

Enforcement Guidelines



The Revised Merger Review Process

Draft For Public Consultation – March 24, 2009

Preface

The Competition Bureau (“Bureau”) is an independent agency responsible for, among other things, the administration and enforcement of the *Competition Act* (“Act”). The Bureau contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice.

Amendments to the merger provisions of the Act enacted in 2009 improved the predictability, effectiveness and efficiency of the merger review process by:

- raising the financial thresholds for merger pre-notification, and establishing a formula for automatic annual adjustments to these thresholds based on Canada’s gross domestic product (“GDP”);
- reducing the time period (from three years to one) within which the Bureau may challenge a merger before the Competition Tribunal (the “Tribunal”) following completion of the transaction; and
- establishing a more direct and effective mechanism for the Bureau to obtain the information that it requires to fulfill its merger review mandate through a supplementary request for information process (“supplementary information request”).

These Guidelines describe the approach of the Bureau to implementing the Act’s two-stage merger review process. In particular, these Guidelines outline the supplementary information request process, including a description of the practices and procedures that the Bureau will follow to ensure that the burden on parties in responding to a supplementary information request is no greater than necessary, while at the same time allowing the Bureau to obtain the information it requires to carry out a timely review of the few proposed mergers that appear likely to pose a significant threat to competitive markets in Canada.

Interim Commissioner of Competition

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INTERPRETATION

These Guidelines describe the general approach of the Bureau in implementing the Act's two-stage merger review process. These Guidelines supersede all previous statements of the Commissioner of Competition ("Commissioner") or other Bureau officials regarding the administration and enforcement of the merger review process.

Merger transactions vary greatly in terms of size, scope and structure. As such, these Guidelines cannot provide a comprehensive review of all procedural issues that may arise in a particular transaction. Firms contemplating notifying the Bureau regarding a proposed transaction are encouraged to seek advice from legal counsel regarding specific issues that may arise. Guidance about the applicability and/or interpretation of any aspect of the merger review process can also be obtained by requesting a binding written opinion from the Commissioner under section 124.1 of the Act.

These Guidelines do not replace the advice of legal counsel and are not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question. Final interpretation of the law is the responsibility of the Tribunal and the courts.



How to contact the Competition Bureau

These Guidelines and other Bureau publications are available on the Bureau's website. To obtain general information, make a complaint under the provisions of the legislation, or request a written opinion, please contact the Bureau by any of the means listed below:

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Organization of Guidelines

These Guidelines are organized into four parts:

Part 1 provides an introduction to the revised merger review process.

Part 2 describes the process the Bureau will follow during the initial 30 calendar day waiting period (the "initial 30-day review period").

Part 3 explains the process the Bureau will follow when it decides to issue a supplementary information request. It describes the pre-issuance dialogue the Bureau will pursue in advance of a supplementary information request; the restrictions on scope that the Bureau will adopt when formulating its supplementary information request; the internal review and approval process that the Bureau will follow before issuing a supplementary information request; the types of timing agreements which the Bureau will consider; the manner in which the reformed process will affect merger review and enforcement as between the Bureau and its international counterparts; the appeal processes available in respect of the reformed merger process; and, the enforcement options available to the Commissioner in the event of non-compliance with the review process.

Part 4 contains the text of the relevant provisions of the Act.



PART 1 - INTRODUCTION

The Bureau recognizes that the majority of mergers do not raise competition concerns and, indeed, may be efficiency enhancing. Nonetheless, from time to time, certain transactions raise a serious risk of substantially lessening or preventing competition, thereby adversely impacting consumers, businesses and the overall competitiveness of the Canadian marketplace. The Act requires that the Bureau investigate these transactions with a view to protecting Canadians by preventing such anti-competitive effects.

In discharging its merger review obligations, the Bureau's priority is to identify in a timely manner those few proposed mergers that pose a significant threat to competitive markets in Canada, and to allow the balance to proceed as expeditiously as possible. The Act provides an initial 30-day review period during which the vast majority of mergers will be cleared. For those few transactions where further review is required, the Act authorizes the Bureau to issue a "supplementary information request" for additional relevant information and extends the review period for an additional 30 calendar days from the date upon which the requested information is supplied. During this time, a proposed transaction may not be completed.

The supplementary information request process reflects the realities of modern competition enforcement, where use of sophisticated analytical tools in performing a competitive effects analysis often requires significant amounts of records and data. The supplementary information request process allows the Bureau to access information required to perform a competitive effects analysis in a timely and effective manner through a more efficient and less formal information-gathering process. The Bureau is committed to minimizing the parties' burden in complying with a supplementary information request by narrowing the issues and/or the requirements for additional data and records to the extent reasonably possible. In this regard, the Bureau has set out in these Guidelines specific steps, evaluative factors, and challenge mechanisms that, subject to certain exceptions, will be followed in all cases.

