Draft Enforcement Guidelines – Revised Merger Review Process

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 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 National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

TABLE OF CONTENTS

Draft Enforcement Guidelines – Revised Merger Review Process

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EXECUTIVE SUMMARY

The *Draft Revised Merger Review Process Guidelines* provide a helpful outline of proposed Bureau practice. However, the draft Guidelines are either silent or unclear on Bureau policy in a number of important respects. The Section believes that the Competition Bureau's merger review enforcement policy should reflect the new statutory merger review process, pursuant to which merger investigations are completed within the statutory waiting periods. In connection with the new Supplementary Information Request process: pre-issuance dialogue ought to be the norm; the number of custodians to be searched ought to be meaningfully restricted; the proposed internal review procedure would benefit from having impartial decision-makers; and additional guidance from the Bureau on the compliance standard would be welcome. Additional guidance would also be welcome with respect to the planned use of section 11 orders, section 100 orders and no action letters. Although the Section appreciates that Bureau enforcement policy in all these areas may change over time following experience with the new regime, stakeholders need clear guidance on the agency's current approach.

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the *Draft Revised Merger Review Process Guidelines* (the Guidelines) issued by the Competition Bureau in March 2009. The CBA Section supports the Bureau's efforts to articulate its views on the application of the *Competition Act* to business conduct by publishing enforcement guidelines, information bulletins, speeches, press releases and other interpretive aids.

The CBA Section supports additional guidance in the merger review process and applauds the Bureau for its willingness to engage in meaningful dialogue with stakeholders about the content of the draft Guidelines in roundtables and other forums. The draft Guidelines provide a helpful outline of proposed Bureau practice. However, the draft Guidelines are either silent or unclear on Bureau policy in a number of important respects. This is unfortunate. The CBA Section appreciates that the draft Guidelines reflect the Bureau's best attempt to predict how a new system will work and that enforcement policies may change over time. But the Bureau should not be reluctant to adopt clear policies on merger processes and should be willing to change those policies if they do not work as expected. Clear statements on enforcement policy, even if changed over time, are useful to the private sector because they help provide certainty and predictability.

II. PARLIAMENT'S INTENT AND THE MEANINGFULNESS OF NEW STATUTORY WAITING PERIODS

The Bureau's internal review policy and process should reflect, and be consistent with Parliament's intent in adopting the new statutory merger review process in Canada. While there was little public discussion on this point by the Government (due to the atypical process by which this legislation was passed), it is clear the Government acted on the advice of the Competition Policy Review Panel.[1] Accordingly, it is instructive to consider the portions of the Panel's June 2008 Report, *Compete to Win*, that discuss the recommendation that Canada adopt a two stage merger review process modeled on the U.S. regime.

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[1] See, e.g., speech by the Honourable Jim Flaherty, Minister of Finance, to the Osgoode Hall Law School and Schulich School of Business LLB/MBA Students' Association Annual Conference, February 6, 2009, available at http://www.fin.gc.ca/n08/09-017_2-eng.asp: "We'll also move forward in the first budget bill, which is being tabled this afternoon in Parliament. We will move forward with the recommendations of the recent Competition Policy Review Panel that was chaired by Red Wilson—important recommendations with respect to making our Canadian economy more competitive, certainly avoiding the peril of protectionism, in fact moving in the other direction toward a more open trading society in Canada." See also, "Canada's Economic Action Plan: A First Report to Canadians" tabled in the House of Commons by the Minister of Finance in March 2009, available at: http://www.fin.gc.ca/pub/report-rapport/2009-1/pdf/EcoPlan_e.pdf: "Improving Canada's Competition and Investment Frameworks: Canada's Economic Action Plan commits the Government to implement improvements to Canada's competition and investment laws and policies based on the recommendations of the Competition Policy Review Panel. These changes will improve the competitiveness of Canadian businesses and better protect consumers. The Minister of Finance has brought forward these reforms through the Budget Implementation Act, 2009, currently before Parliament." See also, comments of the Director General, Marketplace Framework Policy Branch, Industry Canada to the Senate Committee on National Finance, March 10, 2009.

