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November 10, 2004

Ms. Glenda Gies  
Executive Director  
Waste Diversion Ontario  
45 Sheppard Avenue East, Suite 920  
North York, Ontario  
M2N 5W9

**RE: Competition Bureau views regarding the development of a waste diversion program in co-operation with an "Industry funding organization" to deal with used motor oil.**

Dear Ms. Gies:

Thank you for your letter of October 6, 2004 asking for our comments with respect to the draft Used Oil Material Program. As you know, the Competition Bureau is a federal agency with a mandate to assist the Commissioner of Competition in her statutory role to enforce the provisions of the *Competition Act* (the Act).

The Competition Bureau recognizes that the area of stewardship programs for waste materials is developing at a very fast pace across Canada, and further, that the development of these programs may impact on existing markets for waste materials. As advocates for competition, the Competition Bureau has a strong interest in providing you with any competition advice that we can.

You have asked us four questions which I have taken the liberty of paraphrasing into three areas of response:

- i) General economic and competitive considerations with respect to the market for the purchase and sale of used motor oil and the market for the purchase and sale of refined/re-refined motor oil;
- ii) Any features of the Used Oil Material Program Plan (UOMPP) that might raise competition concerns (abuse of dominance and or refusal to deal) and;

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- iii) Features of the UOMPP which despite creating competition concerns would be permissible in light of the “regulated conduct doctrine”.

**General economic and competitive considerations with respect to the market for the purchase and sale of used motor oil and the market for the purchase and sale of refined/re-refined motor oil;**

Any program which is implemented will have a direct impact on the prevailing markets that it is directed towards. In this regard, it is our understanding that the current approach for the disposal of used motor oil in Ontario has evolved into a fairly straightforward market with essentially three groups of players. The first group which are referred to as generators, consists of the those businesses which generate significant used motor oil deposits and the associated waste by-products associated with them (containers and oil filters). Generators enter into commercial relationships with collectors (the second group) to pickup the product and dispose of it. Collectors generate income at two ends of the collection business, they are paid by the generator to collect the product and then sell the product to a variety of end-users (the third group). End-users for the used oil are somewhat unique in the context of the Ontario market as they include an Ontario-based company that re-refines used motor oil as well as in-province and out-of-province companies that burn the oil as a cheap energy source.

One of the most important considerations when considering the economic and competitive impact of any regulatory regime is to first assess whether or not the current market-based solution is achieving the objectives of the policy for which a regulatory solution is sought.

It is our understanding that the objective of any plan implemented to deal with used motor oil is to increase the level of collection and diversion of its use. You have mentioned that the priorities for its diversion are the 3 R's: reduce usage, re-use the product and recycle. In our discussions you indicated that under the current market situation, roughly 78% of used motor oil that is generated in Ontario is being collected. Of that amount, 44% was being directed to re-refining (re-use) and approximately 50% was being burned. The remaining 6% was ending up in landfill. This leaves approximately 22% of product that is not being collected. While we assume that a 100% collection and diversion goal is the target, it is clear that the current market dynamic is providing a partially effective means of dealing with this used motor oil.

The UOMPP if implemented, would change the way in which business arrangements for the collection and diversion would occur. Whereas collectors are generally being paid by generators to dispose of the material, collectors would be compensated once they have collected and deposited the material to approved processors. Generators would then be approached by collectors under a different set of incentives. Previously they would be

willing to pay a collector to remove the material, now they would seek a return (a portion of the collection fee) from the collector in exchange for the used product. This would certainly evolve into a competitive dynamic between collectors for the right to pick-up material from the generators.

In terms of the choice of where to direct the materials, collectors will consider the processor which provides the highest return. At the present time there appear to be two types of end-users of the used motor oil; SafetyKleen which is a company that re-refines the product and industrial consumers that use the material as a cheap energy source. Both groups have a vested interest in obtaining this material as a raw material for their own commercial interest and will, subject to the costs of obtaining this material from alternative sources, continue to compete for the material. The returns to the collectors net of their costs of collection and disposition to end-users will ultimately determine where the used oil ends up. The questions that are of particular importance to the WDO are as follows:

*i) will the incentive program paid to the collectors change the market dynamic of where collectors choose to deliver their product.*

While an incentive fund will be created for the approved collection and disposal of motor oil, the program may very well lead to skewed results in terms of where the product ends up. Clearly, one of the uses of this product is re-refining. In the past re-refiners were able to receive monetary compensation by generators for the collection and disposal of the material. Now while they will receive some compensation for collection and disposal from the incentive fund, they will likely have to compete with other competitors for the right to collect product from generators. These generators will no doubt demand compensation and product will go to those collectors who offer the highest return to the generator. This may have an undesired impact of redirecting material for burning as opposed to re-refining if the collection market is better compensated by the burners than the re-refiners.