Despite the changes to the merger review process, the Bureau's substantive approach to merger review remains unchanged, including with respect to the analysis of competitive effects, the anti-competitive threshold, and the availability of an efficiencies exception. For further information regarding the Bureau's approach to substantive merger review, please see the Bureau's *Merger Enforcement Guidelines*.¹

As described below, merging parties are encouraged to contact the Bureau at the earliest possible opportunity to discuss proposed transactions. Early consultations and communication with the parties and their legal counsel will allow the Bureau to identify critical legal, factual and economic issues with a view to clearing all but the most potentially problematic matters within the initial 30-day review period after filing.

¹ (Ottawa: Industry Canada, 2004), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01245.html>>.



PART 2 - INITIAL 30-DAY REVIEW PERIOD

2.1 Overview

If a proposed transaction surpasses the party-size and transaction-size thresholds in sections 109 and 110 of the Act, subject to certain exceptions described in Part IX of the Act, the parties are required to notify the Commissioner prior to completing the transaction².

The initial 30- day review period begins once a complete filing has been received by the Bureau's Merger Notification Unit. During the initial 30-day review period, Bureau officers will identify those transactions that do not require further investigation and, for those that raise concerns, work diligently to narrow and refine issues to be examined in the second stage of the review. Merging parties are encouraged to assist the Bureau by framing the issues, responding to requests for information in a timely manner and providing the Bureau with substantiated claims regarding any applicable factors or exceptions, such as efficiency gains likely to result from the proposed transaction.

The Bureau's goal is to efficiently and effectively determine whether the proposed transaction is likely to result in a substantial lessening or prevention of competition, or whether the investigation can be closed within the initial 30-day period.³ Where the transaction appears likely to raise competition issues, the Bureau will determine whether additional information is required from the merging parties (normally by way of a supplementary information request) and/or third parties (by way of voluntary information requests or orders pursuant to section 11 of the Act) to conduct a sufficiently thorough assessment of the potential competitive impact of the transaction. When the Bureau requires additional information, it will work diligently to complete its review. The Parties will be free to close their transaction 30 days following the Bureau's receipt of the information requested in the supplementary information request unless the Bureau has obtained an order to prevent the closing of the transaction, such as an interim order under section 100 of the Act.

2.2 Early Consultations

While parties remain free to determine whether and when to engage in early consultations with the Bureau, parties are encouraged to consult with the Bureau prior to or as soon as possible after submitting a merger notification. The goal of these early consultations is to assist officers involved in the review with their assessment of the proposed transaction and to identify any issues requiring further inquiry. The Bureau may also seek information on a voluntary basis during this initial 30-day review period.

² The revised merger review framework does not affect the parties' ability to apply for an Advance Ruling Certificate under section 102 of the Act.

³ The Bureau will continue to make every effort to provide a response to merger notifications and ARC requests for non-complex transactions within the 14-day service standard period.



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As soon as possible within the initial 30-day review period, the Bureau's case team will communicate initial substantive evaluations of the issues identified to that point in time, although the Bureau may not be in a position to identify certain issues until later in the process. The Bureau will also seek to identify potentially dispositive issues. In particular, the Bureau will be open to discussing how certain issues may be accelerated, deferring other issues and/or compliance with additional information requirements to a later date, if appropriate.



PART 3 - ISSUANCE OF SUPPLEMENTARY INFORMATION REQUEST

3.1 Overview

Very few mergers raise a serious risk of anti-competitive effects. As such, it is unlikely that the supplementary information request mechanism will be triggered frequently. If additional information is required for the Bureau to complete its review of the proposed transaction, the Bureau may issue a supplementary information request to the merging parties. The supplementary information request applies to the merging parties. If additional information is required from third parties, the Bureau will continue to make use of orders pursuant to section 11 of the Act or voluntary requests for information.⁴

If a supplementary information request is necessary, officers will notify the parties within the initial 30-day review period that a supplementary information request is forthcoming. It will not be necessary for an inquiry to have been commenced under section 10 of the Act in order for the Bureau to issue a supplementary information request. However, the Bureau will have concluded on a preliminary basis that further information is required to determine whether the proposed transaction is likely to substantially lessen or prevent competition.

The issuance of a supplementary information request extends the waiting period during which the proposed transaction cannot be completed. Specifically, the Bureau will have an additional 30 calendar days to continue its examination of the proposed transaction, which begins once the parties have complied with the supplementary information request (the “second 30-day review period”).⁵ The Commissioner may terminate the waiting period at any time by notifying the parties that the Commissioner does not intend to challenge the transaction at that time.

