19 In this regard, the Sections note there will inevitably be challenges in translating difficult legal and economic concepts into plain language in a manner that is suited to the circumstances of a particular business. The “do’s and don’ts” contained in the Draft Bulletin highlight this difficulty. For example, in the section on “*Conspiracy, Price Fixing, Price Maintenance and Bid-rigging*” (at page 30) the Draft Bulletin states “Don’t attempt to influence upward, or to discourage the reduction of, the price charged by a customer or competitor.” This is a reference to s. 61(1)(a) of the *Competition Act*, which prohibits agreements, threats or promises to influence prices upward or to discourage their reduction. However, the statement made in the Draft Bulletin must be read in light of judicial consideration such as *R v. Must de Cartier Canada Inc.* (1989), 45 B.L.R. 167, where it is stated that not all attempts to influence prices constitute an offence, only those where agreements, threats or promises are present. Similarly, the guidance in the “do’s and don’ts” with respect to agreements potentially subject to section 45 of the *Competition Act* contain a number of blanket statements which would be more suited were section 45 an offence that carried *per se* liability. These statements do not, however, reflect the state of the law as expressed by the Supreme Court of Canada in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, which provides considerable guidance as to whether an agreement or arrangement lessens or prevents competition “unduly” pursuant to section 45. The Bureau may wish to consider the U.S. Federal Trade Commission’s approach to plain language explanations of competition law. *See* http://www.ftc.gov/bc/compguide/index.htm.

Furthermore, the Sections note the statement about record retention and the modalities of seeking guidance in order to comply with the law. In particular, Appendix C provides advice on record retention, and counsels business people to seek legal advice or contact the Bureau in advance of certain undertakings and to cooperate with the Bureau. The Sections commend the Bureau for recognizing the importance of seeking legal advice, but believe that the body of the Draft Bulletin should address the importance and need for privileged consultations between employees and internal and external legal counsel in many circumstances.

In summary, although the Sections recognize the importance of providing businesses with practical compliance guidance, they encourage the Bureau to emphasize that the Appendices are only sample documents that are not intended to illustrate mandatory or minimum content, but rather present one option among many potentially acceptable sets of policies.

C. Additional Comments Concerning the Requirements for a Credible and Effective Compliance Program

In addition to the broad points discussed above, the Bureau may wish to consider the following additional points:

- The Sections note that that competition law compliance programs may (and often do) form a component of a company's overall compliance program, which may itself be comprised by several elements, including codes of conduct and help-lines. Such overall compliance programs can be more effective and efficient than having discrete programs, in part because they can be promoted and implemented throughout the company. The Bureau may wish to confirm its recognition that a competition compliance program, including its monitoring and other control functions, may be appropriately incorporated into a broader compliance program.

- The Bureau may wish to reconsider its omission of the reference to "ethical conduct" that was included in the 1997 Bulletin.[20] The Sections support the Bureau's focus on "fostering a culture of compliance" that "instills compliance as a fundamental value,"[21] and believe that an emphasis on promoting "ethical conduct" is a useful complement to that focus. In the Sections' experience, placing compliance in the framework of ethical conduct can enhance the effectiveness of compliance efforts. The Sections also note that an emphasis on ethical conduct would be consistent with the U.S. Sentencing Guidelines, which require companies to "promote an organizational culture that encourages ethical conduct and compliance with the law."[22]

- Although, as the Bureau recognizes, trade associations face "unique compliance issues," the Draft Bulletin contains only a brief discussion of compliance

---

20 *See* Competition Bureau, Reports and Guidelines, Bulletin on Corporate Compliance Programs (June, 1997), http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01638e.html.

21 *See* Draft Bulletin, at page 9.

22 *See* Sentencing Guidelines Manual § 8B2.1.

programs for these organizations.[23] The Sections understand that the Bureau may be preparing an upcoming bulletin specifically dealing with trade associations, and suggest that the Bureau note that further guidance will be forthcoming on this complicated topic. Also, given the Draft Bulletin's emphasis on advice to corporate employees, the Sections suggest that the Bureau focus the discussion in Part IV on how company employees can participate in trade association activities in a manner consistent with the *Competition Act*. In that regard, the Sections note that Appendix C does contain detailed advice on that issue.[24]

2. Distinguishing Competition and Regulatory-Based Compliance Regimes

The Sections understand that the Bureau's jurisdiction encompasses not only the Canadian *Competition Act*, but also three other statutes dealing with product labeling standards: the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*) (collectively, the "Standards Acts"). The Sections recognize the efficiencies for businesses to have a unitary, consistent source of information about Bureau-related compliance issues.

