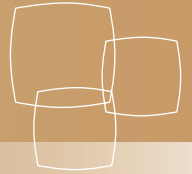




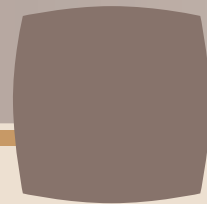
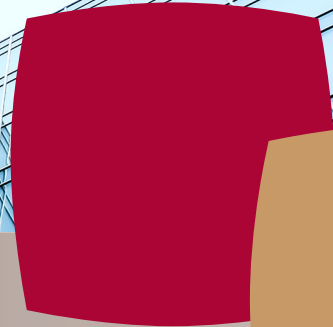
Competition Bureau  
Canada

Bureau de la concurrence  
Canada

Bulletin



# Competition and Compliance Framework



Canada 

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* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act*.

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## PREFACE

The Competition Bureau (the "Bureau"), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. Headed by the Commissioner of Competition (the "Commissioner"), the Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction; namely, the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act* (collectively, the "Acts").<sup>1</sup>

The Bureau has issued this information bulletin on the *Competition and Compliance Framework* to outline the various outreach, enforcement and advocacy instruments used by the Bureau in a comprehensive, integrated approach to promoting compliance with the Acts. Together, these outreach, enforcement and advocacy instruments make up the *Competition and Compliance Framework*. Compliance helps support the Bureau's ultimate goal of an efficient, competitive and open economy.

The Bureau, the legal and business communities, and the broader network of enforcement agencies all have a role to play in promoting compliance with the law. Through this shared compliance, we can achieve immeasurably more than we ever could in isolation, to the benefit of consumers, businesses and the economy.

The *Competition and Compliance Framework* updates and replaces the former *Conformity Continuum* information bulletin. The principles that govern the Bureau's approach to promoting compliance with the Acts remain consistent. Nevertheless, the *Competition and Compliance Framework* provides greater insight on the compliance instruments used by the Bureau today and going forward. The continued goal of this bulletin is to provide transparency to stakeholders regarding how the Bureau seeks to encourage compliance with the Acts, and hence, to promote competition.

The *Competition and Compliance Framework* does not provide a binding statement of how the Bureau will proceed in specific matters. While it describes generally how the Commissioner and the Bureau will approach the administration and enforcement of the Acts, the Bureau will apply appropriate discretion in each situation. The decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question. Final interpretation of the law is the responsibility of the Competition Tribunal (the "Tribunal") and the courts.

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<sup>1</sup> For the purposes of this bulletin, the terms "Acts", "law" and "legislation" are used interchangeably and are used to refer to all legislation that is administered and enforced by the Bureau. The *Competition Act* includes amendments that came into force on July 1, 2014 as a result of Canada's Anti-Spam Legislation.

The Bureau may revisit certain aspects of this bulletin in light of experience and changing circumstances.

**John Pecman**

Commissioner of Competition

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# 1. INTRODUCTION

The *Competition and Compliance Framework* describes the general approach of the Commissioner and the Bureau to the administration and enforcement of the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act* (collectively, the “Acts”).

## 1.1 Guiding Principles

The Bureau’s activities are guided by five governing principles.

1. **Confidentiality** means the Bureau will continue to adopt the proper safeguards to protect confidential information to ensure the integrity of the investigative process and commercially sensitive information provided to us by others;
2. **Fairness** means that the Bureau will continue to be fair in its decisions and try to strike the right balance between enforcement and compliance;
3. **Predictability** means that the Bureau will provide appropriate background information on its decisions, and publish its position on as many issues as possible, both in print and electronically. This should make Bureau positions more predictable and allow businesses to arrange their affairs in such a way as to be in compliance with the law;
4. **Timeliness** means that the Bureau will strive to deal with issues quickly; and
5. **Transparency** means that the Bureau will be as open as possible in the circumstances, develop appropriate service standards, develop performance standards, and be prepared to be judged according to these standards.

The *Competition and Compliance Framework* is guided by these five principles and operates from the assumption that most businesses and their managers prefer to comply with the law rather than to become involved in enforcement proceedings under the Acts. It represents an effective approach to the enforcement and administration of the Acts, and to the successful maintenance and promotion of competition in Canada. Nevertheless, the Bureau sees effective, diligent enforcement as an important determinant of compliance and an essential element of the *Competition and Compliance Framework*. As such, the Bureau will vigorously pursue investigations of potential anti-competitive behaviour, and will enforce the Acts as appropriate in cases of non-compliance.<sup>2</sup>

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<sup>2</sup> Throughout this document, the term “non-compliance” refers to instances where companies or individuals contravene what is proscribed in the Acts, as well as instances where their conduct raises issues under the Acts that could lead to the making of an order by the courts or the Tribunal.

## 1.2 Enabling and Reinforcing “Shared Compliance”

The instruments discussed in this document work within, and reinforce, the spirit of “shared compliance”. This concept recognizes that all stakeholders—the Bureau, the legal and business communities, and the broader network of enforcement agencies—have a role to play in promoting compliance:

- The Bureau promotes compliance through the wide variety of outreach, enforcement and advocacy instruments discussed in the *Competition and Compliance Framework*;
- The legal community promotes compliance by making clients aware of their obligations under the law and advising on how to comply;
- The business community promotes compliance by putting in place and following credible and effective compliance programs; and
- The Bureau’s networks and collaborative relationships with other agencies and organizations, both domestically and internationally, promote compliance through coordinated enforcement actions, the sharing of experience and best practices, and by advocating for policy convergence when appropriate.

Shared compliance acknowledges that, collectively, these stakeholders can promote compliance far more effectively and efficiently than in their individual capacities, and can in turn provide the best conditions for an efficient, competitive and open marketplace.

The full range of instruments in the *Competition and Compliance Framework* is available to facilitate these outcomes, and the circumstances will always dictate what is appropriate in a particular matter.

The Bureau’s active focus on enforcement is an essential aspect of shared compliance. In this regard, the *Competition and Compliance Framework* does not soften the Bureau’s enforcement approach. Rather, to achieve the greatest compliance and competition outcomes, the Bureau uses strong enforcement where necessary. In these cases, the Bureau will act swiftly and diligently to address instances of non-compliance, and to deter such behaviour in the future.

