

**COMMENTS OF THE AMERICAN BAR ASSOCIATION  
SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW  
IN RESPONSE TO  
THE CANADIAN COMPETITION BUREAU  
REQUEST FOR PUBLIC COMMENTS REGARDING  
ITS DRAFT IMMUNITY PROGRAM BULLETIN**

January 19, 2018

*The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.*

The Sections of Antitrust Law and International Law of the American Bar Association (“the Sections”) welcome the opportunity to participate in the Canadian Competition Bureau’s (the “Bureau”) public consultation process on the Bureau’s Draft Immunity Program by responding to the issues raised in the Bureau’s *Consultation Paper* of October 26, 2017 (the “Consultation Paper”). The views expressed in these comments are those of the Sections only and have been approved by the Sections’ Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

**Executive Summary**

The Sections commend the Bureau’s efforts to consult with stakeholders on proposed revisions to its immunity program to increase transparency and predictability. The Bureau and the DPP have experienced a general slowdown in cartel enforcement, which the Sections believe may be attributable, in part, to the difficulty the Canadian enforcers have had in building momentum by securing an immunity applicant quickly in the investigative phase and then moving the investigative and prosecution phases forward more systematically to successful conclusions.

The Consultation Paper is a step forward in many important respects, but the Sections believe there are still areas of concern, particularly with respect to the speed with which the immunity process will unfold and the incentives for applicants to participate in the program. In particular, the Sections expect that the following proposed changes are not necessary to operate a successful immunity program and will be a disincentive to potential domestic and international applicants considering applying for immunity:

- the two-stage interim grant of immunity process,
- the extensive list of information requirements to be addressed in proffers (Appendix II)

- mandatory confidentiality waivers related to cooperation with authorities in other jurisdictions
- moving away from a paperless application process (particularly in respect of recording attorney proffers and more frequent and earlier use of recorded witness interviews), and
- the proposed regime for review of certain privileged records (particularly if this were to be applied beyond records that were contemporaneous with the alleged offences, and to include attorney work product and privileged attorney investigations of potentially problematic conduct)

The Sections first offer overarching comments with respect to those provisions of the Consultation Paper that, in our view, pose continuing challenges to its utility. We also provide, at the Bureau's request, specific commentary on certain elements of the Consultation Paper.

### **Two-Step Immunity Process**

In 2007, the Sections applauded the effort of the Bureau and the DPP to seek policy convergence to facilitate applicants seeking immunity in multiple jurisdictions. Important steps forward were discontinuing the Provisional Granting of Immunity ("PGI") process and the alignment of immunity agreement language between Canada and United States antitrust enforcers. Both jurisdictions, and most other jurisdictions around the world, used a simple and effective tool -- a conditional immunity letter. The letter bound the immunity applicant to cooperation throughout the Bureau's investigation and the DPP's prosecution efforts. Final immunity would be confirmed by the DPP in a second letter to the applicant at the conclusion of the investigation, assuming the applicant lived up to its cooperation commitment and otherwise followed the rules as set out in the Bureau's immunity program. It is exceedingly rare, in our experience, for conditional immunity to be lifted. Conditional immunity becomes final in almost all circumstances. In that respect, once the conditional immunity letter is finalized and signed, all of the parties to the letter (an agreement) know what is coming next with great certainty and confidence. The PGI approach was perceived as a complicated additional interim step, requiring more paperwork for the Bureau, the DPP and the applicant while adding uncertainty to the process.

As proposed now, the adoption of an Interim Grant of Immunity ("IGI") would, therefore, in our judgment, be a step in the wrong direction, unnecessarily impeding and possibly discouraging applicants from seeking immunity in Canada. The Bureau indicates that the proposed revisions are aimed at allowing the Bureau access to witnesses and records earlier in the process. In the Sections' view, the proposed revisions are unnecessary, as the current immunity program and the corporate immunity agreement template, found in the Public Prosecution Service of Canada Deskbook, which is a conditional agreement, allows the Bureau access to witnesses and records immediately once the conditional agreement is in place and during the early stages of the application process. In short, we recommend a return to the more simplified approach.

