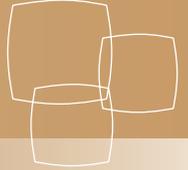




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Enforcement Guidelines



Merger Review Process Guidelines



This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

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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.

These Guidelines describe the Bureau’s general approach to administering the Act’s two-stage merger review process applicable to proposed transactions that are the subject of a pre-merger notification filing. In particular, these Guidelines outline the practices and procedures that the Bureau will typically follow: (i) in determining whether to issue a supplementary information request (“SIR”) under subsection 114(2) of the Act; and (ii) where a decision has been made to issue a SIR, in working with merging parties to narrow issues and/or the requirements for records, including data, wherever reasonably possible, while first and foremost ensuring that the Bureau accesses the information it requires to properly review a proposed transaction.

These Guidelines supersede all previous statements of the Commissioner of Competition (“Commissioner”) or other Bureau officials regarding the Bureau’s approach to the merger review process. 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 Competition Tribunal (“Tribunal”) and the courts.

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

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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 the possibility of lessening or preventing competition substantially, thereby having a negative impact on consumers, businesses and the overall competitiveness of the Canadian economy. The Bureau reviews these transactions with a view to its mandate to protect and promote competitive markets.

In discharging its merger review obligations under the Act, the Bureau's priority is to identify in a timely manner those proposed mergers that pose a potential 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 relatively few transactions that raise a potential substantial lessening or prevention of competition, 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 SIR recipient a certified 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 Bureau notifies the parties that the Commissioner does not intend, at that time, to make an application under section 92 of the Act in respect of the proposed transaction, or where the waiting period is extended pursuant to an order under section 100 or 104 of the Act. Further, where parties have entered into a timing agreement, which includes commitments with respect to closing of the proposed transaction, the transaction shall not be completed unless and until those commitments have also been satisfied.

The SIR process allows the Bureau to obtain the records¹ required for the Bureau's review in a timely and effective manner, and through a more efficient process than that associated with obtaining orders under section 11 of the Act. The Bureau is committed to working with merging parties to narrow issues and/or the requirements for records, including data, wherever reasonably possible, while first and foremost ensuring that the Bureau accesses the information it requires to properly review a proposed transaction. In this regard, these Guidelines set out specific practices and procedures that, subject to certain exceptions, will be followed in all cases.

For further information regarding 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, please refer to the Bureau's *Merger Enforcement Guidelines*.²

1 "Record" is defined in subsection 2(1) of the Act and includes data.

2 ([Ottawa: Industry Canada, 2011](#))



2. STATUTORY WAITING PERIODS

Where a proposed transaction surpasses the “party-size” and “transaction-size” thresholds set out in sections 109 and 110 of the Act, parties are required to notify the Commissioner prior to completing the proposed transaction.³ Notifiable transactions are subject to an initial 30-day waiting period, and where a SIR is issued, are further subject to a second 30-day waiting period. Please refer to the [Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act](#) (“Procedures Guide”) for further information regarding the operation of statutory waiting periods.

2.1 Initial 30-day waiting period

The submission of a complete notification⁴ triggers an initial 30-day waiting period during which parties are legally prohibited from closing their proposed transaction.⁵ During this initial waiting period, the Bureau will work diligently to narrow and refine issues and to determine what, if any, additional information is required from parties to assess these issues. In particular, the Bureau will consider what additional information is required to determine whether the proposed transaction is likely to lessen or prevent competition substantially. Merging parties are encouraged to assist the Bureau by responding to voluntary requests for information on a timely basis, and by 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 discussed further below, timely compliance with a voluntary information request can minimize the need for, or scope of, a SIR.

In circumstances where the Bureau has completed its review in advance of the expiry of the initial waiting period, the Commissioner may waive the remainder of the waiting period by issuing an advance ruling certificate under section 102 of the Act or notifying the parties that the Commissioner does not intend, at that time, to make an application under section 92 of the Act in respect of the proposed transaction. Circumstances in which parties may complete their transaction prior to the expiry of the full initial waiting period are discussed in detail in the Procedures Guide.

2.2 Second 30-day waiting period

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 period, which commences only when the Commissioner has

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

4 Upon receipt of a pre-merger notification filing, the Merger Notification Unit of the Mergers Branch will make a determination as to whether the filing satisfies the statutory requirements and, as such, is complete.

