Submission on

Proposed Amendments to the *Notifiable Transactions Regulations* under the *Competition Act*

COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 35,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Competition Law Section of the Canadian Bar Association.

Submission on Proposed Amendments to the *Notifiable Transactions Regulations* under the *Competition Act*

I. INTRODUCTION

The purpose of this document is to provide the comments of the National Competition Law Section of the Canadian Bar Association (the Section) on the proposed amendments to the Notifiable Transactions Regulations (the Regulations) under the *Competition Act* (the *Act*), as published in the Canada Gazette, Part I, May 15, 1999.

II. GENERAL COMMENTS

Broadly speaking, we support the ultimate objective of "making the pre-merger notification process more effective and efficient". This is consistent with the general thrust of the recommendations in the Report of the Consultative Panel on Amendments to the *Competition Act*.

However, the proposed amendments to the Regulations do little to address the issue that both we and the Consultative Panel recognize as being a significant concern, namely, the fact that the vast majority of transactions which are subject to pre-merger notification do not raise serious competition issues. This is particularly troublesome now that a substantial fee of $25,000 (plus GST) must be paid in connection with pre-merger notification filings.

In the recent Consultative Forum on User Fees, and in a number of previous submissions, we observed that the single most effective way of reducing the burden imposed on merging parties and the Competition Bureau (the Bureau) by the pre-merger notification provisions in Part IX of the *Act* would be to raise the financial thresholds in sections 109 and 110. In that regard, we suggested modest increases from $400 million to $500 million for the "size of parties" threshold and from $35 million to $50 million for the "size of transaction" threshold. We encourage the Bureau to continue to actively study this proposal.

The second way in which the pre-merger notification burden could be reduced is by creating additional exemptions. Such exemptions can be created by amendments to the Regulations, pursuant to paragraph 113(d) and subsection 124(1) of the *Act*. For specific proposals, we refer you to our previous submissions, for example with respect to Bill C-20, which do not bear repeating here. The Consultative Panel also referred to questions that had been raised regarding "the need for further exemptions from notification" (p. 1 of its report), and encouraged the Bureau to "consult with interested parties to identify and define additional exemptions" (p. 5). Notwithstanding those submissions, we are disappointed to note that the only new exemption being proposed relates to certain categories of asset securitization transactions. In the spirit of the Consultative Panel's recommendation, we encourage the Bureau to continue to assess the extent to which the burden imposed on merging parties as well as on the Bureau's limited resources could be reduced through the creation of additional exemptions.

The pre-merger notification burden can also be reduced by reducing the extent of the information required to be provided. To some extent, this will be achieved by the proposed changes to the short-form filing information requirements, which we welcome. However, we strongly believe that proposed changes to the long-form filing information requirements likely will impose an unnecessarily heavy, additional burden on merging parties in terms of management time and financial costs.

Indeed, it may be noted that the proposed long-form information contemplates the delivery of substantially more information than is required under the U.S. HSR Rules. One example is the proposal in subparagraph 17(e)(xv), which contains some of the most objectionable of the proposed additions to the list of information that would be required pursuant to long-form filings. It describes a significant amount of information initially proposed for inclusion in item 4(c) of the initial HSR filing but ultimately rejected after the Federal Trade Commission received complaints that it would impose too onerous a burden on merging parties. Eventually, the FTC agreed that item 4(c) should require only studies, surveys, analyses and similar reports which were prepared "for the purpose of evaluating or analyzing the acquisition with respect to ..." various matters, as opposed to all studies, surveys, analyses and similar reports "prepared by or for or received by a senior officer or director, and have been implemented over the last three years or are to be implemented".

