

Immunity Program Responses to Frequently Asked Questions

Introduction

The Competition Bureau (the Bureau) released its revised Information Bulletin Immunity Program Under the Competition Act (the Bulletin) in October 2007.

The Bulletin explains the policy and procedures relevant to a party's application for immunity from prosecution for criminal competition offences under the Competition Act (the Act). The Bulletin describes the current practices of the Bureau and explains the Bureau's role in the immunity process. The Bulletin also sets out the conditions under which the Bureau will recommend that the Director of Public Prosecutions of Canada (DPP) grant immunity, as well as the process used in such cases. The revised Bulletin replaces the one published in 2000.

The original Bulletin was supplemented in 2003 by a series of Frequently Asked Questions (FAQs) published on the Bureau Web site. These FAQs were expanded in a new series in 2005. The following Responses to Frequently Asked Questions are the latest update, to be read in conjunction with the revised 2007 Bulletin. The following FAQs replace the 2005 FAQ series and include additional topics and further clarifications as to the application of the Immunity Program. The FAQs are divided into categories that reflect the steps in an immunity application as set out in Part E of the Bulletin.

Immunity is most often sought and granted in the case of a conspiracy (also known as a cartel). While the Immunity Program applies in the case of other criminal competition offences under the Act such as false or misleading representations, bid-rigging and price maintenance, many of the questions below deal with a conspiracy situation. The response to question 22 provides specific information relating to immunity for false or misleading advertising offences, including telemarketing and other forms of mass marketing fraud.

This document does not give legal advice. Readers should refer to the Act when questions of law arise and obtain private legal advice if a particular situation causes concern. The Bureau may choose to depart from the approach set out in this document in exceptional circumstances.

Step 1: Initial Contact

Placing a Marker

1. What is a marker?

A "marker" is the confirmation given to an immunity applicant that it is the first party to approach the Bureau requesting a recommendation of immunity with respect to criminal activity involving a particular product. The marker guarantees the applicant's place at the

front of the line as long as the applicant meets all other criteria of the Immunity Program. The applicant then has a limited period of time, usually 30 days, to provide the Bureau with a detailed statement describing the illegal activity, its effects in Canada and the supporting evidence. This statement is known as a “proffer” and is described in more detail in the responses to questions 15, and 17 through 23.

2. For what offences is a marker available?

A party may request a marker for anti-competitive activities subject to sanction under the criminal competition provisions of the Act. Offences described in sections 45 to 51 and section 61 of the Act, including conspiracy (sections 45 and 46), bid-rigging (section 47) and price maintenance (section 61), are handled by the Criminal Matters Branch. False or misleading representations and deceptive marketing practices (sections 52 through 55.1) are handled by the Fair Business Practices Branch.

3. Can I request a marker for an obstruction or destruction of records offence?

No. A marker, and subsequent immunity under the Bureau’s Immunity Program, is not available for the offences of obstruction, destruction of records or things, or any other offence under the Act that is not a competition offence as described in the response to question 2, above. Instances of obstructive behaviour arising in relation to activity for which immunity is sought should be brought to the attention of the Bureau as soon as possible. The Bureau will determine on a case by case basis whether a recommendation of prosecution to the DPP is warranted for the obstructive behaviour in those cases.

4. Who can request a marker?

An individual or a business organization can request a marker. In the Bulletin, the terms business organization and company are used interchangeably. The Bureau may consider not-for profit organizations and trade and professional associations as business organizations.

5. Can I tell others about my marker request or immunity application?

As set out in paragraph 17 of the Bulletin, the Bureau requires that parties keep their immunity applications confidential. An immunity applicant shall not disclose its application for a marker and subsequent immunity, or any related information, to a third party unless consent is obtained from the Bureau or the DPP. The only exceptions occur when the application is made public by the Commissioner or the DPP or when the applicant is required by law to disclose the information. When an applicant believes that disclosure is required by law, that applicant shall give notice to and consult with the Bureau and the DPP on how to protect the interests of the investigation in light of the disclosure requirement. The party shall give this notice as soon as it becomes aware of the disclosure requirement.

Confidentiality helps to ensure that the integrity of the Bureau's investigation is maintained, that evidence is not destroyed, and that targets of the investigation do not become prematurely aware of investigative steps.