(a) Hostile Transactions

Where the proposed transaction is an unsolicited or “hostile” bid, the initial 30-day review period begins when the Commissioner receives a complete filing from the bidder. Correspondingly, the target of the hostile transaction will be required to submit a filing to the Commissioner within 10 days of being notified by the Commissioner that a filing has been received from the bidder. Under the Act, a supplementary information request may be issued to the bidder and/or the target. However, the second 30-day review period will begin upon the date that the Commissioner receives the requested information from the bidder, without reference to the date the target complies with the supplementary information request. This is intended to prevent the target from delaying the completion

⁴ For further information on the application of section 11, please see *the Information Bulletin on Section 11 of the Competition Act* (November 2005), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01995.html>.

⁵ Please see sections 114(2), 114(2.1) and 123(1)(b) of the Act set out in the Appendix.



of a hostile transaction by failing to comply with a supplementary information request in a timely manner.

(b) Interim Injunctions

Under section 100 of the Act, the Commissioner may seek an interim order from the Tribunal to prevent the closing of a transaction where the Commissioner requires additional time to complete a review of the transaction and where other conditions are satisfied. Section 100 of the Act remains available to the Commissioner to address circumstances where additional time is required to review a merger, including circumstances where the Commissioner has obtained all necessary information from the parties, but requires additional time to complete the review.

3.2 Pre-Issuance Dialogue

For potentially problematic cases where additional information is required from the merging parties to assess the transaction, the Bureau will consider how the scope of a supplementary information request can reasonably be narrowed before issuance. Where time permits, discussions with the parties and their respective counsel may assist in reducing the burden imposed by a supplementary information request by, for example, limiting relevant custodians, limiting applicable time periods, identifying technological barriers to production, resolving confidentiality concerns, and discussing any perceived over-breadth, ambiguities or inaccuracies in a supplementary information request. In this regard, the parties are uniquely positioned to assist the Bureau in identifying concerns that can be addressed prior to the issuance of the supplementary information request.

The Bureau may also request interviews with representatives and/or technical experts from the parties with a view to understanding the likely competitive effects of the transaction to possibly eliminate the need for or, where applicable, to narrow any formal request for data and records. These interviews may be complemented by interviews with third parties in the marketplace, including competitors, customers, and other relevant parties, as appropriate.

While efforts will be made to work with the parties to avoid, or at least narrow, any supplementary information request, pre-issuance dialogue by no means precludes post-issuance dialogue for the purpose of further narrowing the issues/scope for productions. To the contrary, the Bureau anticipates that such post-issuance dialogue will be the norm.

3.3 Generally Applicable Scope Restrictions

The following describes a number of restrictions on the scope of supplementary information requests that the Bureau will follow in all but exceptional cases.

(a) Limiting number of custodians

The Bureau understands that the size of a search group is one of the most important determinants of the total cost of a merger investigation. Accordingly, the Bureau will, in



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all but exceptional cases, limit the number of custodians to be searched in preparing a response to a supplementary information request to a maximum of thirty (30) individuals (“Searchable Maximum”). Specifically, where parties engage in pre-issuance dialogue, the parties seeking to limit the custodians must make available to the Bureau the following:

- (i) a chart and personnel directory identifying all past and present employees having management responsibility with regard to potentially relevant products during the relevant time period, and their positions within the parties’ organizations;
- (ii) a member of each party’s staff with appropriate knowledge to discuss particulars of each employee’s roles and responsibilities in the parties’ organizations and their relationship to the issues forming the basis of the Bureau’s investigation; and
- (iii) a member of each party’s staff with appropriate knowledge of the manner in which the party collects, maintains and uses the types of information that the Bureau may seek pursuant to the supplementary information request, as well as the information technology systems which house the information in question.

Where such prerequisites are satisfied, the Bureau will generally limit the number of custodians to be searched for responsive records to the Searchable Maximum. For the sake of clarity, this general limitation does not exempt production of the following:

- (i) specific types of records contained in central files (including, for example, budgets, contracts and financial reports). Such files may be searched in addition to those of the custodians in the Searchable Maximum;
- (ii) predecessors, successors, secretaries and assistants of those custodians identified in the Searchable Maximum within the relevant period. The files of these individuals must also be reviewed along with those of the applicable custodian for the purposes of the supplementary information request; and
- (iii) employees operating at the local level where multiple local markets are relevant to the merger review.

The Bureau will not exceed the Searchable Maximum in the supplementary information request without approval from the Senior Deputy Commissioner of the Mergers Branch and the internal review committee described in section 3.4 below.

