



Competition Bureau
Canada

Bureau de la concurrence
Canada

Enforcement Guidelines



Merger Review Process Guidelines



Canada 

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PREFACE

The Competition Bureau (“Bureau”) is an independent law enforcement 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.

In 2009, amendments to the merger provisions of the Act were introduced to improve the predictability, effectiveness and efficiency of the merger review process by:

- raising the financial thresholds for merger notification and establishing a formula for automatic annual adjustments to these thresholds;
- reducing the time period (from three years to one) within which the Commissioner of Competition (“Commissioner”) may challenge a merger before the Competition Tribunal (“Tribunal”) following completion of the transaction; and
- establishing a two-stage review procedure, and a more direct and effective mechanism for the Bureau to obtain the information that it requires to fulfill its merger review mandate (referred to herein as a “supplementary information request” or “SIR”).

These Guidelines describe the Bureau’s general approach to administering the Act’s two-stage merger review process. In particular, these Guidelines outline the SIR process, including a description of the practices and procedures that the Bureau will follow to ensure that the potential burden on parties in responding to a SIR is no greater than necessary, while at the same time enabling the Bureau to obtain information required to conduct its review.

Commissioner of Competition

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INTERPRETATION

These Guidelines supersede all previous statements of the Commissioner or other Bureau officials regarding the administration and enforcement of the merger review process.

Merger transactions vary greatly in size, scope and structure. As such, these Guidelines cannot provide a comprehensive review of all procedural issues that may arise from a particular transaction. Firms contemplating notifying the Bureau of a proposed transaction are encouraged to seek advice from legal counsel. Guidance regarding the applicability or interpretation of Part IX of the Act or the *Notifiable Transactions Regulations* can also be obtained by requesting a binding written opinion from the Commissioner pursuant to 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.

The Bureau may revisit certain aspects of these Guidelines in light of experience and changing circumstances.

ORGANIZATION OF GUIDELINES

These Guidelines are organized into four parts:

Part 1 provides an introduction to the two-stage merger review process.

Part 2 describes the process the Bureau will follow during the initial 30-day waiting period.

Part 3 describes the process the Bureau will follow when a decision to issue a SIR has been taken.

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

PART I — 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 a substantial lessening or prevention of competition, thereby having a negative impact on consumers, businesses and the overall competitiveness of the Canadian economy. The Bureau reviews these transactions in accordance with the Act, with a view to protecting and promoting competitive markets.

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 establishes an initial 30-day waiting period during which the vast majority of notified mergers will be cleared. For those few transactions that give rise to potentially significant issues, the Bureau may issue a "supplementary information request", or "SIR", for additional relevant information. The issuance of a SIR to one or more notifying parties triggers a second 30-day waiting period, which commences when the Commissioner has received from each recipient a complete response to all information requests set out in the SIR. A proposed transaction may not be completed until the expiry of the applicable waiting period, subject to termination of the waiting period where the Commissioner notifies the parties that the Bureau does not intend, at that time, to make an application under section 92 of the Act in respect of the proposed transaction, or extension of the waiting period pursuant to an order under section 100 of the Act.

The SIR process allows the Bureau to obtain records and data required for the Bureau's review in a timely and effective manner, and through a more efficient and less formal information-gathering process than that associated with obtaining orders under section 11 of the Act. The Bureau is committed to minimizing parties' potential burden in complying with a SIR, to the extent possible, by narrowing the issues and/or the requirements for records and data. In this regard, the Bureau has set out in these Guidelines specific practices and procedures that, subject to certain exceptions, will be followed in all cases.

The amendments to the merger review process do not affect the Bureau's substantive approach to merger review, 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 substantive approach to merger review, please refer to the Bureau's *Merger Enforcement Guidelines*¹ and *Bulletin on Efficiencies in Merger Review*.²

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

² (Ottawa: Industry Canada, 2009), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02982.html>>.

PART 2 — INITIAL 30-DAY WAITING PERIOD

2.1 OVERVIEW

Where a proposed transaction surpasses the “party-size” and “transaction-size” thresholds set out in sections 109 and 110 of the Act, the parties are required to notify the Commissioner.³ In these cases, the parties are legally prohibited from closing the transaction for an initial 30-day waiting period that begins the day after the Bureau’s receipt of a merger notification that is determined to be complete by the Merger Notification Unit.

