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Via Email and Overnight Mail

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Competition Policy
Office of Fair Trading
Fleetbank House
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Re: Consultation on Compliance Guidance

Dear Messrs. Gilbert and Preece:

We present these comments to the Office of Fair Trading (OFT) in response to the request for consultation on the OFT published guidance on compliance issues in Company Directors and Competition Law and How Your Business Can Achieve Compliance. We submit these comments on behalf of the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law. The Institute for Consumer Antitrust Studies is a non-partisan, independent academic center designed to explore the impact of antitrust enforcement on the individual consumer and the public, and to shape policy issues. While these comments have benefited from the review of several members of the Advisory Board of the Institute, they reflect the personal views only of the signors of this letter. The issue of compliance is critical in competition law. A culture of competition and compliance with the resulting legal norms is the most important determinant of a competitive consumer friendly economy. We applaud the OFT for its commitment to compliance issues, in addition to its enforcement responsibilities, and believe that these efforts should be a model for all competition agencies, including those in the United States. We believe that these efforts are part of a broader interest in compliance issues more generally that are now becoming an ever increasing topic of serious interest in government, legal academia, and the practicing bar.

1 For more information about the Institute for Consumer Antitrust Studies please see http://www.luc.edu/antitrust.

2 For example, one of the authors of these comments, Professor Waller addresses compliance issues in a broader context in his forthcoming article, Corporate Governance and Competition Policy, available at

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We commend the OFT for including in its compliance publications sophisticated guides for directors and business employees which address in plain English the importance of competition law, the principal risks, and strategies for achieving meaningful compliance without creating mandatory rules or a one-size-fits-all approach. Nonetheless, we wish to offer a handful of suggestions for further improvements from the perspective of US competition law professionals based on our experience in government service, private practice, in-house corporate practice, and law teaching. We focus on broad issues which we believe to be generally applicable to business behavior generally, but cannot claim expertise in UK law or business culture.

1) The framework of risk identification, mitigation, and review is a sound one as long as the directors and all key employees make it a meaningful part of day-to-day business operations. For the board of directors as a whole, and individual directors, we believe that the most important issues are not only to prevent active participation by directors and managers in competition law violations but also to create systems so the board can become aware (or should have known) of violations of the law with normal reasonable diligence. Along those lines, United States law has developed a number of red flags which may be sufficient for a board of directors to investigate further potential criminal and civil violations of competition law (and other legal regimes). We would therefore suggest including explicit reference to some of the accepted red flags that in the United States may trigger a duty to explore further including failures to maintain proper records in connection with trade association activity or competitor contacts; the initiation of governmental civil or criminal proceedings in the UK and elsewhere involving the firm or other market participants that raise issues of potential involvement of the undertaking in competition law violations in the UK; the filing or potential filings of credible private suits for damages against the firm or other market participants that allege violations of competition law in the UK; or any significant unexplained departures from company practices or policies that cannot be explained as the result of independent profit maximizing behavior.

2) For undertakings that are genuinely seeking to comply with the law, the situations where the board should have known of competition law violations often will be more important than the limited number of circumstances where board members are active participants in the unlawful activity itself. Along those lines, we suggest adding more hypotheticals like Example 5 of the director guide which focus on when the board should or should not be aware of unlawful activity they themselves did not participate in and indeed sought to prevent. This is the area based on our experience where directors will receive the most benefit from a close reading of any published guidance.

3) In addition to what the directors and senior management knew or ought to have known, the OFT in its *Company directors and competition law* guidance may want to require that management identify the pro-active steps it undertook to foster an ethical culture within the firm. Indeed, all the respondents in the earlier OFT study said that "the key driver of competition law compliance within their organisations was ongoing, clear, unambiguous, global messaging by senior management -- up to and including the board level -- that competition law compliance was a core part of the corporate culture and that senior management expected employees to comply with competition law." Consequently, senior management and the directors should be prepared to demonstrate what "active, visible and


unambiguous" commitments they undertook or oversaw to foster a culture of competition law compliance within their business. This is not simply a company statement that all employees are expected to comply with all applicable laws. Rather, senior management and directors should identify the proactive steps they undertook to make ethics and compliance fundamental parts of their corporate identity and corporate vision.