6. Are joint requests for markers, and subsequent immunity, accepted?

Inquiries have been made as to whether two or more parties can jointly request immunity under the Immunity Program.

The Bureau will not consider joint requests: only one party per cartel will be granted immunity under the Immunity Program. The Bureau may make an exception in the case of a joint request from companies that are affiliated, as defined in subsection 2(2) of the Act.

7. Who should a party contact to request a marker?

Markers are given by either the Senior Deputy Commissioner of Competition, Criminal Matters, or the Deputy Commissioner of Competition, Fair Business Practices. The response to question 2, above, describes the offences that are handled by each branch. Contact information is provided at the end of this document.

If contacting the Bureau by telephone, an applicant should indicate that it is making a marker call. The applicant should take care to ensure that all information is clearly stated and that it and the Senior Deputy Commissioner or Deputy Commissioner are in agreement that a marker has been requested, on the time of the request and on the description of the relevant product. The Bureau will advise the applicant as soon as possible, by telephone, and usually within a few days, whether the requested marker is available to the applicant.

8. Do counsel in the Office of the DPP or the Department of Justice grant markers?

No. Neither counsel in the office of the DPP nor counsel in the Department of Justice accept marker calls or provide markers to immunity applicants. Counsel will forward any marker call they receive to the Bureau. Applicants cannot rely on contact with counsel as establishing a marker. Markers are only granted by the Senior Deputy Commissioner, Criminal Matters, and the Deputy Commissioner, Fair Business Practices.

9. Why is it important to be "first-in"?

The Bureau will grant a marker, with respect to particular conduct, only to the first party to request immunity. Subsequent applicants may seek another form of leniency, such as a reduction in sentence, but will not be eligible for a recommendation of immunity by the Bureau to the DPP unless the first-in party ultimately does not qualify.

It is the Bureau's view that by maintaining the first-in approach it encourages parties to apply for immunity as soon as possible and not wait for their co-offenders before

reporting an illegal activity to the Bureau. Parties should come forward as soon as they believe they are implicated in an offence, so as to ensure their status as first-in to qualify for immunity.

10. If a party is unsure that an offence has been committed, or what products are involved, should it request a marker anyway?

Yes. The Bureau encourages parties to come forward and request a marker as soon as they believe they may be implicated in an offence. If a party later determines that it was not involved in an offence, the party should notify the Bureau and withdraw its marker request. In situations where an applicant provides insufficient information in a proffer that it committed an offence, the Bureau will make no recommendation to the DPP as to a grant of immunity and will advise the party of its decision to cancel the party's marker.

11. Is it true that all immunity cases are international cases?

No. To date, the majority of immunity applications made to the Bureau involve international conspiracies; however, the Immunity Program applies equally to domestic conspiracies and the Bureau has recommended immunity in respect of domestic cartels. The Bureau, likewise, has recommended immunity in respect of deceptive practices that target both the domestic and international markets.

12. What kind of information is the Bureau looking for at the marker stage?

The Bureau requires sufficient information to determine whether an immunity applicant is first-in under the Immunity Program. It does this by comparing the product description received to information in its marker database and by ensuring that no other party has already requested a marker for the same conduct. For this reason it is important that the applicant, or its legal representative, provide a precise product definition including a description of any sub-products covered by the marker request. Where more than one applicant requests a marker on similar activity, the Bureau may require information regarding the nature of the criminal offence, the geographic market, or the other parties involved to assist it in determining if a marker is available.

13. Can the information provided be hypothetical?

Yes. An applicant may provide hypothetical information at the marker stage and is not required to reveal its identity in order to obtain a marker. At this stage, information is often provided by an applicant's legal representative. However, once a marker is received the party will be expected to identify itself so that the Bureau can prepare for the proffer and begin its preliminary investigation.

14. Can the Bureau cancel a marker?

Yes. If an applicant who has obtained a marker fails to provide a proffer within 30 days, and the Bureau and the applicant have not agreed to extend the deadline, as described in

the response to question 18, the Bureau may cancel the marker and grant another party a marker. The Bureau may also cancel a marker if the applicant fails to meet any of the other requirements for immunity set out in Part C of the Bulletin.

The Bureau's decision to cancel a marker will be made only after serious consideration of all factors and after notifying the applicant.

