

Competition Bureau Seeks Comment on Confidentiality Bulletin

On August 30, 2005, the Competition Bureau released a new draft Information Bulletin on the communication and treatment of information under the *Competition Act* (the “Act”). The new draft Bulletin is intended to update the Bureau’s policies in light of amendments to the Act, international assistance treaties and enforcement policies since the last iteration of the Bulletin released in 1995.

Information provided to the Competition Bureau almost always includes confidential, commercially sensitive information. Section 29 of the Act protects the confidentiality of information provided to the Bureau, except to a Canadian law enforcement agency or “for the purposes of administration or enforcement of the Act”. Since the introduction of the 1995 Information Bulletin, there have been many changes in the landscape of Canada’s competition law and enforcement regime and many international developments that have created a degree of uncertainty regarding the Bureau’s view of the scope and application of section 29 and its ability to share information with foreign entities. For example, the treatment of information provided on a voluntary basis (added to section 29 in 1999) or by an applicant to the Bureau’s Immunity Program (introduced in 2000) was not specifically addressed in the 1995 Bulletin, nor were

the situations in which the Bureau would consider sharing information with a foreign enforcement authority.

The draft Bulletin is intended to remove uncertainty surrounding to whom, and in what circumstances, the Bureau would disclose a party’s confidential information. The draft Bulletin provides some elaboration on what the Bureau considers to be within the scope of disclosure for the “purposes of administration or enforcement of the Act” and under what circumstances it will consider sharing information with a foreign enforcement authority. However, the draft Bulletin also raises some additional concerns about the circumstances in which the Bureau considers it could disclose confidential information. For example, the draft Bulletin indicates that the Bureau could disclose information for the purposes of, among other things, eliciting additional information from customers, suppliers or competitors; making informal representations to a regulator (where the regulator agrees to maintain the confidentiality); and “assessing the accuracy or evidentiary value” of information. Further, the Bulletin does not indicate under what circumstances the Bureau would assert public interest privilege or other forms of privilege in response to requests from foreign or Canadian litigants, or in litigation to which the Commissioner or Attorney General is a party in the Courts or the Competition Tribunal.

The Bureau is seeking public comment on the draft Bulletin before December 2, 2005. For more information on how the new draft Bulletin may affect the treatment of your company's information or to participate in the consultation process, please contact Randy Hughes, Don Houston, Barry Zalmanowitz or any other member of the **FMC Competition Law Group**:

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