4) Both guides contain a number of references to market definition and market power which is, of course, a critical aspect of many competition law violations. (See, e.g., page 21-22 of the business guide.) In our experience, this is also one of the most complicated and technical issues in competition law in any jurisdiction and one where business intuitions and vocabulary about "the market" may not be congruent with the way agencies and courts interpret these concepts in investigating and applying the law. We would recommend some additional non-technical language alerting the business reader to the key concepts of reasonable effective substitutes as the key to understanding how competition law uses the term relevant market and the potential use of these terms in other contexts in the business world.

5) Both guides make mention of the special needs of small businesses in several places including page 26-27 of the business guide. We agree that the nature and structure of small businesses may affect the nature of an effective compliance program; we disagree strongly with the assertion that there is any reduced risk of exposure for small business. We understand that small business is subject to certain exemptions and immunities under the Competition Act, but we also understand that these exemptions and immunities do not apply to price fixing and related hard-core cartel violations. It has been the experience of the United States that small business have been involved in hard-core cartel activity and sometimes in the greatest need of education about the benefits and requirements of competition law and how best to comply. The history of United States antitrust enforcement is replete with the criminal prosecution of small (often local) businesses in such industries as dairy supply, school transportation, book selling, trash hauling, recycling, retail and wholesale energy distribution, and road building. Too often the defendants asserted that they were unaware of the illegality of their behavior. Although this normally does not affect the outcome of the case, changing such attitudes would constitute a great success. We hope that the final version of both guides reflect the key realization that small business are an equally important sector for the promotion of a culture of competition, although the precise mechanisms for achieving this will be different from a large publicly traded corporation.

6) In the discussion of the risks of trade association participation, we would change the second bullet to read as follows "any staff that attend trade association functions with your competitors." The risk is not limited to sales or management employees, since lower level, non-sales employees can come to agreements with competitors that could be unlawful. Any compliance program should provide training for all employees that participate in trade associations. In certain industries it is also necessary to provide guidance to employees who participate in "professional" associations. Along those same lines, employees who attend professional associations may be considered medium risk. Professional association subjects may implicate competition, such as when industry standards are discussed.

7) In connection with Section 5.3, competition law training should be developed so that it is effective in alerting identified employees to the key elements of the law. Employees should understand what type of conduct to avoid and when to contact counsel for guidance. The most effective training is that which applies the legal principles to the employee's jobs, rather than trying to teach abstract concepts of the law. Similarly, compliance education should relate to the employee's job. Medium risk employees should get sufficient training to be aware of competition law risks. High risk employees should have more in-depth training relating to their jobs so that they approach "mastery" of the concepts.
8) With respect to the case study on page 27 of the business guide, we would refine the hypothetical to make it clear that the training should be aimed at understanding by average employees, not coverage of a law school type curriculum on competition law. Lawyers should provide input on the content, but adult education specialists may be the ones best positioned to translate the substance into training that will lead to understanding.

9) Finally we believe that the 10 percent fine reduction is negligible in cases where the compliance program met all of the criteria. In cases where a rogue employee chooses to ignore policies and training, conceal illegal activity, and evade business controls, punishment of the corporation is inappropriate. In cases where the OFT cannot answer the question "What more could we have done?" it is probably not appropriate to prosecute the corporation at all, but instead target the rogue employee for prosecution. Clearly this would not apply if the compliance program was used to conceal illegal activities. But in cases where an employee engaged in ultra vires acts, there is no indication that the corporation acted in bad faith in any way, and most importantly, the evidence shows that competition law compliance was a core part of the corporate culture and that senior management expected employees to comply with competition law, then there should be a much more significant reduction of penalty. Additional factors could be considered, including whether the compliance program discovered the wrongdoing, and the corporation self-reported to the OFT, but these factors (which would be considered as part of an amnesty program) should not be a sine qua non to achieving fine reduction.

We hope you find these comments of value and are pleased to respond to any questions or provide any additional information on the points we have raised. We look forward to the final versions of the guides and the contributions they will undoubtedly make toward the promotion of a culture of competition compliance in your and other jurisdictions.

Sincerely,

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