Once Bureau officers are provided with the information that is reasonably necessary to identify custodians falling within the search group, Bureau officers will notify the party of the custodians’ identities.

In appropriate cases, such as where the parties’ operations are run on a North American basis and there are no competition issues that are unique to Canada, the Bureau will consult with the parties with a view to limiting the custodians (to the extent possible) to



any list of custodians to which the U.S. authorities have agreed for purposes of a second request under the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*.

(b) Limiting time period

The default search period for hard copy and electronic records created or received by the parties will, in all but exceptional cases, be two (2) years from the date of the supplementary information request. This two-year period may be adjusted, as circumstances demand, to accommodate the particular facts of a case; however, approval from the Senior Deputy Commissioner of the Mergers Branch and internal review committee will be required for any such deviation.

In addition, the Bureau will, in all but exceptional cases, limit the relevant time period for data requests to the period that is three (3) years prior to the date of the supplementary information request. The Bureau recognizes that there will be circumstances where additional records and/or longer data sets are required to facilitate meaningful analysis, such as where the Bureau must assess industry dynamics prior to the entry of a new market participant as well as post-entry; however, departure from the default search period will require approval from the Senior Deputy Commissioner of the Mergers Branch and internal review committee.

(c) Review of back-up media

Back-up tapes and other storage media are used for disaster recovery or archiving purposes, and generally are not configured for routine document review. The Bureau acknowledges the burden that may be associated with reviewing back-up media. However, rather than specifying a standard number of back-up tapes or a period for which information must be preserved, the Bureau will engage in discussions with parties on a case-by-case basis, having regard to the nature of the investigation and the available information. Where the parties engage in pre-issuance dialogue, the parties should provide the Bureau with details of its archival systems and procedures at the earliest possible opportunity. The Bureau and the parties can then work together to determine how best to meet the Bureau's information needs given the parties' particular circumstances and, indeed, whether a review of back-up tapes is required at all. In general, the parties will not be required to resort to producing records contained on back-up tapes where sufficient records can be obtained through less onerous means.

(d) Additional Measures to Manage Burden

The presumptive limits described above reflect the Bureau's commitment to minimizing the burden of the merger review process. The Bureau anticipates that parties, in turn, will use best efforts to respond in a timely manner to information requests, and provide access to business and technical staff to allow the Bureau to better understand the nature and structure of the business at the earliest possible stage. This will also limit the circumstances in which the Bureau will find it necessary to depart from the default limitations specified above.



The Bureau anticipates that this coordinated information-gathering process would continue for the duration of the supplementary information request compliance period. The Bureau shares the parties' desire to resolve any anti-competitive concerns expeditiously. Accordingly, the Bureau will remain open throughout the process to discussing parties' suggestions for tailoring the supplementary information request, provided such modifications are consistent with the Bureau's need for records and data sufficient to enable it to satisfy its statutory mandate.

3.4 Internal Review and Approval

A committee composed of four senior members of the Bureau and the Department of Justice will review all supplementary information requests prior to issuance. The committee consists of the Assistant Deputy Commissioner responsible for the case, the Commissioner's Special Economic Advisor/Chief Economist (or his or her designate), a Senior Counsel, Competition Bureau Legal Services, Department of Justice, who does not have primary carriage of the file, and the senior counsel with primary carriage of the file.

In reviewing a proposed supplementary information request, the committee will assess the requested scope of information, consider any departures from standard timeframes or number of custodians and generally scrutinize the propriety of the supplementary information request in the circumstances. This review is intended to act as an important internal control to minimize the burden imposed on parties in complying with a supplementary information request to the extent reasonably possible, while recognizing the Bureau's need for information to complete its investigation and analysis. Approval of the committee is required before a supplementary information request is issued.

3.5 Timing

The Bureau encourages the merging parties to consult with the Bureau on the timing of certain steps in the review of the transaction, including:

- (a) the date by which the Bureau will issue any supplementary information request;
- (b) the date by which the Bureau will identify employees or agents of the parties that it proposes to interview;
- (c) the period during which parties will make such persons available for interviews;
- (d) rolling commitments on production to comply with supplementary information request categories;
- (e) timing for updates on the status of the investigation;
- (f) the date by which the parties anticipate they will comply with the supplementary information request;



- (g) the date by which the Bureau will provide the parties with a preliminary assessment as to whether it believes they have complied with the supplementary information request;
- (h) the period of time during which parties will use their best efforts to resolve any deficiency Bureau officers may have identified in the response to the supplementary information request;
- (i) timing for interim assessment;
- (j) timing for final assessment; and
- (k) timing of closing.