In light of the U.S. experience and the above-noted general objective underlying the amendments to the Regulations (i.e., "making the pre-merger notification process more effective and efficient"), we submit that this aspect of the Revised Draft Regulations ought to be reconsidered. Subparagraphs 17(e)(xii) and 17(e)(xv) of the long-form filing requirements should not be broader in scope than what is required by item 4(c) of the initial HSR filing. This suggestion implies that the proposal in subparagraph 17(d)(xii), which is closely modelled upon item 4(c) of the HSR notification form, should be narrowed, as it is somewhat broader than item 4(c). In addition, subparagraph 17(e)(xv) should be eliminated in its entirety. Harmonizing these two provisions would be consistent with efforts that are being made within the OECD and elsewhere to bring about a greater convergence in pre-merger notification regimes, in order to reduce the costs on parties to international transactions. Harmonization also would permit a single, common search to be conducted for the types of documents in question, based on the same test.

As you know, it is now common practice to provide the Bureau with substantially less information than what is contemplated by the proposed list of information requirements for long-form filings, in respect of virtually all transactions which fall below the market share/concentration thresholds set out in the Merger Enforcement Guidelines (MEGs) as well as in respect of most transactions involving market shares or concentration levels in excess of those thresholds. In the vast majority of cases, the type of information contemplated by the proposed revisions to the long-form information filing requirements historically has not been required by the Bureau. Indeed, the proposed list of information required for a long-form filing arguably would require significantly more information to be provided to the Bureau than currently is the case in respect of all but the most problematic transactions. In short, the expansion of the long-form filing requirements in the manner proposed could impose an additional undue burden, relative to current practices in virtually all cases where either timing considerations or the Bureau have mandated the filing of a long-form notification.

In this regard, concerns have been expressed that the draft Regulations may signal a shift from the Bureau's current practice of accepting short-form filings and supplementary submissions in lieu of a long-form filing. Specifically, concerns have been expressed that the Bureau might depart from its longstanding practice and require long-form filings even where: (i) merging parties express an intention to cooperate by providing the Bureau with substantial additional information on a voluntary basis and by providing the Bureau with sufficient time prior to closing to review the proposed merger; or (ii) the merger does not raise serious issues or in any event is not likely to exceed the market share/concentration thresholds set out in the MEGs.

Notwithstanding efforts that have been made by senior representatives of the Bureau to alleviate these concerns, they have been rekindled by the discussion in the draft Procedures Guide on Notifiable Transactions and Advance Ruling Certificates Under the *Competition Act*. Specifically, the discussion in Part II of that document, under

the heading "When Would the Commissioner Request a Long Form", suggests that long-form filings may be required much more frequently than has been indicated during the consultation process over the last two years.

Accordingly, we recommend the Commissioner make a clear statement that the Bureau does not intend to make a significant change to the current practice of accepting a short-form filing in cases where the merging parties: (i) express an intention to cooperate and provide the Bureau with the type of information typically provided regarding relevant markets, market shares and the various evaluative criteria listed in section 93 of the *Act* and discussed in Part 4 of the MEGs; and (ii) provide a commitment to provide the Bureau with a sufficient amount of time to complete its review of the merger prior to completing their transaction. This would be consistent with the spirit of the recommendation of the Consultative Panel that "the positive features of the current system [be retained], while addressing those areas that had proven to be problematic".

We suggest, at a minimum, that the Commissioner should clarify what the policy will be in respect of long-form filings under the proposed regime.

In addition, we recommend that the proposed long-form filing information requirements be made considerably less onerous by making the various changes suggested below. This is in keeping with the original intent underlying these amendments to the pre-merger notification provisions, namely to "reduce the paper and regulatory burden" on parties while at the same time ensuring that the Bureau is able to obtain "information *essential* to assessing the likely impact of the transaction".[1]

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[1] Bureau of Competition Policy, "Discussion Paper - Amendments to the *Competition Act*," June 1995, at 7. (Emphasis in original.)

III. SPECIFIC COMMENTS

A. Definition of Senior Officers or Directors (Subsection 2(1))

In our experience, the secretary of the corporation often is the general counsel, and typically would not be the sole recipient of marketing and other non-privileged information that would be relevant to the Bureau's review. However, such an individual would receive or generate a significant amount of privileged communications. Deletion of the reference to this person could help to avoid raising potentially difficult issues related to privilege in respect of virtually every long-form filing. We further submit that the words "any individual who performs their functions" are vague and in many cases likely would lead to significant uncertainties on the part of the person responsible for certifying the completeness of the filing. Therefore, we suggest that these words be deleted.

