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OFT Competition Law Compliance Resources

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Following on from a consultation in 2010, the U.K.'s Office of Fair Trading ("the OFT") in 2011 published a collection of online resources to help business people and their legal advisers increase awareness and understanding of competition law compliance, as well as explaining what they can do if something goes wrong in compliance terms. The resources include the guidance documents *Company Directors and Competition Law* and *How Your Business Can Achieve Compliance with Competition Law*, as well as *A Quick Guide to Competition Law Compliance* and a film, *Understanding Competition Law*.

The OFT, the U.K.'s primary competition and consumer enforcement authority, is keen to help businesses to develop an effective culture of competition law compliance. Successfully creating a compliance culture can help businesses avoid the severe consequences of infringing the competition law prohibitions of the Competition Act 1998 and the Treaty on the Functioning of the European Union. These include fines of up to 10 percent of worldwide group turnover and the risk of damages claims from persons who have suffered loss as a result of the infringement. And the consequences are not just for the business: directors of infringing companies can be disqualified from acting as company directors for up to 15 years, and individual employees involved in a cartel can face prison sentences of up to five years. Of course, these consequences are over and above the bad publicity faced by infringing businesses.

But enforcement is only one aspect of the OFT's work. The OFT recognizes that the majority of businesses wish to comply with competition law. The documents published in 2011 aim to assist businesses to do so, and avoid breaching competition law in the first place. Company directors and their advisers may be especially interested in the guidance document *Company Directors and Competition Law* ("the Directors Guidance"), which sets out:

- the key competition law risks for individual company directors to be aware of,
- the role directors can play in minimizing the risks of their company infringing competition law, and
- how the OFT will assess the extent of a director's responsibility for an infringement of competition law by their company in deciding whether to pursue a disqualification order against the director.

The Directors Guidance sets out the level of knowledge expected from directors and notes that the specific steps directors should take to prevent, detect, and bring to an end infringements of competition law by their company will depend on their roles within the company, as well as the size of the organization. However, there are some things that all directors should know about competition law, including that cartel agreements (such as price-fixing) are serious infringements of competition law.

The guidance document *How Your Business Can Achieve Compliance With Competition Law* ("the Compliance Guidance") has been published in tandem with the Directors Guidance. Business

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people and their legal advisers can cross-refer to the Compliance Guidance to get a practical feel for what their business should be doing to ensure that it has an effective competition law compliance culture. The Compliance Guidance sets out the OFT's recommended four-step process for achieving a compliance culture, which can be graphically represented in the form of a wheel:



At the center of this is a clear and unambiguous commitment to competition law compliance, from the top of the organization to the bottom—which is to say, at all levels of the management chain. The four steps can be briefly summarized as follows:

- *Step One—Risk Identification:* Identify the competition law compliance risks a business faces. These risks might be specific to the operations of the business and might even vary between business units within the same business.
- *Step Two—Risk Assessment:* Assess whether the risks identified are high, medium, or low risks for the business, based upon the likelihood of the risks occurring. This assessment should be undertaken for each risk identified.
- *Step Three—Risk Mitigation:* Identify and implement appropriate risk mitigation activities, including appropriate policies, procedures, and training.
- *Step Four—Regular Review:* Regularly review all steps of the process. This step is designed to highlight that this framework for competition law compliance is not static. The competition law risks faced by a business might change over time and the compliance activities must adapt to such changes.

The Compliance Guidance sets out practical measures for how to implement each step of the process, as well how management can demonstrate a clear and unambiguous approach to competition law compliance to ensure that this commitment is embraced by employees. One

such approach might include email reminders from the chief executive or other senior managers setting out the business' expectation of compliance.

The guidance also includes examples of “red flags” highlighting increased competition law risk. Such red flags can include business people seeming to have knowledge of competitors' commercially sensitive information, or even be as innocuous as the business being in an industry in which “everyone seems to know each other.” The Compliance Guidance also includes examples of things that businesses can do to mitigate risks, including training and establishing controls. The OFT also acknowledges that businesses may already have in place, or choose to implement, a compliance methodology that differs from the four-step process but which might be equally effective in delivering an effective competition compliance culture within the business. This is not a problem—the focus is on achieving compliance in a way that works for each business.

The OFT has also published a *Quick Guide to Competition Law Compliance*, which draws on the content of both guidance documents. It offers a high-level summary of the key points for competition law compliance and may be of particular benefit to managers within smaller businesses.

The compliance wheel depicted above is available in interactive form on the OFT website as is the film *Understanding Competition Law*, which is designed to raise awareness and increase understanding of competition law. Available free of charge in DVD form, the film includes interviews with OFT officials and a leading commentator on competition law, in which they explain what competition law is, why it is important, and how businesses can implement the four-step process for compliance. The film's emphasis is on practicality and ease of understanding.

The OFT is keen to support business people and their legal advisers to ensure competition law compliance is a high priority item on the corporate governance agenda. Business people and their legal advisers can use the resources that the OFT has developed to help their businesses to comply with competition law. The various resources are available at:

<http://www.of.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/>.