COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, SECTION OF INTERNATIONAL LAW, SECTION OF BUSINESS LAW, AND CRIMINAL JUSTICE SECTION ON THE REVISED DRAFT INFORMATION BULLETIN ON SENTENCING AND LENIENCY IN CARTEL CASES ISSUED BY THE COMPETITION BUREAU OF CANADA

May 29, 2009

The Section of Antitrust Law, the Section of International Law, the Section of Business Law, and the Criminal Justice Section of the American Bar Association (ABA)(collectively, the Sections) appreciate the opportunity to present their views on the Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (Bulletin) published for public consultation by the Competition Bureau of Canada. The views expressed herein are presented on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the ABA.

EXECUTIVE SUMMARY

The Sections fully support the Bureau's effort to establish a transparent and consistent process for sentencing and leniency in cartel cases. The Sections had filed comments on the Draft Information Bulletin on Sentencing and Leniency in Cartel Cases on July 14, 2008 and we commend the Bureau on its revisions and rethinking of several important issues that the Sections and other commentors had proposed. As the Sections set forth in July, the fundamental requirement of any effective settlement program is that it provides sufficient incentives to encourage the parties to settle. To that end, the Sections respectfully suggest four criteria that are essential for an effective settlement program and the Sections encourage the Bureau to establish a program that meets these four criteria. The sentencing program must have procedural

transparency, generous or significant settlement discounts, legal certainty and the protection of confidentiality and privilege.

The Bureau's role in sentencing and leniency is to make recommendations to the Director of Public Prosecutions (DPP), and the DPP then makes recommendations to the Court, which has the final sentencing power. Accordingly, the Bureau cannot guarantee specific sentencing outcomes. To the extent that there is inconsistency between recommendations made by the Bureau and by the DPP, it will reduce the incentives for cartel participants to come forward and seek leniency. The Sections appreciate the organizational structures which give rise to the division of responsibilities between the respective organizations, but, to the extent that there can be explicit and transparent cooperation arrangements or understandings between the Bureau and the DPP on sentencing and leniency issues in cartel cases, the Sections would encourage such cooperation. Such cooperation should be achieved by the Bureau and DPP working closely and seamlessly together to achieve transparency and legal certainty.

The sentencing considerations that the Bureau describes in the Bulletin are similar to the considerations for calculating a sentence in other jurisdictions, including the United States. The Bureau's consideration of the volume of commerce in determining economic harm, if any, is appropriate. We remain concerned that the proposal to measure economic harm through use of a proxy of 20% of the volume of commerce, and an overcharge assumption of 10%, is not based on credible empirical evidence (as you know, this approach has been questioned by the U.S. Antitrust Modernization Commission). We are similarly concerned by the proposal for a proxy based on 20% of "indirect" sales. This approach is controversial and does not find direct support in legal precedent. At the same time, the Sections are encouraged by the Bureau's decision to permit defendants and leniency applicants, as well as the Bureau itself, to rebut any presumption

based on a proxy, by establishing through evidence the actual overcharge or economic harm based on the actual gain or loss from the cartel behaviour. Although it falls short of addressing our concerns about the use of proxies generally and the reliance on "indirect" sales in particular, this revision does move in the direction of a fair, proportional and transparent approach to this important issue**.**

The Bureau articulates aggravating and mitigating factors that will shape its sentencing recommendations. The factors are general and subjective and the Sections encourage the Bureau to provide some form of scoring that allows more transparency and legal certainty.

The Sections approve of the Bureau's recognition of the continuing use of prohibition orders as an available remedy in cartel cases, which are particularly appropriate in cases where there has been no admission or finding of guilt. The Sections encourage the Bureau to include language making it clear that a prohibition order is available to leniency applicants without a guilty plea.

The sentencing process requires a leniency applicant to enter into an agreement to plead guilty to the offense and to make explicit (and public) admissions about the cartel. The Bulletin provides some transparency in this area, and the Sections encourage the Bureau to continue in this direction and also to recognize the need for flexibility for applicants that may be confronted with multi-jurisdictional demands. Inclusion in the Bulletin of the circumstances in which the Bureau will recommend prosecution of individuals and a lenient sentence would be of great assistance to potential leniency applicants.

Transparency, legal certainty, generous settlement discounts and confidentiality and privilege are necessary criteria for making the leniency program attractive to potential

defendants, corporate and individual. In that context, the Sections believe that the weight given by the Bureau to two of the primary leniency factors, namely, the timeliness of cooperation and the value of the evidence, must be clearly articulated and should not result in the inconsistent application of the Bureau's leniency program.