B. Conversion into Canadian Dollars (Subsection 5(4))

The revisions to subsection 5(4) do not take into account that there often are significant exchange rate shifts during any given year. Accordingly, basing the calculation of gross revenues on the daily noon exchange rate published by the Bank of Canada on a specific date, as contemplated by the draft Regulations, could significantly distort the level of the notifying party's gross revenues. We suggest that a superior benchmark would be the average exchange rate for the year that is published by the Bank of Canada.

C. Intervening Events (Subsection 14(1))

Although not one of the proposed amendments, the words "or was otherwise affected by" in the Regulations are too vague. Consideration should be given to defining the

types of specific circumstances, such as being the subject of a transaction, that the Bureau wishes to capture in this provision.

D. Short-Form Filing Requirements (Section 16)

Consideration should be given to amending subparagraph 16(c)(ii) to include the words "in Canada, and if applicable, the address of any head office outside Canada".

In addition, clause 16(c)(iv)(A) should be expanded to permit the provision of unaudited financial statements if, as frequently occurs, audited financial statements are not available.

Regarding the proposal in clause 16(c)(iv)(C), we suggest that it typically would be much less onerous for parties to provide the information in question in respect of the top twenty customers of the products that, to the knowledge of the notifying party, are supplied by both parties to the proposed transaction, and to provide information in respect of the top twenty suppliers of inputs into only those products. This should provide the Bureau with a sufficient number of customers and suppliers to conduct an initial review of the transaction and to determine whether the transaction is one of the few that require the provision of additional information. In addition, we question whether it is necessary to provide the addresses of the above-noted customers and suppliers, given that telephone numbers and contact persons will be provided.

E. Long-Form Filing Requirements

With respect to clause 17(e)(iv)(C), please see our comments in respect of clause 16(c)(iv)(C). Confining clause 17(e)(iv)(C) to products that are sold by both parties to the transaction could easily be accomplished by shifting that provision to paragraph 17(e)(vii).

With respect to clause 17(e)(iv)(D), we suggest that it would be oppressive to have to provide this information in respect of each party to the transaction and its affiliates. Therefore, once again, we suggest that this provision be shifted to subparagraph 17(e)(vii), in order to limit its scope to products sold by both parties to the transaction. Moreover, we suggest that the word "principal" be inserted before the references to warehouses and retail establishments, as the current wording of this provision would give rise to an inordinate burden on large retail chains and other establishments with large numbers of warehouses or retail establishments. In addition, this provision should be confined to facilities located in Canada.

With respect to subparagraph 17(e)(v), we submit that this information would be far too burdensome for notifiers with a large number of products or sales locations. To the extent that this information should only be relevant for overlapping products, we suggest that the provision be moved to subparagraph 17(e)(vii).

With respect to subparagraph 17(e)(vi), we submit that the words "completion of the transaction" be replaced with the words "date of notification". This will remove potential confusion, as the current wording of that paragraph may be interpreted as contemplating only merger-related plans. Moreover, the date of notification is fixed, whereas the completion date may be a moving target.

With respect to clause 17(e)(vii)(A), we suggest that the word "facility" be replaced with the word "plant", as the concepts "production capacity" and "capacity utilization" are not readily applicable to retail establishments and warehouses.

With respect to subparagraph 17(e)(x), we suggest that the words "carrying on an operating business" be inserted after the word "combination", to confine the requested information to businesses which have some connection with Canada.

With respect to subparagraph 17(e)(xii), as noted earlier, this provision goes somewhat beyond the corresponding requirement in item 4(c) of the HSR initial

filing form. Given that item 4(c) has a proven track-record over a period of more than 20 years in an economy that is ten times the size of the Canadian economy, we suggest that there is no need to impose a greater onus on Canadian businesses. Moreover, as discussed above, harmonization of this provision with the requirements of item 4(c) would be consistent with current efforts within the OECD to achieve greater harmonization in respect of pre-merger filings. In this case, harmonization would streamline the search for documents within entities that have a presence on both sides of the Canada-U.S. border, by permitting a single, contemporaneous search for such documents.