During this initial waiting period, the Bureau’s goal is to determine in an efficient manner whether the proposed transaction is likely to result in a substantial lessening or prevention of competition, or whether the review of the transaction can be closed. Bureau officers will identify those transactions that do not require further examination and, for those that raise concerns, work diligently to narrow and refine issues. Merging parties are encouraged to assist the Bureau by responding to requests for information in a timely manner, and substantiating claims regarding applicable factors or exceptions upon which the parties intend to rely, such as efficiency gains likely to result from the proposed transaction.

As soon as possible within this initial period, the Bureau’s case team will communicate preliminary views on potential competition issues identified to that point in time (understanding that further issues may be identified at a later stage as the review progresses). The Bureau may also request that the parties provide records and data on a voluntary basis. As discussed further below, timely compliance with a voluntary information request can minimize the need for, or scope of, a subsequent SIR.

Where a proposed transaction appears likely to raise significant competition issues, the Bureau will determine whether additional information is required from the merging parties and/or third parties to conduct a sufficiently thorough assessment of the potential competitive impact of the transaction. If the Bureau requires additional information, such information will generally be sought from the merging parties by way of a SIR⁴, and from

³ Subject to certain exceptions described in Part IX of the Act.

⁴ If merging parties cooperate and comply with the issuance of a SIR, the Bureau anticipates that use of orders pursuant to section 11 of the Act to obtain additional information from merging parties in a consensual transaction will be rare. Notably, the Bureau retains jurisdiction to review transactions that do not trigger the statutory thresholds for merger notification, and in these cases, the Bureau may use orders pursuant to section 11 of the Act in order to gather required information from the merging parties. Further, in the case of a transaction that falls within the ambit of subsection 114(3) of the Act (an “unsolicited bid”) that raises potentially significant competition issues, and where pursuant to subsection 123(3) of the Act the second waiting period is not based on compliance with the SIR by the target, SIRs and/or orders pursuant to section 11 of the Act may be used to obtain necessary information concerning the target and the bidder. Section 11 orders may also be used in circumstances where a party has committed to supply information to the Bureau on a voluntary basis but fails to do so.

third parties by way of voluntary information requests or orders under section 11 of the Act.⁵

Pursuant to paragraph 123(1)(b) of the Act, the issuance of a SIR to one or more notifying parties triggers a second 30-day waiting period⁶, which commences when the Commissioner has received from each recipient a complete response to all information requests set out in the SIR.⁷ A proposed transaction may not close until the expiry of this second waiting period, subject to termination of the waiting period where the Commissioner notifies the parties that the Bureau does not intend, at that time, to make an application under section 92 of the Act in respect of the proposed transaction, or extension of the waiting period pursuant to an order under section 100 of the Act.⁸

There may also be circumstances where the Bureau's review is not completed within the initial 30-day waiting period and the Commissioner has elected not to issue a SIR. In such cases, the Bureau will proceed to complete its investigation beyond the expiration of the initial waiting period⁹, and may request that the parties enter into a "timing agreement"¹⁰ with the Bureau to address key milestones, such as closing of the proposed transaction and production requirements. If, upon completion of the investigation, the Commissioner is of the view that sufficient grounds do not exist to initiate proceedings before the Tribunal, the Bureau will provide the parties with written confirmation of this conclusion, typically in the form of a "No-Action Letter" (as described below).

2.2 ADVANCE RULING CERTIFICATES AND NO-ACTION LETTERS

The amendments to the merger review framework do not alter the parties' ability to request (or the Bureau's ability to issue) an Advance Ruling Certificate ("ARC") under section 102 of the Act. The Commissioner may issue an ARC in response to a request for assurances that a proposed transaction will not give rise to proceedings under section 92

⁵ For further information on the application of section 11 of the Act, please refer to the Bureau's *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>>.

⁶ Note that if the end of either waiting period falls on a Saturday or statutory holiday, the waiting period will end on the next day that is not a holiday.

⁷ Subject to an exception in the case of unsolicited bids, as more particularly described at footnote 15 of these Guidelines.