If the Bureau and the DPP determine to proceed with the IGI middle-ground step, the Sections suggest that the Consultation Paper clarify that the IGI is a three-party agreement – between the applicant, the Bureau and the DPP. The Consultation Paper presents information as to the standard by which the Bureau will assess the applicant’s cooperation under the IGI’s requirements. Unfortunately, the Consultation Paper does not identify the standards by which the DPP will similarly assess the applicant’s qualifications and cooperation. As a result, the prospective applicant is left without guidance as to how one of the parties to the IGI will assess its conduct. The Sections recommend that the DPP should use the same standards as the Bureau and should make that commitment in writing

### **Timeline for Securing Immunity**

The Sections believe that in many cases it takes too long for the Bureau and the DPP to grant immunity (or some confirmation that immunity will be recommended) to willing applicants. That hurts the applicant, as it is exposed to prosecution risk throughout this lengthy period and must incur significant expense in the process, and the burdensome requirements of the Bureau’s and the DPP’s immunity program do not assist the enforcers in building case momentum, which contributes to the successful prosecution of cartels. We note, for instance, the recent announcement of an investigation in the Canadian bread industry, which resulted from an initial immunity application submitted to the Bureau over two years earlier. In our experience, that is an unusually long initial investigation period. We see aspects of the Consultation Paper as continuing this lack of pace in this aspect of Canadian antitrust enforcement. We offer these comments and suggestions for improvement:

- The proposed requirement by the Bureau that the applicant provide exhaustive information relating to the list of topics to be covered in the attorney and the initial witness proffers is too burdensome. To gather and confirm the Bureau’s list of ‘required’ information, as outlined in Appendix 2 of the Consultation Paper, will take considerable time, and much of this information could be provided after the conditional immunity agreement is in place.
- The Sections recommend a far more collaborative process between the Bureau and the DPP at an earlier stage than is outlined in the Consultation Paper. The Consultation Paper does not appear to require, or even call for, the involvement of the DPP at the outset of the immunity process, at the attorney proffer stage, or at the point of interviewing confirming witnesses. Being present at the proffer, the DPP could ask for additional information and any clarifications, if necessary, and once satisfied that the applicant has described the illegal conduct and its role in the offence, it could then offer conditional immunity without having to wait to receive from the Bureau all the information on all the topics listed in Appendix 2. In short, the Sections recommend that the Bureau and the DPP work jointly to develop their cases from the beginning.

- Multi-jurisdictional cartel investigation and the demands placed on subjects of those investigations, including immunity applicants, are increasing. The increasing requirements that are being placed on leniency applicants by many jurisdictions to satisfy the full-continuing-complete-cooperation standards common in immunity programs are cumulative burdens that have become enormous. Our perception is that the costs are so great that they have been or may be a disincentive to companies to choose to cooperate with enforcement authorities. Therefore, in the multi-jurisdictional context, it is important for authorities to appreciate the cumulative effect of the increasing demands placed on immunity applicants around the world and the disincentive this places on companies to self-report and cooperate. In the Sections' view, the Bureau's list of topics to be included in the proffer and the company's cooperation efforts continue this trend of imposing unnecessary burdens too early in the leniency process. The Sections believe that it is not reasonable or necessary to require a Canadian immunity applicant to comply with the burdensome demands in Appendix II to secure conditional immunity from the Bureau and the DPP.

### **Mandatory Confidentiality Waivers**

The Bureau states several times in the Consultation Paper that applicants should identify the other countries in which immunity or leniency has been sought by the applicant. *See, e.g.*, Paragraph 40. Furthermore, the Bureau suggests that it will require a full waiver of confidentiality as to these other applications as a condition precedent to receiving immunity from the Bureau and the DPP. The Sections have consistently advised against such mandatory waiver requirements, which are counter to the entire confidential process of immunity and leniency programs throughout the world.<sup>1</sup> Immunity works because it is confidential and does not put the applicant at risk of negative outcomes or negative developments in the country in which immunity is being sought or elsewhere. The guiding principle has been that the applicant should not be made worse off as a result of the application. The Bureau's mandatory waiver requirement puts the applicant at risk of violating confidentiality policies of other countries and could expand the scope of the company's

