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Voluntary Codes Guide - Processes for Developing Effective Codes

Voluntary Codes: A Guide for Their Development and Use

Developing and Implementing Voluntary Codes

Processes for Developing Effective Codes

Because voluntary codes deal with so many subjects and are initiated for so many reasons, there is no single preferred approach to developing them. There is also no guarantee that any development process, no matter how complete and thorough, will result in a successful code. The model presented below is based on several case studies and shows one way a code could be developed.

An Eight-step Model for Developing Codes

1. ***Gather information***
   Ask and answer some basic questions:

   - Have you identified all the people and organizations that could be involved or affected by the code and taken their interests or concerns into account?
   - Have the key players clearly articulated and agreed to the issues surrounding the code?
   - What are the objectives of the code and does everyone agree to them?
   - How can the identified problem be resolved and what are the potential costs, drawbacks and benefits of each solution?

2. ***Preliminary discussions with major stakeholders***
   The objective of this stage is to test the tentative conclusions reached in the information-gathering phase and identify the partners willing to help develop the code. It can be useful to reach beyond like-minded colleagues, employees and other firms and organizations to include more broadly affected interests such as consumer, labour and environmental organizations, community groups [1] and governments. This can help to confirm initial perceptions of their interests and concerns, and could lead additional people and organizations to participate in code development. Focus groups, representing like-minded peers or a broad cross-section of interests, can also be useful for testing new ideas.

3. ***Create a working group***
   Having the right people on the working group is essential. They must be dependable, credible and knowledgeable, represent different elements of the affected community and have the necessary time and resources to commit. Frank discussion should take place at the outset about the group's objectives, members' responsibilities, anticipated workloads and outcomes, and the ground rules about how the group will operate (consensus, majority or rotating chairs, for example). Regular updates between the working group and the larger community are also useful.

4. ***Preliminary draft of the code***
   In preparing a preliminary draft, members will likely identify who (people, organizations and new groups, for instance) will be responsible for which specific aspects of implementation. [2] For example, certain employees may perform key functions, and a new agency or management structure may be created to assist in implementation. As far as possible, people who have been identified as performing key roles should be part of the working group discussions so that their ideas, capabilities and support or resistance can be factored into the terms of the draft code.

5. **Consultations on preliminary draft**
   Thorough consultations at the beginning can prevent problems later. One good approach is to work outward — that is, to start with the people most likely to be directly affected by the code and who are already aware of it, and move to more formal information dissemination to and discussions with groups and people who may not yet know about the code. A consultation plan can be useful. It should include roles for high-profile officials with good communications skills to explain the code and receive feedback. This feedback will go to the working group, who will discuss how and to what extent the final draft will reflect the comments.

6. **Publication and dissemination of the code**
   A good communications plan is important. It should identify who must be made aware of the code, who should receive a copy and how the individuals and groups will be reached. The communications activities might include an awareness campaign addressing such matters as the use of a logo, publicity endeavours such as advertising and speeches, and a notice that firms and organizations can display in their premises.

7. **Implementation**
   This step is discussed in detail **later** in the Guide but it is worth noting here that implementation is part of code development because codes are ongoing, flexible documents that should be updated to reflect new circumstances and perceptions. For example, when compliance data is collected and analyzed it might reveal that parts of the code should be changed.

8. **Review**
   The code should include provision for regular review of its terms and operation. When and how often the reviews take place should be based in part on how long it will take to generate data on impacts, effects and objectives achieved. To measure the impact of a program, data is needed on the situation prior to the code being launched, and at frequent intervals afterward. This data can be used not only to determine weaknesses in code design and operation, but also to demonstrate results achieved (if any) and progress made through use of the code.