5 For further information regarding when a notification is determined to be complete, please refer to the Bureau’s *Fees and Service Standards Handbook for Mergers and Merger-Related Matters*, as well as the Procedures Guide.

received from each SIR⁶ recipient a complete response⁷ to the SIR⁸. A proposed transaction may not close until the expiry of this second waiting period, subject to the parties being notified by the Commissioner that she does not intend, at that time, to make an application under section 92 of the Act in respect of the proposed transaction, or subject to an extension of the waiting period pursuant to an order under section 100 or 104 of the Act.⁹ As discussed in [part 4](#) of these Guidelines, where parties provide commitments regarding the completion of the proposed transaction, whether pursuant to a timing agreement or otherwise, the transaction shall not be completed prior to those commitments having been satisfied.

2.3 Initial 30-day waiting period permitted to expire

There may be circumstances where the Bureau's review is not completed within the initial 30-day waiting period and the Commissioner elects not to issue a SIR.¹⁰ In such cases, the Bureau will proceed to complete its investigation beyond the expiration of the initial waiting period and, depending on the circumstances, may enter (before or after expiration of the initial 30-day waiting period) into a "timing agreement"¹¹ with the parties to address key milestones, such as commitments regarding closing of the proposed transaction and possible further production requirements.

Subject to commitments made to the Bureau regarding timing of the completion of a proposed transaction or orders obtained pursuant to section 100 or 104 of the Act, parties are legally entitled to close their transaction upon expiry of the initial 30-day waiting period where no SIR has been issued. However, in the absence of an ARC or no-action letter, the parties have no assurances that the Commissioner has no present intention to challenge the proposed transaction.

2.4 Hostile transactions

Where a transaction falls within the ambit of subsection 114(3) of the Act (a "hostile transaction"), the statutory waiting periods are determined without reference to the day on which a notification or a complete response to a SIR is received from the target. Thus, the initial

-
- 6 Except in the context of a hostile transaction, where the second waiting period commences once the bidder has submitted a certified complete response, as more particularly described at [section 2.4](#) of these Guidelines.
 - 7 See [section 3.6](#) of these Guidelines for further information on what is required for a response to be complete.
 - 8 This assumes that the Bureau has not challenged the completeness of the response. Where the Commissioner is of the view that the response provided is incomplete, the Commissioner may apply to the Tribunal or a court for an order under section 123.1 of the Act.
 - 9 Pursuant to section 100 of the Act, where certain conditions are met, the Tribunal may issue an interim order forbidding any person from doing any act or thing that appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger.
 - 10 In such cases, the Merger Notification Unit will send the parties, on the last day of the initial 30-day waiting period, a letter indicating that the waiting period ends on that date and that the assessment is incomplete. For further information, please refer to the Procedures Guide.
 - 11 See [Part 4](#) of these Guidelines for a discussion on timing agreements.

30-day waiting period begins when the Commissioner has received a complete notification from the bidder and the second 30-day waiting period begins when the Commissioner has received a complete response to a SIR from the bidder.

At the time a bidder submits its certificate of compliance with the SIR, the Bureau will consider whether subsections 114(3) and 123(3) are applicable to the proposed transaction.¹² Where these subsections are applicable, the second 30-day waiting period begins after the Commissioner has received a complete SIR response from the bidder. Accordingly, in the context of a hostile transaction, a target is not able to affect the commencement of the relevant waiting periods.

As discussed in [section 4.2](#) of these Guidelines, to ensure receipt of SIR responses from a target on a timely basis, the Bureau will typically issue a SIR in combination with a timing agreement¹³ and/or orders pursuant to section 11 of the Act.

2.5 Early consultations

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

Ultimately, such consultations can facilitate a more efficient and effective review process for the merging parties as well as 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 the Bureau's analysis. Where parties engage in substantive discussions with the Bureau and provide information pertinent to the Bureau's review prior to or as earlier as possible during the initial waiting period, the Bureau is more likely to be able to reduce the scope of, or necessity for, a SIR.