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<sup>1</sup> Comments of the American Bar Association's Section of Antitrust Law and Section of International Law in Response to the Hong Kong Competition Commission's September 23, 2015 Draft Leniency Policy for Undertakings Engaged in Cartel Conduct (2015), [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_20151030\\_salsil\\_hk.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20151030_salsil_hk.authcheckdam.pdf); Comments of the ABA Sections of Antitrust Law and International Law on the Public Consultation Version of the Guidelines on Leniency in Cartel Cases in Chile Published by the Fiscalía Nacional Económica (2015), [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_20150227chile.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20150227chile.authcheckdam.pdf); *see also*, Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on INDECOPI's Draft Leniency Program Guidelines (2016), [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_salsil\\_20160620\\_per\\_u.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20160620_per_u.authcheckdam.pdf).

investigative exposure. We accordingly request that the Bureau and the DPP reconsider the mandatory confidential waiver.

### **Oral Applications — The Paperless Process**

One cost — sometimes the greatest cost — that a corporation must consider in deciding whether to pursue immunity or leniency and thus expose a cartel is the high probability that its decision to do so will precipitate civil damages actions in the United States, Canada and other jurisdictions.

There is uncertainty in the United States over whether materials prepared specifically for the immunity or leniency process are discoverable and thus can be used by plaintiffs as evidence in such civil actions. The possibility of discovery can play a significant role in a corporation's decision to seek immunity, and may therefore impact the efficacy of an immunity program generally. Accordingly, the Sections submit that one of the Bureau's primary goals should be reducing the burden on applicants to submit written or recorded materials that may be discoverable in private litigation. We are not aware of an evidentiary requirement for the recording of attorney proffers and we believe that it could uniquely harm the immunity applicant by creating a record that is not generated by non-cooperating co-conspirators. Recording a proffer defeats the purpose of proffering orally and could unduly complicate the process, as it may have evidentiary consequences in other jurisdictions. Finally, we are not aware of any other jurisdiction that requires that an "attorney" proffer be audio recorded.

The Sections also have similar concerns about witness interviews which "may be video and/or audio recorded" (see Paragraph 90). We do not understand the need for recordings of early stage, immunity applicant witness statements. Substantively, the Sections' concerns with respect to recording of attorney proffers apply with equal force to witness proffers. Recordings of witness statements may be used for impeachment purposes at a subsequent trial, if the cooperating witness diverts from what the DPP believes the witness was supposed to say. But this is a rare occurrence and the harm to the immunity applicant likely outweighs the DPP need, in our view. The tape recording will certainly be used against the immunity applicant in civil cases arising from the investigation its self-reporting initiated and furthered. Additionally, Bureau recording of immunity applicant witness statements made in the context of joint Bureau and United States Department of Justice investigations may create substantial discovery burdens for the United States enforcers, who may be obligated to produce the recording in subsequent prosecutions. Finally, recording early stage witness statements at the outset of the immunity process would likely have very limited utility for the Bureau and the DPP. These statements are often made without the benefit of much documentation, were not prepared by the Bureau or the DPP with subsequent prosecutions in mind, and are usually intentionally incomplete. In sum, the Sections believe that any perceived benefits from tape recording these statement do not outweigh the cost to the immunity applicant.

Accordingly, the Sections respectfully recommend that the Bureau accept attorney proffers and initial witness statements orally and without being audio recorded.

### **Disclosures By The Immunity Applicant**

The Sections respectfully submit that the “required by law” and consent exceptions to the Bureau’s confidentiality commitment (Paragraph 32) are too restrictive. The immunity applicant should be permitted, without seeking Bureau consent, to make third-party disclosures that are necessary after taking into account the Bureau’s confidentiality preferences and securities law or other disclosure obligations. In particular, disclosures may be necessary to insurers, lenders and external auditors or other similarly-situated third parties, each of whom have made confidentiality commitments to the applicant, and rarely, if ever, pose any risks to the Bureau’s investigative interests. Auditors, in particular, may need information about the application process and its implications and the Bureau should not need to be consulted in advance for each and every disclosure to the applicant’s external and/or statutory auditor. The Sections recognize and appreciate that certain disclosures may jeopardize the Bureau’s and the DPP’s investigative interests, particularly those which may result in broader public statements by the applicant, and the Bureau and the DPP should be consulted before such disclosures. However, there are certain disclosures to auditors and other third parties that do not pose such a risk and the need for prior consent appears too restrictive.