⁸ Pursuant to section 100 of the Act, provided that an application has not been made under section 92, and where certain conditions are met, the Tribunal may issue an interim order forbidding any person from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger.

⁹ Parties are legally entitled to close the transaction upon expiration of the initial 30-day waiting period if a SIR has not been issued, subject to any commitments made to the Bureau or orders obtained pursuant to section 100 or 104 of the Act.

¹⁰ Further discussion of timing agreements can be found at section 3.4 of these Guidelines.

of the Act. Where information has been supplied in support of an ARC request, and that information is substantially similar to the information required under subsection 114(1), the Commissioner or a person authorized by the Commissioner may, under paragraph 113(c) of the Act, waive the subsection 114(1) notification requirement and, consequently, the applicable waiting period.

If the Commissioner is not prepared to issue an ARC in respect of a proposed transaction, the Commissioner may issue a No-Action Letter. A No-Action Letter provides written confirmation that, in the Commissioner's view, sufficient grounds do not exist at that time to initiate proceedings before the Tribunal under the merger provisions of the Act with respect to the proposed transaction and, therefore, the Commissioner does not, at that time, intend to make an application under section 92 of the Act in respect of the transaction.

2.3 EARLY CONSULTATIONS

While parties remain free to determine whether and when to engage in discussions with the Bureau regarding a proposed transaction, the Bureau encourages consultations prior to, or as soon as possible after, submission of a merger notification. The goal of early consultations is to provide appropriate context and foundational information on a voluntary basis to Bureau officers involved in the review of the proposed transaction, and to identify issues requiring further examination.

Ultimately, such consultations can facilitate a more efficient and effective review process for the merging parties and the Bureau; however, realization of these benefits is largely dependent upon the parties' willingness to engage in full and frank communications with the Bureau, and to proactively assist the Bureau in obtaining information required for its analysis. Early consultations and timely compliance with the Bureau's information requests may also reduce the scope of, or necessity for, a SIR.

2.4 SERVICE STANDARDS AND FEES

2.4.1 SERVICE STANDARDS

While the statutory waiting periods set out in the Act govern the parties' legal ability to close a proposed transaction, the Bureau is also obligated by Treasury Board Secretariat to assign a complexity designation and associated service standard for each proposed transaction that is the subject of a merger notification or ARC request.¹¹ As described in greater detail in the Bureau's *Fee and Service Standards Policy*¹², service standards represent the maximum time within which the Bureau will endeavour to provide a

¹¹ Service standards were established in accordance with federal government policy regarding the imposition of fees. For further information regarding service standards, please refer to the Bureau's website at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00116.html>.

¹² (Ottawa: Industry Canada, 2003), online: <<http://strategis.ic.gc.ca/pics/ct/ct02537e.pdf>>.

response to merger notifications and ARC requests, assuming cooperation from the parties in the course of the examination.

A proposed transaction will be assigned a service standard of “non-complex”, “complex” or “very complex” depending on the nature and complexity of the issues raised. For proposed transactions that are designated as “non-complex”, the Bureau’s two-week service standard reflects a commitment to review and clear those transactions that pose no competitive concerns as quickly as reasonably possible. On the other hand, transactions that are designated as “very complex” are considered to require a longer period of time to allow the Bureau to complete its assessment of significant and often complicated competition issues.

In the case of “complex” transactions, the Bureau’s service standard accounts for those transactions that raise competition issues that cannot be reviewed adequately within the initial 30-day waiting period, but in respect of which the Bureau determines that a SIR is not the preferred method to gather the information required to complete the assessment of the transaction. For these transactions, the Bureau’s preferred approach is to allow the initial waiting period to lapse¹³ on the understanding (as may be embodied in a timing agreement) that: (1) the Bureau is continuing to review the proposed transaction; (2) the parties will work cooperatively with the Bureau to address additional information requests from the Bureau through a voluntary process; and, (3) the parties will not close the transaction for an agreed-upon period of time to allow the Bureau to complete its review. The Bureau believes that such an approach will reduce the number of SIRs that are issued and provide an important measure of flexibility for the parties and for the Bureau. As described in section 2.2 of these Guidelines, the Bureau will provide written confirmation of its conclusions and, where sufficient grounds do not exist at that time to initiate proceedings before the Tribunal under the merger provisions of the Act, will typically issue a No-Action Letter.