3. SUPPLEMENTARY INFORMATION REQUESTS

3.1 Overview

Where a notifiable transaction raises concerns regarding a potential substantial lessening or prevention of competition, the Bureau will determine what additional information is required from 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,

¹² For further information regarding the Bureau's policy with respect to the commencement of the paragraph 123(1)(b) waiting period, please refer to [Hostile Transaction Policy No. 2 - Running of Subsection 123\(1\) Waiting Periods](#).

¹³ See [Part 4](#) of these Guidelines for further information on timing agreements.

such information will generally be sought from the merging parties by way of a SIR¹⁴, and from third parties by way of voluntary information requests or orders under section 11 of the Act.¹⁵

Where the Bureau determines that a SIR is necessary, it will notify the parties within the initial 30-day waiting period that a SIR is forthcoming and at this time, if possible, will communicate to the parties the Bureau's 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). In certain circumstances, for example, where the Bureau is of the view that focusing its efforts on certain substantive aspects of a merger review may enable it to eliminate the need for a SIR, the Bureau may defer a determination regarding the issuance of a SIR to later in the initial 30-day period.

As described above, the issuance of a SIR to one or more notifying parties triggers a second 30-day waiting period, which only commences when the Commissioner has received from each recipient a certified complete response to all information requests set out in the SIR.¹⁶

3.2 Pre-issuance dialogue

Prior to issuing a SIR, the Bureau will generally provide a draft to the recipient party and, at that party's election, engage in dialogue with the party, its counsel and its business representatives and technical staff, regarding the information requests set out therein. The pre-issuance dialogue process is not intended to serve as a forum for debate or negotiation with the Bureau on the merits of the case or the relevance of particular information requests found in the draft SIR. The purpose of this pre-issuance dialogue is to:

- (i) ensure that the party understands the information requests;
- (ii) discuss whether the party maintains data in the form requested by the Bureau and with whom or how such records are held;
- (iii) determine whether there are sources or forms of information that may be more directly responsive to the Bureau's request, provided such alternatives satisfy the Bureau's need for records sufficient to satisfy its statutory mandate; and
- (iv) ascertain whether there are any other factors that might impair the ability of the party to comply with the SIR.

¹⁴ Where parties to a notifiable transaction certify complete responses to their respective SIRs, and the Commissioner does not challenge the completeness of the responses, 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. For transactions not subject to the notification provisions of Part IX of the Act, the Bureau may use orders pursuant to section 11 of the Act to gather required information from merging parties.

¹⁵ 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).

¹⁶ Where the Commissioner is of the view that the responses provided are incomplete, the Commissioner may apply to the Tribunal or a court for an order under section 123.1 of the Act, and may seek an injunction pending a decision of that motion.

Pre-issuance dialogue with the party may also assist in reducing the scope of a SIR by, for example, limiting certain specifications to particular categories of employees with responsive information where appropriate, or identifying technological barriers to production.¹⁷ 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.

In most cases, the Bureau anticipates that the recipient will review the draft SIR and will be prepared to provide comments relating to the matters identified above during the pre-issuance dialogue or immediately thereafter. 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 considers 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 be no longer than two business days.

3.3 Limiting time periods

3.3.1 Default search periods

The default search period for hard copy and electronic records (excluding data) in the possession, custody or control of a party will generally be the year-to-date period immediately preceding the date of issuance of the SIR and the previous two full calendar years. The Bureau will also generally limit the relevant time period for data requests to the year-to-date period immediately preceding the date of issuance of the SIR and the previous three full calendar years. These search periods are subject to the refresh requirement, which in certain circumstances, as discussed further in [section 3.3.3](#) of these Guidelines, require a party to produce records up to 30 days prior to the date it certifies completeness.

These default search periods may be adjusted, as circumstances demand, to accommodate the particular facts of a case. For example, circumstances may dictate a need for additional records and/or longer data sets 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. Any departure from the default time periods outlined above requires approval from the Senior Deputy Commissioner of the Mergers Branch.

3.3.2 Review of back-up media

In general, a party will not be required to produce records contained on back-up tapes where sufficient records can be obtained otherwise. Given the time and cost that may be associated

¹⁷ 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 with the Tribunal.

with the review of back-up media, the Bureau will engage in discussions with a party on a case-by-case basis in an attempt to understand the value and volume of resources that would be associated with production, 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, 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 store 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.