It may be helpful to use the initial code development process as a model for the review methodology — that is, information collection, identification of key stakeholders, establishing a working group. An independent third party who conducts parts or all of the assessment can provide a more detached perspective and perhaps lend more credibility to the process. With respect to review techniques, many of the tools the government uses to evaluate its programs and measure the impacts of regulatory schemes, and that businesses uses to analyze the benefits of strategic alliances and other corporate arrangements can be adapted for the review of voluntary codes.

Tips and Suggestions

Be flexible
Original conceptions of the problem and possible solutions will likely change as new information becomes available, better understanding of capabilities and difficulties develop, and circumstances change. Remaining flexible and alert to the need for change can make it easier to modify expectations and outcomes.

Be patient and be prepared to accept a less-than-perfect first try
Code development is essentially a learning process. Once a code is in place, trust, communication and experience can lead to the creation of more rigorous obligations, accountability structures and institutions being set out in the first round of code amendments. Building structured, regular reviews into a code's terms encourages a process of continuous improvement, and will help to make the code increasingly effective and credible.

Take advantage of existing institutional structures
For many firms and organizations, industry associations represent known quantities — trusted intermediaries with the profile and experience to bring parties together and broker differences. Associations can provide forums for discussion and serve as a basic institutional structure for moving codes from the concept stage to implementation. However, for many associations, developing and implementing codes may represent new territory, a step away from simply promoting a sector's interest toward actually supervising and even disciplining member organizations. This can be a fundamental change in orientation for the association and it should be undertaken only with the full cooperation of its members.

Get input and advice from employees
When a code particularly affects employees or is of special interest to them, they or their representatives should be invited to participate in its development and implementation. In the case of The GAP Sourcing Code, for example, labour organizations played a key role in disseminating information about incidents of code non-compliance that led to changes in the code and its implementation, including the use of third-party monitoring. Standards developed by organizations such as the International Labour Organization can form the basis for voluntary codes initiated by individual firms or groups of firms.

Draw on the credibility and expertise of non-governmental organizations (NGOs)
Consumer, environment, health, human rights and other public interest NGOs represent a wealth of information and valuable perspectives, and their input can give the code additional legitimacy in the public eye. For marketplace-oriented codes, consumer groups in particular represent an excellent "hands-on" source of market intelligence about customer preferences, experiences and attitudes. NGO participation can take several forms, including a "one-off" advisory role, ongoing input through a formal panel, or direct involvement in implementation, monitoring and dispute resolution. Even when NGOs do not participate in actual compliance verification, they may endorse processes others carry out. Unless they prefer otherwise, NGOs should be paid for their services and expenses (for research, consultations with members and

attending meetings, for example) just as consultants are. NGOs and code proponents should work together to maintain the credibility and independence of the participating NGOs. Regular communication with the full NGO community is also useful.

Labour and Voluntary Codes

Meaningful, effective employee participation in voluntary code development and implementation depends on such factors as the following:

- early agreement by all parties on the roles to be played by employees in developing and implementing the code
- complete, accurate information so that employees and their representatives can contribute useful input from the outset and carry out their full role in the code's development, implementation and verification
- trained employees to help implement the code
- effective involvement of employees and their representatives in compliance verification
- incentives to encourage employee buy-in and the removal of any barriers to such buy-in
- protection for employees in "watchdog" or "whistle-blowing" roles.

Select NGOs and their representatives with care
A good fit is important. Select carefully which NGOs — and which individuals within those organizations — to invite. Discuss with them the code's goals, the development and implementation processes and the roles and responsibilities of NGOs. This ensures mutual understanding, builds trust and sets the groundwork for a good working relationship.

Key Questions to Guide NGO Participation [3]

Are all of the major players — including customers, key suppliers and NGOs — at the table? Is there meaningful participation by government at all stages? Is a strong industry association in place to manage code development and implementation?

Does the industry have a good record of similar initiatives in the past? Are the industry leaders demonstrating strong commitment? Have the background conditions and motivations been clearly identified?

Are the proponents inviting meaningful third-party representation and involvement by consumer groups, other NGOs and standard-setting bodies, and are they prepared to pay for this involvement?