Step 2: Proffer

15. What is a proffer?

After placing a marker an applicant must provide the Bureau with a statement known as a proffer. In a proffer, an applicant describes in detail the illegal activity for which immunity is sought, its effect in Canada, and the supporting evidence. Proffers are typically hypothetical and are generally provided by an applicant's legal representative.

16. What happens after a proffer has been provided?

After receiving and considering a proffer, the Bureau will present the information to the DPP with a recommendation as to whether the DPP should provide the applicant with an immunity agreement. The DPP has the final independent authority to decide if it will enter into an immunity agreement with an applicant. The DPP's policy on immunity is articulated in the Federal Prosecution Service Deskbook.

17. When should a proffer be made?

An applicant is required to provide the Bureau and the DPP with complete, timely and ongoing co-operation, at its own expense, throughout the Bureau's investigation and any subsequent prosecution. A party should make a proffer as soon as possible after receiving its marker. The Bureau typically requires an applicant's proffer within 30 days of the initial marker contact. Timing is usually discussed during the marker call or shortly thereafter, and a schedule is set for providing the information. The Bureau may require the applicant to make its proffer earlier than the end of the 30-day period.

Delay in providing a proffer can affect other steps in the Bureau's investigation, such as a search or co-operation with another jurisdiction, where timing can be critical.

18. What if an applicant cannot meet the 30-day deadline? Will the marker be cancelled?

If an applicant does not believe it can produce its proffer within 30 days, this must be communicated to the Bureau as soon as possible after the marker call, together with reasons for the delay. The Bureau will decide whether the delay is reasonable and, where appropriate, establish a schedule for delivery of the proffer. A delay may be warranted in complex cases, particularly where multiple jurisdictions are involved and information is difficult to gather or where a key witness is ill or otherwise unavailable. The Bureau will

not accept lengthy delays solely because an applicant has commitments arising out of immunity applications in other jurisdictions. Parties should alert the Bureau to anticipated delays as early in the process as possible to avoid harm to other steps in the Bureau's investigation.

The Bureau's decision to cancel a marker will be made only after serious consideration of all factors and after notifying the applicant.

19. What kind of information should be provided at the proffer stage?

At the proffer stage an applicant must co-operate fully with the Bureau. It should provide details of the illegal activity for which immunity is sought and all the information that it can, relating to that activity. Accuracy is critical; the Bureau relies on the information provided to assess the immunity application and to pursue its investigation of other participants in the alleged offence.

The Bureau does not require exhaustive information at this stage but will not accept a bare outline of the conduct or speculation as to an applicant's role. Even if an applicant's role was minor, the Bureau expects to learn details of that role and to gain a clear understanding of what information each witness can provide about the conduct. Information should be as complete and accurate as possible and reported with candour and in a spirit of co-operation.

Topics that should be covered in a proffer include those set out below. Not all of these topics will be relevant to every offence. For example, evidence of an undue lessening of competition is required only in the case of a conspiracy. Other information, such as the use of targeted lists by telemarketers, is likely to be relevant only in the context of false or misleading representations and deceptive marketing practices. This list is not intended to be exhaustive and the information required will depend on the facts of each particular case.

The Parties:

- a general description of the applicant and the other parties implicated in the conduct;
- ownership structures and affiliations;
- the applicant's share of, and role in, the market;
- membership in, or involvement with trade or other associations;
- nature and level of involvement in the offence;

The Product

- physical and technical characteristics of the product;
- quality claims;
- end use of the product;

The Industry

- a general description of the industry and how it functions;
- how pricing in the industry works;
- the regulatory framework;
- the existence and nature of contracts;
- how the product is supplied;
- customer or supplier countervailing power;
- use of targeted lists by telemarketers;

Market Definition (product and geographic)

- other market participants (domestic or foreign) and their market shares;
- a description of the key customers in Canada;
- product substitutes and their price levels (including transportation costs);
- barriers to entry into the market;
- cost for a customer to switch to an alternate product;
- geographic locations of sellers and customers;

The Conduct

- a description of the conduct;
- the time period of the conduct;
- the geographic scope of the conduct;
- the representations involved and the medium;
- monitoring or enforcement measures related to carrying out the offence;
- set out in writing;
- whether others continue to engage in the conduct;
- measures taken to hide identity;
- measures taken to launder money;
- re-loading (or re-victimizing) customers;
- selling of customer lists;
- targeting vulnerable groups;
- abusive and threatening behaviour towards consumers;

Impact of the Conduct

- the volume of commerce involved;
- pricing and other effects;
- whether customers are aware of the conduct or have complained about it;

Evidentiary Process

- a general description of witnesses that the applicant believes could testify about the conduct and the anticipated nature of their evidence;

- identification of individuals that the applicant believes could assist with the investigation;
- records available to the applicant that provide evidence of the conduct;
- any records or witnesses that are unavailable and the reasons for the unavailability;

International Issues

- whether an application for immunity has been made, or is anticipated, in other jurisdictions.