### **Disclosure Of All Offences**

We question the need for the Bureau to insist that the applicant “will be required before the Bureau recommends that the DPP sign an immunity agreement with the applicant” to disclose all offenses of which the applicant may be aware. *See* Paragraph 32b. We recognize that it is appropriate for the Bureau to ask the applicant to investigate what other offenses, if any, the applicant has committed. We do not understand, however, the need for the applicant to actually disclose other offenses to the Bureau as part of the immunity process. That may be in any event impractical if the applicant is under investigation for one offense and comes forth to the Bureau seeking immunity on a new, previously undisclosed, offense. We recommend that the Bureau state its preference for disclosure of other offenses, but not make such disclosure a requirement for immunity from prosecution on the offense that has been disclosed. Paragraph 32c, which appears to state that the cooperation requirement only relates to the offense for which immunity is sought is a better, less oppressive formulation of the need for disclosure of relevant offense conduct. The requirement that offences uncovered after the granting of the marker must be brought to the attention of the Bureau and the DPP at the earliest possible time should not be an obligation if such disclosure would constitute self-incrimination by the applicant.

## Coercer

A primary objective of all leniency programs is to uncover and terminate cartels. The Sections believe that the success of these programs turns on clarity, predictability, and ease of assessment — prospective applicants need to understand how the enforcement authority will treat their case. Similarly, the criteria for disqualification for immunity or leniency must also be clearly defined and consistently applied. As drafted, paragraph 23 of the Consultation Paper does not sufficiently identify the test the Bureau will apply in determining whether the applicant coerced others into the alleged illegal activity.

Given the fact-specific nature of the inquiry, the Sections believe that it is not necessary to provide a detailed definition of “coercer.” However, in order to provide prospective applicants with an adequate basis to predict how their case will be assessed, the Sections believe that the Bureau should specify the criteria that will determine whether an applicant would be rejected for “coercing” others into a conspiracy. On this point, the Sections suggest the Bureau review the type of guidance found in the Australian and U.K. leniency programs. The Australian program provides that, “[f]or an applicant to have coerced others, there will need to be strong evidence of coercive behavior. In particular, there must be clear evidence that the coercer pressured unwilling participants to be involved in the cartel conduct.”<sup>2</sup> The U.K. program offers similar direction:

[T]here must be evidence to prove the two elements of coercion (on an objective basis): [1] an unwilling participant in the cartel, and [2] clear and positive steps from a coercer to pressurize that unwilling participant to take part.<sup>3</sup>

In considering whether a party will be excluded from obtaining leniency, the Sections believe that the Bureau should apply a test consistent with the guidelines found in the Australian and U.K. programs.

## Privileged Records

The Consultation Paper appears to establish a procedure that may require the applicant to engage in a complicated, time-consuming, and expensive process with the DPP to test the assertion of attorney-client privilege claims by the applicant while its application is pending with the Bureau and the DPP. *See* Paragraphs 32 and 96 and Appendix 4. The Consultation Paper appears to

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<sup>2</sup> ACCC immunity and cooperation policy: frequently asked questions (September 2014), at Q36, [https://www.accc.gov.au/system/files/885\\_ACCC%20immunity%20and%20cooperation%20policy%20FAQ\\_FA2.pdf](https://www.accc.gov.au/system/files/885_ACCC%20immunity%20and%20cooperation%20policy%20FAQ_FA2.pdf).

<sup>33</sup> Applications for leniency and no-action in cartel cases: OFT’s detailed guidance on the principles and process (July 2013), at Paragraph 2.52, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284417/OFT1495.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf).

assert that the failure to follow this testing and objection process, or the wrongful assertion of privilege, even if done in good faith, could result in immunity being withdrawn at any stage. We understand the need for the Bureau and the DPP to be advised that certain documents of the applicant have been withheld on the basis of attorney-client or other privilege, but the review process outlined in the Consultation Paper imposes an unnecessary burden, particularly since claims of attorney-client privilege by applicants may be subject to judicial review in the event that the Bureau and the DPP later bring charges against a co-conspirator who challenges the claim in connection with those proceedings.