The Panel noted that "merger analysis needs to be conducted on a timely basis in the fast-paced world of modern business" and that during its consultations "concerns were expressed about the time taken to review complex merger transactions and the use of formal investigative processes by the Competition Bureau, both of which can be time consuming and costly for the merger parties and other market participants"[2]. The Panel also observed that few merger cases actually require remedies, and indeed that "from 2002 to December 2007, data indicate that there were 7937 mergers in Canada. Of these, 1431 transactions were reviewed by the Competition Bureau and only 15 resulted in merger remedies, such as divestitures of assets or businesses"[3].

The Panel proceeded to make recommendations designed to provide the Bureau with more time and effective tools to review those few cases that could legitimately require remedies, while at the same time providing greater certainty to parties to all other transactions by virtue of a system that would "effectively clear" their cases within the initial 30 day period. The Panel described the new two stage process as follows:

> This change would separate merger cases into two categories: those cases that are concluded (and effectively cleared) within 30 days of the initial filing, and "second stage" cases that raise complex competition issues. So-called "second stage" cases would be subjected to an additional review period that would terminate 30 days following full compliance with a "second request" for information.[4]

This statement demonstrates that, in recommending the new merger review process, the Panel contemplated a review process in which proposed transactions not subjected to a "second request" would rarely be challenged by the Commissioner (at any time).

This understanding is consistent with the recent statement of the Acting Senior Deputy Commissioner of Competition to the Senate Banking Committee: "Bill C-10 would [...]

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2 *Compete to Win* (Government of Canada, June 2008) at p. 56, available at http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html.

3 *Ibid*. at p. 55

4 *Ibid*. at p. 56.

enshrine in law that it [the Bureau] must decide and notify parties within 30 days of the receipt of the relevant information, whether a merger will be challenged."[5]

In addition to transparency, predictability and efficiency, the Panel highlighted the desirability of achieving greater harmonization with the U.S. merger review process and specifically stated that "it would be beneficial to adjust our merger review process into a two-stage regime that would more closely align our procedures with those in the U.S"[6]. In this regard, while we acknowledge that a practice of "pulling and refiling" is used in the U.S. in some cases (see discussion below), it remains that the clear view in the U.S. is that once the initial statutory waiting period has expired (i.e., no second request has been issued), there is very little risk of a post-closing challenge if the parties proceed to close their transaction.

In light of the above, the Bureau should state in the Guidelines that, in all but exceptional cases (e.g., the discovery of relevant new facts not disclosed by the parties), the expiry of the initial 30 day waiting period without the issuance of a Supplementary Information Request (SIR) effectively clears the transaction such that there is effectively no risk of the relevant transaction being subject to post-closing challenge.

Further the Bureau's approach to practices such as pre-filing dialogue, filing competitive impact submissions, issuing no-action letters, resorting to section 11 and section 100 orders and complying with Treasury Board's Policy on Service Standards for External Fees must be reconsidered and revised to reflect and be consistent with Parliament's intent. These practices should be administered in a way which is consistent with, and maximizes the transparency, predictability and efficiency of the new regime.

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5 Statement before the Senate Banking, Trade and Commerce Committee, March 10, 2009. Similar statements were made by the Director General, Marketplace Framework Policy Branch, Industry Canada to the same Committee on March 10 and on May 13, 2009.

6 *Supra* note 2.

III. INITIAL WAITING PERIOD

(a) Early Consultations

Under the new regime the Bureau's objective within the initial 30 day review period is solely to determine whether the notified transaction raises sufficient issues to warrant a Supplementary Information Request (**SIR**) to more fully review its competition implications. This task, as recognized by the Panel, will require the Bureau to adopt a more streamlined approach to its review and triage of merger filings.

The CBA Section welcomes wholeheartedly the opportunity for parties to engage in pre-filing dialogue with the Bureau. Meaningful pre-filing dialogue can assist in narrowing the material substantive competition law issues and thereby considerably enhance the efficiency and effectiveness of the Bureau's review in the initial waiting period.

Furthermore, the CBA Section welcomes the statement in section 2.2 that the Bureau will communicate "initial substantive evaluations" as early in the 30 day period as possible. For merger parties, the opportunity to understand the nature of any substantive concerns of the Bureau as early as possible is an important part of an efficient merger.