To the extent that the Bureau agrees that it is appropriate to dispense with or defer production obligations, this will neither limit the Bureau's right to seek production of information through a discovery process where applicable, nor alter the parties' record preservation obligations. The Bureau has a right to discovery in all merger cases in which a challenge is filed with the Tribunal.

3.6 International Cooperation

The Bureau intends to continue its extensive cooperation and coordination efforts with foreign agencies. The Bureau's experience in this regard has, in recent years in particular, significantly improved the efficacy and efficiency of its merger reviews. The amended merger review process allows the Bureau to further harmonize its regime with those of Canada's major trading partners.

The Bureau will accept access to and copies of information and documents produced to a foreign agency as compliance with the relevant terms of a supplementary information request (to the extent such information and documents are responsive), provided parties agree that information and documents received in this manner will be treated for all purposes "as if" provided directly to the Bureau and parties do not impose restrictions on the use of such documents that are unacceptable to the Bureau. In this way, provided the parties have furnished the foreign agency with appropriate waivers, duplicative search and production efforts may be significantly reduced.

As indicated in the discussion above pertaining to limits on custodians to be searched, the Bureau will be prepared to coordinate with foreign agencies, to the extent appropriate given Canadian issues, as to the specific individuals from whom documents need to be collected.

3.7 Compliance with Supplementary Information Request

Pursuant to section 116 of the Act, parties are not required to supply certain information in response to a supplementary information request, including information that is not known or reasonably obtainable, information that cannot be supplied because of the



privilege that exists between lawyers and notaries and their clients, or information that cannot be supplied because of a confidentiality requirement established by law, as long as the parties inform the Commissioner under oath or solemn affirmation of the reason why the information cannot be supplied. In these circumstances, parties are urged to consult with the Bureau at the earliest possible stage regarding any information that will not be supplied pursuant to section 116.

In accordance with section 118 of the Act, the information supplied in response to a supplementary information request must be certified under oath or solemn affirmation as being correct and complete in all material respects. Where the information is supplied by a corporation, the oath or solemn affirmation must be given by an officer of the corporation or other person duly authorized by the board of directors or other governing body of the corporation. Where the information is supplied by a person other than a corporation, then the oath or solemn affirmation must be given by that person.

3.8 Appeal Procedure

(a) Where scope of supplementary information request is challenged

Any party who objects to the scope of a supplementary information request is encouraged to engage in discussions with the responsible Assistant Deputy Commissioner at the earliest opportunity. Where following such discussions, the party continues to object to the scope of all or part of a supplementary information request, this party may submit a request to the Senior Deputy Commissioner of the Mergers Branch to have the supplementary information request reviewed through the Bureau's internal appeal process. Under this procedure, a Senior Deputy Commissioner or Deputy Commissioner of a branch of the Bureau (the "Reviewer") – other than the Mergers Branch – will provide the merging parties with a reasonable opportunity to make submissions or consult regarding the scope of the supplementary information request. The Reviewer will speak to the responsible Assistant Deputy Commissioner and will review the scope of the supplementary information request to ensure that the information requested is appropriate. If necessary, the Reviewer will modify the requirements of the supplementary information request.

A party may rely on this procedure if it believes that the supplementary information request is unreasonably broad, unduly burdensome or duplicative and, after exhausting reasonable efforts, has been unable to reach an agreement with the Assistant Deputy Commissioner responsible for the review. The party will be required to submit, in writing, a brief explanation of the reasons why it believes that compliance would be unduly burdensome and the modifications proposed. All appeals should be directed to the Senior Deputy Commissioner of the Mergers Branch, who will immediately forward the request to the appropriate Reviewer. The Reviewer may request additional information within five (5) business days of receipt of the written appeal, and will render a decision within seven (7) business days after the party has provided all requested information. An appeal must be made prior to an assertion that the recipient has complied with the



information request, and such party must agree to defer asserting compliance with the supplementary information request until the appeal process has been completed or the party has withdrawn its appeal.

(b) Where non-compliance is challenged

If the party has certified that it has complied with the request, the Bureau will advise the party in a timely manner whether the information supplied complies with the supplementary information request and if so, the date upon which the second 30-day waiting period commenced.

The Bureau has also established an appeal mechanism to deal with any disputes between the Bureau and the party supplying the information regarding compliance. Where the party supplying the information, after reasonable efforts, has been unable to reach agreement with the responsible Assistant Deputy Commissioner regarding compliance, the party may appeal the matter to a Senior Deputy Commissioner or Deputy Commissioner of a branch of the Bureau (the “Reviewer”) – other than the Mergers Branch. The Reviewer will provide the merging parties with a reasonable opportunity to make submissions or consult regarding compliance with the supplementary information request. The Reviewer will speak to the responsible Assistant Deputy Commissioner and will review the information provided to ensure that it complies with the supplementary information request.

