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Canadian Competition Bureau Releases Revised Immunity Program for Consultation

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The Competition Bureau released a revised version of its Immunity Program (Revised Immunity Program) for public consultation on October 26, 2017. The Immunity Program is intended to provide incentives to businesses and individuals to report conduct that constitutes an offence under the *Competition Act*. The consultation period ends on December 29, 2017.

The last time the Immunity Program was updated was more than seven years ago, in 2010, although the Immunity Program's "Frequently Asked Questions" (FAQs) were updated in 2013.

The impetus for the Revised Immunity Program likely stems in part from the Bureau's recent significant defeats in certain criminal cases that involved information obtained under the Immunity Program (see our [2016 Top Competition and Foreign Investment Review Trends](#) for further details). In press materials announcing the release of the Revised Immunity Program, the Bureau described the changes as necessary to allow the Bureau and the Crown to be "prosecution ready." It appears, however, that the Bureau believes that in order to be prosecution ready, it must impose stronger cooperation and disclosure obligations upon immunity applicants under the Revised Immunity Program.

In addition to other changes such as the integration of the Immunity Program FAQs into the description of the program itself, the Revised Immunity Program includes the following key changes:

- **Recording of Proffers.** In a practice similar to that of the U.S. Department of Justice, the Bureau has to date touted a "paperless proffer" system, whereby counsel to an immunity applicant can deliver a proffer orally. However, under the Revised Immunity Program, Bureau staff will continue to have the ability to take detailed notes of the oral proffer and will now have as well the ability to take an electronic recording of the proffer. Typically proffers are provided by external counsel and not the parties directly.
- **Four-Stage Process.** The Revised Immunity Program now includes an intermediary stage, the Interim Grant of Immunity (IGI), which is effectively a conditional grant of immunity with full immunity contingent on cooperation by the immunity applicant. Under the Revised Immunity Program, the Bureau will recommend to the Public Prosecution Service of Canada (PPSC), the organization responsible for prosecuting criminal offences under federal jurisdiction, the IGI on the basis of proffered information (e.g., records, witness interviews, etc.). Where the Bureau determines that the immunity applicant has not met the requirements of the IGI, the Bureau may make a recommendation to the PPSC to revoke the IGI and to not grant full immunity to the applicant. Only when the PPSC is satisfied that no further assistance is required by the immunity applicant (once enforcement proceedings against other parties are completed) will it grant full immunity. Interestingly, until 2010, the Immunity Program included a similar fourth stage, i.e., the Provisional Guarantee of Immunity (PGI). However, the Bureau removed the PGI from the Immunity Program to reduce uncertainty for an immunity applicant as to its obligations and assurances in respect of its agreement to cooperate with the Bureau; to align the program with the prevailing practice of partner enforcement authorities, thereby simplifying the process for protection in multiple jurisdictions; and to reflect what had become the Bureau's and the PPSC's practice (i.e., typically only the PGI was ever issued to an immunity applicant, and this became the de facto final agreement). The introduction of the IGI step underscores the emphasis that the Bureau is placing on continued cooperation from immunity applicants.
- **Recorded Witness Interviews.** While interviewing of relevant individuals is an accepted and important part of any immunity program, including the current program in Canada, the Revised Immunity Program provides that the Bureau "may" now audio- and/or

video-record witness interviews. However, the revised program does not provide any guidance on what will influence the Bureau's decision to record certain interviewees and not others. Further, the Revised Immunity Program requires such witness interviews to be completed within six months of the IGI. These proposed practices may also impede international agency cooperation.

- **Enhanced Disclosure Requirements and Privilege Determination.** The Revised Immunity Program requires the disclosure of all non-privileged, relevant documents, including internal investigative records. Further, under the Revised Immunity Program, if an applicant withholds an otherwise relevant record on the basis of legal privilege, within 30 days of the IGI being issued, the applicant would be required to provide the Bureau with notice of the claim of privilege, the specific privilege being relied upon and the nature of the record to which privilege is attached. The Bureau will provide such information to the PPSC, which can require a determination of the privilege claim from an independent counsel pursuant to certain processes as described in the Revised Immunity Program. Again, failure to cooperate could trigger the revocation of the IGI.

Implications

While the proposed changes in the Revised Immunity Program may be aimed at incentivizing businesses and individuals to report conduct that constitutes an offence under the *Competition Act*, the contemplated changes seriously risk upsetting the balanced Immunity Program currently in place and having a “chilling” effect, discouraging immunity applicants from coming forward. For example, the increased uncertainty associated with witness interview recordings and, further, whether such recordings could be discoverable for subsequent civil liability proceedings will undoubtedly raise concerns for immunity applicants. The enhanced disclosure requirements and the addition of the conditional interim immunity stage may also complicate the timing and processes associated with complex global investigations that require coordination of immunity applications across multiple jurisdictions. Recourse to the Immunity Program has declined in recent years for a number of reasons, including increased uncertainty and cost, and the contemplated changes could easily exacerbate that decline. Is it really necessary to fix a program that is not broken?

Interested stakeholders have an opportunity until December 29, 2017, to provide comments and seek to influence the Revised Immunity Program.

Read the full text of the [Revised Immunity Program](#).

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