Similarly, the Sections respectfully submit that the effect that multiple leniency applications would have on the leniency process should be more clearly expressed to give prospective leniency applicants more clarity and predictability of outcome. A transparent and predictable leniency process is at least as important as clearly articulated leniency considerations.

Finally, the Bureau has properly recognized the need for confidential treatment of the identities of leniency applicants and the information they provide. The Sections believe, however, that the exceptions to confidentiality, in both the Bulletin and an earlier informational bulletin, are too broad, and may constitute a substantial disincentive to seeking leniency in numerous cases. The Sections recommend that the Bureau expressly provide that the confidentiality provisions of the Bulletin supersede those of that earlier informational bulletin, and otherwise narrow and clarify the scope of exceptions to confidentiality.

COMMENTS

Introduction

The Sections welcome this revision of the Bureau's proposal on sentencing and settlements and commend the Bureau on its acceptance of many of the ideas raised in the earlier consultation – including some recommendations by the Sections. The Sections, individually or jointly, have previously commented on several matters relating to the investigation and criminal prosecution of cartel conduct in the United States and Canada, and issues in many jurisdictions relating to international cartel enforcement, including sentencing and settlement issues.[1] In the sentencing and settlement area, the Sections have the benefit of substantial experience in several jurisdictions where they have observed and practiced in a variety of settlement and sentencing programs. The Revised Bulletin is especially timely with the recent passage of Canada's new competition law and its sharp increase in criminal penalties for corporations and individuals.

The Sections commend the Competition Bureau of Canada for seeking to bring clarity and transparency to the sentencing process in criminal competition law cases, particularly as it complements the Bureau's Immunity Policy. The Sections believe that, because of the increasingly serious penalties in cartel cases around the globe, enforcement agencies must articulate their sentencing policies fully and fairly to the public, the prosecutors and the courts.

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[1] With respect to Canada, see comments of the American Bar Association Section of Antitrust Law and Section of International Law on the revised draft information bulletin on sentencing and leniency in cartel cases issued by the Competition Bureau of Canada (July 2008) Submission of the American Bar Association Sections of Antitrust Law and International Law in Response to the Canadian Competition Bureau's Request for Comments on its Upgraded Draft Bulletin on Corporate Compliance Program (May 2008), available at http://www.abanet.org/antittust/at-comments/2008/05-08/comments-canadian-draft.pdf; and Comments of the ABA Section of Antitrust Law in Response to the Canadian Competition Bureau Request for Public Comments Regarding Immunity Program Review (May 2006), available at http://www.abanet.org/antitrust/at-comments/2006/05-06/com-canadian-leniency.pdf.

The ultimate aim is to provide sufficient information for the parties to be able to assess whether settlement is advisable, as well as incentives to settle where liability is clear, rather than attempt to litigate each and every potential matter. The Sections encourage the Bureau to evaluate its proposal utilizing four criteria that will make settlement attractive and compelling to defendants where settlement can produce a just result: procedural transparency, generous settlement discounts, legal certainty and protection of confidentiality and privilege.[2] Our comments will review the program by considering these four criteria.

I. The Decision Making Role of the DPP

The Sections reiterate the suggestions made in their July comments that the decision making role of the DPP is central to the success of the Bureau's policy on sentencing. While the sentencing proposal described in the Bulletin is a program and policy of the Bureau, which makes recommendations to the DPP of prosecutions and sentences, it is critical for transparency and legal certainty purposes that the DPP and the Bureau agree to common principles, factors, and processes on which such recommendations and decisions will be based, understanding that the Court will ultimately determine the actual sentence based on the DPP's agreement with the defendant. The DPP's official approach to the plea process is set out in Chapter 20 of the Federal Prosecution Service Desk Book (the Deskbook). That document establishes the general practice of the DPP in relation to the wide range of criminal matters it considers but it contains nothing specific in relation to cartels. The Sections note with approval, however, that the Deskbook explicitly recognizes that "because of the benefits that flow to the administration of

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[2] Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law in Response to the Commission of the European Communications' Request for Public Comments on the Draft EU Settlement Procedures (December 2007), *available at* http://www.abanet.org/antitrust/at-comments/2007/02-07/comments-EU-Draft-Settlement.pdf.

justice from early guilty pleas, the Crown should make its best offer to the accused as soon as practicable," and that "in Competition Act matters, because of the frequent involvement of counsel during the investigative stage, discussions may take place before charges are laid."[3]