The appeal regarding compliance must be submitted in writing and must include a concise explanation of the reasons why the party believes that it is in compliance. All appeals should be directed to the Senior Deputy Commissioner of the Mergers Branch, who will immediately forward the request to the appropriate Reviewer. The Reviewer may request additional information within five (5) business days of receipt of the written appeal. The Reviewer will render a decision within seven (7) business days after the party has provided all of the necessary information. If the Reviewer determines that the party has submitted the information requested under the supplementary information request, the waiting period will begin on the date that the parties certified compliance. If the Reviewer determines that the party has not submitted the information required pursuant to the supplementary information request, the Bureau will advise the party in writing that the response to the information request is deficient and describe the specific areas where further information is required.

As discussed below, if the Bureau is of the view that the parties have not complied with a supplementary information request, the Commissioner may apply to a court⁶ for a determination on the question of compliance. As part of this determination and, significantly, prior to the court’s power to impose any sanction, parties will have an opportunity to demonstrate to the court that they have complied with the information

⁶ Note that for the purposes of addressing issues involving failure to comply, section 123.1(4) defines a court to mean the Tribunal, the Federal Court or the superior court of a province.



request or, where they did not comply, that they had good and sufficient cause not to comply.

3.9 Enforcement

A notifiable transaction in respect of which a supplementary information request has been issued may not close pending the expiry of second 30-day waiting period. If parties proceed to complete the proposed transaction prior to submitting the information requested under a supplementary information request and prior to the expiration of the second 30-day waiting period without good and sufficient cause, such parties may be subject to sanctions under section 123.1 of the Act. Specifically, on application by the Commissioner, a court may make an order requiring that the completed transaction be dissolved, or an order requiring the payment of an administrative monetary penalty up to a maximum amount of \$10,000 for each day on which the parties have failed to comply. Monetary penalties are only applicable if parties have proceeded to close in violation of the waiting period.

Where the parties provide notice of an intention to complete the proposed transaction without complying with the supplementary information request, or the Commissioner otherwise believes that the parties are likely to complete the proposed transaction without complying, the Commissioner may apply to a court for an injunction pursuant to section 123.1, prohibiting the parties from doing anything that may constitute or be directed toward the completion or implementation of the proposed transaction.

The Commissioner bears the burden of demonstrating a failure to comply with the supplementary information request before any sanction can be imposed. Significantly, in all cases, parties have an opportunity to demonstrate to a court that they have complied with a supplementary information request or, where they did not comply, that they had good and sufficient cause not to comply.



PART 4 - RELEVANT PROVISIONS OF THE ACT

Limitation period

97. No application may be made under section 92 in respect of a merger more than one year after the merger has been substantially completed.

Application of Part

110. (1) This Part applies only in respect of proposed transactions described in this section.

Acquisition of assets

(2) Subject to sections 111 and 113, this Part applies in respect of a proposed acquisition of any of the assets in Canada of an operating business if the aggregate value of those assets, determined as of the time and in the manner that is prescribed, or the gross revenues from sales in or from Canada generated from those assets, determined for the annual period and in the manner that is prescribed, would exceed the amount determined under subsection (7) or (8), as the case may be.

Acquisition of shares

(3) Subject to sections 111 and 113, this Part applies in respect of a proposed acquisition of voting shares of a corporation that carries on an operating business or controls a corporation that carries on an operating business

(a) if

(i) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that are owned by the corporation or by corporations controlled by that corporation, other than assets that are shares of any of those corporations, would exceed the amount determined under subsection (7) or (8), as the case may be, or

(ii) the gross revenues from sales in or from Canada, determined for the annual period and in the manner that is prescribed, generated from the assets referred to in subparagraph (i) would exceed the amount determined under subsection (7) or (8), as the case may be; and

(b) if, as a result of the proposed acquisition of the voting shares, the person or persons acquiring the shares, together with their affiliates, would own voting shares of the corporation that in the aggregate carry more than the following



percentages of the votes attached to all the corporation's outstanding voting shares:

- (i) 20%, if any of the corporation's voting shares are publicly traded,
- (ii) 35%, if none of the corporation's voting shares are publicly traded, or
- (iii) 50%, if the person or persons already own more than the percentage set out in subparagraph (i) or (ii), as the case may be, before the proposed acquisition.