Are the processes for developing and implementing the code open and transparent? Is there a clear articulation and understanding of the rights and responsibilities of all stakeholders?

Is there clear evidence that the code will promote the public interest in areas such as health, safety, and the environment, and address consumer concerns?

Does the code include effective complaints-handling and redress mechanisms accessible to everyone, effective programs to inform consumers and the public, and an evaluation framework to track progress and provide credible evidence of success and failure? Will a reputable third party regularly monitor the code?

Does the code have the capacity to mature through time and respond to new learning and developments?

Solicit input from community representatives early and often
In a fundamental sense, industry is a guest of the community and, as such, has an obligation to respect community norms and values. While community representatives often do not have the same degree of expertise as NGO participants, they can help gauge the community's concerns and perspectives and ensure support of the industry's endeavours.

Explore the feasibility of using the National Standards System (NSS) [4]
NSS standards are developed through a consensus process involving teams of volunteers representing many stakeholders. Standards development organizations (SDOs) have a pre-established, credible approach to developing standards. In addition, certification organizations and accredited testing laboratories can test and audit compliance with standards.

No clear dividing line exists between voluntary codes developed through SDOs and those created outside the SDO system. However, the SDO network of rule-making and implementation expertise may make this approach particularly appropriate for broad, nation-wide and international standards. For example, a diverse group of industry, government, consumer and other representatives developed a multisector national standard for the protection of personal information under the auspices of the Canadian Standards Association (CSA). The CSA Model Privacy Code represents the only existing national consensus standard on

personal information protection.

Approach relevant government agencies for input and advice as early in the process as possible
Even when government does not act as a catalyst, relevant departments and agencies should be notified as soon as possible of the intention to create a voluntary code. Once a code is in operation, government officials should be kept informed of any changes or developments.

In the short term, government agencies can provide important expertise and advice. In the longer term, failure to inform them could leave the code and its proponents open to regulatory enforcement actions.

Standards Development Organizations and Voluntary Codes

Voluntary codes and the voluntary standards developed by standards development organizations (SDOs) can share common elements. SDOs use formal, open, transparent development processes that are intended to ensure a matrix of representation from affected interests. SDOs are accredited and have a reputation as knowledgeable, but neutral, standards experts.

Creating a standard through an SDO can be the first step toward developing an international standard with the Standards Council of Canada, which can then be adopted by Canada and its major trading partners. Standards developed by SDOs within the National Standards System (NSS) may be applied to goods and services that can be assessed for conformity by NSS organizations.

Canada, through the Standards Council of Canada, a Crown corporation, is a member of the International Organization for Standardization (ISO) and the International Electrotechnical Commission, the two primary international standards organizations.

As an ISO member, the development, certification, testing and registration of voluntary standards in Canada is governed by internationally determined protocols. These protocols allow countries to compare goods and services using a mutually recognized standards system that, in turn, facilitates the flow of goods and services across borders.

At the time this Guide was published (March 1998), the Standards Initiatives Program, chaired by Industry Canada, was preparing a handbook on the use of standards and associated conformity assessment procedures.

The Role of Government in Code Initiation and Development

Government departments and agencies can contribute to the initiation, development and implementation of voluntary codes in many ways. However, government's role must be defined at the beginning to prevent confusion on the part of the public about the code's status, frustration on the part of the code developers and government liability in non-compliance situations.

Catalyst — Government representatives can encourage parties to explore voluntary approaches even if laws or regulations are not imminent. Government research, analysis and consultations can reveal concerns that stimulate action.

Facilitator — Governments can provide meeting rooms, teleconference facilities, information (for example, reports and case studies), advice — and, in some cases, financial assistance — in the early stages of code development.

Endorser — In some circumstances, government departments or agencies can explicitly endorse a particular code or association that satisfies the provisions of a code. However, it is important that clear legal authority for such endorsements exists.