Predictability about the benefits of cooperation is particularly important in cartel cases because cartel behavior is inherently covert. Generally, the only witnesses to the cartel violations are the participants themselves and the witnesses often need to explain their words or the deeds that followed them. Accordingly, it would enhance the objectives of the Bureau if there were an understanding or agreed upon course of conduct between the DPP and the Bureau as to the principles that the DPP will adopt in deciding whether to accept a recommendation of the Bureau. An alternative may be for the DPP to itself develop a position specific to cartel conduct which is consistent with the Bureau's approach to sentencing and leniency. At the very least, the Sections recommend that Chapter 20 of the Deskbook be amended to provide a statement of support for the Bureau's leniency program. Such a statement would not be at odds with the principles that generally inform Crown counsel's approach to sentence negotiations. In that regard, Chapter 35 of the Deskbook which addresses Immunity Agreements devotes a section of the Chapter specifically to Provisional Guarantees of Immunity for Competition Act Offences.[4]

The Bulletin appears to separate the sentencing and settlement process of the Bureau from that of the DPP. In practice, the Bureau and the DPP have worked together regularly on the development and resolution of cases, from the interrogation of witnesses to settlement. The idea

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[3] *See* Chapter 20, The Federal Prosecution Service Deskbook, The Department of Justice Canada, at footnote 12.

[4] The *Sections* note that the Deskbook has not yet been updated to account for changes to the Bureau's Immunity Program introduced in October 2007.

that the Bureau and the DPP would work together to a resolution of the case is consistent with the criteria that will provide incentives for settlement. There is a procedural transparency that is apparent if the defendant is dealing with what appears to be one organization that is able to assure the defendant how the second organization will approach sentencing (or how both organizations will do so together), rather than having to negotiate and make its deal twice with no legal certainty that both organizations are like minded and will approve the same settlement. The generosity of the settlement discounts also appears more compelling to the defendant if it feels it is dealing with one party and does not fear that the second agency, the DPP, will take the deal made with the Bureau as a starting point and attempt to whittle it down. Finally, and importantly, the DPP is actually involved in the settlement negotiations to which privilege and confidentiality are accorded. A separate negotiation with the Bureau, which is not the determinative negotiation, may not enjoy the safety of the settlement privilege, adding to the concerns the defendant will have in the civil damage processes in Canada, the United States and other jurisdictions. Providing a more unified negotiation that has the Bureau and the DPP involved simultaneously and seamlessly, as exists in cartel enforcement actions today, is the best opportunity to provide incentives to settlement in these criminal cartel prosecutions.

II. Sentencing Principles: Volume of Commerce, Economic Harm, and Proxies

As noted in our earlier comments, the Bureau's articulation of the factors it will take into consideration at sentencing are important steps in creating transparency and legal clarity. Whether these factors foster transparency and predictability, and create or establish generous settlement discounts that provide incentives to settle, are the critical questions. Here the Sections' comments address the Bulletin's approach to volume of commerce and economic harm, and the attendant employment of certain presumptions and proxies. These issues highlight

the tension between flexibility and transparency – a tension at the heart of effective implementation.

The problem of how to calculate a criminal [or administrative] fine based on the economic impact of a cartel offense has been a challenging issue in all jurisdictions that have sought to address it. As a general matter, the Sections urge the Bureau to calculate each sentence based on the actual economic harm, if any, in the case and to rely on presumptions only where that approach is unworkable. It continues to be our view that the two relevant factors should be (1) the "volume of commerce" in Canada, and (2) the calculation of the "overcharge" or quantum of economic harm to be used as a basis for fine determination.

Volume of commerce: The Bureau proposes to calculate the "volume of commerce" for each cartel participant "by aggregating the value of that participant's sales of the product in Canada."[5] The Bureau treats all sales in Canada as "affected by the cartel . . . unless evidence that rebuts that assumption is brought forward."[6] The Bureau further provides a formula based on global market share for imputing sales in Canada to a cartel participant that has agreed "not to trade in the Canadian product market."[7]

In addition, "when a cartelized product is used as an input into an intermediate or final product" sold in Canada, these "indirect sales" may be considered in the Bureau's "overall assessment of economic harm" in instances where the prospect of such harm resulting from

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5 Bulletin, ¶ 36.

