CONDUCTING A COMPETITION LAW COMPLIANCE AUDIT: A CHECKLIST FOR CORPORATE COUNSEL

1. General

a. Conduct employee interviews to the extent necessary to fully assess the company's contractual practices and agreements, pricing policies, competitive information gathering, procurement in trade associations and transactions, agreements, and
b. Review major agreements, as applicable to the company. This will often include:
   • competitors who are also suppliers or customers;
   • competitors who are in a position to engage in or be exposed to
   • joint sourcing, marketing or packing agreements.

c. In all of the agreements, close consideration should be given to any clauses that reference competitors, such as "most favored nation" clauses (which require the contractual terms provided to be at least as favourable as those provided to competitors), discounting clauses, etc. Consider whether the agreement between the company and the competitor or a brand (e.g., "negotiations continue with Customer X where we hope to see the elimination of
   • sales plans;
   • competitors who are partners in a joint venture;
   • competitors who are also suppliers or customers;
   • distributors; and
   • licensing agreements;

   d. Review other relevant documents for competition compliance, including:

   i. Sales practices:
      • which employees should be interviewed? which employees are in a position to engage in or be exposed to

   ii. Pricing/Distribution:
      • Are there industry-wide practices that involve discounting, allowances or other price-related policies?
      • Are there refusals to deal – what is the process for termination of distributors? Is legal counsel involved in the process
      • Do the contracts contain penalties for violations of the price policies?
      • How far in advance of a price change does this occur?
      • Price changes are announced and subsequently reduced? What role does competition price fixing have in this behaviour?

   iii. Referrals to third-party providers:
      • How does the company decide on such policies and changes to such policies?

   iv. Employee Interviews:
      • Are there refusals to deal – what is the process for termination of distributors? Is legal counsel involved in the process
      • Are there written records of such contact?

   v. Compétition Information Gathering:
      • Are there refusals to deal – what is the process for termination of distributors? Is legal counsel involved in the process
      • Do the contracts contain penalties for violations of the price policies?

   vi. Commercial/Subcontract:
      • Are there written records of such contact?

   v. Other Contract with Competitors:
      • Are there written records of such contact?

   vi. Compliance with competition law:
      • Are there refusals to deal – what is the process for termination of distributors? Is legal counsel involved in the process

   vii. Refunds:
      • Are there written records of such contact?

   viii. Business Practices:
      • Are there written records of such contact?

   ix. Other Contract with Competitors:
      • Are there written records of such contact?

   x. Compliance with competition law:
      • Are there written records of such contact?

   xi. Other Contract with Competitors:
      • Are there written records of such contact?

   xii. Refunds:
      • Are there written records of such contact?

   xiii. Business Practices:
      • Are there written records of such contact?

   xiv. Other Contract with Competitors:
      • Are there written records of such contact?

   xv. Compliance with competition law:
      • Are there written records of such contact?

   xvi. Other Contract with Competitors:
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   xviii. Business Practices:
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   xix. Other Contract with Competitors:
      • Are there written records of such contact?

   xx. Compliance with competition law:
      • Are there written records of such contact?

   xxi. Other Contract with Competitors:
      • Are there written records of such contact?

   xxii. Refunds:
      • Are there written records of such contact?

   xxiii. Business Practices:
      • Are there written records of such contact?

   xxiv. Other Contract with Competitors:
      • Are there written records of such contact?

2. Pricing/Distribution

a. Review major agreements, as applicable to the company. This will often include:

b. Pose questions on how the company communicates price changes. Consider:

   • How does the company decide on such policies and changes to such policies?

   • Are there industry-wide practices that involve discounting, allowances or other price-related policies?

   • How far in advance of a price change does this occur?

   • Are there written records of such contact?

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   • Are there written records of such contact?
• Confirm that such employees have attended competition compliance training. Consider if more in-depth training is appropriate for any employees involved in sensitive areas of trade association functions, such as membership criteria setting and industry standard setting.

• Verify that such employees are familiar with the limits on competitor discussions and the need to end and report any inappropriate contact from competitors.

Stage IV: Audit Outcomes

a. No violations identified

If no violations were identified, then no remedial action is required. Continue with the compliance training on a regular basis. Provide updates to employees and management on any changes in competition law. Consider performing another audit, depending on changes in the law or in the company's business practice.

b. Possible areas of concern identified

Develop a remedial plan to address the areas of risk in the competition compliance program. This may include:

• Review and update of training materials used in competition law compliance seminars;
• Additional competition compliance training;
• Follow-up seminars on a smaller scale;
• Changes to business processes and procedures; and
• Other changes specific to the business.

c. Potential or actual competition law violations identified

Consider the appropriate action, including:

• Assessing the scope of the violations;
• Preventing further violations;
• Correcting any continuing effect of a violation that has already ceased;
• Whether to report the conduct to authorities and the best approach to doing so;
• Potential conflicts of interest, and the need for individual employees to consider retaining their own counsel; and
• Modifying competition compliance training programs and carrying out remedial training as required.