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**Submission of the Competition Bureau (Canada) to the Canadian Council of  
Ministers of the Environment**

Dear Sirs.:

Please find enclosed the submission of the Competition Bureau (Canada) to the Canadian Council of Ministers of the Environment regarding the discussion document "Towards a Proposed Canada-wide Action Plan for Extended Producer Responsibility".

We would be pleased to discuss this submission with you or your staff should you have any questions or require further information from the Competition Bureau.

Yours truly,

Duane Schippers  
Deputy Commissioner of Competition  
Competition Bureau

Submission of the Competition Bureau  
To The Canadian Council of Ministers of the Environment  
Regarding Their Discussion Document:  
“ Towards a Proposed Canada-wide Action Plan For Extended Producer  
Responsibility”

May 2009

## Introduction

1. This submission is made on behalf of the Commissioner of Competition (“the Commissioner”) who is responsible for the administration and enforcement of the *Competition Act* (“the Act”) along with the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. The Competition Bureau (the “Bureau”) is the organization that assists the Commissioner in carrying out her statutory mandate.
2. In addition to enforcing the *Act*, the Commissioner also has statutory mandate to advocate for competition. Sections 125 and 126 of the *Act*, provide authority for the Commissioner on her own volition, to make representations or present evidence in respect of competition to a federal or provincial board, commission, tribunal or regulator (“regulator”). A regulator is defined in the provisions as a person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of Parliament [or the legislature of a Province] with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product.” The Commissioner has significant experience as an advocate for competition in a number of key Canadian sectors including telecom, energy, transportation and postal services.
3. Competition arising from market forces provides the greatest benefits to all Canadians through its promotion of higher quality goods and services, greater choice and lower prices. It promotes innovation and dynamic growth that ultimately leads to greater productivity and prosperity. This view has recently been reiterated by the Competition Policy Review Panel in their final report of June of last year<sup>1</sup>:

Competition matters. It brings dynamism to our economy. It is not merely an economic concept. It means good jobs for our citizens. Being open to competition serves Canada’s national interest. ... We need to view competition as being a necessary means to an end. We must become more engaged with enhanced competition domestically and with increased efforts to penetrate global markets.
4. The advocacy power provides the Commissioner with the authority to advocate for a greater reliance on market forces rather than regulation. The Bureau recognizes that a strict reliance on market forces may not always permit society to attain the desired level of other important policy objectives such as health, safety, or in this case the proper treatment of waste material. In these instances there may be a necessity for some form of government intervention.
5. Where government intervention is required, it is still important to ensure that an optimal level of intervention is achieved. This requires some pre-regulatory analysis that

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<sup>1</sup>“Compete to Win, Final Report of the Competition Policy Review Panel”, June , 2008

includes defining the policy objective, identifying the least intrusive mechanism necessary to achieve the objective and periodically reviewing the situation with a view to determining whether a particular regulation is still required.

6. The Bureau welcomes the opportunity to offer some guiding principles and general observations that may assist in designing the approach we understand is being contemplated by the Council of Canadian Ministers of the Environment ("CCME"). As we understand it, the Canada-wide Action Plan for Extended Producer Responsibility ("EPR") has the potential to have a significant impact on the issue of waste recycling in Canada. EPR envisages an environmental policy approach in which a producer's responsibility for a product is extended to the post-consumer stage of its life cycle. The CCME is seeking to provide guidance on the development and implementation of EPR programs, to strengthen the use of EPR as an environmental risk-management tool and to contribute to the harmonization and consistency of programs across the country. It is anticipated that the costs of the end-of-life management of product will be treated by producers similarly to other factors of production and incorporated into wholesale and retail product prices. It will also, however, have a direct impact on the markets for these products and the markets for dealing with these products at the end of their life cycle.

### **General Observations on Developing Effective Regulation to Promote Extended Producer Responsibility**

7. As a general observation, introducing regulation into a pre-existing market typically distorts the competitive dynamic of that market and any other related markets. These types of distortions are distinct from those associated with simply imposing the costs of properly dealing with waste material on the producers of these products.

8. In this case, as we understand it, the key public policy objective is to promote the reduction, reuse and recycling of designated waste products through a national action plan that would see the burden of responsibility for dealing with waste shift from municipalities and taxpayers to producers. By imposing this responsibility on producers the EPR correspondingly would envisage the empowering of these producers by giving them responsibility to self-regulate this economic activity. Necessarily, the design, implementation, monitoring and enforcement mechanisms associated with self-regulation will have a direct bearing on competition including the market for recycling affected products at the end of their life cycle.

9. As a general matter, self-regulatory models associated with producer responsibility can generate additional distortions of competition by providing incumbent competitors with incentives to act in a cooperative manner with one another and to perhaps use these regulatory models to erect barriers to entry for potential new competitors. For example, restricting the access of co-operatively run recycling facilities to incumbents could serve as an effective barrier to entry to new entrants. There is also the potential to significantly change the role and incentives of the municipalities who presently collect much of this waste. If municipalities continue to collect waste, under the new model they would have some market power over those producers who need to

acquire the waste for proper treatment. Private firms may want to enter the waste collection market as there will be increased incentives to do so if there is a ready market for the waste. This would be likely to impact upon the competitive dynamic and the efficiency of the market for waste collection.