## 1.3 Placing the *Competition and Compliance Framework* in Context

The Bureau operates in a constantly changing and increasingly complex environment. A combination of factors continuously informs the Bureau’s approach to the administration and enforcement of the Acts. These include:

- evolving jurisprudence;
- legislative amendments;
- changing economic and business environments;

- expanded responsibilities; and
- financial and resource constraints (with a resulting need to use the available resources in the most effective manner possible).

As a result, the Bureau recognizes that increasing stakeholders' knowledge of the Acts and fostering voluntary compliance are complementary approaches that may help limit the need for contested proceedings before the courts or the Tribunal. The Bureau also recognizes that neither the single-minded pursuit of proceedings nor an approach based solely on education and non-litigation responses is the most effective manner to fulfil the Bureau's mandate.

To achieve the most effective compliance outcomes, the Bureau relies on a variety of outreach, enforcement and advocacy instruments. Collectively, these make up a "framework" of instruments. The term "framework" expresses the concept of a comprehensive, integrated, and flexible approach to achieving the ultimate goal of compliance with the Acts. A diagram of the *Competition and Compliance Framework* is presented in **Figure 1**.

With this integrated approach, the Bureau is able to choose the appropriate instrument or combination of instruments to address the issues raised by any specific situation. This may require, as necessary, the use of vigorous enforcement measures to ensure compliance. Such a response is supported by the appropriate use of other outreach, enforcement and advocacy instruments in the *Competition and Compliance Framework*: their integration ensures that the business and legal communities are provided with the knowledge and tools necessary to understand and comply with the Acts.

## 1.4 Overview of the *Competition and Compliance Framework*

The *Competition and Compliance Framework* can be best understood as a system of Bureau instruments designed to complement one another and work interdependently toward promoting competition and compliance with the Acts. It is intended to inform businesses, legal communities and the general public on how the Bureau seeks these outcomes through a range of outreach, enforcement and advocacy instruments. These instruments are used to help businesses avoid coming into conflict with the Acts, to address instances of non-compliance, and to promote competition in the Canadian marketplace.

No individual part of the model is more important than another; each part plays a role in promoting competition and compliance; and each element reinforces the others such that their collective outcomes are greater than the sum of their parts. The *Competition and Compliance Framework* includes instruments that range from informal to formal actions, and those that range from general to targeted applications. General application involves proactive efforts in the form of outreach directed universally at the public and the marketplace to build awareness and encourage compliance. Targeted application refers to

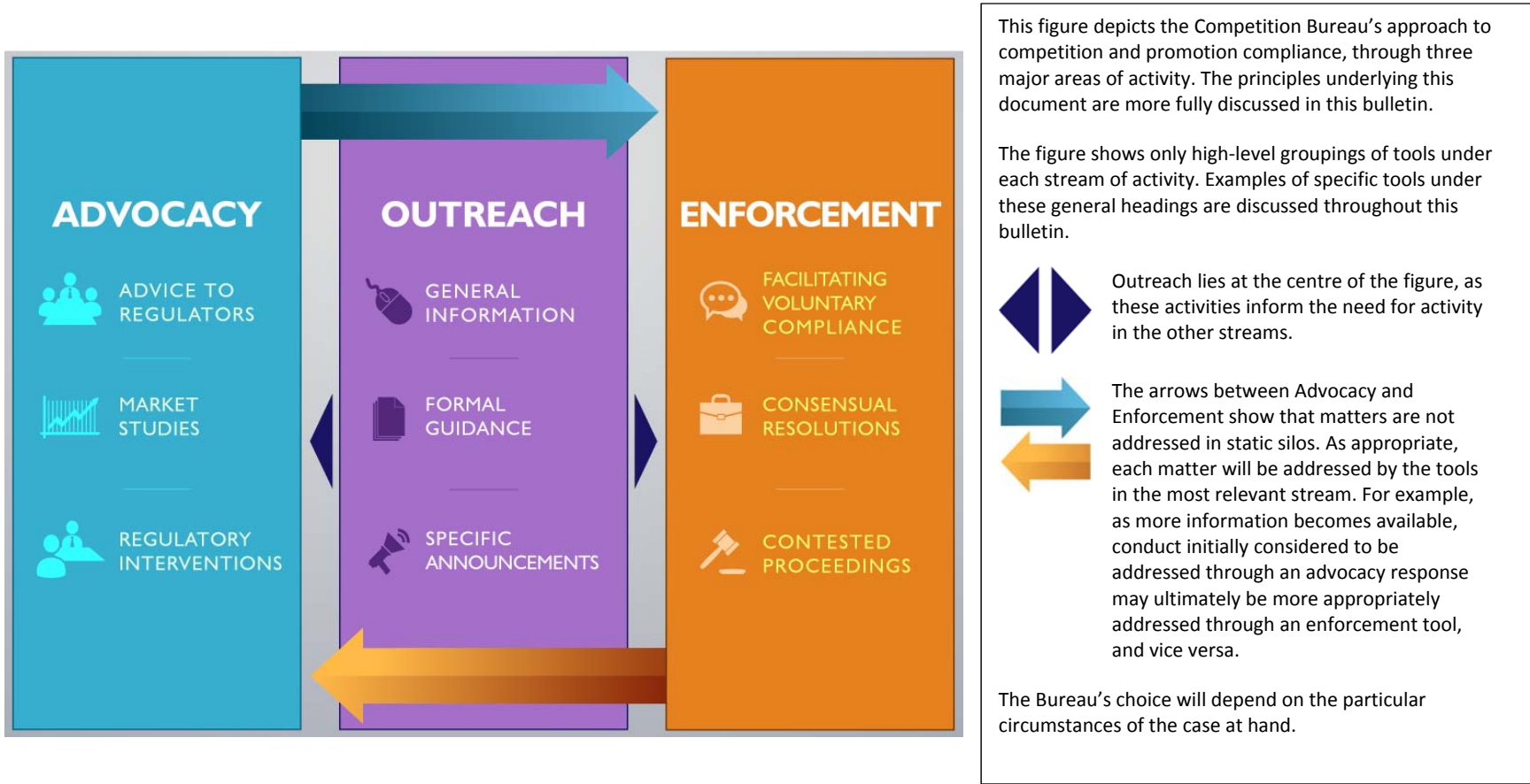
responses to individual compliance initiatives or the resolution of specific instances of non-compliance.