3.3.3 Requirement to refresh

Once a SIR has been issued, merging parties have significant control over the timing of the merger review process owing to the fact that the second waiting period commences when the Commissioner has received from each recipient a certified complete response to all information requests set out in the SIR, assuming the Bureau does not challenge the completeness of those responses.¹⁸ As the Bureau requires current information to conduct its review of a proposed transaction, the Bureau will require that a party produce "refreshed" information where the period between the date of issuance of the SIR and the date of certification of a complete response exceeds, typically, 90 days. Where this is the case, and also for certain limited categories of documents responsive to a SIR, (e.g., transaction documents and efficiencies-related records), the Bureau requires responsive records to be current to within 30 days of a party's certification of a complete response.

Where a party that has engaged in rolling production is required to produce refreshed records, and the Bureau has indicated in writing that it has received sufficient information with respect to a particular SIR specification, refreshed records in respect of that specification will not be required.

3.4 Post-issuance dialogue

3.4.1 Overview

Once a SIR is issued, the Bureau encourages the recipient party to engage in post-issuance dialogue for the purpose of, among other things:

- (i) prioritizing information to be supplied by a party;

¹⁸ In the case of a hostile transaction, see [section 2.4](#) of these Guidelines for further information regarding the commencement of the second waiting period.

- (ii) discussing custodians and search terms to be used in conducting electronic searches; and
- (iii) where information has been produced on a rolling basis, confirming whether further information is required by the Bureau in response to a particular specification of the SIR.

The Bureau anticipates that parties will use best efforts to respond to a SIR in a timely manner and on a rolling basis, and will 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 of the Bureau's review. Further, providing the Bureau with, for example, competitive impact submissions, will assist the Bureau in narrowing issues.

3.4.2 Limiting number of custodians

The Bureau acknowledges that the number of custodians is an important determinant of the total cost involved in responding to a SIR. A party is uniquely positioned to determine which individuals within its organization will have documents responsive to the SIR. As such, the Bureau cannot endorse a proposed list of custodians; however, the Bureau encourages discussions with parties regarding the custodians that the party proposes to search. In order to have an effective discussion, a party seeking to limit custodians should make the following available to the Bureau:

- (i) a detailed chart and personnel directory identifying all past and present employees having management or decision-making 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 respective relationships to the issues forming the basis of the Bureau's investigation.

Following SIR issuance and receipt of the information referred to above, Bureau officers will engage in discussions with appropriate members of the party's staff, to understand the roles and responsibilities of the custodians that the party has identified as part of the search group. The Bureau expects that the number of custodians to be searched for responsive records would normally not exceed 30. In the event that records subsequently provided by the party appear to be substantially incomplete, it may then be necessary to revisit the issue of custodians, including potentially identifying additional custodians to be searched. Although the Bureau will engage in custodian discussions, parties are required to certify on oath or solemn affirmation that information provided in response to a SIR is complete and correct in all material respects in accordance with section 118 of the Act and, as such, parties must satisfy themselves that the custodians identified as part of the search group will be adequate to enable them to provide the requisite certificate. Custodian discussions provide parties with the opportunity to explain to the Bureau its process and rationale for including and excluding individuals from the search group, and also provide the Bureau with an early opportunity to identify any concerns it may

have, which may reduce the likelihood of the Bureau subsequently raising concerns about the completeness of the responses provided by a party.

The identification of a search group does not exempt production of the following:

- (i) specific types of records contained in central files (including, for example, budgets, contracts and financial reports). SIRs will normally require that such files 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.

In appropriate cases, such as where the parties operate on a North American basis and, in the Bureau's view, there are no competition issues that are unique to Canada, the Bureau may consult with the party 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*.¹⁹

3.4.3 Responding to a SIR – SIR instructions

To expedite the Bureau's review of information submitted in response to a SIR, the Bureau has defined certain streamlined procedural measures in the instructions to a SIR that govern the submission of information, a copy of which is attached hereto at the [Appendix](#). 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 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 to the Bureau.