6 *Id.*

7 *Id.* ¶ 38.

indirect sales is "likely and significant."[8] Indeed, such sales may be included in the volume of commerce by counting "the volume of sales of the cartelized input contained in the intermediate or final products sold in Canada."[9] The Bureau may "derive" this volume of commerce figure "from available data," for example by aggregating a cartel member's sales to its top customers in light of their downstream sales volume into Canada.[10] This approach is contemplated even when there are intermediate transactions -- *i.e.*, "further levels of trade before the cartelized input is sold into Canada."[11]

Finally, acknowledging the potential for "double counting," if "cartel members have already been penalized in another jurisdiction for the direct sales that led to the indirect sales in Canada, the Bureau will consider the penalties imposed by other jurisdictions on a case-by-case basis."[12] The Bulletin does not indicate what weight will be given to a party's payment of fines in one or more other jurisdictions.[13]

The Bulletin adds additional explanatory text describing in general terms the circumstances under which indirect sales may be considered in calculating the volume of commerce, as well as the calculation of a volume of commerce proxy for cartel participants "agreeing not to trade in the Canadian product market." The principles articulated in these revisions, although very general in their terms, contribute to the transparency of the Bulletin. The Sections remain concerned, however, that the inclusion of indirect sales may increase the

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8 *Id.* ¶40.

9 *Id.* ¶41.

10 *Id.*

11 *Id.* ¶41 n. 41.

12 Id. ¶42.

13 The same sort of general statement is made as regards sentencing for individuals. *See Id.* ¶65.

potential level of fine in a manner that might not be adopted by the Courts if the matter were contested. In fact, to our knowledge, no enforcement authority has yet utilized "indirect sales" to derive a sentence in a cartel case that has been subject to judicial scrutiny.

The use of "indirect sales" to calculate a sentence is particularly challenging for the leniency applicant (and likely for the Bureau) because the data and documents are necessarily elsewhere, down the stream of commerce, and outside the possession, custody or control of the party subject to a fine. As the Bulletin seems to acknowledge, even if data can be obtained through compulsory process or otherwise, determining what is the "indirect" commerce attributable to the party, let alone that portion of the indirect commerce that represents "harm," is exceedingly challenging. It would necessarily complicate and prolong the sentencing process, thereby reducing predictability and transparency. Further, it seems unnecessary for the Bureau to reach for indirect commerce when, by all accounts, the fashioning of appropriate sentences using direct sales into Canada to calculate the volume of commerce has been readily achievable by pleading defendants and the Bureau in the past.

Calculating what is the appropriate direct sales "volume of commerce," particularly in international cartel cases, has been the subject of considerable controversy and some judicial uncertainty in the United States and elsewhere. Accordingly, it would seem that the inclusion of indirect commerce in the Canadian equation could only lead to greater confusion, and, therefore, an increased lack of transparency. Indeed, the Bureau acknowledges that it may only be able to "derive" indirect commerce from whatever incomplete data and information are available to it, essentially stipulating that the process is not transparent and is subject to uncertainty and challenge. This uncertainty could create a serious disincentive to participation in the leniency program, and would be highly undesirable from a policy perspective.

Overcharge factor: The Revised Bulletin cites a number of studies that "have estimated that the amount of the 'overcharge' resulting from cartel activity is in the order of at least 10 percent,"[14] and then proposes 20 percent of the volume of commerce affected as "a proxy for the economic harm"[15] caused by the cartel and as "the starting point for its sentencing assessment."[16] Similarly, the Bureau will use "20 percent of the volume of commerce affected in Canada by the cartel as a proxy for the economic harm caused in Canada by the indirect sales of the cartelized product."[17]

In sum, like its predecessor, the Bulletin proposes a presumption concerning the overcharge or economic harm caused by the crime.[18] In the Sections' July 2008 comments, we noted that the use of a presumption that all antitrust conspiracies result in the same level of harm could be inequitable and disproportionate – in either direction – in any given case. Those comments recommended, in the interest of fairness and proportionality, that defendants and parties seeking leniency or to settle cartel allegations be expressly entitled to an opportunity to rebut the presumption by providing evidence of the actual overcharges, if any.

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[14] *Id.*

[15] *Id.* ¶36.

[16] *Id.* ¶35.

[17] *Id.* ¶41.