Provider of framework rules and regulatory support — Although voluntary codes may not be required by legislation, the existence of such codes may help to achieve regulatory objectives and could have regulatory implications. For example, in a regulatory enforcement action a company could point to its adherence to a voluntary code to help establish "due diligence." Conversely, failure to adhere to a voluntary code may assist in prosecutions. In some circumstances, a regulatory authority could insist on adherence to voluntary codes as a condition of issuing a licence, and enforcement and procurement policies can encourage voluntary code compliance. Consistent, rigorous law enforcement is an essential backdrop to the effective development and use of voluntary codes.

Government officials must assess their involvement in relation to the broader public interest. They must also be scrupulously open, fair and consistent in their dealings with all parties. Governments must not condone any activity that would lessen competition or otherwise contravene the *Competition Act* or other statute. Governments must also ensure that voluntary codes do not act as barriers to trade. Given that it could cost a department considerable money to help develop and monitor a voluntary code, it may want to conduct at

least a notional cost-benefit analysis of the initiative along the lines of the federal Regulatory Impact Assessment Statement.

As the code is developed, governments must remain flexible and willing to shift approaches if necessary. If evidence surfaces that a voluntary initiative is not working as intended, or that the public interest is at risk, governments should be prepared to act, taking legislative or enforcement actions if necessary.

Components of Effective Codes

Effective codes vary significantly but most contain the following key attributes.

A "plain language" statement of code objectives — Ideally, the entire code will be written in plain language so that everyone can read and understand it. However, in some cases — for example, when the code addresses highly technical matters and is intended for specialists – it may be impossible to avoid technical language. In all cases though, the objectives, at least, should be written in a simple, straightforward manner. A code that is scrutinized by a plain-language editor should be reviewed carefully to ensure that the final product retains the original meaning and key terms.

Clear, concise obligations — The heart of the code is the statement of commitments or standards that participants must meet. These obligations must be written in precise, unambiguous language so that they deliver the guidance required at the operational level. Otherwise, people may interpret them differently, which can frustrate those who apply the code, the intended beneficiaries and the individuals responsible for evaluating compliance. However, there is also value in writing obligations in a way that promotes operational flexibility. For example, rather than setting out in detail how an obligation should be met, the code should specify the performance result to be achieved.

A range of information-oriented provisions governing compliance — For fairness and credibility, the parties themselves and the greater affected community must have information about the state of compliance with code provisions and how non-compliance is being addressed. The code's information-related provisions should include some combination of self-reporting obligations for adherents, powers of monitoring, compliance verification or auditing, impact assessments and the ability to publicize data on compliance and non-compliance.

To ensure openness, fairness and honesty, it may be best to have community and NGO representatives involved in compliance verification. From the public's perspective, third-party verification offers more credibility than does self-reporting. Under the Responsible Care® Program of the Canadian Chemical Producers' Association, a combination of competitors, community and NGO representatives verify compliance. Meaningful compliance verification and auditing can take considerable time and energy on the part of third-party experts. For National Standards System standards, third parties such as certification organizations, quality registrars and testing laboratories accredited by the Standards Council of Canada can undertake compliance auditing.

Provisions creating positive inducements for parties to comply — Businesses are more likely to comply when adherence to codes attracts customers or offers privileges not available to others.

Examples of Positive Inducements

- The use of logos to signify membership in good standing and adherence to customer-oriented standards.
- Rating systems (such as the three–, two– or one-star method for rating accommodations).
- Plaques and awards for those who consistently meet or exceed code terms, whose operations have improved markedly or who have otherwise engaged in exemplary activity.
- Seminars, guest speakers, training sessions and publications.
- The Multiple Listing Service available to participating real estate brokers creates an inducement for brokers to comply with real estate board standards.