Amalgamation

- (4) Subject to subsection (4.1) and section 113, this Part applies in respect of a proposed amalgamation of two or more corporations if one or more of those corporations carries on an operating business, or controls a corporation that carries on an operating business, where
 - (a) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that would be owned by the continuing corporation that would result from the amalgamation or by corporations controlled by the continuing corporation, other than assets that are shares of any of those corporations, would exceed the amount determined under subsection (7) or (8), as the case may be; or
 - (b) the gross revenues from sales in or from Canada, determined for the annual period and in the manner that is prescribed, generated from the assets referred to in paragraph (a) would exceed the amount determined under subsection (7) or (8), as the case may be.

General limit relating to parties to an amalgamation

- (4.1) This Part does not apply in respect of a proposed amalgamation of two or more corporations if one or more of those corporations carries on an operating business or controls a corporation that carries on an operating business, unless each of at least two of the amalgamating corporations, together with its affiliates,
 - (a) has assets in Canada, determined as of the time and in the manner that is prescribed, that exceed in aggregate value the amount determined under subsection (7) or (8), as the case may be; or
 - (b) has gross revenues from sales in, from or into Canada, determined for the annual period and in the manner that is prescribed, that exceed in aggregate value the amount determined under subsection (7) or (8), as the case may be.



Combination

- (5) Subject to sections 112 and 113, this Part applies in respect of a proposed combination of two or more persons to carry on business otherwise than through a corporation if one or more of those persons proposes to contribute to the combination assets that form all or part of an operating business carried on by those persons, or corporations controlled by those persons, and if
- (a) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that are the subject-matter of the combination would exceed the amount determined under subsection (7) or (8), as the case may be; or
 - (b) the gross revenues from sales in or from Canada, determined for the annual period and in the manner that is prescribed, generated from the assets referred to in paragraph (a) would exceed the amount determined under subsection (7) or (8), as the case may be.

Combination

- (6) Subject to sections 111, 112 and 113, this Part applies in respect of a proposed acquisition of an interest in a combination that carries on an operating business otherwise than through a corporation
- (a) if
 - (i) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that are the subject-matter of the combination would exceed the amount determined under subsection (7) or (8), as the case may be, or
 - (ii) the gross revenues from sales in or from Canada, determined for the annual period and in the manner that is prescribed, generated from the assets referred to in subparagraph (i) would exceed the amount determined under subsection (7) or (8), as the case may be; and
 - (b) if, as a result of the proposed acquisition of the interest, the person or persons acquiring the interest, together with their affiliates, would hold an aggregate interest in the combination that entitles the person or persons to receive more than 35% of the profits of the combination, or more than 35% of its assets on dissolution, or, if the person or persons acquiring the interest are already so entitled, to receive more than 50% of such profits or assets.



Amount for notification

- (7) In the year in which this subsection comes into force, the amount for the purposes of subsections (2) to (6) is \$70,000,000.

Amount for notification — subsequent years

- (8) In any year following the year in which subsection (7) comes into force, the amount for the purposes of any of subsections (2) to (6) is

(a) any amount that is prescribed for that subsection; or

(b) if no amount has been prescribed for that subsection,

- (i) the amount determined by the Minister in January of that year by rounding off to the nearest million dollars the amount arrived at by using the formula

$$A \times (B / C)$$

where

A is the amount for the previous year,

B is the average of the Nominal Gross Domestic Products at market prices for the most recent four consecutive quarters, and

C is the average of the Nominal Gross Domestic Products at market prices for the four consecutive quarters for the comparable period in the year preceding the year used in calculating B, or

- (ii) until the Minister has published under subsection (9) an amount for that year determined under subparagraph (i), if the Minister does so at all, the amount for that subsection for the previous year.

- (9) As soon as possible after determining the amount for any particular year, the Minister shall publish the amount in the *Canada Gazette*.

Notice of proposed transaction

- 114.** (1) Subject to this Part, the parties to a proposed transaction shall, before the transaction is completed, notify the Commissioner that the transaction is proposed and supply the Commissioner with the prescribed information in accordance with this Part, if



- (a) a person, or two or more persons pursuant to an agreement or arrangement, propose to acquire assets in the circumstances set out in subsection 110(2), to acquire shares in the circumstances set out in subsection 110(3) or to acquire an interest in a combination in the circumstances set out in subsection 110(6);
- (b) two or more corporations propose to amalgamate in the circumstances set out in subsection 110(4); or
- (c) two or more persons propose to form a combination in the circumstances set out in subsection 110(5).

Additional information

- (2) The Commissioner or a person authorized by the Commissioner may, within 30 days after receiving the prescribed information, send a notice to the person who supplied the information requiring them to supply additional information that is relevant to the Commissioner's assessment of the proposed transaction.

Contents of notice

- (2.1) The notice shall specify the particular additional information or classes of additional information that are to be supplied.