[18] The *U.S. Guidelines* employ similar presumptions. The ABA Section of Antitrust Law ("ABA Antitrust Section") has questioned, and continues to question, whether the current presumption in determining criminal fine levels is empirically sound or good public policy. *See* Comments of the ABA Section of Antitrust Law In Response to the Antitrust Modernization Commission's Request for Public Comment on Criminal Remedies (November 14, 2005), *available at* http://www.abanet.org/antitrust/at-comments/2005/11-05/criminal remedies-comm.html); ABA Antitrust Section, Comments on the Proposed Amendments to the United States Sentencing Guidelines for Antitrust Sentencing (March 2005), *available at* http://www.abanet.org/antitrust/comments/2005/03-05/ussg-05.html; and ABA Antitrust Section, Comments on HR 1086: Increased Criminal Penalties, Leniency Detrebeling and the Tunney Act Amendment (January 2004), *available at* http://www.abanet.org/antitrust/comments/2004/reports.html.

The Sections are pleased to note that the Bulletin appears to take the approach that its proxies are rebuttable presumptions. For example, the Bureau professes willingness to "consider relevant and compelling evidence . . . that demonstrates an overcharge greater or less than the 10 percent proxy,"[19] and with respect to indirect sales states that it "will adjust the proxy of 20 percent of the volume of commerce affected if the accused brings forward evidence of actual harm to rebut this proxy."[20]

The Sections commend the Bureau for providing defendants and other parties seeking to settle cartel investigations the right to rebut the application of the proxy percentages adopted by the Bulletin. At the same time, the Sections recommend that – if it does not forego entirely an approach that considers indirect sales – the Bureau eliminate the apparent inconsistency between the treatment of direct and indirect sales, which may arise because accused parties are entitled to bring forth evidence to rebut the proxy of 20 percent for "economic harm" caused by indirect sales, while with respect to direct sales they are entitled only to present evidence challenging the 10 percent "overcharge" proxy with no comparable right provided with respect to the 20 percent proxy for "economic harm."[21]

III. Prohibition Orders

Consistent with our earlier comments, the Sections fully support the Bureau in its ongoing use of prohibition orders, particularly pursuant to subsection 34(2) in cases where there has not been an admission or finding of guilt. For greater transparency, the Sections recommend

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[19] ¶34.

[20] ¶42.

[21] *Compare* ¶42 with ¶¶34 and 35.

that the Bureau provide further guidance on the circumstances in which a prohibition order on consent without a guilty plea would be appropriate. In addition, because the Bulletin addresses both sentencing and leniency in cartel cases, the Bureau should consider including language that explicitly states that a prohibition order without a guilty plea under subsection 34(2) would be available to leniency applicants.

IV. Sentencing Recommendations: The Process

A. General Considerations

In our previous submission, the Sections suggested that the Bulletin could benefit from a more complete description of the plea process to better highlight and explain some of the features of the Canadian system, including the full discretion Canadian courts have to accept or reject a proposed plea agreement. The revised Bulletin, does, in the Sections' view, provide a better description of the elements of the plea process. There is, for example, a more complete description of the judicial discretion with respect to plea agreements and the revised Bulletin fairly explains that Canadian courts will typically only reject an agreed plea in exceptional circumstances, while recognizing that the possibility of a court rejecting a plea does exist. While the revised Bulletin states that defendants will be required to agree to an explicit (and public) statement of admitted facts, the revised Bulletin could go further by explaining that the statement of admissions will typically outline the nature of the conspiracy, the defendant's role in it, and such detail as the overall volume of commerce in the relevant product by the defendant over the period of the conspiracy. A fuller description will be of assistance to familiarize the defendants (particularly those unfamiliar with the criminal process) with the requirements and potential implications of seeking leniency in Canada.

B. Sentencing Recommendation for Individuals

The Sections noted in our previous submission that, while the Bulletin provided a basic description of the factors that will be taken into account in developing sentencing recommendations for individuals, it was unclear under what circumstances the Bureau will actually prosecute individuals separately from the company which has been involved in an offense and has obtained leniency. The revised Bulletin provides some guidance in this area, stating that, "witnesses who refuse to comply in a timely fashion, and without good reason, with the cooperation requirements in the plea agreement will typically be carved out of, or cease to be covered by, that agreement."[22] What remains unclear is whether this is intended to identify the only circumstance in which the Bureau will carve out individuals. If that is intended, this should be made explicit. If there are other circumstances which may result in individuals being carved out of a corporate settlement, those should be identified in the Bulletin. The Sections note that under United States practice, the circumstances in which individuals may be carved out are broader than the failure to provide timely cooperation. A clearer statement of prosecution policy for carve-outs of individuals in cartel cases will allow both corporations and associated individuals to know where they stand, lead to greater transparency and certainty in the process, and generally enhance the effectiveness of the leniency process in Canada.