2.4.2 FEES

Since November 1997, the Bureau has required fees for statutory merger notification filings, ARC requests and advisory opinions. The existing fee structure remains unaffected by the amendments to the Act, and fees for merger notification filings and ARC requests should be submitted at the time the filing or request is made. For further information, please refer to the Bureau’s *Fee and Service Standards Handbook*.¹⁴

¹³ The Act allows the Commissioner to seek a remedy within one year after the closing of a transaction, irrespective of whether the waiting period has expired.

¹⁴ (Ottawa: Industry Canada, 2003), online: <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ct02530e_a.pdf/\\$FILE/ct02530e_a.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ct02530e_a.pdf/$FILE/ct02530e_a.pdf)>.

PART 3 — SUPPLEMENTARY INFORMATION REQUESTS

3.1 OVERVIEW

Very few mergers raise a serious risk of a substantial lessening or prevention of competition. As such, it is unlikely that the SIR mechanism will be employed by the Bureau on a frequent basis. The Bureau will only issue a SIR when a proposed transaction raises significant competition issues and additional information is required. If the Bureau determines that a SIR is necessary, officers will notify the parties as soon as reasonably possible within the initial 30-day waiting period that a SIR is forthcoming. As described above, the issuance of a SIR to one or more notifying parties triggers a second 30-day waiting period, which commences when the Commissioner has received from each recipient a complete response to all information requests set out in the SIR.¹⁵

The Commissioner may terminate either waiting period at any time by notifying the parties that the Commissioner does not intend to challenge the transaction at that time. Section 100 of the Act also remains available to the Commissioner to address circumstances where the Commissioner has obtained all necessary information from the parties in respect of a proposed transaction, but requires additional time to complete the review.

3.2 PRE-ISSUANCE DIALOGUE

Prior to issuing a SIR, the Bureau will generally provide a draft to the recipient party and engage in dialogue with that party's counsel (and, in association with counsel, such party's business representatives and technical staff) regarding the information requests set out therein. The purpose of this pre-issuance dialogue is to: ensure that the party understands the information requests; discuss whether the party maintains data in the form requested by the Bureau and with whom or how such records or data are held; identify confidentiality concerns; determine whether there are sources and forms of information that may be more directly responsive to the Bureau's request; and ascertain whether there are any other issues that might impair the ability of the party to comply with the SIR as a result of, for example, ambiguities or inconsistent terminology.

Pre-issuance dialogue with the party may also assist in reducing the potential burden of a SIR by, for example, limiting applicable time periods and identifying technological barriers to production. In this regard, the party is uniquely positioned to assist the Bureau in identifying concerns that can be addressed prior to the issuance of the SIR.

¹⁵ In the case of an unsolicited bid, the second 30-day waiting period begins upon the date when the Commissioner receives the requested information from the bidder, without reference to the date upon which the target complies with a SIR. This is intended to prevent the target from delaying the completion of the unsolicited bid by failing to comply with a SIR in a timely manner. In such cases, the Bureau may elect to obtain required information from the target through the use of section 11 orders.

Although the Bureau will generally outline preliminary views regarding the relevant issues to be examined in its assessment of the proposed transaction, as reflected in the draft SIR, the pre-issuance dialogue process is not intended to serve as a forum for debate with the Bureau on the merits of the case or the relevance of particular information requests found in the draft SIR.

In most cases, the Bureau anticipates that the party will review the draft SIR with counsel and provide comments in a prompt fashion. In certain circumstances, a proposed SIR may require more extensive discussions. While the Bureau will give due consideration to all comments received from the party, it is ultimately within the Bureau's discretion to amend the draft SIR as it deems appropriate.

Subject to any constraints that arise in the context of a particular case, the period of time between the party's receipt of the draft SIR and completion of the pre-issuance dialogue process would generally last no longer than three business days. Of course, the process may be condensed or expanded depending on the views of the party and the Bureau in continuing the dialogue.

Importantly, dialogue prior to the issuance of a SIR does not preclude post-issuance dialogue for the purpose of further narrowing issues or scope for production. To the contrary, the Bureau anticipates that such post-issuance dialogue will be the norm.