20. What is undueness in a conspiracy case? Do I have to show undueness in order to qualify for immunity?

Section 45 of the Act prohibits agreements that prevent or lessen competition unduly or enhance prices unreasonably. A conspiracy must meet the threshold of undueness or unreasonableness before it can be considered a criminal offence. It is the combination of market power and behaviour likely to injure competition that makes a lessening of competition undue. The determinants of market power include such factors as market shares, the number of competitors and the concentration of competition, barriers to entry, geographical distribution of buyers and sellers, differences in the degree of integration among competitors, product differentiation, countervailing power, and cross-elasticity of demand.

Market information provided by an applicant at the proffer stage enables the Bureau to assess the likely impact of the arrangement and whether it has caused an undue lessening of competition. Applicants are required to address the issue but are not required to demonstrate decisively to the Bureau that an undue lessening of competition has occurred.

In contrast to the conspiracy offences under the Act, certain offences, notably bid-rigging, price maintenance and false or misleading representations, do not require that an undue lessening of competition be shown.

21. Does the Bureau provide opinions on whether ongoing or past conduct amounts to an “undue lessening”?

No. The Immunity Program is a mechanism for reporting illegal activity and is not designed as a means for the Bureau to provide advice or opinions about whether ongoing or past conduct contravenes the Act. Similarly, written opinions (binding opinions of the Commissioner issued pursuant to section 124.1 of the Act) are not available for conduct that has already commenced.

If a party wants to seek advice on the applicability of the Act to proposed business conduct it may request a written opinion from the Commissioner. Written opinions are binding on the Commissioner if all the material facts have been submitted and those facts

are accurate. The fees for written opinions are set out in the Bureau's Fee and Service Standards Handbook.

22. What is materiality in a false or misleading case? Do I have to show materiality in order to qualify for immunity?

Section 52 of the Act prohibits making a representation to the public for the purpose of promoting a product or business interest that is false or misleading in a material respect. Similarly, section 52.1 prohibits such representations from being made while telemarketing. A false or misleading representation must be material before it can be considered an offence. Generally stated, a representation is material if it could lead a person to a course of conduct that, on the basis of the representation, he or she believes to be advantageous.

At the proffer stage, applicants are required to provide information regarding the representation made, the manner in which it was conveyed and the product or business interest being promoted. Although not required to demonstrate decisively to the Bureau that the false or misleading representation was material, applicants are required to provide all information that addresses the issue. The Bureau will assess the general impression created by the representation and whether it was material.

23. Are both written and oral proffers accepted?

Yes. The Bureau accepts both written and oral proffers. In oral proffers Bureau officers take notes of the information provided. Applicants should take special care in an oral proffer to ensure that all information is clearly stated and that counsel for the applicant and the Bureau officers are in agreement on the nature of the information provided. Accuracy is critical as the Bureau relies on the information to assess the immunity application and to pursue its investigation of other participants in the alleged offence. As described in the response to question 13, proffers typically are hypothetical and are generally provided by an applicant's legal representative.

Step 3: Immunity Agreement

24. What is an immunity agreement?

An immunity agreement is an agreement between the DPP and an immunity recipient setting out the terms and conditions under which the DPP grants the applicant immunity from prosecution. The agreement sets out the applicant's obligations to provide full disclosure and co-operation throughout the Bureau's investigation and any subsequent prosecutions. It states who is covered by the agreement, how information provided by the immunity recipient will be treated and under what circumstances the agreement can be revoked.