In the Sections' view, it would be sufficient if the applicant is required to preserve the records over which a claim of attorney-client or other privilege is asserted during the immunity application process. We understand that in rare cases there may be a need for the Bureau or DPP to review a claim of privilege by an immunity applicant and the Consultation Paper needs to address that possibility, no matter how remote. However, the Consultation Paper suggests a more frequent use of the process. The Sections recommend that the Bureau clarify when and how the attorney-client privilege claim review process will be used.

### **Comments Regarding Specific Paragraphs**

**Paragraph 21:** The Sections have recommended to other jurisdictions that have a two-part investigative and prosecution model to better define the standards by which the investigative agency (here, the Bureau) will refer matters to the prosecuting agency (here, the DPP). Similarly, paragraph 21 would benefit from an enhanced description of what is meant by the Bureau's statement regarding "sufficient evidence to a warrant a referral of the matter" to the DPP.

**Paragraphs 27 and 28:** The statement that individual applicants "may" be eligible for immunity when their employer may not be, requires further clarification – in this area, predictability and protection is critical. Paragraph 28 should be redrafted to be consistent with paragraph 33 in which all employees are covered, essentially automatically, for immunity.

### **Paragraph 32:**

We offer the following additional commentary on Paragraph 32 of the Consultation Paper --

32b -- Despite our comments above regarding the discovery and disclosure of other offenses, when an applicant becomes aware of instances of obstruction or destruction of records or other issues that arise in relation to activity for which immunity is sought, such information should be brought to the attention of the Bureau and the DPP as soon as possible. Requiring this sort of disclosure in the application process is consistent with Paragraph 32c, which provides that all information about the anticompetitive conduct for which immunity is being sought must be disclosed. Paragraph 32c adequately addresses the type of "other offense" conduct that should be disclosed.

32d -- "All reasonable measures" is a vague expression and immunity applicants would benefit from a fuller description of what the Bureau and the DPP expect from a corporate applicant's efforts to encourage officer, director and employee cooperation.

**Paragraph 33:** We commend the Bureau’s clarification in Paragraph 33 that current employees’ ongoing co-operation includes co-operation “. . . in the Bureau’s investigation and any subsequent prosecution.” We would suggest changing the phrase to read: “timely and ongoing co-operation in the Bureau’s investigation and any subsequent prosecution related to the conduct being reported . . .” This revision would apply to both current and former directors, officers, and employees.

**Paragraph 34:** In order to clarify that the obligations of agents are the same as those of former directors, officers and employees, we suggest changing paragraph 34 to read: “Agents of a company that qualifies for a recommendation for immunity who admit their involvement as a party to, or their knowledge of, an offence under the Act and offer to co-operate with the Bureau’s investigation and any subsequent prosecution related to the conduct being reported may qualify for a recommendation of immunity. However, the Bureau will make any such determination on a case-by-case basis.”

**Paragraph 35:** We recommend changing the last sentence of Paragraph 35 to read: “To qualify, these parties will be required to admit their involvement as a party to, or their knowledge of an offence under the Act and be willing to provide complete, timely and ongoing co-operation with the Bureau’s investigation and any subsequent prosecution related to the conduct being reported.” We suggest the change to ensure that the cooperation obligation is limited to the conduct being reported and is not a blanket or open-ended commitment to cooperate with the Bureau on other matters.

**Paragraph 40:** Throughout the Consultation Paper, the Bureau appears to require that the Immunity Applicant “must identify all of the other jurisdictions where it has made a similar application for immunity or leniency.” *See, e.g.*, Paragraph 32c. It also proposes to require, in Paragraph 40, that “absent compelling reasons, the Bureau will expect a waiver allowing communication of information with jurisdictions to which the applicant has made similar applications for immunity of leniency. Such waivers shall be provided immediately and are expected to cover both substantive and procedural information.” Without exception, the Sections have commented to other cartel enforcers that it does not believe that a mandatory confidentiality waiver is appropriate.<sup>4</sup> The Sections believe that an applicant should be permitted to consider whether it is in its interests to provide the waiver and whether it could be harmed as a result of the waiver. Because the applicant may be facing different exposure scenarios in multiple jurisdictions,

