

what's new with the FAQs

The Canadian Competition Bureau (Bureau), like many antitrust authorities, has established programs of immunity and leniency with respect to *Competition Act* or antitrust offences (click to view the guidelines with respect to the [Immunity Program](#) and [Leniency Program](#)). In very broad outline, these programs provide for the granting of criminal immunity to the first party to a *Competition Act* offence that reports the matter to the authorities and assists the authorities in their prosecution of others; and grants more lenient treatment than that which would otherwise apply to subsequent parties who come forward and agree to cooperate with the Bureau. The immunity recipient receives immunity from prosecution for itself and its employees, officers and directors. The first applicant for leniency will typically receive a significantly reduced fine, as well as immunity for its personnel. Second and subsequent applicants for leniency will receive lesser reductions in fines, and may not receive full immunity for their personnel.

These programs, both in Canada and elsewhere, are designed to create incentives for firms and individuals to report unlawful conduct and to cooperate with the authorities in its prosecution. They create a race to the authorities, with the prize for first place being significantly more valuable than the prize for second place, which is itself more valuable than the prize for third place, and so on. These programs have, broadly stated, succeeded brilliantly in aiding the detection and prosecution of price-fixing and related conduct. One critical element in the success of such programs is that they must be predictable. Unless firms understand with a very high degree of confidence how they will be treated if they apply for immunity or leniency they will be less willing to make such applications.

In order to promote transparency and predictability in the operation of its immunity and leniency programs, the Bureau has released answers to a number of frequently asked questions (the FAQs) to assist parties in understanding the process. The Bureau has just released **revised FAQs** with respect to its immunity and leniency programs. These revised FAQs were subject to consultations with the criminal matters committee of the Canadian Bar Association, but were not subject to broad consultation amongst the public or with international antitrust organizations which have characterized such consultations in the past. The reason the Bureau has given for not consulting more broadly is that the latest changes are relatively 'minor tweaks', rather than wholesale revisions to, the FAQs. Nevertheless, because a thorough understanding of the immunity and leniency process is important for potential participants in the system, minor tweaks worth making are similarly worth noting.

In broad outline the changes to the FAQs are as follows:

1. If a party has sought a marker to secure its place in the line for either immunity or leniency, the marker will expire after a period of time (typically 30 days) unless extended or unless a proffer is made to perfect the marker within that period of time. The new FAQs make it clear that if that period of time passes, and the party has not perfected its marker or sought and received an extension of time, the marker will expire without any warning or action on behalf of the Bureau. It is the responsibility of the applicant to keep the marker alive.
2. If the Bureau advises a person with a marker that in order to perfect the marker they need to do certain additional things, it is up to the applicant to request a sufficient extension of time for the marker to complete perfecting their position. Again, if the applicant has not taken those steps, the marker will expire.
3. By contrast, if the Bureau seeks to cancel an immunity or leniency marker for failure to meet other requirements of the process, it will give the applicant at least 14 days' notice of the proposed cancellation.

4. With respect to leniency applicants, fines sought are typically calculated based on the volume of commerce (VOC) in issue. This has given rise to peculiar situations, such as for instance where participants in a bid-rigging scheme have not actually received revenue because they provided cover bids but were not awarded business. The revised FAQs make it clear that the fact that the VOC attributable to a particular participant in the scheme is zero, or negligible, because they were participating as accommodation or cover parties, does not mean that that negligible amount will be the basis upon which fines are calculated.
5. The revised immunity and leniency FAQs indicate that detailed data identifying the VOC affected by the illegal conduct must be provided at the initial proffer stage, along with the "data and sources" used by the applicant to calculate the affected VOC. In many cases, this will have the effect of "front-end-loading" a significant amount of investigative work and analysis that, until recently, had typically been undertaken later in the co-operation process.
6. The new FAQs make it clear that where the Bureau has an applicant for immunity, and is of the view that an offence has been committed, but nevertheless determines (for discretionary reasons such as, perhaps, the relatively small amount of commerce involved) that it will not pursue a criminal case or refer the matter to the Public Prosecution Service of Canada (PPSC), the Bureau will not negotiate and enter into a formal immunity agreement with the immunity applicant in such a case. It will instead advise the applicant of the scope of the recommendation for immunity that it would otherwise have provided to the PPSC and, upon request, provide a comfort letter indicating the same. Should it subsequently decide to pursue the conduct, the Bureau will advise the applicant, and it will recommend immunity to the PPSC on the terms it would have done earlier.
7. The revised FAQs make express the requirement that immunity and leniency applicants are obliged to update information which

was the subject of the proffer as additional information becomes available.

8. The FAQs provide that leniency applicants, if they choose to participate in the program and receive leniency, are not to raise subsequent legal objections to the charges. If they agree to participate in the leniency program the understanding is that there will be a guilty plea.
9. The FAQs make it clear that persons who are not subject to prosecution as principals, but may be prosecuted as parties for aiding and abetting or counseling the offence, may seek markers and obtain leniency or immunity with respect to the conduct, and that those markers will count, in line with other applicants (e.g. first applicant for immunity, first applicant for leniency, second applicant for leniency, etc.) depending on the order in which the requests for markers were received by the Bureau, whether from a principal or from an aider, abettor or counsellor.

As noted at the outset, these changes to the FAQs are not earth-shattering, but they do clarify the Bureau's approach in a number of cases and reflect current practices and thinking at the Bureau. Clarity of understanding as to the operation of the program is very important for marketplace participants in deciding whether or not to seek immunity or leniency, and is therefore critical for the effectiveness of immunity and leniency programs.

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[a cautionary note](#)

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