When a business or individual disregards the law or chooses to ignore the compliance options, the Bureau has specific instruments available to respond to non-compliance. With contested proceedings, the results of which are made public, the Bureau builds on jurisprudence, achieves general and specific deterrence, and identifies areas that need to be addressed to improve efforts to educate the business community and increase compliance.

The resolution of each case is determined on its own merits, in light of the objectives of the applicable legislation. When the Bureau becomes aware of alleged non-compliance, the appropriate instrument is selected from the range of available responses. When appropriate, the Bureau will use a blended approach, which involves the selection and use of more than one instrument. The choice will depend on the particular circumstances of the case at hand. A variety of factors will be assessed, including the gravity and the impact of the alleged non-compliance, previous anti-competitive conduct and the willingness of the parties to resolve the matter.

Although increased emphasis has been placed on providing the business community with the knowledge and the tools to comply, the Bureau does not consider the use of enforcement instruments as a last resort. Rather, as with all other instruments, enforcement is used at the appropriate time and under the appropriate circumstances. This does not mean that all other efforts must be exhausted before the Bureau will consider using litigation. In selecting the appropriate instrument, it may be necessary for the Bureau to take immediate enforcement action. In civil matters, the Bureau will not hesitate to apply to the Tribunal or the courts. In criminal matters, the Bureau will, where appropriate, refer cases to the Public Prosecution Service of Canada ("PPSC") and recommend that prosecution be undertaken with the full force of the law.

Figure 1: The *Competition and Compliance Framework*



## 2. PROMOTING COMPETITION AND COMPLIANCE THROUGH OUTREACH

The Bureau's outreach efforts aim to inform stakeholders—the business and legal communities, consumers and government departments—about the Bureau's mandate and the requirements under the Acts, and to provide publications and other resources that promote compliance.

Outreach instruments serve to increase awareness, predictability and transparency on how the Bureau delivers on its mandate in order to educate stakeholders and promote compliance.

The Bureau relies on various instruments to facilitate its outreach efforts and conceptualizes them in three ways:

1. General information about our mandate and operations;
2. Formal guidance to further increase predictability and transparency regarding our approach to enforcement, policies and procedures; and
3. Specific guidance in targeted areas.

### 2.1 General Information

#### Website

The Bureau's website provides general information about its mandate and the legislation that the Commissioner administers and enforces, including **videos** on various topics. In addition, the Bureau's "**CB in Brief**" e-publication provides a snapshot of recent Bureau news and developments through regular circulation to media and stakeholders.

#### Guidance on Bureau Operations

The Bureau also provides information on its operations. Guidance on Bureau operations includes:

- the Bureau's **Three-Year Strategic Plan**, which guides the Bureau's competition enforcement and promotion activities, and strengthens the link between the Bureau's operations and its longer-term objectives;
- the Bureau's **Annual Reports** and **Performance Reports**, which set out a comprehensive picture of the Bureau's performance for past fiscal years;

- the Bureau's **Annual Plan**, which is forward looking and sets out the Bureau's priorities for the current fiscal year; and
- the Bureau's **Quarterly Reports**, which present statistics relating to a variety of intake measures, merger and non-merger related enforcement matters, as well as advocacy, outreach and partnership initiatives.

These guidance documents can be found on the Bureau's website.

## Speeches

Remarks delivered by the Commissioner or other members of the Bureau are often posted on the website to provide another source of general information on the Bureau's priorities, as well as other issues related to its mandate. Speeches may also contain more specific or targeted information depending on the intended audience and purpose.

## Domestic and International Efforts

The Bureau works closely with domestic and international stakeholders and partners, including competition and consumer protection authorities in other countries, to effectively enforce the Acts and deliver on its mandate. Such work acknowledges the importance of these cooperative relationships to improving the delivery of our respective mandates. In addition to cooperating on specific enforcement matters, the Bureau's domestic and international efforts include:

- participating in several law enforcement partnerships across Canada;
- negotiating agreements and other instruments that increase cooperation specific to competition and consumer protection with these entities;
- arranging meetings at the senior and working levels and organizing staff exchanges; and
- arranging technical assistance programs to share expertise.

The Bureau also participates in international organizations that promote convergence in competition law and policy (e.g., the Organisation for Economic Cooperation and Development, the International Competition Network, the International Consumer Protection and Enforcement Network, and the London Action Plan) and supports the Government of Canada in the negotiation of competition provisions in Canada's international trade agreements.

## 2.2 Formal Guidance

### Technical Guidance

The Bureau provides formal guidance through the issuance of its technical documents, including enforcement guidelines and information bulletins.

**Enforcement guidelines** articulate the Bureau's enforcement policy under specific sections of the Acts, based on the Bureau's past experience, jurisprudence and accepted economic theory.<sup>3</sup>

**Information bulletins** (such as this document) are policy statements that describe the Bureau's approach to a variety of its enforcement instruments, policies and procedures.

### Prevention Publications

The Bureau provides various tools for businesses and consumers aimed at prevention. These include:

- **The Little Black Book of Scams**, a reference guide designed to inform consumers and to help protect themselves against a variety of common scams;
- material to support **Fraud Prevention Month**, an annual public awareness campaign that seeks to prevent Canadians from becoming victims of fraud; and
- various **pamphlets** dealing with certain provisions of the Acts, which provide tips to consumers, and help inform businesses of their requirements under the Acts.<sup>4</sup>

### Presentations

Finally, Bureau staff deliver outreach presentations to various stakeholders to raise awareness of specific issues and provisions of the Acts and to promote compliance with them (e.g., corporate compliance sessions<sup>5</sup> and Bid-Rigging: Awareness and Prevention presentation<sup>6</sup>).

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<sup>3</sup> For example, see [The Abuse of Dominance Provisions](#) guidelines and the [Merger Enforcement Guidelines](#).

<sup>4</sup> For further information, refer to the Bureau's [Tools for Consumers and Businesses](#) webpage.

<sup>5</sup> For example, see the Bureau's [Corporate Compliance Programs](#) bulletin.

<sup>6</sup> For example, see the Bureau's [Bid-Rigging—Awareness and Prevention Presentation](#).