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<sup>4</sup> Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law in Response to the Hong Kong Competition Commission’s September 23, 2015 Draft Leniency Policy for Undertakings Engaged in Cartel Conduct (2015), [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_20151030\\_salsil\\_hk.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20151030_salsil_hk.authcheckdam.pdf); Comments of the ABA Sections of Antitrust Law and International Law on the Public Consultation Version of the Guidelines on Leniency in Cartel Cases in Chile Published by the Fiscalía Nacional Económica (2015), [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_20150227chile.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20150227chile.authcheckdam.pdf); *see also*, Joint Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law on INDECOPI’s Draft Leniency Program Guidelines (2016), [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_salsil\\_20160620\\_per\\_u.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20160620_per_u.authcheckdam.pdf).

it should be permitted to make disclosures and permit enforcer cooperation in some jurisdictions but not others.

**Paragraph 41:** In paragraph 41, “disqualify” should be “disqualified.”

**Paragraph 46:** We propose the following drafting edit: “Only one immunity marker will be granted for each offence, regardless of whether liability arises as a principal or an aider or abettor pursuant to section 21 and/or a counsellor pursuant to section 22 of the Criminal Code.”

**Paragraph 57:** Given the complexity of many cartel cases, we are concerned that 30 days will not be sufficient time in every case to provide a proffer statement with the level of detail the Bureau appears to require. We, therefore, recommend that the Bureau take an approach similar to the United States Department of Justice, Antitrust Division for the granting of markers by it: “A 30-day period for an initial marker is common, particularly in situations where the Division is not yet investigating the wrongdoing. If necessary, the marker may be extended at the Division’s discretion for an additional finite period as long as the applicant demonstrates it is making a good-faith effort to complete its application in a timely manner.” Such a policy would allow the Bureau to continue to work with applicants who are proceeding in good faith in complex cases.

**Paragraph 58:** This paragraph references Appendix 2 for the “[t]opics to be covered in a proffer.” While the list in Appendix 2 provides useful guidance, it may be over-inclusive or otherwise not applicable in every case, and may unnecessarily delay the immunity process. We, therefore, recommend language moderating the strict requirement by adding the word “may”: “Topics to be covered in a proffer may include those set out in Appendix 2.” Both the Bureau and the DPP have been cited for taking too long to progress matters into and through the immunity and leniency process. Appendix 2 if taken literally and as the baseline “requirement” for the topics to be covered in proffers will likely continue to delay the Canadian enforcers in advancing their matters on a timely basis.

**Paragraph 74:** It appears to the Sections that Paragraph 74, which permits the Bureau to use in a future prosecution proffers and records when the “applicant or individual is found to be ineligible for immunity or otherwise fails to comply with the terms and conditions of the IGI,” is inconsistent with paragraphs 58 and 62, which state that proffers and records are provided to the Bureau on a “without prejudice” basis. We recommend that paragraph 74 be brought into line with paragraphs 58 and 62. We also recommend that paragraphs 58 and 62 be clarified that information will not be used directly “or indirectly” against the applicant.

**Paragraph 85:** This paragraph should be clarified to confirm that the IGI is a three-party agreement.

**Paragraph 88:** This paragraph appropriately informs applicants that witnesses will be asked about prior criminal convictions, but it also suggests that the DPP will insist on being informed of other potentially criminal conduct in Canada and elsewhere as a condition of the witness receiving immunity from the DPP. As noted above, we suggest that is an unnecessarily intrusive and potentially harmful condition for conditional or final immunity. The Sections understand that the DPP, in a subsequent prosecution of other co-conspirators, does not want its immunity witnesses to withhold relevant information about prior criminal histories, but the DPP needs to make a

choice. It either needs to build its cases on the back of immunity applicants, no matter how “unclean” they are, or require broad disclosures from immunity applicants about other offenses, for which no protection is being offered by the DPP, which is likely to discourage applicants from using the immunity program in the first place. The Sections believe that the balance weighs in favor of case momentum at the outset.

***Paragraph 94:*** The Sections suggest that Paragraph 94 should specify that the Bureau or DPP request for translations must be “reasonable”. If this requirement is unlimited it could become enormously burdensome for an applicant.