

Competition Bureau Clarifies Immunity Program Process and Disclosure Expectations

On October 17, 2005, Canada's Competition Bureau ("the Bureau") released a new Frequently Asked Questions (FAQ) about its successful Immunity Program for criminal competition offences. The FAQ partially codifies the informal procedures used since the inception of the Immunity Program ("the Program") in 2000 and gives additional guidance on the considerations employed by the Bureau when considering when immunity may be available and its cooperation expectations of Program applicants. The FAQ supplants the prior version released in 2003.

The Immunity Program, released in September 2000, has been a highly effective enforcement tool, encouraging early disclosure of competition offences that may otherwise be difficult to detect, such as international cartels. Under the Program, immunity from prosecution is available to the first party to disclose evidence of criminal activity of which the Bureau was either not aware or may not be in a position to effectively prosecute without cooperation from a participant in the illegal conduct. In practice, the procedures and considerations employed by the Bureau under the Program closely resemble those of the U.S. Amnesty Program. However, until now, many of these procedures were unwritten in Canada - raising uncertainty about the application of the Program, which can be a disincentive for potential applicants coming forward. The newly released FAQ codifies the procedures employed in the past and adds some new guidance to Program applicants. In particular, the new FAQ:

- Sets out the procedure for the first-in applicant to obtain a "marker" guaranteeing the applicant's place at the front of the line. The FAQ clarifies that only Bureau officials (and not the Attorney General) may grant a first-in marker and that

"no-names" hypothetical information is adequate to request a marker. In addition, the FAQ emphasizes the importance of providing precise product and sub-product definitions to ensure that the Bureau can do a proper search of its immunity marker database.

- Prescribes a new 30-day period from the date that a marker is requested for the delivery of an oral or written proffer, or as otherwise agreed with the Bureau. Where an applicant with a marker does not meet this timeline, the marker may be revoked;
- Sets out the process for delivering either an oral or written proffer adequate for the Bureau to recommend to the Attorney General that a Provisional Guarantee of Immunity (PGI) be granted to a Program applicant. The FAQ sets out the types of information the Bureau expects to receive in a proffer including:
 - a description of the parties involved in the conduct;
 - the product and geographic markets affected;
 - the time period of the illegal conduct;
 - a description of the industry involved, including pricing mechanisms and supply channels;
 - a description of the conduct and any monitoring mechanisms used by participants;
 - the effect of the conduct, including the volume of affected commerce and key Canadian customers;
 - a general description of the witnesses and records available to assist the Bureau in its investigation; and
 - whether and from which other international authorities leniency has been requested.

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This bulletin is designed to supply brief details of recent legislative or other initiatives of interest and some commentary. The summaries and comments provided are, of necessity, brief and should not be relied upon as legal advice. We encourage you to contact any of the lawyers listed for further details or advice in the context of a particular situation.

- Clarifies that the Bureau does not expect an applicant to demonstrate decisively that an “undue” lessening has occurred as a precondition to the Bureau recommending the grant of a PGI (although the Bureau does expect an applicant’s proffer to disclose adequate information to assess the potential anti-competitive effects); and
- Sets out the Bureau’s expectations on the timing of cooperation obligations, including witness interviews (as soon as possible) and documentary production (complete within 6 months).

The FAQ does not add any more guidance on when the Bureau would consider recommending that a PGI or grant of full immunity be revoked. In addition, the FAQ indicates that the exceptions to the policy of non-disclosure of the identity of, or information obtained from, a Program applicant are currently under review. At present, the FAQ indicates that the Bureau will only consider disclosure where the information is otherwise made public, where the applicant consents and the information is necessary for enforcement of the *Competition Act*, to prevent the commission of a serious criminal offence, or where otherwise required by law.

[Click here for a link to the new FAQ.](#)

FMC’s Competition Group has extensive experience representing Program applicants and those implicated in Competition Bureau and international cartel investigations. For further information, please contact Randy Hughes, Don Houston, Barry Zalmanowitz or any other member of the [FMC Competition Group](#).

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