The draft Guidelines are silent on the submission of competitive impact submissions or white papers by merger parties and the extent to which they may be helpful in narrowing issues within the initial waiting period and the scope of SIRs. Competitive impact submissions have been an important part of Canadian merger practice but are not common in the U.S. regime. If the Bureau believes that such submissions are helpful to the substantive assessment of merger transactions and would be helpful in narrowing the scope of SIRs, the CBA Section encourages the Bureau to include a statement to that effect in the Guidelines.[7]

(b) Pulling and Re-Filing

The Guidelines should be expanded to confirm the Bureau's enforcement position that, if the acquiring party chooses to withdraw a notification before the expiry of the applicable

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[7] The CBA Section does not object in principle to the use of the other techniques to narrow SIRs identified in the draft Guidelines, such as early consultations and witness interviews.

waiting period and then re-submits the same notification, a new initial 30 day waiting period begins to run.

The Guidelines might also confirm that the Bureau does not expect the "pull and re-submit" approach to be a common practice, but that it is an option available to merger parties who may want to use this approach .

In the case of a pulling and re-submitting the notification near the end of the waiting period, the CBA Section recognizes that the merger parties would not be entitled to a refund of the filing fee. However, the Bureau should confirm in the Guidelines that the original filing fee would be retained and applied to the ongoing consideration of the same proposed transaction. Specifically, the Bureau should confirm that a second filing fee would not be required where the merger parties pull and re-file a merger notification in respect of the same transaction.

The Guidelines should also confirm that, to the extent the notification was coupled with an application for an Advance Ruling Certificate (ARC), then pulling and re-filing would not raise issues with respect to a second fee. This is because the ARC application would remain lodged with the Bureau and the *Competition Bureau Fee and Service Standards Handbook* recognizes that only one fee is payable in respect of a proposed transaction for which both an ARC application and a notification is filed.

(c) Role of the ARC under the New Regime

The CBA Section welcomes the statement in the draft Guidelines that the Bureau will continue to complete its assessment of non-complex transactions within two weeks.[8] Given that the ARC process remains part of the new merger review regime, the CBA Section suggests that the Bureau consider issuing an ARC, even if not requested, where it completes its review of a notifiable transaction early.

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[8] The International Competition Network's (ICN) Recommended Practices for Merger Notification Procedures states that: "[t]he existence of specified waiting periods should not preclude competition agencies from granting early termination once they determine that a proposed transaction does not raise material competitive concerns. Accordingly, each jurisdiction's procedures should enable the competition agency to grant early termination of applicable waiting periods."

IV. SUPPLEMENTARY INFORMATION REQUESTS

(a) General

As a general point, the Guidelines would benefit from a clear statement that whenever an SIR is issued the Bureau will provide the parties with a detailed explanation of the reasons for the request and the nature of its concerns.[9]

(b) Pre-issuance Dialogue

The CBA Section welcomes the Bureau's desire to engage in pre-issuance dialogue and its recognition that focused information requests can benefit both the Bureau and merger parties by fostering the efficient use of limited resources and minimizing the production of irrelevant information. The U.S. model of issuing standard form information requests that require production of huge amounts of information is widely perceived as a tool to extend the merger review period. It is certainly not an efficient manner of gathering information relevant to a merger inquiry. The CBA Section believes that there can and should be divergence from the U.S. model in this respect and welcomes the Bureau's initiative to create a more efficient system. In that regard, the CBA Section believes it would be helpful to state in the draft Guidelines that an SIR will be used solely to gather information and not as a mechanism to prevent or delay the parties from completing a merger.

Section 3.2 of the draft Guidelines states that pre-issuance discussions with merger parties and their respective counsel will occur "where time permits". This suggests that dialogue may be the exception, not the norm. In the CBA Section's view, the Guidelines should reinforce that the Bureau will make reasonable efforts to engage in dialogue with the merger parties on the breadth and scope of a possible SIR for *all* mergers that raise potential substantive issues. Since the time frame for issuing an SIR is generally predetermined (i.e., at the end of the initial 30 day waiting period), it would not be difficult to make it a practice to offer to meet with the merger parties on a potential SIR at a specified date during the initial 30 day waiting period.

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[9] This section of the Guidelines could also be clarified somewhat. It would be helpful, for example, to amplify on what is meant by "The Bureau will also seek to identify potentially dispositive issues."