The Sections note, however, that there are significant differences in the substantive aspects of the *Competition Act* and the Standards Acts, as well as the basic enforcement process and procedures. Compliance with economic-based statutes such as the *Competition Act* typically addresses corporate behavior in the context of business dealings; liability for such behavior will in many instances depend on the impact of the conduct on consumers in the marketplace. On the other hand, compliance with product marking statutes such as the Standards Acts typically involves specific technical requirements (e.g., properly weighing a pre-packaged product, assaying a precious metal, or technically identifying a garment's fiber content). Moreover, unlike the *Competition Act*, the Standards Acts are strict liability statutes with a due diligence defense.[25]

Although the "principles-based" approach to compliance set out by the Bureau in Part IV is sufficiently broad to encompass these different laws, the Bureau may wish to further acknowledge that the differences between the *Competition Act* and the Standards Acts translate into separate and distinct considerations for businesses when establishing and implementing compliance programs, and that the underlying compliance activities, as well as the methodology and audience for training purposes may be dissimilar in practice. The Bureau recognizes these differences in the Draft Bulletin; Appendix C to the Draft Bulletin (the "Do's and Don'ts") segregates the discussion of the *Competition Act* entirely from the discussion of the Standards Acts, and the Preface to Appendix A (the model Framework) makes it clear that the Framework could be used with respect to any one or more of the Acts.[26] Part IV, however, makes no reference to the notable practical differences in implementing effective compliance for the

---

23 *See* Draft Bulletin, at pages 8 & 33.

24 *See* Draft Bulletin, at page 33.

25 *See*, for example, s. 9(2) of the *Consumer Packaging and Labelling Act*.

26 *See* Draft Bulletin, at Apps. A, C.

various Acts, and indeed is drafted from a competition law perspective. The Bureau may wish to highlight in Part IV the underlying differences between the Acts, and note some of the elements of the compliance program, such as monitoring and training that may need to be quite different depending on which law is being discussed. The Bureau also may wish to more explicitly state that businesses have the flexibility to adopt an integrated program encompassing all of these laws, or separate programs, provided the aforementioned general principles are adequately addressed.

3. Consideration Given to a Compliance Program

Although the Bureau makes a commitment in the Draft Bulletin to consider the existence of a compliance program in its enforcement decisions, the Sections believe that a stronger commitment would foster greater adoption of competition compliance programs. The Draft Bulletin states only that the Commissioner and the Director of Public Prosecutions "may give weight to the existence of a credible and effective program." [emphasis added][27] The Bureau *should* give weight to a *bona fide* compliance program. Stronger commitment by the Bureau would provide an additional incentive for companies to invest in compliance efforts. In this regard, it is noteworthy that the Bureau's *Information Bulletin on the Immunity Program under the Competition Act* (Oct. 2007) explicitly provides that the Bureau "recognizes the importance of programs that contribute to the detection, investigation and prosecution of serious crimes."[28] Again, the Sections believe that giving greater weight to effective compliance programs will encourage greater adoption of such programs by businesses.

Further, to ensure that businesses operating in multiple jurisdictions are properly recognized for implementing effective global compliance policies, it would be helpful if the Bureau expressly recognized the existence and general validity of effective company-wide compliance programs for companies operating in multiple jurisdictions. In particular, in determining the consideration given to a competition law compliance program, the Bureau could recognize the existence of company-wide compliance programs for companies based outside of Canada. Many companies that operate on a global or North American basis have a single, centralized competition law compliance program that meets the basic requirements for a credible and effective program set out in Part IV of the Draft Bulletin. While compliance with local law is generally emphasized in such compliance programs, a separate compliance program for each jurisdiction is often not warranted.

The Sections also believe that the Bureau may wish to consider further its treatment of the role of "senior management" in its enforcement calculus. The Draft Bulletin provides that "[i]f the senior management of a company either participated in or condoned the conduct in breach of the

27 *See* Draft Bulletin, at page 16.