Corporation whose shares are acquired

- (3) If a proposed transaction is an acquisition of shares and the Commissioner receives information supplied under subsection (1) by a party to the transaction, other than the corporation whose shares are being acquired, before receiving such information from the corporation,
 - (a) the Commissioner shall immediately notify the corporation that the Commissioner has received from that party the prescribed information; and
 - (b) the corporation shall supply the Commissioner with the prescribed information within 10 days after being notified under paragraph (a).

Notice and information

- (4) Any of the persons required to give notice and supply information under this section may
 - (a) if duly authorized to do so, give notice or supply information on behalf of and in lieu of any of the others who are so required in respect of the same transaction; or



(b) give notice or supply information jointly with any of those others.

Where information cannot be supplied

116. (1) If any of the information required under section 114 is not known or reasonably obtainable, or cannot be supplied because of the privilege that exists in respect of lawyers and notaries and their clients or because of a confidentiality requirement established by law, the person who is supplying the information may, instead of supplying the information, inform the Commissioner under oath or solemn affirmation of the matters in respect of which information has not been supplied and the reason why it has not been supplied.

Where information not relevant

(2) If any of the information required under section 114 could not, on any reasonable basis, be considered to be relevant to an assessment by the Commissioner as to whether the proposed transaction would or would be likely to prevent or lessen competition substantially, the person who is supplying the information may, in lieu of supplying the information, inform the Commissioner under oath or solemn affirmation of the matters in respect of which information has not been supplied and why the information was not considered relevant.

Where information previously supplied

(2.1) If any of the information required under section 114 has previously been supplied to the Commissioner, the person who is supplying the information may, in lieu of supplying it, inform the Commissioner under oath or solemn affirmation of the matters in respect of which information has previously been supplied and when it was supplied.

Commissioner may require information

(3) Where a person chooses not to supply the Commissioner with information required under section 114 and so informs the Commissioner in accordance with subsection (2) or (2.1) and the Commissioner or a person authorized by the Commissioner notifies that person, within seven days after the Commissioner is so informed, that the information is required, the person shall supply the Commissioner with the information.

Time when transaction may not proceed

123. (1) A proposed transaction referred to in section 114 shall not be completed before the end of



- (a) 30 days after the day on which information required under subsection 114(1) has been received by the Commissioner, if the Commissioner has not, within that time, required additional information to be supplied under subsection 114(2), or
- (b) 30 days after the day on which the information required under subsection 114(2) has been received by the Commissioner, if the Commissioner has within the 30-day period referred to in paragraph (a) required additional information to be supplied under subsection 114(2).

Waiving of waiting period

- (2) A proposed transaction referred to in section 114 may be completed before the end of a period referred to in this section if, before the end of that period, the Commissioner or a person authorized by the Commissioner notifies the persons who are required to give notice and supply information that the Commissioner does not, at that time, intend to make an application under section 92 in respect of the proposed transaction.

Acquisition of voting shares

- (3) In the case of an acquisition of voting shares to which subsection 114(3) applies, the periods referred to in subsection (1) shall be determined without reference to the day on which the information required under section 114 is received by the Commissioner from the corporation whose shares are being acquired.

Failure to comply

123.1 (1) If, on application by the Commissioner, the court determines that a person, without good and sufficient cause, the proof of which lies on the person, has completed or is likely to complete a proposed transaction before the end of the applicable period referred to in section 123, the court may

- (a) order the person to submit information required under subsection 114(2);
- (b) issue an interim order prohibiting any person from doing anything that it appears to the court may constitute or be directed toward the completion or implementation of the proposed transaction;
- (c) in the case of a completed transaction, order any party to the transaction or any other person, in any manner that the court directs, to dissolve the merger or to dispose of assets or shares designated by the court;
- (d) in the case of a completed transaction, order the person to pay, in any manner that the court specifies, an administrative monetary penalty in an amount not



exceeding \$10,000 for each day on which they have failed to comply with section 123, determined by the court after taking into account any evidence of the following:

- (i) the person's financial position,
 - (ii) the person's history of compliance with this Act,
 - (iii) the duration of the period of non-compliance, and
 - (iv) any other relevant factor; or
- (e) grant any other relief that the court considers appropriate.

Purpose of order

- (2) The terms of an order under paragraph (1)(d) shall be determined with a view to promoting conduct by the person that is in conformity with the purposes of this Part and not with a view to punishment.

Unpaid monetary penalty

- (3) The amount of an administrative monetary penalty imposed under paragraph (1)(d) is a debt due to Her Majesty in right of Canada and may be recovered as such from the person in a court of competent jurisdiction.

Definition of "court"

- (4) In this section, "court" means the Tribunal, the Federal Court or the superior court of a province.



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