3.5 International cooperation

Where a multi-jurisdictional merger gives rise to review by multiple competition agencies, the parties may wish to provide the Bureau with copies of records produced to a foreign agency that are also responsive to the SIR. The Bureau will generally agree to such an arrangement, provided that, among other things:

- (i) the parties have provided appropriate confidentiality waivers to the foreign antitrust agency to permit sharing of information with the Bureau; and
- (ii) the records received in this manner will be treated for all purposes as though provided directly to the Bureau.

¹⁹ In respect of any transaction, the Bureau may identify both Canadian and foreign custodians.

If a party arranges for the Bureau to have access to records submitted by the party to a foreign agency 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 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 a party in response to a SIR, including information that:

- (i) is not known or reasonably obtainable;
- (ii) cannot be supplied because of the privilege that exists between lawyers or notaries and their clients;
- (iii) cannot be supplied because of a confidentiality requirement established by law;
- (iv) cannot reasonably be considered relevant to the Commissioner's assessment of the proposed transaction; or
- (v) has been previously supplied to the Bureau by that party,

provided that the party informs the Commissioner on oath or solemn affirmation of the reason why the information cannot be or has not been supplied, as applicable, and where information has previously been supplied, the date on which such information 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 on oath or solemn affirmation by:

- (i) an officer of the company supplying the information or other person duly authorized by the board of directors or other governing body of the company; or
- (ii) in the case of any other person supplying the information, by that person;

as having been examined by that person and as being, to the best of his/her knowledge and belief, correct and complete in all material respects.

Where the information is supplied by an entity other than a corporation, the oath or solemn affirmation must be given by a person who exercises functions similar to those of a corporate officer, or another person duly authorized by the governing body of the entity. The Bureau does not issue a certification that a party's response to a SIR is complete.

The Bureau cannot properly assess whether information in response to a particular specification remains outstanding until it has received each party's response to the specification and any related specifications, and has had an opportunity to review those responses. 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. Where parties have engaged in rolling production, the Bureau is typically better situated to identify and raise any deficiencies with parties on a rolling basis, and thereby reduce the risk that the Bureau will identify deficiencies post-certification.

As discussed in [section 3.8](#) of these Guidelines, where the Commissioner is of the view that the responses provided are incomplete, the Commissioner may apply to the Tribunal or a court for an order under section 123.1 of the Act.

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 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 the Tribunal or a court for a determination on the question of compliance.

3.8 Enforcement

As described above, a notifiable transaction in respect of which a SIR has been issued is permitted to close at the expiry of a second 30-day waiting period, subject to earlier termination of the waiting period or extension of the waiting period pursuant to an order under section 100 or 104 of the Act, or commitments made to, and accepted by, the Bureau regarding timing of completion of a proposed transaction. If parties proceed to complete the proposed transaction before the waiting period has expired, such parties may be subject to court ordered remedies 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 prior to the expiry 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 the Tribunal or 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.



4. TIMING AGREEMENTS

Depending on the particular circumstances, timing agreements may include a variety of commitments, including providing the Bureau with information necessary to conduct its review and/or advance written notice of closing of the proposed transaction. Unilateral commitments by parties to provide the Bureau with, for example, information or advance notice of closing are not, on their own, a timing agreement.

4.1 Providing information pursuant to a timing agreement

There are limited circumstances where the Bureau may consider an appropriately worded timing agreement as an acceptable means of obtaining additional information. For example, where a transaction is not subject to the pre-merger notification requirements under Part IX of the Act or where information is required from third parties, the Bureau may proceed by way of timing agreement or orders under section 11 of the Act.

For notifiable transactions, the Bureau will typically seek additional information from merging parties by way of a SIR; however, in limited circumstances, it may proceed by way of a timing agreement.²⁰ Factors that the Bureau may consider in making this determination include, among other things, the type of transaction (e.g., hostile or friendly transaction²¹), whether a statutory waiting period is running, and the information required by the Bureau to conduct its review and to what extent such information has been received from the parties.

Where the Bureau determines that a timing agreement is acceptable, such agreement will, among other things, provide:

- (i) a detailed description of the information to be provided by the party;
- (ii) commitments on rolling production, including specific dates by which the requested information will be supplied;
- (iii) that the information supplied in response to the information request will be certified on oath or solemn affirmation to be correct and complete in all material respects in the form required by section 118 of the Act;²² and
- (iv) 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; and
- (v) timing of closing (except where the timing agreement is with a third party).