10. Some such distortions can alter and even reduce the competitive vigour of the marketplace to the detriment of consumers and the public interest. Reduced competition can manifest itself in terms of lower quality products, fewer choices and higher prices to consumers. At the same time, the imposition of responsibility on producers to recycle their products at the end of the life cycle would create a market for waste that did not previously exist. Firms may wish to enter this market and it will be important to ensure that there are no artificial restrictions that may reduce the incentives to compete in this emerging market.

11. It is encouraging to note that in the discussion paper the CCME have encouraged authorities, producers and any producer responsibility organizations to take the necessary steps to ensure that competition issues are considered when developing and operating the EPR programs. The Bureau, however, would recommend that these programs are designed not only to avoid offending the various civil and criminal provisions of the *Competition Act*, but that they are formulated and implemented in a way that minimizes the harm to competition, while still achieving their policy objectives.

12. In this regard, and as a general rule we believe that legislators and regulators can improve their decision making process with the use of two important tools: first, a set of principles that recognizes the importance of competition as a source of public welfare; and second, a competition assessment tool that facilitates the analysis of the competitive impact of any proposed or existing regulation in the affected markets. In the Bureau's view there is an opportunity here for using both tools in connection with the development of EPR, to the benefit of competition.

## **Principles of Effective Regulation**

13. The Bureau considers the following six guiding principles important to ensure that legislators develop and maintain strong, efficient regulation that maximizes the welfare of Canadians.

### **i) Regulation should have clearly defined and specific objectives**

14. Effective regulation must be premised on clearly defined and specific objectives so as to improve transparency and reduce the likelihood that regulation will be used to pursue private interests under the guise of public protection. Any regulatory model should state the reasons for its existence and the outcomes it intends to achieve. Rather than simply presenting broad general principles, the model should address specific problems.

**ii) Restrictions should be directly linked to clear and verifiable outcomes**

15. Specific restrictions chosen to achieve regulatory objectives should be directly linked to intended outcomes. To this end, a regulatory model should include performance standards that tie restrictions to outcomes through evidence rather than theory alone.

**iii) Regulation should be the minimum necessary to achieve stated objectives**

16. Regulation should only extend to what is reasonably required to protect the public and should not restrict competition any more than is necessary to achieve the desired objectives. When considering regulatory options, regulators should look to regulatory schemes that exist across the country or elsewhere that have been shown to meet the intended policy objectives, while not compromising quality, choice and prices levels associated with healthy competition.

17. It is often the case that multiple restrictions aim to achieve the same objective. Such overlap may indicate that there is more than the minimum necessary regulation in place.

**iv) The regulatory process should be impartial and not self-serving**

18. Those empowered to oversee regulatory models should ensure they have the best most effective governance structure. To this end, the model should reflect broad representation. The decision making process should involve representatives from the key groups affected by the regulation. A transparent and impartial governance structure ensures that self-regulatory activities are carried out in the public interest. With broad representation, it is more difficult for one market participant or group of participants to control the regulatory process and manipulate it to their advantage.

19. Without assuming to direct, one could envisage a board of directors of a recycling operation composed of producers, consumers, environmental groups and experts as well as representatives of municipal or local governments.

**v) A regulatory scheme should allow for periodic assessment of its effectiveness and be subject to regular reviews**

20. Regulators should produce annual reports on their activities and regularly review the regulatory scheme to ensure it effectively meets *current* needs. In light of ever-

changing technology and market conditions, regulators must continually question the effectiveness of current restrictions. As well, regulators must regularly review restrictions to identify those that have imposed unnecessary costs as well as those whose goals could be better achieved through less intrusive approaches. Regulatory models can have unanticipated results either in the markets they directly affect or in ancillary markets. Even if they don't initially have these effects they can emerge over time. To promote an ongoing assessment of such effects over time, there should be some mechanism for reviewing these types of considerations. Without a dynamic review mechanism, regulatory models run the risk of losing their relevancy and/or becoming sub-optimal responses to policy objectives.

**vi) A primary objective of the regulatory framework should be to promote open and competitive markets**

21. To help minimize unnecessary or overly restrictive regulation, all regulators should promote competition as one of the primary objectives. Competition is generally the most effective way to promote the efficient, low-cost and innovative supply of products meeting and exceeding consumers' tastes and needs. A market is open and effectively competitive, and provides the maximum benefits of low prices and the efficient use of economic resources, when the following conditions are met:

- all potential competitors have the ability to compete, subject to any necessary technical, safety or other such requirements, based on their costs and ability to meet consumer demands at a lower price; and
- no participant in the market has sufficient market power to profitably sustain a significant and non-transitory price increase.