The Sections note that the statement that, "Reference will be made to precedential case law involving similar facts and offences"[23] that was included in the prior version of the Bulletin, is proposed to be deleted. The Sections question whether this is to be taken as a change in

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[22] Revised Bulletin at ¶ 109.

[23] *Id.* at ¶56.

Bureau policy. For example, the Bureau's approach to date has predominantly featured fines rather than incarceration as the approach to punishing individuals in criminal cartel cases. If the preceding point signals a fundamental change in Bureau policy in this regard, this should be made clear in the revised Bulletin. Similarly, if no change in policy was intended, it would be helpful for the Bulletin to include a clear statement that the Bureau will have regard to relevant precedents in making its sentencing recommendations.

V. Leniency Considerations in Sentencing Recommendations

The Sections believe that the Bulletin would benefit from greater clarity if it addressed, in greater detail, the relationship between leniency considerations and sentencing recommendations. For example, Part II of the Bulletin describes cooperation with authorities as a mitigating factor to be considered by the Bureau in its sentencing assessment and recommendations. Full cooperation with the authorities is also an important condition for eligibility for lenient treatment. The Bulletin does not explain whether a party's cooperation will be considered by the Bureau to reduce the otherwise applicable sentence and whether that sentence will again be reduced by 50 percent for the "first-in" leniency applicant or by 30 percent for subsequent leniency applicants, or whether the 50 percent or 30 percent reduction for applicants will be a reduction of a sentence that has not already been reduced for mitigating factors.

There are several potential situations that the Sections recommend the Bureau consider exploring in greater detail, perhaps in the form of "frequently asked questions about the leniency program." For example, will the Bureau be prepared to recommend leniency to a corporation whose director, officer or employee is the immunity applicant? Similarly, will the Bureau be

prepared to recommend leniency to a parent corporation whose Canadian subsidiary has independently sought immunity for a section 46 offense? How will the percentage reductions be calculated? Will they be explained and illustrated? Given that the ultimate aim of a leniency program should be to provide sufficient incentives for the parties to settle rather than attempting to litigate each and every potential matter, the Sections submit that leniency should be granted liberally to provide incentives for parties to accept responsibility, cooperate and settle these matters.

A significant feature of the leniency system will be the extent to which the Bureau needs additional evidence when the leniency candidate comes forward to settle. The "value added" that the candidate brings forth will likely affect the size of the discount that it ultimately receives. The Bureau needs to be very clear in articulating the value of the cooperation lest a candidate believe that it is eligible for a bigger discount simply because it came in early but provided only cumulative evidence (although the Bureau should bear in mind the usefulness of corroboration from two or more sources). This must be transparent and certain, thus the clarity of the Bulletin is a critical factor to creating the race to the Bureau with "value added" cooperation.

VI. The Leniency Process and Privilege

As recognized by the Bureau, "lenient treatment" is not a novel concept under Canadian law. The Bureau has recommended lenient treatment in the past for cartel participants who have cooperated with Bureau investigations. However, to date, the Bureau's approach to leniency has been case specific and sometimes inconsistent. The Sections commend the Bureau for proposing a more formal leniency policy. A transparent and predictable leniency program will complement the Bureau's Immunity Program and support the effective and efficient enforcement of the Act.

The Bureau's approach to the incentives to settlement is completely consistent with the Commissioner's statement that parties are more likely to come forward and cooperate (rather than litigate) where they are fully aware of sentencing and leniency considerations and are confident that the Bureau will follow them in its recommendations to the DPP.

Transparency, legal certainty, generous settlement discounts and confidentiality and privilege are necessary criteria for making the leniency program attractive to potential defendants, corporate and individual. In that context, the Sections respectfully submit that the weight given by the Bureau to two of the primary leniency factors, namely, the timeliness of cooperation and the value of the evidence, should be more clearly articulated to prevent the inconsistent application of the Bureau's leniency program.

Similarly, the Sections submit that the effect that multiple leniency applications would have on the steps in the leniency process should be more clearly expressed in order to give prospective leniency applicants more clarity and predictability of outcome. A transparent and predictable leniency process is equally as important as clearly articulated leniency considerations.