As the Bureau cannot stipulate a date by which it will have completed its review prior to receiving and reviewing the requested information, such timing commitments will not be included in timing agreements; however, the Bureau will, as always, provide parties with timely and appropriate updates regarding the status of its review.

4.2 Timing agreements in context of hostile transactions

As discussed in section 2.4 of these Guidelines, the second statutory waiting period in the context of a hostile transaction is determined by the bidder without reference to when a complete response to a SIR is received from the target. As a result, where the Bureau issues a SIR to the bidder and also requires additional information from the target, the Bureau must be assured that information required from the target will be received on a timely basis. In these circumstances, regardless of whether the transaction remains hostile, the Bureau will typically issue a SIR to the target in combination with either a timing agreement or an order under section 11 of the Act. Where the transaction is no longer hostile at the time the bidder certifies completeness with its SIR, the second waiting period will not commence unless and

20 Where the Bureau decides not to issue a SIR or to seek orders under section 11 of the Act, 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 with the Tribunal.

21 See [section 4.2](#) of these Guidelines.

22 See [section 3.6.2](#) of these Guidelines.

until the target certifies completeness with its SIR, and it will only commence then, assuming the Bureau has not challenged the completeness of either parties' responses.²³

The Bureau may also request that a bidder provide timing commitments. For example, it may request that the bidder not certify completeness of its SIR responses prior to a specific date and that the bidder provide the Commissioner with advance notice of closing. Such commitments allow the Bureau sufficient time to obtain and analyze the information required to conduct its review and to focus on the substantive review of the potential competitive effects of the transaction.

²³ For further information regarding the Bureau's policy with respect to the commencement of the paragraph 123(1)(b) waiting period, please refer to [Hostile Transaction Policy No. 2 - Running of Subsection 123\(1\) Waiting Periods](#).



APPENDIX

Sample Supplementary Information Request Instructions

These instructions are being provided as a sample only and are subject to change.

In order to facilitate the handling and orderly maintenance of Records, including data, provided in response to this Supplementary Information Request (“SIR”), the following procedures shall be observed:

I. General

- (a) Subject to subparagraphs I(b) and I(c), unless otherwise specified, this SIR requires the production of all responsive Records, including data, in the possession, custody, or control of the Company on the date that this SIR was issued.
- (b) Notwithstanding subparagraph I(a) above, and subject to subparagraph I(c) below, the Company may be required to produce information and Records in response to certain paragraphs or subparagraphs of this SIR up to thirty (30) calendar days prior to the date of the Company’s full compliance with this SIR, except responsive Records that must be translated into English or French, for which the date is forty-five (45) calendar days prior to the date of the Company’s full compliance with this SIR (“Continuing Production Requirement”).
- (c) Unless otherwise specified,
 - (i) if the Company’s full compliance with this SIR occurs within ninety (90) calendar days of the date of issuance of the SIR, then only paragraphs [•] of Part [•] of this SIR are subject to the Continuing Production Requirement; and
 - (ii) if the Company’s compliance with this SIR is completed more than ninety (90) calendar days after the date of the issuance of the SIR, then the entire SIR is subject to the Continuing Production Requirement.
- (d) Unless otherwise specified, each paragraph and subparagraph of Part [•] of this SIR that requests Records, other than data, requires the Company to submit all responsive Records that were created or received by the Company during the two (2) calendar years immediately preceding the year of issuance of this SIR. The Company shall also submit Records for the period from January 1 of the current year to the later of either: (i) the date of issuance of this SIR, or (ii) such time as specified by a Continuing Production Requirement.
- (e) Unless otherwise specified, each paragraph and subparagraph of Part [•] of this SIR that requests data requires the Company to submit such data for the period of three (3) calendar years immediately preceding the year of issuance of this SIR. The Company shall also submit data for the period from January 1 of the current year to the later of either: (i) the date of issuance of this SIR, or (ii) such time as specified by a Continuing Production Requirement.