Both the applicant and the DPP must sign the Agreement. Unofficial sample corporate and individual template agreements are available on the Bureau Web site. A sample

template agreement can also be obtained from the office of the DPP and will soon be available online in the Federal Prosecution Service Deskbook

25. When is the immunity agreement signed?

The Bureau must be satisfied that the applicant meets the requirements of the Immunity Program. After receiving sufficient information from the applicant, typically in the form of a proffer, the Bureau will present the relevant information to the DPP with a recommendation as to whether or not the DPP should grant immunity to the applicant. In some cases, the Bureau may request an interview with one or more witnesses, or an opportunity to view certain documents, prior to recommending that the DPP grant immunity. If the DPP accepts the Bureau's recommendation, it will sign an immunity agreement with the applicant. The DPP has independent discretion in these matters.

Step 4: Full Disclosure

26. What information is an applicant required to provide the Bureau after entering into an immunity agreement?

As set out in paragraph 17 of the Bulletin, an immunity agreement requires that an applicant provide complete, timely and ongoing co-operation throughout the course of the Bureau's investigation and any subsequent prosecutions.

After a party enters into an immunity agreement with the DPP it must complete the full disclosure process. The Bureau requires full, complete, frank and truthful disclosure of all non-privileged information, evidence or records in the applicant's possession, under its control or available to it, wherever located, that in any manner relate to the anti-competitive conduct. Parties will be expected to provide all documents and other evidence to the Bureau on a timely basis and witnesses will be expected to be interviewed at the Bureau's request. There must be no misrepresentation of any material facts.

Topics addressed will generally be the same as those addressed at the proffer stage (see the responses to questions 19, 20 and 22, above) but will be covered in greater detail. The Bureau will want to view and obtain copies of documents and to interview witnesses, at times under oath and recorded on video or audio-tape. The full disclosure process can be an expensive and time consuming process and the applicant must be prepared to dedicate the appropriate resources to ensure that the Bureau is able to conduct an expeditious and thorough investigation.

Companies are expected to take all lawful measures to secure the co-operation of current directors, officers and employees and to facilitate their ability to appear for interviews and to provide testimony in judicial proceedings. Companies must also take all lawful measures to secure the co-operation of former directors, officers and employees as well as both current and former agents. Before communicating any information regarding the investigation to a third party (either a current agent or a former director, officer,

employee or agent) the company must seek the consent of the Competition Bureau or the DPP.

Accuracy of the information provided is critical. The Bureau relies on this information to pursue its investigation of other participants in the alleged offence and a lack of co-operation can jeopardize the Bureau's investigation where time is of the essence. A party who provides false or misleading information to the Bureau pursuant to the terms and conditions of an immunity agreement can face revocation of that agreement. The party could also face a criminal charge of obstructing a Bureau inquiry or examination under section 64 of the Act or of destroying or altering records under section 65 of the Act. Providing false or misleading information can also lead to charges, including perjury or obstruction, under the Criminal Code.

27. How soon do witnesses and documents need to be made available after immunity is granted?

An immunity applicant is required to provide complete, timely and ongoing co-operation to the Commissioner and the DPP, at its own expense, throughout the Bureau's investigation and any subsequent prosecutions. This means that the applicant must make witnesses and documents available as quickly as possible. The Bureau will often want to schedule interviews with key witnesses very soon after an immunity agreement is signed. Relevant documents may be used in witness interviews and, when requested by the Bureau, should be provided to the Bureau by the applicant at least two weeks before an interview. Typically a schedule for post-proffer production should be established early in the process and production of information completed within this period, normally targeted to within a six-month time line. The Bureau will not accept lengthy delays or the non-availability of witnesses based on other commitments, including commitments that arise from immunity applications in other jurisdictions.

The objective of the Immunity Program is to stop illegal activity by the applicant and to obtain information that can be used to detect, investigate and prosecute other participants in the illegal activity. Timing is critical to the Bureau's enforcement interest and in particular to locating evidence as quickly as possible and co-ordinating investigatory steps with other jurisdictions.

28. What happens if a witness refuses to co-operate with the Bureau's investigation?

A witness that refuses to provide complete, timely and ongoing co-operation with the Bureau's investigation may be "carved out" of the immunity agreement. Paragraphs 20 and 21 of the Bulletin provide that current directors, officers and employees will qualify for the same grant of immunity as their employer if they provide complete, timely and ongoing co-operation. Current agents and former directors, officers, employees and agents may also qualify on a case by case basis. The co-operation required from such individuals, as set out in paragraph 17 of the Bulletin, includes, among other things, an obligation to provide full, complete, frank and truthful disclosure of all non-privileged information, evidence or records in the applicant's possession, under its control or

available to it, wherever located, that in any manner relate to the anti- competitive conduct. There must be no misrepresentation of any material facts.