## 2.3 Specific Guidance

### Announcements and Position Statements

The Bureau provides more specific guidance to stakeholders through its announcements and position statements. **Announcements**—typically a news release, information notice or an excerpt included in the *CB in Brief* or *The Competition Advocate* e-publications—may relate to a specific case or advocacy initiative. The Bureau also uses **social media** as an alternative way to share content posted on the Bureau’s website and to interact with stakeholders.

In addition, in certain circumstances, an announcement may be accompanied by a **position statement** that publicly communicates the results of an investigation, inquiry or merger review. A position statement briefly describes the Bureau's analysis of a particular matter and summarizes its main findings.<sup>7</sup>

### Discussion Papers

The Bureau may issue discussion papers on a specific topic to convey the Bureau’s views and to encourage debate and further discussion regarding the topic. The Bureau may commission these papers from independent experts or develop them internally.<sup>8</sup>

### Workshops

The Bureau also hosts workshops from time to time to engage in discussions regarding a specific topic of interest and to communicate the Bureau’s position on the topic. Workshops allow the Bureau to gain information and generate a dialogue regarding emerging issues that can inform the Bureau’s position. Bureau workshops often include panels with speakers from our counterpart agencies, other government departments, and industry experts, including members of the relevant business and legal communities.

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<sup>7</sup> The Bureau balances the interests of transparency in such statements with its obligations of confidentiality under the Acts. Information gathered during investigations under the *Competition Act* is held confidential under the terms of s. 29 and inquiries under the *Competition Act* are conducted in private under the terms of s. 10(3). For further information, see the Bureau’s [Information Bulletin on the Communication of Confidential Information Under the Competition Act](#).

<sup>8</sup> See, for example the Bureau’s paper “[Patent Litigation Settlement Agreements: A Canadian Perspective](#)”, 2014.

### **3. PROMOTING COMPETITION AND COMPLIANCE THROUGH ENFORCEMENT**

The Bureau's enforcement mandate seeks to promote competition by identifying and addressing potential and actual non-compliance with the Acts. In carrying out enforcement activity, the Bureau endeavours to be as transparent as possible while still fulfilling its strict obligations regarding confidentiality. In doing so, the Bureau seeks to equip businesses and individuals with the knowledge they need to identify early on when their actions may contravene one of the Acts.

The Bureau pursues enforcement investigations to determine whether or not certain conduct contravenes one of the Acts. An active investigation does not, by itself, suggest any pre-determination of non-compliance. Nevertheless, business awareness of Bureau investigations may deter future non-compliance by demonstrating that the Bureau actively pursues its enforcement mandate and by signaling to businesses that it is likely to detect non-compliant behaviour. In this regard, the Bureau may communicate the results of its investigations to the public, as an important part of the administration and enforcement the Acts, and in promoting compliance.

Generally speaking, in using the range of enforcement instruments outlined below, the Bureau encourages and facilitates voluntary compliance and, when possible, will attempt to achieve a negotiated settlement in response to actual or potential non-compliance. However, the Bureau will not hesitate to vigorously pursue contested enforcement action when necessary.

#### **3.1 Enforcement Instruments**

In response to actual or potential non-compliance, the Bureau relies on a range of instruments to enforce the Acts. The Bureau conceptualizes these instruments in two categories:

1. **Facilitating Voluntary Compliance:** This category of instruments seeks to encourage businesses and individuals to undertake measures to maintain or achieve compliance with the legislation in specific instances; and
2. **Resolutions to Non-compliance:** This category of instruments seeks to respond to, and resolve, alleged non-compliance with the Acts, through either consensual means or litigation.

Each category is discussed in further detail below.

### 3.1.1 Facilitating Voluntary Compliance

The Bureau seeks to facilitate voluntary compliance through various types of communication to businesses or individuals in specific matters before, during and following an investigation.

In instances that raise concerns of potential non-compliance with the Acts, the Bureau may initially seek to facilitate voluntary compliance by providing guidance to the business or individual on relevant aspects of the law and, where appropriate, to seek alternative case resolutions (“ACRs”). ACRs refer to certain processes and remedies through which, in appropriate circumstances, the Bureau resolves concerns of non-compliance without the need for litigation or consensual resolutions (as discussed further in this section).

Through the range of instruments discussed further below, the Bureau may facilitate voluntary compliance by identifying the issue to the business or individual at an early stage. Such interventions may provide long-term benefits as well; as businesses and individuals are made increasingly aware of their responsibilities under the Acts, there may be less future need to respond to instances of non-compliance.

#### Information Letters

The Bureau may send information letters to businesses and/or individuals to advise them that the Bureau is concerned about possible contraventions, and to emphasize their obligations to comply with the Acts. These letters note specific requirements of the legislation but contain no warning statements. They may be used when the Bureau believes a business or individual is unaware that a particular type of conduct raises issues.

#### Warning Letters

Warning letters are formal written notices to a business or individual that identify a specific alleged contravention. The Bureau will typically advise the business or individual that more stringent action may be considered if the conduct is not corrected or if it is repeated. These letters provide a clear record of, and reference to, the responsibilities of the business and/or individual under the Acts. Letters may also request that the recipient provide information on how it intends to comply with the Acts.

#### Information Meetings

The Bureau may engage with a business or an individual through an information meeting at a stage in the investigation when the Bureau believes that a business or individual may be unaware that particular conduct raises compliance concerns under the legislation. In such cases, the Bureau may seek to facilitate compliance by contacting the business or individual

to explain the legislation.<sup>9</sup> Persons contacted are not under any obligation to discuss the matter or justify their conduct, but may choose to take this opportunity to do so.