- (f) All responsive Records are to be produced in their entirety. If any portion of any Record is responsive to any paragraph or subparagraph of Part [•] of this SIR, then the entire responsive Record, as well as any other stapled or otherwise attached Records, shall be produced with privileged material redacted and recorded in a manner set forth in subparagraphs 2(g) and 3(b) of Part [•] of this SIR.
- (g) The Company shall provide an index that shall include an entry for each paragraph and subparagraph of Part [•] of this SIR, and a corresponding reference to all Records that are responsive to such 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 paragraph 1 of Part [•] is acceptable. In the alternative, the Company shall provide a list of search terms used to identify potentially responsive documents and information or to eliminate potentially non-responsive documents and information provided in response to each paragraph and subparagraph of Part [•] of this SIR.
- (h) Where a Record is responsive to more than one paragraph or subparagraph of Part [•] of this SIR, the Company may produce it only once, but must indicate in the index required in subparagraph (g) all paragraphs or subparagraphs to which the Record is responsive.
- (i) The Records produced are to be either original Records or certified by affidavit of a duly authorized representative of the Company to be true copies.
- (j) Those Records written in a language other than English or French must be translated into either English or French. The foreign language document must be submitted with the English or French translation attached thereto.

2. *Electronic Records*

- (a) All electronically stored information (“ESI”) (i.e., information readable in a computer system) should be produced free of computer viruses or malware, be accessible, readable and printable, and be devoid of passwords or encryption.
- (b) All ESI should be produced in its original electronic format (i.e., native format) except where near-native format is required by clause 2(c)(ii) and subparagraph 2(f) of Part [•] of this SIR. Detailed instructions are set out in Schedule A of Part [•] for production using computer systems without application export capabilities and in Schedule B of Part [•] for production using litigation application exports. The Bureau’s preference is to receive ESI in accordance with Schedule B of Part [•].
- (c) Where a Record being produced is part of a family, all parent and child Records should be produced and the parent/child relationship should be preserved. A family is a collection of pages or files produced manually or by a software application, constituting a logical single communication of information, but consisting of more than one single stand-alone Record. Examples include:

- (i) a fax cover, the faxed letter, and an attachment to the letter, where the fax cover is the parent and the letter and attachment are each a child;
 - (ii) email repositories (e.g., Outlook .PST, Lotus .NSF) can contain a variety of Records, including messages, calendars, contacts, and tasks. For purposes of production, all parent Records, both native (e.g., documents, spreadsheets, presentations) and near-native (e.g., email, calendar, contacts, tasks, notes), and child Records (e.g., object linking and embedding items and attachments of files to emails or to other parent records) should be produced with the parent/child relationship preserved. Similar items found and collected outside an email repository (e.g., .MSG, .EML, .HTM, .MHT) should be produced in the same manner; and
 - (iii) archive file types (e.g., .zip, .rar) should be uncompressed for processing. Each file contained within an archive file should be produced as a child to the parent archive file. If the archive file is itself an attachment, that parent/child relationship should also be preserved
- (d) Hard copy or paper Records produced as ESI should be produced as single page TIFF images with a resolution of 300 dpi (dots per inch) and OCR generated text. The Records should be produced as they are kept, reflecting attachment relationships between Records and information about the file folders within which the Record is found. Where colour is required to interpret the Record, such as hard copy photos, and certain charts, that image should be produced in colour. These colour images are to be produced as .jpg format. Hard copy photographs should be produced as colour .jpg, if originally in colour, or greyscale .tif files if originally in black and white.

The following bibliographic information, if it is available, should also be provided for each Record:

- (i) document ID
 - (ii) date;
 - (iii) author / author organization
 - (iv) recipient / recipient organization
- (e) Each database Record submitted in response to a paragraph or subparagraph of Part [•] of the SIR:
- (i) should be produced whole, in a flat file, in a non-relational format and exported as a delimited text file where fields are separated by the pipe character (|) and a caret (^) is used as the text qualifier (e.g. ^ Field1 ^ | ^ Field2 ^ | ^ Field3 ^ etc.); and
 - (ii) should include a list of field names; a definition for each field as it is used by the Company, including the meanings of all codes that can appear as field values; the

format, including variable type and length, of each field; and the primary key in a given table that defines a unique observation.