No current director, officer, employee or agent will be carved out of an immunity agreement for any reason other than a failure to admit its knowledge of or participation in the conduct or a failure to co-operate in a complete, timely and ongoing manner.

29. Are witnesses required to travel to Canada?

Witnesses for an immunity applicant must travel to Canada or another mutually convenient location to be interviewed by the Bureau unless special circumstances justify a different approach. Business organizations applying for immunity are required to cover their own expenses and the expenses of witnesses travelling on their behalf.

30. Can the information I provide as full disclosure be used against me?

As described in paragraph 26 of the Bulletin, the full disclosure process will be conducted on the understanding that neither the Bureau nor the DPP will use the information against the applicant unless the applicant fails to comply with the terms and conditions of its immunity agreement. An applicant's continuing obligations under an immunity agreement are described above in the response to question 26.

31. Can an immunity agreement be revoked?

Yes. As set out in Part F of the Bulletin, the failure of a party to comply with any of the terms and conditions in its immunity agreement may result in revocation of the agreement.

Where the Bureau becomes aware that an applicant does not meet the terms and conditions set out in its immunity agreement, the Bureau may make a recommendation to the DPP that the applicant's immunity be revoked. The Bureau will in the normal course discuss the situation with the applicant and provide a reasonable opportunity to the applicant to address any shortfalls in its conduct before making a recommendation to the DPP.

As a result of the Bureau's recommendation, or on its own initiative, the DPP may revoke an immunity agreement where the applicant does not meet all of the terms and conditions of that agreement, and take appropriate action against the party. Where the DPP determines that a party has failed to fulfil the terms and conditions set out in its immunity agreement, the DPP will provide fourteen (14) days written notice to the party before revoking the immunity agreement.

The DPP's policy on immunity, including the approach it will take when an agreement is breached, is set out in the Federal Prosecution Service Deskbook.

32. If a company loses immunity, will its directors, officers, employees and agents who are covered by the agreement also lose their immunity?

Revocation of immunity will only affect the party that does not co-operate or that otherwise fails to comply with the Immunity Program requirements. A company's immunity can be revoked while its co-operating directors, officers, employees or agents who were covered retain their protection. Likewise, an individual's immunity can be revoked while the individual's employer company remains covered.

Other

33. To qualify for immunity I am required to stop participating in the conduct in question but doing so may alert other participants that I've approached the Bureau, and affect the Bureau's investigation. What should I do?

Applicants are required to stop participating in the illegal activity in order to qualify for immunity. At the earliest opportunity, applicants should raise with the Bureau any concerns they have about what they can or can not do to comply with this requirement, and the possible impact their non-compliance could have on the Bureau's investigation.

34. Securing the co-operation of directors, officers, employees and agents may alert other participants in the illegal activity that I've approached the Bureau and affect the Bureau's investigation. What should I do?

Companies should conduct their internal investigation of the illegal activity and secure the co-operation of potential witnesses in a manner that is consistent with their confidentiality obligation under their immunity agreement. At the earliest opportunity, an applicant should raise with the Bureau and the DPP any concerns they have about confidentiality and the possible impact this could have on the Bureau's investigation.

35. How do you determine if a party has coerced others to be party to the illegal activity?

Paragraph 15 of the Bulletin states that to qualify for immunity the party must not have coerced others to be party to the illegal activity.

The Bureau will only disqualify a party where there is evidence of clear coercive behaviour. In particular, where there is evidence that the party pressured unwilling participants to be involved in the offence, the party will not qualify for immunity. The coercion may be either express or implied.

36. When would a party be disqualified under paragraph 16 of the Bulletin as the only party involved in the offence?

Paragraph 16 of the Bulletin provides that where the party requesting immunity is the only party involved in the offence it will not be eligible for immunity.

Certain offences under the Act are carried out by only one business organization. This may occur in price maintenance cases where one company attempts to influence upward or discourage the reduction of the resale price by threat, promise, agreement or other like means. In this instance only one company has committed an offence. Likewise, the offence of false or misleading representations may be committed by one business organization and be intended for the sole benefit of that organization. These offenders are ineligible for immunity under paragraph 16 of the Bulletin. While a business organization acting alone may not be eligible for immunity as a result of this provision, its directors, officers or employees are encouraged to apply for individual immunity.