## Standards-Based Inspections

Standards-based inspections can identify issues within a particular firm or industry and afford an opportunity to review the means of achieving compliance. Under the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act* (collectively the “Standards-Based Acts”), a Bureau inspector may at any reasonable time enter any premises of a dealer of a prepackaged product or a textile fibre product, or the premises of any dealer of a precious metal article. In addition, under the *Consumer Packaging and Labelling Act* (the “CPLA”) and the *Textile Labelling Act* (the “TLA”), a Bureau inspector may also at any reasonable time enter any other place in which the inspector believes on reasonable grounds that there is any prepackaged product or textile fibre product that is owned by a dealer. Each of the Standards-Based Acts also provides inspectors varying powers to open and examine (as the case may be) products, documents, and/or records. These inspections also help deter future anti-competitive activity.<sup>10</sup>

## Compliance Meetings

Compliance meetings may be arranged when there are continued infractions under one of the Standards-Based Acts, but there is still the possibility of encouraging the party to comply without resorting to prosecution. The senior officials of a company are requested by letter to attend a meeting to discuss the history of inspections, record of compliance and measures that the party intends to take to correct the situation in a timely manner. At the meeting, the company officials may be informed that, without changes, the Bureau will consider seizing and detaining the product until corrective action is taken and may also refer the matter to the PPSC.

## Corporate Compliance Programs

The Bureau also facilitates voluntary compliance by promoting the development of credible and effective compliance programs. The Bureau’s *Corporate Compliance Programs* bulletin<sup>11</sup> provides guidance on measures that businesses can take to prevent or minimize the risk of non-compliance with legislation, and to detect and deal with such behaviour. It describes

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<sup>9</sup> Meetings may take place at the business premises, the Bureau’s offices, or by way of a teleconference.

<sup>10</sup> For further information on the Standards-Based Acts and the reasonable grounds required under each Act, please see the Bureau’s [Labelling Corner](#) webpage.

<sup>11</sup> For further information, see the [Corporate Compliance Programs](#) bulletin.

elements that the Bureau considers essential for any compliance program to prevent or detect anti-competitive conduct. In seeking to resolve instances of non-compliance, the Bureau may seek a requirement that a company institute a corporate compliance program to address the Bureau's concerns.

## Written Opinions

The Bureau has the discretion, on request from any person and for a fee, to provide written opinions on whether or not particular provisions of the *Competition Act* or regulations, as specified in the request, are applicable to proposed practices or conduct.<sup>12</sup> Where issued, written opinions facilitate compliance with the *Competition Act* by providing businesses an opinion regarding proposed practices or conduct in appropriate circumstances. Written opinions are binding on the Commissioner if all material facts have been submitted, are accurate, and remain substantially unchanged.<sup>13</sup>

## Communications during Inquiries

The Bureau generally communicates with parties whose conduct is being inquired into under the *Competition Act*, as well as industry participants, complainants and the general public after an inquiry has been commenced.<sup>14</sup> Communications during inquiries aim to provide timely and predictable opportunities to engage in dialogue to resolve matters in a manner that preserves the Commissioner's discretion and other enforcement interests, including applicable privileges and statutory obligations. As a means of promoting compliance, such communications reflect the Bureau's recognition that dialogue with parties generally facilitates resolutions and helps to avoid protracted litigation.

## Advance Ruling Certificates and No-Action Letters<sup>15</sup>

The Bureau may issue an Advance Ruling Certificate (ARC) or, in the alternative, a No-Action Letter (NAL), following a merger review. When appropriate, an Advance Ruling Certificate will be issued when the Bureau has determined that it does not, at that time, have sufficient grounds to apply to the Tribunal for an order to remedy a proposed merger. Alternatively, the Bureau may issue a NAL indicating that it does not intend, at that time, to challenge the

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<sup>12</sup> Including whether or not a transaction is notifiable under the merger provisions of the *Competition Act*.

<sup>13</sup> The Bureau's bulletin – [Competition Bureau Fee and Service Standards Handbook for Written Opinions](#) contains additional information on the steps the Bureau may take in responding to a request for a written opinion

<sup>14</sup> For further information, consult the Bureau's bulletin – [Communication during Inquiries](#).

<sup>15</sup> Despite this characterization as an instrument that facilitates voluntary compliance, merger notification is required under the *Competition Act* for mergers that exceed certain size thresholds. For further information, consult the Bureau's bulletin - [Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act](#).

merger or proposed merger before the Tribunal. Even when parties fulfill their pre-merger notification obligations under the *Competition Act*, ARCs and NALs facilitate compliance by providing parties with greater transparency about the Commissioner's decisions regarding whether or not a proposed transaction raises competition issues under the merger provisions of the *Competition Act*. Notably, failure to notify the Bureau of a merger when required by the *Competition Act* is considered a distinct non-compliance issue that is addressed separately from competition issues that may result from the merger itself.<sup>16</sup>

### 3.1.2 Resolving Non-Compliance

Consensual resolutions and litigation can be viewed as complementary forms of more formal enforcement action.<sup>17</sup> Consensual instruments generally involve negotiated or collaborative resolutions with parties to address contraventions of the Acts. Litigation may involve contested criminal prosecutions or civil proceedings before a court or the Tribunal, as well as product seizures under the Standards-Based Acts. Litigation is used when the Bureau cannot resolve a case on a consensual basis with the business or individual under investigation, or when a consensual resolution is considered inappropriate in the circumstances.

In criminal cases involving alleged offences under the Acts, the Bureau refers matters to the PPSC to conduct either litigation or consensual proceedings on the Bureau's behalf. The Bureau works with the PPSC to address alleged violations of the criminal provisions of the Acts, and to denounce and deter serious and deliberate misconduct by businesses and individuals. Through penalties and sentencing imposed by the courts, the Bureau aims to, among other things, deter similar anti-competitive conduct.

In civil matters under the *Competition Act*, the Bureau may apply to the Tribunal or the courts for remedial orders or seek other forms of relief, such as registering a consent agreement, to address non-compliance.

When specific action by a business or individual is required to address contraventions of the Acts, the Bureau and the contravening party may agree to enter into negotiations to resolve the matter. These negotiations can often lead to settlements that are less costly and more efficient than contested proceedings.

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<sup>16</sup> For further information, consult the Bureau's bulletin - *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act*.

<sup>17</sup> These distinctions are not mutually exclusive; however, certain compliance instruments involve aspects contested proceedings in an otherwise consensual process, while others involve consensual elements in a largely contested process.