It would also be helpful if the Bureau undertook to provide the merger parties with a reasonable opportunity to review and comment on a draft of the proposed SIR. While the Bureau is under no obligation to accept suggested drafting changes, the input of merger parties who have a better understanding of their operations and business may improve the effectiveness and precision of the SIR. Effectiveness of an SIR will often turn on specific drafting issues that cannot reasonably be resolved beforehand without reviewing a draft.

(c) Number of Custodians

The CBA Section believes that limiting the number of custodians to be searched in the context of an SIR to 30 individuals is a material departure from past Canadian practice. It will result in more, not fewer, individuals being searched for responsive information in the context of merger reviews. Moreover, the ability to search "central files", "predecessors, successors, secretaries and assistants" as well as "employees operating at the local level" would permit the Bureau to exceed the searchable maximum in virtually every case.

The CBA Section applauds the Bureau's desire to put caps on the scope of SIRs, but the draft Guidelines do not impose any meaningful restraint on the number of custodians to be searched. A much smaller number of individuals would be more appropriate in light of numbers of individuals normally searched in connection with section 11 orders, and the burden imposed by these searches on businesses. Alternatively, the CBA Section suggests that the Bureau consider the use of other, non-numerical, caps, such as an intent to limit SIRs to information in the possession of certain "senior officers."

The draft Guidelines suggest that parties must cooperate with the Bureau, and actively seek to limit the number of custodians, before the Bureau will consider adopting the 30 custodian maximum.[10] This is inappropriate (and the suggestion may be unintended). The Bureau should make a good faith effort to limit custodians and focus information requests regardless of whether parties cooperate. Parties that do not voluntarily provide additional information to the Bureau should not be punished for not cooperating. As a practical matter the Bureau may wish to acknowledge that limiting custodians or focusing requests may be difficult

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[10] In paragraph 3.3(a) of the draft Guidelines the Bureau states that "…where parties engage in pre-issuance dialogue, the parties seeking to limit the custodians…".

where parties do not cooperate, but the Bureau should attempt and be seen to be attempting to employ "best practices" in all cases.

(d) Internal Review of SIRs

The CBA Section commends the Bureau for including in the draft Guidelines procedures relating to the review of concerns of merger parties over the scope of SIRs as well as disputes over compliance with such requests. In the absence of a mechanism for the judicial review of SIRs, some sort of review is necessary to ensure procedural fairness. However, the *internal* review mechanism set out in the Guidelines, in which other Bureau staff is responsible for carrying out the review, although better than nothing, is unlikely to be accepted as impartial and effective. A review process could be improved if the reviewer were neutral. Involving a lawyer from outside practice, or a former judge, for instance, would be an improvement over the procedure in the draft Guidelines.

(e) Timing

The draft Guidelines state that the Bureau will urge parties to consult with them on a number of steps in the merger review process. Among them is identifying "employees or agents of the parties that [the Bureau] proposes to interview" and the "period during which parties will make such persons available for interviews."[11]

The CBA Section believes there is no statutory basis for formal witness interviews as part of an SIR and this statement misleadingly suggests that witness interviews may be required as part of SIRs in merger cases. Even under section 11, the use of formal witness interviews would be a marked departure from current practice with section 11 orders, which in merger reviews normally require only the production of records and a written return. If sections 3.5(b) and (c) of the draft Guidelines are meant to reflect only the long-standing practice of meetings between the Bureau and business personnel from the parties, the Guidelines should be revised to reflect that.

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[11] Guidelines, sections 3.5(b) and (c).

More generally, if this section is intended to encourage parties to enter formal or informal "timing agreements" with the Bureau, it would be helpful to set that out in greater detail.

(f) Compliance with SIRs

The statements in the draft Guidelines relating to sections 116 and 118 of the Act largely summarize the statutory provisions. As currently drafted, section 3.7 does not provide helpful guidance on the Bureau's proposed enforcement policy or its interpretation thereof.

The standard parties must meet to comply with an SIR is an important issue. In the absence of case law on the scope of sections 116 and 118, guidance from the Bureau would be helpful. The statutory standard that a request be "correct and complete in all material respects" is vague and potentially subjective. Similarly, it would be helpful to know the Bureau's expectations with respect to assertions that information is not reasonably obtainable, not relevant or has been previously provided. The draft Guidelines should also explain why the Bureau seeks to have advance notice of plans to not provide certain categories of information. It would also be helpful to have a statement in the draft Guidelines that a subsection 116(3) request for information would not affect the commencement of the second 30 day waiting period.