A grant of immunity to a sole participant in an offence is of no benefit to the Bureau as there is no other party to investigate. Individuals employed by an organization ineligible under paragraph 16 may be separately eligible under the Immunity Program as their admissions and evidence may further an investigation of the organization. They are encouraged to apply for immunity through separate counsel.

37. What previous offences must be disclosed?

Paragraph 17 of the Bulletin provides that throughout the course of the Bureau's investigation and subsequent prosecutions, the party must provide complete, timely and ongoing co-operation. In particular, subparagraph 17(b) requires that the party must reveal to the Commissioner and the DPP any and all conduct of which it is aware, or becomes aware, that may constitute an offence under the Act in which it may have been involved. A number of questions have been raised regarding what an applicant is required to disclose pursuant to this provision.

The Bureau requires immunity applicants to disclose all competition offences under the Act of which they are aware and that relate to any product. Applicants will be expected to exercise reasonable due diligence in determining whether they have been involved in other criminal competition offences. Disclosure of the offences should be made as soon as possible after an immunity application and will be required before the Bureau recommends that the DPP sign an immunity agreement with the applicant. Offences uncovered after the signing of the agreement must be brought to the attention of the Bureau and the DPP at the earliest possible time. The Immunity and Immunity Plus Programs may apply to the additionally disclosed conduct. For a description of the Immunity Plus Program see the response to question 38, below.

The Bureau may recommend increased penalties for criminal competition offences that the party should have discovered through its due diligence efforts and disclosed. Revocation of immunity may be warranted where the party knew of and failed to disclose those other offences. The Bureau will also recommend increased penalties in these circumstances to address the multiple offences as an aggravating factor in sentencing.

Applicants should also anticipate that witnesses will be asked about any criminal activity, under any legislation, that can reasonably be expected to impact their credibility as a witness. Before offering immunity it is essential that counsel for the DPP be satisfied that

the applicant has disclosed all the information likely to affect its credibility. Such disclosure may relate to criminal activity in Canada or abroad.

Paragraph 17 of the Bulletin requires parties to provide full, complete, frank and truthful disclosure and prohibits misrepresentation of any material facts. A party who provides false or misleading information to the Bureau in the context of an immunity application and performance of related obligations may be considered ineligible for immunity and face revocation of an immunity agreement. It could also face a criminal charge of obstruction under section 64 of the Act, or of destroying or altering records under section 65 of the Act. Providing false or misleading information under oath can lead to charges, including perjury or obstruction, under the Criminal Code. Applicants remain at risk of being prosecuted for any undisclosed criminal offences and will not be eligible for either the Immunity or the Immunity Plus Program (described below) in relation to that conduct.

38. What is Immunity Plus?

Parties which are not first to disclose conduct to the Bureau may nonetheless qualify for immunity if they are first to disclose information relating to another offence. This concept is known as "Immunity Plus." Immunity Plus may be available in situations such as the following: Company ABC is not the first to disclose the pencils cartel to the Bureau and therefore does not qualify for immunity for pencils. However, ABC does disclose information relating to a different offence unknown to the Bureau, one involving a different product, for example, a cartel with respect to erasers.

ABC will be granted immunity for the cartel on erasers, subject to compliance with the requirements set out in the Immunity Program. If ABC pleads guilty to the cartel related to pencils, the value of ABC's contribution to the investigation of the pencils cartel and the disclosing of the eraser cartel will be recognized by the Bureau and the DPP in their sentencing recommendations with respect to the pencils cartel.

Immunity Plus encourages targets of ongoing investigations to consider whether they may qualify for immunity in other markets where they compete. Although a company may not qualify for immunity for the initial matter under investigation, the value of its assistance in a second matter can lead to immunity for the second offence and a reduction (the "plus") in the calculation of the recommended sentence for its participation in the first offence. Immunity Plus is aimed at encouraging companies already under investigation to report the full extent of their illegal activities and put all competition law matters behind them.

39. Will the identity of an immunity applicant be disclosed to the public?

The Bureau treats the identity of an immunity applicant as confidential. Paragraph 31 of the Bulletin states that the only exceptions to this policy are where:

- a. disclosure is required by law;

- b. disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
- c. disclosure is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- d. the party has agreed to disclosure;
- e. there has been public disclosure by the party; or
- f. disclosure is necessary to prevent the commission of a serious criminal offence.