28 *See* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02483e.html at ¶ 5. The Sections note that the Bureau's *Draft Information Bulletin On Sentencing And Leniency In Cartel Cases (For Public Consultation),* released on April 28, 2008, like the Draft Bulletin, provides only that the implementation of a competition law compliance program may be a factor considered by the Bureau in determining acceptance of responsibility. See http://www.competitionbureau.gc.ca /epic/site/cb-bc.nsf/en/02663e.html at ¶ 48.

Act it would be apparent to the Bureau that management's commitment to compliance was not serious and the program was neither credible nor effective."[29] It further provides that "[i]n such cases, the Commissioner would also recommend that charges be laid against the company."[30] That suggests an *irrebuttable* presumption that a compliance program is deficient where any member of senior management is involved in inappropriate behavior. The Sections do not support that approach.

Under the Sentencing Guidelines, there is a rebuttable presumption that a compliance program is ineffective if "high-level personnel" were involved in a violation.[31] The Section of Antitrust Law has opposed this provision because, in practice, collusion and price fixing by their nature involve employees with managerial or pricing authority. That Section also has criticized the U.S. Department of Justice's consistent position that all such employees are "high-level personnel" and that the relevant compliance program was thus ineffective.[32] The Bureau's presumption here appears to codify this approach, which the Sections believe runs counter to sound enforcement policy. It also seems inconsistent with the overall principles articulated in the Draft Bulletin, which provide that even when a breach occurs, "a program may still be considered credible and effective, where it can be demonstrated that it was reasonably designed, implemented and enforced in the circumstances."[33] With an irrebuttable presumption, a company will not have an opportunity to demonstrate that its program was reasonable under the circumstances.

The Sections believe that "an effective program" may be implemented that still does not deter violations by high-level managers. In particular, the presumption may not adequately take into account credible situations where a rogue element of the senior management conceals intentional violations of the *Competition Act* notwithstanding reasonably diligent compliance efforts by the company. In those situations, their failing to take the company's compliance program into effect unjustly penalizes the organization. Equally, by determining *ex ante* that many compliance programs will be deemed ineffective, the Bureau may reduce the incentives of a company to implement and actively support a compliance program.

The Sections recommend that the good faith of the organization be evaluated separately from the identity of the perpetrators of the violation and the ultimate success of the compliance program. A company should receive credit for attempting to prevent and seeking to detect violations of the

---

29 *See* Draft Bulletin, Part V(B)(1).

30 *See id.* (emphasis added).

31 Guidelines Manual, § 8C2.5(f).

32 *See* American Bar Association Section of Antitrust Law, Response To Request For Comments By The Advisory Group On Organizational Guidelines To The United States Sentencing Commission (June 2002), http://www.abanet.org/antitrust/at-comments/2002/06-02/ussentencingcomments.pdf ("Comments on Sentencing Guidelines").

33 *See* Draft Bulletin, Part V(A), page 16.

Competition Act by virtue of the program, even if that program does not successfully prevent improper conduct by senior management.[34]

For similar reasons, the Sections also encourage the Bureau to consider further the provision that "[i]f a program is a sham and used only to conceal or deflect liability, this also may be an aggravating factor for sentencing purposes . . . ."[35] The Sections agree that, in certain circumstances, it may be appropriate to consider for enforcement or leniency purposes that those in charge of a compliance program subverted it or stymied its effectiveness in the course of violating the *Competition Act*. The Sections believe, however, that the Bureau should carefully define the limits of its sham provision. As currently drafted, the term "sham" is undefined, and the Section is concerned that any compliance program that did not succeed in preventing a violation by a member of senior management could be characterized as a "sham" that was in effect used to "deflect liability." The Bureau may also wish to further describe the type of situations it would consider as evidence of a "sham" compliance program.

CONCLUSION

The Sections commend the Competition Bureau for revisiting its 1997 Bulletin on corporate compliance programs, and for soliciting feedback from stakeholders on the new Draft Bulletin. This initiative increases transparency and predictability and is a welcome resource for U.S. businesses with operations in Canada and the internal and external lawyers who counsel them. We are grateful for the opportunity to submit these Comments, and hope that they are helpful to the Bureau as it finalizes the new Bulletin.

---

34 The Section of Antirust Law made this same point in comments to the U.S. Sentencing Commission in 2002. See Comments on Sentencing Guidelines, supra n. 32.

35 See Draft Bulletin, Part V(B)(2), p. 17.