The Bulletin sets out six steps to the leniency process:

Step 1 – Initial Contact/Marker Request

Step 2 – The Proffer

Step 3 –Lenient Treatment Recommendation to the DPP

Step 4 – Plea Agreement

Step 5 – Full Disclosure

Step 6 – The Plea

The Bulletin states that the Bureau will make a preliminary assessment of the potential contribution of the applicant to the investigation and will provide its recommendation on the rate of sentence reduction, or potentially the recommended fine if sufficient information is available to do so, as soon as the proffer is made. The Bulletin specifies that, at the proffer step in the process, the Bureau will need to know with detail and certainty the evidence and testimony in the applicant's possession or control and what measures the applicant is prepared to take to facilitate and ensure cooperation of its directors, officers and employees. Where the Bureau requires more information to assess the matter than is produced in the proffer, the Bureau may request, as with immunity applications, on a without prejudice basis, an interview with witnesses or an opportunity to review certain records.

The Bulletin also provides that full disclosure will be specified as part of the plea agreement negotiated with DPP, typically along with a schedule for such disclosure. The Bureau encourages early disclosure of evidence and unspecified "credit" for earlier disclosure of records and interviews can be expected to be reflected in the recommendation. The Bulletin clarifies, however, that full disclosure is not required under the Program until after a plea agreement has been concluded. Production after the plea agreement will typically occur within a six-month time frame. If the full disclosure occurs after the plea, it is expected to take place with little delay. The Sections commend the Bureau for providing this articulation of the process.

As with immunity applications, the Bulletin states that the "proffer" should typically be made within 30 days of initial contact. It is foreseeable, especially in situations where immunity has been granted and a search or "dawn raid" has been conducted, that multiple parties will come

forward within a short period of time seeking lenient treatment. The Bureau needs to clarify whether the Bureau's Leniency Program is a "race for the door" as it is with the Bureau's Immunity Program or how the Bureau will weigh the value of the evidence in making its leniency recommendation. The Bureau does not discuss what effect a second-in leniency applicant will have on a first-in leniency applicant if the second-in proffers evidence of greater probative value. That is an issue the Bureau will need to address to provide transparency and legal certainty to all potential leniency applicants.

As the Section of Antitrust Law has previously recommended, "[t]he timeliness of a party's cooperation should be the principal criterion considered by the Bureau, as it complements the 'first-in' nature of the Immunity Program" and "the guiding principle in determining incentives should be to encourage and reward parties for coming forward early."[24] Thus, the Sections recommend that the Bureau clarify that only the first-in leniency applicant is entitled to a 50 percent reduction in its fine regardless of the probative value of the evidence of subsequent leniency applicants. In this regard, the Sections recommend that the Bureau consider publishing responses to frequently asked questions about the Leniency Program similar to those published for the Bureau's Immunity Program.

With respect to the process of full and frank disclosure, the Sections recommend that, for greater certainty, the Bureau address what happens to directors, officers or employees of a leniency applicant who have cooperated with the Bureau's investigation if their employer ceases

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[24] Comments of the ABA Section of Antitrust Law in Response to the Canadian Competition Bureau Request for Public Comments Regarding Immunity Program Review (May 2006), *available at* http://www.abanet.org/antitrust/at-comments/2006/05-06/com-canadian-leniency.pdf.

to cooperate or fails to comply with its leniency obligations. The analogous issue is addressed in the Bureau's Immunity Program Responses to Frequently Asked Questions (FAQs).[25]

By conditioning the Bureau's request to interview witnesses immediately after a proffer but before making a recommendation on a specific need for more information than produced in the proffer and by providing a process of scheduling for disclosures after the plea, the Bulletin already appears to recognize some sensitivity to the legitimate concerns of applicants regarding the timing of making witnesses available for interviews. In particular, in investigations involving multiple jurisdictions, the applicant may confront conflicting requirements and impediments to production of witnesses in the time frames indicated in the Bulletin. Thus, the Sections are of the view that more clarity for the position that postponements of interviews for good cause should not weigh unfavorably in the process.

The Bulletin should also consider the general procedural due process implications of a "failed" leniency application. While the disclosures made in conjunction with the plea negotiations are protected as discussed in more depth below, this would not address the disclosures to the Bureau made at the proffer stage or before a recommendation is made. Both direct and indirect prosecutorial use of evidence or information derived from the unsuccessful leniency applicant in an indictment against it should be absolutely barred. Such a direction would not only enhance procedural clarity for potential applicants, but contribute to the overall integrity of the Bureau's cartel investigations and regulation process.

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[25] The FAQs are available at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02482e.html. In response to question 32, the Bureau responds: "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."