- (f) The Company may use de-duplication or email threading software if the Company provides the Bureau with a written description of the proposed process to be used, including what is considered a duplicate, and the Bureau confirms that the deployment of such processes permits the Company to comply fully with this SIR.
- (g) Documents requiring redaction pursuant to any claim of privilege should be produced as single-page TIFF or multi-page PDF images and designated “Redacted” in the field as described in Schedule B of Part [•] of this SIR. Appropriately redacted searchable text (OCR of the redacted images is acceptable), metadata, and bibliographic information must also be provided. All documents that are part of a document family that includes a document withheld pursuant to any claim of privilege will be designated “Family Member of Privileged Doc” in the field as described in Schedule B. Placeholder images with BEGDOC#, FILENAME, FILEPATH and reason withheld (e.g., “Privileged”) should be provided in place of the document images of the privileged document.
- (h) All ESI should be provided on portable storage media appropriate to the volume of data (e.g., USB/flash drive, CD, DVD, hard drive) and should be identified with a label setting out the matter name, the contents and the date of production. Each medium should contain no more than 250,000 files (e.g., native ESI or images or a combination of both).
- (i) In the event that ESI is delivered in a format that is not one of the formats set out in Schedule A or Schedule B of Part [•] of this SIR, the ESI should be provided along with all available instructions and other materials, including software, as necessary for the retrieval and use of the ESI (subject to any software licensing restrictions, which the Company and the Bureau should discuss in advance of production).

3. Completeness

- (a) In accordance with section 118 of the *Competition Act*, the information supplied to the Commissioner pursuant to this SIR shall be certified on oath or solemn affirmation by:
 - (i) an officer of the Company supplying the information or other person duly authorized by the board of directors or other governing body of the Company;
or
 - (ii) in the case of any other person supplying the information, by that person;
as having been examined by that person and as being, to the best of his/her knowledge and belief, correct and complete in all material respects.
- (b) For each Record or portion thereof or any other information withheld under a claim pursuant to section 116 of the *Competition Act*, including:
 - (i) information that is not known or reasonably obtainable;

- (ii) 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;
- (iii) information that 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; or
- (iv) information that has been previously supplied to the Commissioner;

the Company shall inform the Commissioner under oath or solemn affirmation of the reason why the information cannot or has not been supplied, as applicable, and where information has been previously supplied, the date such information was supplied.



SCHEDULE A

Computer Systems With No Application Export Capabilities

1. ESI generated by office productivity suite software should be produced in its native format.
2. Emails should be produced in their near-native format. Where an email has attachments, the attachments should be left embedded in the native file and not extracted separately.



SCHEDULE B

Litigation Application Exports

1. A load file (e.g., Opticon (OPT), IPRO (LFP), Summation (DII) or Ringtail (MDB)) and all related ESI should be produced in native format, except where near-native format is required by clause 2(c)(ii) and subparagraph 2(f) of Part [•] of this SIR.
2. Within the delimited metadata file where fields are separated by the pipe character (|) and a caret (^) is used as the text qualifier (e.g. ^ Field1 ^ | ^ Field2 ^ | ^ Field3 ^ etc.), and depending on the nature of the ESI, the following fields should be provided:

DOCID
BEGDOC
ENDDOC
BEGATTACH
ENDATTACH
FILEPATH
PARENTBATES (bates number of parent record)
CHILDBATES (bates number(s) of any child records)
MD5HASH (MD5HASH of the native format ESI)
TEXTPATH (link to extracted text on the production media for tiffs only)
NATIVEPATH (link to any files produced in native format on the production media)
CUSTODIAN
ALLCUSTODIAN
TO
FROM
AUTHOR
CC
BCC
SUBJECT/TITLE
FILENAME
DOCDATE
DATESENT
TIMESENT
DATECREATED
TIMECREATED
DATELASTMOD
TIMELASTMOD
DATEACCESSED
TIMEACCESSED
SPECIFICATION
FILEEXTENSION
REDACTED
FAMILYMEMBERPRIVILEGEDDOC

The ESI produced should be indexed by using the 'SPECIFICATION' field as being responsive to the paragraphs or subparagraphs of Part [•] of this SIR. If multiple values exist for the specification, they should be separated by a semi-colon (e.g. 1a; 1b; 2a, etc.).



HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Web Site

[www.bureaudelaconurrence.gc.ca]

Address

[Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Québec K1A 0C9]

Telephone

[Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired): 1-800-642-3844]

Facsimile

[819-997-0324]