## **Competition Assessment Toolkit**

22. Perhaps the most critical stage of the design and implementation of a regulatory process is the preliminary period when the analysis is conducted to determine the impact of the regulatory proposal. Often those charged with this task tend to focus on the desired policy objectives result rather than taking a broader perspective accounting for the impact on other important public policy objectives. The Bureau believes that a critical component to this analysis involves a thorough assessment of whether the regulatory model has the potential to negatively impact competition. The Bureau recommends that legislators require those proposing regulatory models to assess the impact on competition in the affected markets.

23. Many jurisdictions throughout Europe and in the United States have implemented a competition assessment tool as part of the review of their proposed regulatory initiatives. The Organization for Economic Co-operation and Development (OECD) produced a competition assessment tool in its report titled *Guiding Principles for*

*Regulatory Quality and Performance.* According to the OECD the purpose of a competition assessment is:

- to attain public policy goals in ways least restrictive of competition;
- to develop a framework to identify, at the development stage, legislation and policies that unnecessarily restrict the functioning of the market; and
- to determine alternative approaches that would be less intrusive.

24. To help identify and measure the impact of regulation that may unduly restrict competition, the OECD developed a toolkit and a guidance document for competition assessment. The Bureau is certainly prepared to assist any group tasked with developing a regulatory model in properly using this toolkit. This toolkit raises the following basic questions designed to detect whether regulation or other intervention in the market is likely to restrict competition and provides a framework for assessing any effects on competition:

**i) Does the proposal limit the number or range of suppliers?**

25. This is a likely consequence when regulation grants exclusive rights to certain groups to provide certain services, establishes a licence requirement to practice, limits the scope of practice of certain groups or significantly raises the cost of entry.

**ii) Does the proposal limit the ability of suppliers to compete?**

26. The approach selected to establish EPR programs could determine who can and cannot enter the markets for these products. Some firms may in fact benefit at the expense of others by the imposition of a regulatory requirement

27. Specifically in the EPR context, there is clearly a concern that the requirement to ensure that products will be recycled at the end of their life cycle will impose costs on the producers of these products. The extent that these imposed costs vary among competitors will alter the competitive balance in the market.

28. One can think of a number of variables in waste recycling programs that could skew or vary the ability of suppliers to compete. For example important factors such access to waste materials and to recycling facilities may differ between competitors. Multinationals compelled to meet varying regulatory requirements across a variety of local, or state governments may face significantly different costs from those confronting a local supplier.



### **iii) Does the proposal reduce the incentive of suppliers to compete vigorously?**

29. The incentive to compete may decrease when restrictions are imposed such as limits on the size and scale of businesses, recommended fee schedules, or a regulatory scheme that increases the costs to consumers of switching service providers.

30. Regulatory models can then often create an incentive for competitors to co-ordinate or co-operate with one another in ways that one would not normally expect in a competitive market. Depending on the circumstances, this co-operation can be pro-efficient. However, in some instances it can limit the vigour of competition between the competitors.

31. If the answer is yes to one or more of the above three questions it is likely that the regulatory scheme will create a competition concern.

### **Assessing Competition Issues**

32. Carrying out a full competition assessment includes clearly identifying policy objectives, considering alternative regulatory responses to achieve those objectives, and evaluating and comparing the impact on competition of the various alternatives. When a proposal merits assessment, regulators should evaluate the harm to competition. Key factors to look at, as set out in the OECD toolkit, include assessing how the regulatory scheme will impact on the incumbent firms and the ease of entry of new firms into the affected markets, what impact it will have on prices and cost of production, on quality and the variety of products and services. The assessment should also assess the impact on innovation in the market and the overall growth of the market and related markets.

33. Through this analysis it may become apparent that the policy objectives can only be met by imposing a restriction that would have a negative impact on competition. In such a case, the competition costs should be weighed against the other benefits of the regulation to ensure that the intervention provides net benefits to the public. Following this framework should allow regulators to identify regulatory options that achieve policy objectives with the minimum impact on competition.

### **Conclusion**

34. The most effective regulation achieves its stated aim with the least amount of distortion to the market. The six principles of effective regulation outlined in this submission along with the use of the Competition Assessment Tool are premised on the view that regulation, when necessary, must be developed and implemented in an open, effective and reviewable manner. Regulators, comprising representatives of various interests, including consumers, government, professional organizations and competition experts, each bringing their respective areas of expertise to the table, must ensure that restrictions are aimed at defined, measurable and limited goals. Furthermore, restrictions

must be subject to regular and ongoing assessment. Meeting these essential conditions will help minimize unnecessary restrictions on competition by ensuring ongoing scrutiny.

35. The Bureau hopes that Canadian Council of Ministers of the Environment succeeds in drafting an National Action Plan for Extended Producer Responsibility and that this plan recognizes the importance of promoting competition in any of the regulatory models that it may recommend. Should the Council or any of the bodies responsible for the implementation of this plan have any questions regarding this submission, our principles of effective regulation or the Competition Assessment toolkit, the Competition Bureau would be pleased to respond.