3.3 GENERALLY APPLICABLE SCOPE RESTRICTIONS

In administering the two-stage merger review process, the Bureau is committed to adhering to certain practices and procedures so as to ensure that a party's burden in responding to a SIR is no greater than necessary, while at the same time allowing the Bureau to obtain information required to conduct its review. These practices and procedures are set out below.

3.3.1 LIMITING NUMBER OF CUSTODIANS

The Bureau acknowledges that the number of custodians is an important determinant of the total cost of a merger investigation. The Bureau will, at the option of the party and in all but exceptional cases, limit the number of custodians to be searched in preparing a response to a SIR to a maximum of 30 individuals. A party seeking to limit custodians must make available to the Bureau the following:

- (i) a detailed 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 party's organization; and
- (ii) a member of the party's staff with suitable knowledge to discuss with the Bureau particulars of each employee's roles and responsibilities in the party's organization and their relationship to the issues forming the basis of the Bureau's investigation.

Following review of information provided by the party and discussions with applicable members of the party's staff, Bureau officers will work with the party post-issuance of the SIR to identify custodians falling within the search group, with a view to limiting the number of custodians to be searched for responsive records to 30. In the event that records provided by the party appear to be substantially incomplete, it may then be necessary to revisit the issue of custodians, including potentially designating additional custodians to be searched.

For the sake of clarity, the general limitation on custodians 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 identified custodians;
- (ii) predecessors, successors, secretaries and assistants of the identified custodians within the relevant period. The files of these individuals must also be reviewed along with those of the identified custodian for the purposes of the SIR; and
- (iii) employees operating at the local level where multiple local markets are relevant to the merger review.

The Bureau will not exceed the general limitation on custodians in the absence of approval from the Senior Deputy Commissioner of the Mergers Branch. In appropriate cases, such as where the party's operations are run on a North American basis and there are no competition issues that are unique to Canada, the Bureau may consult with the party in order to examine the prospect of limiting custodians (to the extent possible) to those custodians to which U.S. authorities have agreed for purposes of a second request under the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*.¹⁶

3.3.2 LIMITING TIME PERIOD

The default search period for hard copy and electronic records prepared or received by a party will generally be limited to the period covering the two calendar years immediately preceding the date of issuance of the SIR. In addition, the Bureau will generally limit the relevant time period for data requests to the period covering the three calendar years immediately preceding the date of issuance of the SIR. In each case, the Bureau may also request records and/or data for the year-to-date period preceding the issuance of the SIR.¹⁷

These periods may be adjusted, as circumstances demand, to accommodate the particular facts of a case. For example, circumstances may dictate a need for additional

¹⁶ In respect of any given transaction, the Bureau may identify both Canadian and U.S. custodians.

¹⁷ Where the parties produce requested records or data after a period of time specified in the SIR, the Bureau may require the parties to refresh their search.

records and/or longer data sets in order to facilitate meaningful analysis, such as where the Bureau must assess industry dynamics both prior to and following the entry of a new market participant. However, any departure from the default time periods outlined above will require approval from the Senior Deputy Commissioner of the Mergers Branch.

3.3.3 REVIEW OF BACK-UP MEDIA

In general, a party will not be required to resort to producing records contained on back-up tapes where sufficient records can be obtained through less onerous means. Given the burden that may arise with respect to review of back-up media, the Bureau will engage in discussions with a party on a case-by-case basis in an attempt to limit the resources that must be expended by that party, having regard to the nature of the investigation and the information at issue.

Parties are advised to provide the Bureau with details of their archival systems and data access/recovery procedures during pre-issuance dialogue. In particular, so as to facilitate a constructive dialogue, a party should provide the Bureau with access to a member of its technical staff with suitable knowledge of the manner in which that party collects, maintains and uses the types of information that the Bureau may seek pursuant to the SIR, as well as the information technology systems that house the information in question. Following review of this information and discussions with appropriate members of the party's staff, the Bureau can work cooperatively with the party to determine how best to meet the Bureau's information needs in light of that party's particular circumstances and, indeed, whether a review of back-up tapes is required at all.