Regarding the proposal in subparagraph 17(d)(xv), we submit that the information described in this provision would impose an inordinate burden on merging parties and should not be required at the pre-merger notification stage of the Bureau's review. For this reason, and for the reasons described in our general comments on the Revised Draft Regulations, we recommend that this provision be deleted. If the Bureau determines that a particular merger raises sufficiently serious issues to warrant imposing the substantial onus on the merging parties that would be required by this provision, it can request the information described in this provision at that time, as is the current practice. In the very rare cases where a satisfactory response is not provided in respect of a merger which raises serious *prima facie* competition issues, the formal powers under section 11 of the *Act* would be available as a potential tool to compel production of the information the Commissioner requires to complete his review. This suggestion is consistent with the observation made by the Consultative Panel, to the effect that in the "few cases where the information required by the Bureau is not provided voluntarily, it can be obtained through the use of formal powers" (p. 2).

In any event, we submit that the words "and similar documents" in sub-paragraph 17(d)(xv) are vague and should be deleted.

F. The Proposed Exemption for Asset Securitization Transactions (Sections 2 and 15)

We endorse the following remarks of practitioners with extensive experience with asset securitization transactions. These observations are directed toward (i) expanding the definitions of "asset securitization transaction" and "financial asset" to cover a broader range of asset securitization transactions; and (ii) eliminating certain wording that would seriously undermine the intended effect of the regulations, by leaving parties no alternative but to continue to submit pre-merger notifications in respect of such transactions.

These comments refer to changes suggested to the wording of the definitions of the terms "asset securitization transaction" and "financial asset", as well as the wording of the proposed subsections 2(2) and section 15. For ease of reference, we have reflected the proposed changes in the Appendix below and have the annotated the text of the Appendix to correspond with the comments as numbered below.

(1) Paragraph (a) of the definition of "asset securitization transaction" should be modified as indicated to encompass three common securitization structures. These are the leasing of financial assets, the sale of certificates evidencing undivided co-ownership interests in financial assets directly to investors without a special purpose vehicle as intermediary, and the use of the most common special purpose vehicles, trusts.

(2) The servicing of financial assets in an asset securitization transaction requires, among other things, a level of reporting sufficiently detailed to satisfy all parties to the transaction. Thus, if a seller does not have the expertise or systems to report at the required level, a service may be appointed who is independent of both the person disposing of the financial assets and the person acquiring them and whose business includes administering assets for others.

(3) Due to the evolving nature of the transactions coming to market, we consider it very important that the Commissioner have the ability to exempt deserving transactions.

(4) The definition of financial asset should be modified to reflect the actual structure of different types of transactions. It is essential to the completion of a legal sale that these structures be respected. The reference to related collateral is included here and deleted in paragraph (a) of the definition of "asset securitization transaction".

(5) The range of circumstances entitling the acquirer of assets to replace the service or dispose of assets may, on a narrow interpretation, be somewhat broader than the word "default" would suggest.

(6) The inclusion of the concept of acquisition of control would entirely vitiate the intended effect of the regulations. First, it is essential to the structure of assets securitizations that there be a "true sale" of the financial assets to the purchaser at the outset. Thus control, in the sense of ownership of the assets, must pass immediately. Second, it is also essential that practical control of the assets be capable of being transferred. A previous draft of the amendments to the Regulations recognized that the continuing administration of the assets might be disrupted due to an event of default. In such an event the purchaser would, on its own or, more likely through a servicing agent, assume such administration. Combined with the original transfer of ownership, this may well result in the acquisition of legal and practical control of an operating segment of a business - for example, the mortgage business of a financial institution - although this would not have been the original intent or desired result of the transaction. Ultimately, however, what precisely would constitute control is a factual matter the determination of which would introduce a significant - and in many cases insurmountable - element of uncertainty in any analysis of the applicability of the exemption.

As a result, the legal opinion essential to any such transaction would not be deliverable, thus rendering the completion of the transaction on an exempt basis potentially hazardous and defeating the purpose of the exemption.