

Intelligence MEMOS



From: George N. Addy and Alysha Manji-Knight
To: The Competition Bureau of Canada
Date: November 9, 2017
Re: **REVISED IMMUNITY PROGRAM MAY NOT BE YOUR BEST WEAPON**

Last month the Competition Bureau released for public consultation a [revised version](#) of its immunity program, its self-described ‘best weapon’ to provide incentives to businesses and individuals to report criminal anticompetitive agreements.

The impetus for the revised immunity program – it was last revised in 2010 – 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](#)). In 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. This may end up being counter-productive. Extra complexity and uncertainty may discourage participation in a program that, notwithstanding some recent setbacks, has served the bureau well.

The following key changes are proposed and are open for public consultation until December 29:

- **Recording of Proffers.** In a practice similar to that in the US, the bureau has touted a “paperless proffer” system, whereby counsel to an immunity applicant can deliver a proffer orally. However, 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 make an electronic recording.
- **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 subsequent cooperation by the applicant. The bureau will recommend the IGI to the Public Prosecution Service of Canada 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, it may recommend its revocation, and ask prosecutors to not grant full immunity to the applicant. Only when they are satisfied that no further assistance is required by the applicant (once enforcement proceedings against other parties are completed) will it grant full immunity. 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, the revised immunity program provides that the bureau “may” now record witness interviews. However, there is no guidance on what will influence the bureau’s decision to record certain interviewees and not others. Further, the revised program requires such witness interviews to be completed within six months of the IGI. This may impede international agency cooperation.

While the proposed changes in the revised immunity program may be aimed at encouraging businesses and individuals to report conduct that constitutes an offence under the *Competition Act*, the contemplated changes seriously risk upsetting the current balanced immunity program and have 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?

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