The Bureau also treats as confidential information obtained from a party requesting immunity, subject only to the exceptions listed above, or where disclosure of such information is otherwise for the purpose of the administration or enforcement of the Act. Typically, the identity of an immunity applicant will remain confidential until charges against other participants in the offence are laid and disclosure of the Crown's case to the accused is required. Applicants should be aware, however, that their identity may be disclosed before charges are laid if the Bureau relies on their evidence in an application to a Canadian court for a search warrant, production order or judicial authorization of another investigative measure. Recourse to search warrants and production orders, among other things, can be of utmost importance to an investigation. In order to obtain court authorizations, the Bureau must provide the court with information that there are reasonable grounds to believe that an offence has been, or will be committed. The Bureau will rely on the information provided by the immunity applicant to establish these grounds.

The Bureau will not allow an applicant's interest in maintaining confidentiality to jeopardize the Bureau's ability to effectively enforce the Act. However, the Bureau will take all reasonable steps to ensure that this type of early disclosure does not occur, except where absolutely necessary. The Bureau will draft applications to the courts for authorization of investigative powers (referred to as "Informations to Obtain" or "ITOs") in a manner designed to secure the protection of an immunity applicant's identity, unless the Bureau is of the view that such drafting would not reveal sufficient grounds required to obtain the authorization requested. If the identity of the immunity applicant cannot be kept confidential when the Bureau applies for such authorization, it will request that the ITO, or relevant portion thereof, be sealed until charges are laid. If a party challenges the sealing order before a court in order to access the ITO, the Bureau will resist the disclosure of the immunity applicant's identity and provide a redacted version of the ITO, with the identity of the immunity applicant kept confidential, unless the court orders otherwise. Where it appears likely that disclosure is unavoidable, the Bureau will advise the immunity applicant as soon as possible.

40. Will information provided by an immunity applicant be shared with foreign law enforcement agencies?

As set out in paragraph 33 of the Bulletin, the Bureau will not share the identity of an immunity applicant, or the information provided, with a foreign law enforcement agency unless the immunity applicant provides a waiver giving the Bureau consent to do so. It is important to note that this confidentiality protection is an added benefit to being first-in

under the Immunity Program. However, as part of an applicant's ongoing co-operation, the Bureau will expect a waiver allowing communication of information with jurisdictions to which the applicant has made similar applications for immunity or leniency.

Where a company has not applied for or does not qualify for immunity, to the extent that disclosure to a foreign agency is permissible by law, the Bureau will not agree to conditions, for example, in plea agreements that limit its disclosure to another anti-trust agency. To strengthen its ability to address cross-border conduct aimed at Canadian markets, Canada has entered into international agreements that provide for mutual legal assistance among anti-trust enforcement agencies world-wide. These agreements generally provide that information may be exchanged, subject to domestic laws. Agreeing to conditions that limit the disclosure of information to other agencies would cast doubt on our commitment to co-operate with other enforcement agencies. More important, such conditions could hamper our co-operation efforts in all of our cross-border cases. 41. Can foreign counsel represent immunity applicants before the Bureau or must a Canadian lawyer be involved?

Typically, a Canadian lawyer represents the applicant in its dealings with the Bureau although foreign counsel may be present at certain meetings. When in Canada, foreign counsel must ensure that they are acting in accordance with the requirements of the relevant provincial bar association.

Contact Information

Anyone wishing to apply under the Commissioner's Immunity Program may contact:

Senior Deputy Commissioner, Criminal Matters

Tel: 819-997-1208

Fax: 819-934-3602

Deputy Commissioner, Fair Business Practices

Tel: 819-997-1231

Fax: 819-953-4792

As set out in Appendix I of the Immunity Bulletin, offences described in sections 45 to 51 and section 61 of the Act, including conspiracy (sections 45 and 46), bid-rigging (section 47) and price maintenance (section 61), are handled by the Senior Deputy Commissioner, Criminal Matters. False or misleading representations and deceptive marketing practices (sections 52 through 55.1) are handled by the Deputy Commissioner, Fair Business Practices.

Mailing Address:

Competition Bureau

Place du Portage I

50 Victoria Street

Gatineau, Québec
K1A 0C9