*ii) are there other considerations which might distort this competitive dynamic.*

Answering this question moves us into the realm of the possibility of anti-competitive behaviour.

**Any features of the Used Oil Material Program Plan (UOMPP) that might raise competition concerns (abuse of dominance and or refusal to deal)**

The key consideration from a Competition Policy perspective is the issue of whether the proposed plan will disrupt the competitive dynamic of the pre-existing market for the collection and consumption of the used motor oil.

In addition to the issues already identified, one additional factor must be considered. The generators of used motor oil are also competitors with one of the end-users of used motor oil. SafetyKleen, which collects and re-refines motor oil also competes in the Ontario market for clean motor oil as its re-refined product is a competitive substitute for new motor oil. This factor would remain somewhat benign but for the fact that the administrators of the proposed plan include the large generators but exclude SafetyKleen from the board of directors of the overseeing authority of the Plan.

Arguably it is in the plan administrators' collective interest to see that used motor oil is disposed of in an acceptable way. However it is arguable that it is also in their interests to try to prevent re-refined product from entering the market in direct competition with their products.

We are aware of the fact that the OUOMA has decided to prohibit SafetyKleen from membership on its board as it argues that SafetyKleen would be in a conflict of interest given that it is an end-user of used motor oil. In my opinion, this is no less of a conflict than the other members of OUOMA who compete in the sale of new motor oil and would no doubt benefit by restricting the access SafetyKleen or any other re-refiner has to used motor oil which it could re-refine and market in direct competition to these companies. It is with this in mind that consideration should be given to allowing all members of the market equitable access to both the plan and its governance.

**Features of the UOMPP which despite creating competition concerns would be permissible in light of the "regulated conduct doctrine".**

When determining whether the Regulated Conduct Doctrine (RCD) is applicable, the Bureau considers whether there is conflict between the statutory regulatory regime and the *Competition Act*. Conflict is defined as a situation, where obeying one statute means disobeying another. Only where such conflict exists can the RCD come into play and cause the specific statute (the regulatory regime) to prevail over the general legislation (the *Competition Act*). If there is no conflict, both pieces of legislation can exist in harmony.

In the case at hand, it is not clear that the incentive program by itself would conflict with the *Competition Act*. The possibility of conflict relates more to the ability of the plan administrators to use their collective market power associated with this administration function to engage in anti-competitive activities associated with denying access to the governance of the program or in some way restricting the ability of a competitor from having an equitable opportunity to compete.

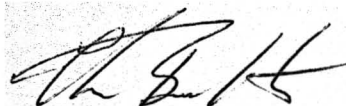
The RCD only applies to situations where a regulatee's conduct is mandated or required by the regulator, and that conduct is contrary to the Act. It is not our understanding that any plan, if adopted would be mandated by the regulator through legislation. The purpose of the Waste Diversion Act (WDA) is to promote the reduction, re-use and recycling of waste and to provide for the development, implementation and operation of waste diversion programs. Under the WDA, The Minister of Environment and Energy of Ontario may require Waste Diversion Ontario (WDO) to develop a waste diversion program for a designated waste. In turn, the WDO develops programs in co-operation with industry funding organizations. The Minister ultimately approves the program. While the Minister may set regulations governing such things as the composition of the board of directors of the industry funding organization, there does not appear to be any specific regulation which mandates the industry association's activities. Consequently, it is difficult to envisage that the regulated conduct doctrine would apply to any conflict with the *Competition Act* that might arise.

The Bureau is aware that self-regulators carrying out their statutory mandate in the public interest may sometimes be required to make decisions on matters in which they themselves have a direct pecuniary or other self-interest. It is the Bureau's view that self-governing regulators are distinct from regulators of public institutions, such as marketing boards. This is because public regulators generally do not make decisions on matters which have a direct impact on themselves. As a result, while the analysis regarding the RCD remains the same, the activities of self-regulators may be subject to greater scrutiny as to whether the agency in acting within its scope of authority due to the Bureau's concern that they may be regulating in their own interest.

In the Bureau's view, the RCD is only applicable in situations where Parliament or a provincial legislature has passed a statute setting up a regulatory regime. This means the RCD cannot be invoked unless the conduct complained of is grounded in a statute or regulations. In other words, the RCD cannot come about due to administrative fiat or convention.

I hope that these comments are of use to you in your efforts to devise waste diversion programmes. Should you have a further questions, please do not hesitate to call me at (819) 953-4965.

Yours sincerely,



Chris Busuttil  
Acting Major Case Director and  
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Civil Matters Branch