## Consensual Resolutions – Civil Cases

In civil cases, negotiated settlements are often formalized in a **consent agreement** registered with the Tribunal so that the terms are enforceable in a court setting. When registered, consent agreements have the force of a court order; violations of their terms may result in criminal penalties, including fines and imprisonment. Accordingly, a consent agreement must be based on terms that could be the subject of an order of the Tribunal or other courts and, depending on the provision in question, may include other terms, whether or not they could be imposed by the court. In addition, as provided for under the *Competition Act*, such terms can be varied or rescinded where it can be established that the circumstances that formed the basis of the consent agreement have changed or the Commissioner and the person who consented to the agreement have consented to an alternative agreement. Depending on the specific provision(s) being addressed in the investigation, negotiated settlements can include various structural and behavioural remedies or penalties. These may include terms that require:

- prohibition of the conduct;
- changes to contractual terms;
- the establishment of a corporate compliance program;
- voluntary product recalls;
- publication of corrective notices;
- divestitures;
- payment of administrative monetary penalties; and
- restitution.

Registered consent agreements are published on the Tribunal's website, which promotes compliance through increased transparency.

In certain circumstances, the Bureau may consider addressing anti-competitive conduct through an **undertaking**. The Bureau may consider accepting an undertaking in matters involving infrequent and inadvertent non-compliance by parties that are willing to cooperate with the Bureau to address the non-compliant behaviour, offset the potential negative effects and restore competition in the market. Undertakings vary in form and substance, depending on the circumstances. The breach of an undertaking may result in a range of consequences, which may be specifically identified in the undertaking itself. These may include the reopening of the investigation and, ultimately, more stringent enforcement responses.

## Consensual Resolutions – Criminal Cases

Consensual resolutions in criminal cases under the *Competition Act* typically arise under the Bureau's immunity and leniency programs.<sup>18</sup> Under these programs, parties who, among other requirements, admit their involvement in criminal offences under the *Competition Act* and offer to cooperate with the Bureau's investigation and subsequent prosecutions may be eligible for immunity from prosecution or receive lenient treatment in sentencing.

Under the Immunity Program, the Bureau will recommend immunity from prosecution to the PPSC for the party involved in the offence that is the first to apply for immunity and meets all the requirements of the program. Subject to the PPSC's acceptance of the Bureau's recommendation, resolutions typically take the form of an **immunity agreement** signed by the immunity applicant, the Director of Public Prosecutions ("DPP"), and the Commissioner. The immunity agreement sets out the terms and conditions under which the DPP grants the party immunity from prosecution, including the party's obligation to provide complete cooperation and disclosure throughout the Bureau's investigation and any subsequent prosecutions. In certain circumstances, as an alternative to recommending immunity, the Bureau may provide confirmation to an immunity applicant that, although the Bureau was prepared to recommend immunity, it will not do so because it has decided not to further investigate the alleged offence.

Under the Leniency Program, subsequent parties involved in cartel offences<sup>19</sup> that come forward after an immunity applicant and that meet all the requirements of the program<sup>20</sup> can request that the Bureau recommend to the PPSC lenient treatment in sentencing, such as recommendations to the court for reduced fines in return for cooperation with the Bureau and the PPSC. The degree of lenient treatment recommended by the Bureau is generally reduced with each subsequent application. Consequently, the timing of a request for lenient treatment is important. Resolutions under the Leniency Program typically take the form of a **plea agreement** between the leniency applicant and the DPP, which sets out the terms and conditions under which the party is granted leniency in sentencing. These terms include an obligation to provide complete cooperation and disclosure throughout the Bureau's investigation and any subsequent prosecutions, as well as a guilty plea.

Generally, in criminal cases under the *Competition Act*, the Bureau can also make a recommendation to the PPSC to apply directly to the courts for a **prohibition order**. A prohibition order can be part of a sentence imposed by the court in both contested and

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<sup>18</sup> For further information, consult the bulletins – [Immunity Program under the Competition Act](#) and [Leniency Program](#). These bulletins are supplemented by the [Immunity Program: Frequently Asked Questions](#) and the [Leniency Program: Frequently Asked Questions](#), respectively.

<sup>19</sup> Offences under sections 45 to 49 of the *Competition Act*, including conspiracy (sections 45 and 46) and bid-rigging (section 47).

<sup>20</sup> Among other requirements, the Leniency Program requires that applicants be prepared to plead guilty to a cartel offence under the *Competition Act*.

consent proceedings where parties have been found guilty, or it can be made by the court without a finding of guilt in circumstances where the parties have committed acts or done things directed toward the commission of an offence. A prohibition order normally includes terms prohibiting the continuation or repetition of an offence. In the case of a conviction, it includes prescriptive terms requiring positive steps or acts that are considered necessary to prevent the commission, continuation or repetition of the offence. Examples of additional terms that may be imposed by a court include the establishment of a corporate compliance program, which may include the implementation of seminars on competition law and policy for officers or employees of the business. Parties who contravene a prohibition order may face fines in the discretion of the court or imprisonment for up to five years. In addition to remedying the anti-competitive activity, these enforceable orders encourage future compliance with the legislation, provide an educational tool to others with respect to competition offences, and help restore competition in the marketplace.

## Litigation

When negotiated settlements are not possible or appropriate, the Bureau will pursue litigation to address contraventions of the legislation. These include **contested proceedings** before the Tribunal or the courts. By their nature, contested proceedings are costly and time-intensive, but may be required for the Bureau to appropriately administer and enforce the Acts.

Remedies or penalties sought in contested proceedings may include those that are also available under consensual resolutions. In civil cases, these include divestitures, changes to contractual terms, the establishment of a corporate compliance program, the publication of corrective notices, administrative monetary penalties, and restitution, as well as others with much more stringent consequences, such as the dissolution of a merger or the termination of an agreement. In criminal cases, penalties involve sentences consisting of fines and/or imprisonment pursuant to the applicable provision of the legislation, and/or prohibition orders.

Contested proceedings may also include **injunctions** under the *Competition Act*. Injunctions may be used to immediately halt activities that constitute or are directed toward the commission of an offence, or otherwise prevent further action of parties, including the closure of a proposed merger that is likely to result in competitive harm, pending the commencement or completion of legal proceedings. The Bureau may also apply to the Tribunal for an injunction to remedy anti-competitive practices. This instrument provides an expedient and cost-effective means of preventing activities that would injure competition or harm consumers.