Provisions creating penalties for non-compliance — The ability to respond to non-compliance with appropriate penalties can induce compliance on the part of all adherents, instill notions of fairness, and enhance the credibility of the code in the eyes of the public. For penalties to work, the code should set out procedures for identifying breaches and hearing cases and opportunities to respond. Graded responses are also appropriate as they allow administrators to tailor the sanctions to the seriousness of the non-compliance.

Penalties can include negative publicity, fines, suspension or revocation of membership and withdrawal of certain privileges. The Ontario Press Council, for example, requires that decisions concerning complaints be published in the newspapers against which the complaints was made. The Ontario Real Estate Association levies fines. The Canadian Direct Marketing Association and the Canadian Chemical Producers' Association

revoke membership. In Australia, consumers who have been overcharged due to incorrect bar coding can get the product for free.

Dispute-resolution provisions — The ability to resolve complaints and respond appropriately to non-compliance in a fair, transparent, consistent manner will help to maintain and enhance the reputation and credibility of a code and its administrators. Effective dispute-resolution techniques can often help to preclude bad publicity and costly court cases. Graded responses — starting with, for example, low-profile attempts to resolve matters internally, moving to mediation (when a mutually selected third party helps disputing parties find a non-binding solution) and finally to arbitration (a binding third-party solution) — give parties the opportunity to avoid costly and adversarial public approaches. Litigation is a last resort.

Disputes tend to happen in two areas: between code adherents and code administrators, and between code adherents and the public. Different resolution approaches work best for different types of disputes. For example, if the dispute involves two code adherents or code adherents and administrators, an internal approach such as mediation might be best because both parties know the code well and mediation requires this level of knowledge. Disputes involving the public (for example, consumer complaints) might benefit from the involvement of an ombudsman because these individuals have the knowledge and ability to investigate and resolve complaints on behalf of the public.

The Canadian Competitive Telecommunication Association's customer service standards set out the role of an ombudsperson to address customer disputes. Formal decision-making tribunals are another option. This is the last resort mechanism provided by the Cable Television Standards Council. The tribunal consists of a neutral chair with tribunal experience, a cable television industry representative and a consumer representative. The judgments of each tribunal member are published and available to the public.

Whatever approach is adopted, the powers, duties and administrative structures underlying the dispute-resolution techniques should be fully set out in the code or in a subsidiary agreement to the code.

Periodic review and amendment — By building in progress reviews at predetermined intervals (for example, after two years and every three years thereafter) and the authority to amend terms, adherents and the public will see that the code's administrators are willing to improve the code as required. As everyone concerned becomes familiar with how a code works — or does not work — in practice and, as circumstances change, periodic reviews provide the opportunity to revise and strengthen the code to reflect the needs and concerns of affected parties. Depending on the code and the circumstances surrounding it, it is usually preferable that third parties, such as consumer groups, NGOs, outside auditors and evaluators, participate in the review.

Financing and commitment of key human resources — Administering the code — whether it be monitoring, reporting, publicity, dispute resolution or sanctioning — costs money. The code must explicitly set out adequate resources to carry out these tasks. Such provisions should authorize payment of NGOs and other outside parties that participate in code development and implementation and describe possible self-financing approaches such as levying dues and charging for the use of logos and materials, and for inspections, testing and training.

Effective Implementation of Voluntary Codes

A code must be properly implemented to influence behaviour as intended, to have the sought-after market and community impact, and to safeguard the reputations of participants and those who support it or contributed to its development. A poorly implemented code can prevent or delay necessary legislation. If necessary legislation is put off too long, deficient code implementation could lead to a public crisis that can result in quickly — and poorly — drafted statutes.

Poorly implemented codes can also confuse and frustrate the public, government officials, the community, clients and customers. A bad impression, once made, can be difficult to dispel. This can jeopardize later attempts to correct the code and could even affect new, unrelated measures. Codes that are not complied with can also have legal implications for code adherents and others. This section discusses the roles of code adherents, associations, affected parties, NGOs and government in implementation.