3.3.4 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 parties' respective businesses at the earliest possible stage. Providing the Bureau with, for example, competitive impact submissions or white papers, entering into timing agreements and providing responses to information requests on a rolling basis will not only assist in narrowing issues, but will also limit the circumstances in which the Bureau may conclude that it is necessary to depart from the default limitations specified above.

In order to limit the Bureau's burden and expedite the Bureau's review of records and data submitted in response to a SIR, the Bureau has also worked to define certain streamlined procedural measures in the instructions to a SIR that govern the submission of information. For example, in responding to a SIR, a party is requested to provide an index that includes an entry for each paragraph and subparagraph of the SIR, and a corresponding reference to the records and/or data that are responsive to that

paragraph or subparagraph. Records that are responsive to a particular paragraph or subparagraph may be referenced as a group. For example, a statement that the records in “Binder 1”, “Tab 1”, “Box 1” or “CD 1” are responsive to a particular paragraph will be acceptable for the Bureau’s purposes.

The Bureau shares the parties’ desire to resolve any anti-competitive concerns expeditiously. Accordingly, the Bureau anticipates that this cooperative process will continue for the duration of the SIR compliance period, and the Bureau will remain open throughout the process to discussing parties’ suggestions for tailoring a SIR, provided such modifications are consistent with the Bureau’s need for records and data sufficient to satisfy its statutory mandate.

3.4 TIMING AGREEMENTS

Merging parties are encouraged to consult with the Bureau in respect of the anticipated timing of certain steps of the Bureau’s review. The results of such consultations may be embodied in a formal timing agreement, which can include provisions respecting, for example:

- the date by which the Bureau will identify employees or agents of the parties that it proposes to interview on a voluntary basis;
- the period during which parties will make such persons available for interviews on a voluntary basis;
- commitments on rolling production to comply with categories of information requests defined in the information request;
- timing for updates on the status of the investigation;
- the date by which each party anticipates that it will certify that it has fully complied with the information request;
- the period of time during which a party will use its best efforts to resolve any deficiencies Bureau officers may have identified in such party’s response to the information request;
- timing for the Bureau’s interim assessment;
- timing for the Bureau’s final assessment; and
- timing of closing.

Where the Bureau agrees that it is appropriate to dispense with or defer production obligations, this neither limits the Bureau’s right to seek production of information through a discovery process, nor alters the parties’ record preservation obligations. The

Bureau has a right to discovery in all merger cases in which a challenge is filed before the Tribunal.

3.5 INTERNATIONAL COOPERATION

Where a multi-jurisdictional merger gives rise to review by multiple foreign competition agencies, the parties may wish to provide the Bureau with copies of data and records produced to such agencies that are also responsive to the SIR. The Bureau will generally agree to such an arrangement, provided that: (a) the parties have provided appropriate confidentiality waivers to the foreign antitrust agency to permit sharing of information with the Bureau; (b) the parties do not impose restrictions unacceptable to the Bureau with respect to its use of the data and records; and (c) the data and records received in this manner will be treated for all purposes “as if” provided directly to the Bureau.

If a party arranges for the Bureau to have access to data and records submitted by the party to foreign agencies rather than providing copies directly to the Bureau, and where the Bureau determines that such an approach is acceptable, the conditions listed above must also be met. In addition, the party must provide the Bureau with an index that includes an entry for each paragraph and subparagraph of the SIR, and corresponding unique identifiers that will allow the Bureau to locate in the production to the foreign agency each record and data set that the party claims to be responsive to the applicable paragraph or subparagraph of the SIR.

3.6 COMPLIANCE AND COMPLETENESS

3.6.1 CLAIMS PURSUANT TO SECTION 116

Pursuant to section 116 of the Act, certain information need not be supplied by the parties in response to a SIR, including information: (i) that is not known or reasonably obtainable; (ii) that cannot be supplied because of the privilege that exists between lawyers and notaries and their clients; (iii) that cannot be supplied because of a confidentiality requirement established by law; or (iv) that the parties claim cannot reasonably be considered relevant to the Commissioner’s assessment of the proposed transaction, provided that the parties inform the Commissioner under oath or solemn affirmation of the reason why the information cannot be supplied. In addition, where information requested in a SIR has been supplied previously to the Bureau by a party and that information can be located by the Bureau, such information need not be supplied again provided that the party informs the Commissioner under oath or solemn affirmation of the matters in respect of which the information has previously been supplied and when it was supplied.