VII. Confidentiality and Privilege

The Sections commend the Bureau for its recommendation, in the Bulletin, for confidential treatment of the identify of a party requesting leniency and the information provided by the party, except where the identity or the information has already been made public, or where disclosure is required by law, to a Canadian law enforcement agency, for the purposes of the administration or enforcement of the Competition Act, or authorized by a party or necessary to prevent the commission of a serious criminal offense.[26] The Sections further note with approval that Section 29, subsection 10(3) of the Competition Act requires that all inquiries be conducted in private, and that, in the Information Bulletin on the Communication of Confidential Information Under the *Competition Act* (2005) (the Confidentiality Bulletin), the Commissioner of Competition and the Bureau have committed, in normal circumstances, to commenting publicly on the existence of an inquiry or examination only if it has become public through another source.[27] The recognition under Canadian law of a settlement privilege – the so-called "without prejudice" rule – that protects from disclosure settlement communications,[28] is another laudatory protection of confidentiality that, in the context of leniency applications, will provide a meaningful incentive to potential applicants.

There are, however, possible inconsistencies between these protections and the provisions of the Confidentiality Bulletin.[29] The latter provides for communication of confidential information in numerous other circumstances, including when: (1) "eliciting from market

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[26] Bulletin, at ¶¶ 88-89.

[27] Confidentiality Bulletin, ¶ 3.3, *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/info-bulletin-confidential-info-e.pdf/$FILE/info-bulletin-confidential-info-e.pdf.

[28] John Sopinka et al., THE LAW OF EVIDENCE IN CANADA, at 817 (2d ed. 1999).

[29] Bulletin, at ¶ 84.

participants, such as customers, suppliers or competitors, [information?] that may be used as evidence to determine whether the Bureau's or a third party's assessment of a matter is accurate" (though, in such circumstances, the Bureau takes "care to refrain from, or to minimize, the communication of confidential information" and "[s]uch communication will only occur if it is not otherwise reasonably possible to obtain necessary information from these third parties"); (2) "obtaining an opinion or analysis by an industry, legal, economic or other expert on some or "all aspects of the matter in question"; (3) "coordinating enforcement actions with foreign law enforcement authorities"; and (4) "when assessing the accuracy or the evidentiary value of information"; as well as during proceedings before the courts or the Competition Tribunal.[30]

While the establishment of a general rule for the preservation of confidentiality is laudable, some of the exceptions in the Confidentiality Bulletin are broad and may constitute serious disincentives to seeking leniency. Further, it is not clear whether the provisions in the Bulletin, which appear to provide for fewer and narrower exceptions to confidentiality of information obtained in the Leniency Program override those that are established generally in the Confidentiality Bulletin. The Sections therefore recommend that the Bureau expressly provide that, where inconsistent, the confidentiality provisions of the Bulletin supersede those of the Confidentiality Bulletin, and otherwise consider strengthening the assurances of confidential treatment of information provided by leniency applicants.[31]

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[30] Confidentiality Bulletin at ¶ 4.2.1.2.

[31] *See* Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law in Response to the Commission of the European Communications' Request for Public Comments on the Draft EU Settlement Procedures (December 2007), at 15-23, *available at* http://www.abanet.org/antitrust/at-comments/2007/02-07/comments-EU-Draft-Settlement.pdf (discussing the need to avoid a requirement for written submissions by leniency applicants, or if required, that the submissions be strictly limited and protected as confidential; the use of hypothetical fact patterns and proposed statements in lieu of submissions, especially in light

Conclusion

The Bureau's leniency proposal establishes a sound foundation for an effective program to encourage settlements in cartel cases. In light of the significant increase in corporate and individual penalties ushered in by the new Competition Law, this proposal is timely and necessary. Given the high penalties, the Sections encourage the Bureau to create a system with procedural transparency and legal certainty – to the extent that is possible – and settlement discounts that will be sufficiently generous to encourage parties to cooperate fully and settle early. The Bureau and the DPP also need to provide confidentiality and privilege assurances to protect the parties in future damage proceedings. This type of system will enhance the Bureau's ability to obtain early and complete cooperation and reduce the need for contested proceedings. These benefits will help the Bureau achieve its important goals of deterring and punishing cartels.

Respectfully submitted,

American Bar Association

Section of Antitrust Law

Section of International Law

Section of Business Law

Criminal Justice Section

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of the risk of statements in U.S. civil litigation and other enforcement proceedings; and the need to adopt specific safeguards to protect against the disclosure of settlement submissions).