In addition, when a Bureau inspector believes on reasonable grounds that there has been a failure to comply with any provision of the Standards-Based Acts or their regulations, the product, labelling, packaging or advertising material in question may be seized and detained. The Bureau may undertake **product seizures** to ensure control of a product or

advertising material, when alternative actions are unlikely to maintain control and when it is in the public interest to prevent the sale of the product, until such time as the products are brought into compliance, or for a period of 90 or 180 days (as the case may be) where no charges have been laid. If charges are laid before the expiry of the 90 or 180 day period (as the case may be), the products may be detained until court proceedings are concluded.

### 3.2 Considerations in Promoting Competition through Enforcement

When determining the most appropriate response to actual and potential contraventions of the Acts, the Bureau's objective is to select the most effective and efficient instrument or instruments to address the specific situation, while achieving lasting compliance. The importance of each of these considerations varies according to the provision of the legislation under which the matter falls. Only the factors relevant to a particular situation are considered, and no one factor determines the resolution.<sup>21</sup>

The Bureau may consider the following:

- **Economic Impact:** Considerations of economic impact involve various factors, which may include the volume of commerce affected by the conduct, the geographic scope of the conduct and the duration of the conduct. Typically, the Bureau will use stronger enforcement action in cases with significant losses to the economy. That said, the Bureau may pursue cases involving a smaller economic impact where it is in the public interest, such as cases that will provide important clarification to the relevant jurisprudence.
- **Prevalence of Conduct:** The Bureau will also consider whether or not the practice in question is widespread. For example, if there is a practice by a whole industry group or a significant portion of an industry that contravenes the legislation and there is a particular need to deter members of the industry from the use of this practice, depending on the circumstances, it may be appropriate to use litigation, perhaps in conjunction with industry-wide outreach programs or advocacy efforts.
- **Evidence of Market Power:** In some circumstances, the Bureau will consider whether or not a firm has the incentive or ability to maintain or enhance its market power. The Bureau considers market power, in the general sense, to be the ability to profitably maintain prices above the competitive level (or similarly restrict non-price dimensions of competition) for a significant period of time. Market power may be evaluated using various factors, such as market shares, the likelihood of entry or expansion by other enterprises, the existence of product substitutes, and the

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<sup>21</sup> Note that the following is not a discussion of case selection criteria used by the Bureau.

presence of other competitors, including the presence of factors that may result in coordinated behaviour among competitors.<sup>22</sup>

- **Party Conduct and Case History:** The conduct of the party and the case history are also relevant in determining the appropriate enforcement instrument. Litigation may be more appropriate in cases involving serious conduct that is deserving of sanction from either the courts or the Tribunal. Such conduct may include deliberate attempts to harm competition, clear disregard of the legislation, and covert acts for the purpose of concealing evidence. If the party assists with the investigation or inquiry, or terminates and attempts to remedy the effects of the conduct, consideration may be given to recommending a mitigation of sentence, using a consent agreement, or proposing an ACR, where appropriate.<sup>23</sup> With less serious conduct, a non-deliberate contravention where the activity has ceased, or where it is believed that certain behaviour is at risk of contravening the legislation, compliance meetings or other instruments to facilitate voluntary compliance may be most appropriate.
- **Recidivism:** Contested proceedings may be appropriate or necessary in some circumstances, such as for a recidivist or one who has acted in contravention of an order, previous undertaking or other consent instrument. If the conduct is not of a serious nature and does not involve significant economic harm, and if there is no prior history of contravention, an ACR may be the most appropriate choice. However, instruments that facilitate voluntary compliance will generally not be appropriate if the Bureau has previously provided a written opinion, a warning or an information visit concerning the conduct in question. A long history of ongoing non-compliance or heightened public sensitivity to a particular matter may also influence the choice of instrument.
- **Detering Effect:** The Bureau will also determine the selection of instrument, in part, by whether or not it will achieve the requisite level of general and specific deterrence. Deterrence is achieved both by the prosecution of alleged offenders and by the publication of the results of these proceedings.

The above considerations should serve as a guide as to how the Bureau determines the most appropriate instrument to respond to contraventions or potential contraventions of the Acts. However, the Bureau and the PPSC retain the right to exercise their discretion with respect to all enforcement decisions and the resolution of all matters. The final decision is based on the particular facts, timing and context of each case.

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<sup>22</sup> For further discussion of the Bureau's assessment of market power, see the Bureau's enforcement guidelines – [Merger Enforcement Guidelines](#) and [Abuse of Dominance Provisions](#).

<sup>23</sup> For example, as noted above with respect to criminal cases under the *Competition Act*, cooperating parties under the Immunity and Leniency Programs may be eligible for immunity from prosecution or receive lenient treatment in sentencing. ACRs are not available under the Leniency Program because of the requirement that applicants be prepared to plead guilty to a cartel offence under the *Competition Act*.

## 4. PROMOTING COMPETITION AND COMPLIANCE THROUGH ADVOCACY

As part of its mandate, the Bureau participates in a range of activities to promote and advocate for the benefits of a competitive marketplace. More competition can lead to lower prices for consumers, as well as increased choice and greater innovation.

Section 7 of the *Competition Act* provides the Commissioner with the authority to undertake competition promotion activities in Canada when such activities are directly related to the administration or enforcement of the *Competition Act*. This authority is connected with section 1.1 of the *Competition Act*, which sets out that the purpose of the act, among other things, is to “promote the efficiency and adaptability of the Canadian economy” and “provide consumers with competitive prices and product choices”. The Commissioner is further granted a legislative authority under sections 125 and 126 of the *Competition Act* to intervene before, and provide advice to, federal and provincial boards, tribunals, and other regulators.

Generally, the Bureau advocates that regulators and policy makers regulate only where it is strictly necessary to achieve a legitimate policy objective. The Bureau provides advice to regulators to assist in satisfying legitimate policy objectives without unnecessarily restricting competition in the Canadian economy. To this end, the Bureau has been active in a number of areas over the years, and will continue to place a strong emphasis on targeted advocacy work in the interest of promoting competition.

### 4.1 Advocacy Instruments

The Bureau has a broad and flexible range of instruments available for advocacy work. Advocacy can take place within the confines of formal regulatory proceedings, and advice can be provided through publications posted on the Bureau’s website, or through confidential consultations with regulators or industry stakeholders.