Phased-in Compliance

Ideally, everyone will eventually commit to the terms and conditions of the code. However, 100 percent sign-on at the beginning is usually not feasible and may not even be the best approach. Compelling all members of an association to comply immediately can result in the adoption of "lowest-common-denominator" terms and conditions. It is often useful to allow a transition or phase-in period in which only those members who want to sign on voluntarily, and have the required implementation capacity, adhere to the initial code. Once implementation experience and a critical mass are achieved, commitment can be made mandatory. This allows sector leaders to forge the way and the rest to follow when success and benefits have been demonstrated.

Implementation Roles
Code adherents

The main responsibility for the successful implementation of a code lies with the individual adherents. Several techniques are available to ensure that firms or organizations can achieve an appropriate level of implementation. One is to assign a senior manager to be responsible for developing a compliance plan. Another is to provide training and orientation to employees so that they know and carry out their responsibilities. As well, spot checks and audits can reveal problem areas before serious non-compliance occurs.

In the case of sector-wide codes, participating firms and organizations can notify each other of incidents of non-compliance. It is in their best interests to do so because the reputation of the entire sector can be at stake and notification of non-compliance helps keep the playing field even. The code for Australian fruit juice manufacturers, which allows firms to test competitors' claims of juice purity, is an example of a formalized system that, in effect, encourages companies to check up on the activities of their competitors. Peer pressure can also be exerted in the form of frank discussions among parties during which the reasons for non-compliance and possible solutions are explored.

Industry associations

An industry association involved in a code's implementation might consider developing a compliance policy that explains how, when and why it will carry out its responsibilities. The policy should be drafted in close consultation with all concerned to help preclude misunderstandings or surprises later. Associations might also develop separate but affiliated bodies to undertake specialized tasks.

NGOs, other affected parties and the public

NGOs, employees, clients, customers and members of the community can all play important roles in implementation. In many ways, these groups and individuals represent an extra set of "eyes and ears" for code participants, alerting them to incidents of non-compliance and even taking part in monitoring, compliance auditing and verification, and dispute resolution. This kind of involvement can enhance a code's credibility.

Third-party compliance verification is increasingly common in multijurisdictional codes pertaining to the treatment of workers. For input from NGOs, community representatives and others to work, code adherents must respect the expertise and perspectives provided (for example, taking appropriate action in response to concerns), giving credit when it is due (and not overstating it for public relations purposes), and remunerating investments of time, energy and resources.

Government

Governments can play an important role in code implementation. In some instances, non-compliance with codes may constitute a breach of federal or provincial law. For example, a firm that falsely claims to adhere to certain standards could be subject to enforcement actions under federal or provincial law. Failure to comply with codes pertaining to environmental, health and safety, consumer or labour protection laws could be factors in convicting organizations under regulatory laws if the non-compliance is based on a lack of due diligence.

The government's role also extends beyond the legal arena. For example, government officials can share their experiences and information concerning the implementation of other codes or how related regulatory schemes could be applied to improve the effectiveness of a voluntary instrument. Governments can also encourage compliance by recognizing code efforts in licences, compliance and enforcement policies, and procurement activities.

Private Law Implications

Non-compliance with voluntary codes may also have implications in terms of private law such as in actions in contract and tort. Private law suits can be brought by other firms or organizations, consumers or other members of the community. Failure to comply with a voluntary code can be taken as evidence that a firm or organization is not meeting industry standards and is therefore not exercising reasonable care or due diligence. In some circumstances non-compliance may also constitute evidence of breach of contract.

[1] Code developers may also find the Canadian Standards Association's *A Guide to Public Involvement* helpful. Back to text

[2] The next section of the Guide discusses the key components of a code. Back to text

[3] This material is drawn extensively from the Consumers' Association of Canada's *Consumer Interest Test for Alternatives to Regulation* and discussions with other non-governmental organizations. Back to text

[4] The NSS includes standards development organizations, certification and testing organizations, and registration organizations. Back to text

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