Where a party does not intend to supply certain information based on a claim under section 116, the Bureau encourages consultations with the officers reviewing the transaction at the earliest possible stage. Where the Bureau disagrees with a party’s

claim, the Bureau may require the party to supply certain information pursuant to subsection 116(3) of the Act.

3.6.2 CERTIFYING COMPLETENESS

In accordance with section 118 of the Act, the information supplied in response to a SIR must be certified under oath or solemn affirmation to be correct and complete in all material respects. Where 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, the oath or solemn affirmation must be given by that person. For greater clarity, the Bureau does not issue a certification that a party's response to a SIR is complete.

The Bureau must receive each party's response to their respective SIR before it can properly assess whether any information remains outstanding. Where a party has certified that it has complied with a SIR but the Bureau disagrees, the Bureau will, as soon as reasonably possible, indicate in writing the deficiencies in that party's production.

3.7 INTERNAL APPEAL PROCEDURE

Any party seeking to contest the scope of a SIR, or the Bureau's determination that the party's response to a SIR is incomplete, is encouraged to engage in discussions with the responsible Assistant Deputy Commissioner at the earliest opportunity. Where, after reasonable efforts, the party has failed to reach agreement with the responsible Assistant Deputy Commissioner, the party may submit a written notice of appeal to the Senior Deputy Commissioner of the Mergers Branch, outlining the nature of the complaint in reasonable detail.

The Senior Deputy Commissioner of the Mergers Branch will immediately forward the notice to a Senior Deputy Commissioner or Deputy Commissioner in another branch of the Bureau (the "Reviewer"). The Reviewer will speak with the responsible Assistant Deputy Commissioner, request additional information pertaining to the complaint from the party within five business days of receipt of the written appeal, and provide the party with a reasonable opportunity to make submissions. The Reviewer will render a decision within seven business days after the party has provided all requested information.

In the case of an appeal regarding the scope of a SIR, the Reviewer will either advise the party in writing that the scope of the SIR is appropriate in the circumstances, or modify the requirements of the SIR to reflect the Reviewer's conclusions. Parties are advised that an appeal as to the scope of a SIR must be made prior to any assertion that the party has complied with the SIR, and the party must agree to defer any assertion of compliance until the completion of the appeal process or until such time as the party has withdrawn its appeal.

In the case of an appeal regarding completeness of a party's response to a SIR, if the Reviewer determines that the party has submitted the information requested under the SIR, then the waiting period will begin on the last date that all relevant parties to the transaction certified compliance. If the Reviewer determines that a party has not submitted the information required pursuant to the SIR, the Bureau will advise the party in writing that the response to the information request is deficient and identify outstanding required information. As discussed below, if the Bureau is of the view that a party has not complied with a SIR, the Commissioner may apply to a court¹⁸ 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, such party will have an opportunity to demonstrate to the court that it has complied with the SIR or, where it did not comply, that it had good and sufficient cause not to comply.

3.8 ENFORCEMENT

As described above, a notifiable transaction in respect of which a SIR has been issued is prohibited from closing until the expiry of a second 30-day waiting period, subject to termination of the waiting period where the Commissioner notifies the parties that the Bureau does not intend, at that time, to make an application under section 92 of the Act in respect of the proposed transaction, or extension of the waiting period pursuant to an order under section 100 of the Act. If parties proceed to complete the proposed transaction before the waiting period has expired, such parties may be subject to sanctions under section 123.1 of the Act. In particular, on application by the Commissioner, a court may make an order requiring any party to the transaction to dissolve the merger, or to pay an administrative monetary penalty to a maximum amount of \$10,000 for each day on which the parties have failed to comply with section 123 of the Act. Administrative monetary penalties apply only where 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 a SIR, or where 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 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 SIR before any sanction can be imposed. Significantly, in all cases, the relevant parties are provided with an opportunity to demonstrate to a court that they have complied with a SIR or, in cases of non-compliance, that they had good and sufficient cause not to comply.

¹⁸ For purposes of addressing issues involving failures to comply, subsection 123.1(4) defines a court to mean the Tribunal, the Federal Court or the superior court of a province.

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.