The Bureau generally conceptualizes these advocacy instruments into three main categories:

1. Advice to Regulators and Policy-Makers;
2. Market Studies; and
3. Regulatory Interventions.

Each category is discussed in further detail below.

## Advice to Regulators and Policy-Makers

The Bureau provides advice to regulators, government departments, legislators, and other stakeholders on matters related to competition. This advice is aimed at assisting these bodies to formulate and implement rules that satisfy legitimate policy objectives while ensuring that competition is not unnecessarily restricted in the Canadian economy. This type of advocacy may take the form of confidential consultations with a regulator, or may be communicated through public letters, studies, or other publications posted on the Bureau's website. Advice may also be provided, where appropriate, to industry associations, self-regulated bodies, and other stakeholders.

## Market Studies

Market studies allow the Bureau to examine an industry and identify factors that impede competitive forces. Whereas other forms of advocacy, such as participation in regulatory proceedings, may be limited to a small number of discrete issues, market studies typically allow the Bureau to undertake analyses with a wider scope or with a focus that is more tailored to the Bureau's mandate. The main goal of a market study is to assess an industry through a "competition lens" in order to highlight issues that may restrict competition.

## Regulatory Interventions

Regulators<sup>24</sup> will, from time to time, engage in public proceedings to solicit evidence for use in determining potential regulatory changes in an industry. Sections 125 and 126 of the *Competition Act* provide the Commissioner with the legislative authority to make representations and introduce evidence in respect of competition in federal and provincial regulatory proceedings.

## 4.2 Considerations in Promoting Competition and Compliance through Advocacy

When assessing a potential advocacy project, the Bureau generally considers four strategic factors:

1. Does a forum to present the Bureau's findings exist, and is there a high level of public interest?

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<sup>24</sup> In this context, the term "regulator" has the meanings ascribed to "federal board, commission or other tribunal" and "provincial board, commission or other tribunal" in subsections 125(2) and 126(2) of the *Competition Act*.

2. Will the Bureau bring forward unique arguments, unlikely to be presented by others?
3. Will the Bureau be able to gauge the impact of its advocacy efforts?
4. Will the Bureau's efforts have clear, tangible benefits for Canadians? How widely and how deeply will the impact be felt?

While this document is not intended to be definitive, the following discusses each of these factors in greater detail.

### Does a forum to present the Bureau's findings exist, and is there a high level of public interest?

An advocacy project is likely to be more successful where a forum exists to present the Bureau's findings. For example, formal regulatory proceedings often occur when a regulator has voiced an interest in assessing or changing its rules. Absent this interest, there is a risk that the Bureau's advice may not be implemented if regulators or decision-makers are comfortable with the status quo. The Bureau's findings are also likely to carry more weight with regulators or decision-makers where there is a high level of public interest in the issues being studied.

### Will the Bureau bring forward unique arguments, unlikely to be presented by others?

Regulatory matters are often debated by those with commercial or other private interests. For example, a business may argue in favour of a regulatory rule that restricts entry into a market that it serves, or a consumer may advocate for a requirement that preserves a certain level of service quality in an industry. In these situations, the Bureau can undertake an independent analysis and provide advice to regulators that is free of these commercial or other private interests. The Bureau has significant expertise to assess the effect that regulatory or structural changes may have on competition and, in this respect, will often have a unique perspective that cannot be duplicated by other parties.

### Will the Bureau be able to gauge the impact of its advocacy efforts?

To ensure that the Bureau's advocacy efforts are effective, it is important that benefits flowing from advocacy projects be measurable and visible. Specifically, the Bureau will typically prefer advocacy projects that will likely result in measurable outcomes that affect competition, rather than those where the outcomes either: (a) focus only on technical rules that have a small effect on competition; or (b) are not directly linked to competition.

Will the Bureau's efforts have clear, tangible benefits for Canadians? How widely and how deeply will the impact be felt?

It is important that advocacy projects undertaken by the Bureau result in clear, tangible benefits for Canadians. In assessing the depth and breadth of these benefits, the Bureau may consider, among other factors, the volume of commerce affected by the competition issue, as well as the geographic scope, duration, and the extent to which the issue is widespread either in an industry or in the Canadian economy.

### 4.3 Dynamics between Advocacy and Enforcement

In addition to, and complementing, the four strategic factors above, some broader considerations are important to understand the context of the Bureau's advocacy mandate.

Typically, competition issues that come to the Bureau's attention are first evaluated for potential enforcement action. However, the Bureau recognizes that some matters are best addressed through the use of advocacy instruments, and may proceed directly to commencing an advocacy project when presented with a competition issue. In instances where an advocacy project uncovers evidence that the Acts may have been contravened, that evidence may be used in an enforcement action. Conversely, investigations by the enforcement branches may, in some instances, yield information that motivates the Bureau to undertake an advocacy project. The Bureau endeavours to share information between its advocacy and enforcement functions as appropriate, to maximize its impact in promoting competition.

The final decision to undertake an advocacy project is based on the particular facts, timing, the availability of resources, and context of each issue assessed. The factors discussed previously assist in the Bureau's assessment of whether or not to proceed with any particular project, but may not be determinative in and of themselves. Instead, these factors serve as a guide as to how the Bureau determines which projects to undertake.

## 5. CONCLUSION

The *Competition and Compliance Framework* integrates the Bureau's wide range of outreach, enforcement and advocacy instruments into a cohesive framework to promote competition and achieve compliance with the Acts.

The instruments within it are used as necessary to help businesses avoid coming into conflict with the Acts, to address instances of non-compliance, and to promote competition in the Canadian marketplace.

This framework of Bureau instruments provides a flexible approach that can be used to secure these outcomes in the most efficient and effective way.

The *Competition and Compliance Framework* does not suggest a step-wise enforcement approach. The instrument used in each case is determined on the specific facts and may require immediate enforcement action where necessary.

Supported by the targeted application of the Bureau's resources, the *Competition and Compliance Framework* will maximize compliance with the Acts and ensure a competitive marketplace with continuing benefits to consumers, businesses, and the Canadian economy.

# HOW TO CONTACT THE COMPETITION BUREAU

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

## Website

[www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca)

## Address

Information Centre  
Competition Bureau  
50 Victoria Street  
Gatineau QC K1A 0C9

## Telephone

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

## Facsimile

819-997-0324