The CBA Section also suggests moving the first paragraph in section 3.8(b) to section 3.7 so that the discussion of SIR compliance process is in a single section. Finally, if the Bureau has a concern about compliance, it ought to let the parties know as soon as possible.

V. USE OF SECTION 11 ORDERS

The CBA Section is pleased that the only references to section 11 orders in the Guidelines indicate that they would be used to collect information from third parties. The Guidelines do not say that section 11 orders would be used to collect information from the merger parties, but that additional information would "normally" be obtained from merger parties by way of an SIR (para 2.1).

The CBA Section believes that it would not normally be appropriate for the Bureau to seek section 11 orders to collect information from the parties to a notifiable transaction. The SIR

process was designed to enable the Bureau to request from the merger parties all the information it needs to complete a review. Also, if the Bureau declined to exercise its power to issue an SIR, a court may be unwilling to issue a section 11 order to allow collection of information from the merger parties. In particular, the Bureau would have to disclose that it did not issue an SIR under 114(2) to request information "relevant to the Commissioner's assessment", but instead was asking to the court to order production of "information relevant to [an] inquiry" under section 11. Given Parliament's clear intent to equip the Bureau with the information powers it needs through the SIR process, it would also be necessary to explain why the Bureau failed to have recourse to this process.

By contrast, the CBA Section agrees that section 11 orders are an appropriate mechanism for collecting information from third parties and from parties to non-notifiable mergers. Section 11 is not the only mechanism available to the Bureau in these circumstances, since many parties and non-parties may be willing to provide information voluntarily. It would be useful for the Guidelines to explain more fully, in light of the new SIR power, the circumstances in which section 11 orders (as opposed to voluntary requests) would be sought against third parties.

VI. USE OF SECTION 100 ORDERS

The draft Guidelines state that "[s]ection 100 of the Act remains available to the Commissioner to address circumstances where additional time is required to review a merger, including circumstances where the Commissioner has obtained all necessary information from the parties but requires additional time to complete the review."[12] The additional requirement that closing would substantially impair a remedy should also be set out in the draft Guidelines.

This statement does not provide guidance on the Bureau's proposed enforcement policy on the use of section 100 orders. Section 100 has been rarely used in merger cases and its use will likely diminish with the advent of the SIR process. The draft Guidelines should acknowledge this and clarify future expectations.

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[12] Draft Guidelines at page 8.

The CBA Section believes it would normally be difficult for the Bureau to obtain a section 100 order in circumstances where it has chosen not to issue an SIR. To obtain an order under section 100, the Bureau must demonstrate that (1) its remedy would be impaired if an order did not issue, and (2) it needs more time to complete its inquiry. For (2), the Bureau would also have to disclose to the court that it had chosen not to exercise its unilateral ability to extend the waiting period through issuance of an SIR. For example, a court may not be sympathetic to the Bureau's timing needs where the Bureau had all the information it required within the initial 30 days but could not complete its review of this information on a timely basis.

The Bureau should also not generally seek to extend review periods by way of a section 100 order in circumstances where it has issued an SIR. The response to an SIR may result in a considerable volume of information being provided to the Bureau. The Bureau's receipt of this information should not be used as a basis for seeking a section 100 order because "additional time to complete the review" is necessary. The Panel recommendation and new statutory scheme envision that statutory waiting periods will typically expire within 30 days of notification or the submission of an SIR response. In light of these factors, a court may be unwilling to issue a section 100 order because the Bureau needs more information to complete its inquiry, following issuance of and compliance with an SIR.

The CBA Section appreciates that in rare, exceptional circumstances, an SIR response may be voluminous and more time to review the response may legitimately be needed. However, the preferred alternative to a section 100 order would be to request "rolling returns" from the merger parties, to enable the Bureau to review information piecemeal over time rather than in 30 days. If the Bureau agrees this is a reasonable enforcement policy, the draft Guidelines should adopt it and emphasize that the Bureau will, wherever possible, endeavour to work with merger parties to minimize the potential for a section 100 order being sought.

VII. PRACTICE OF ISSUING NO ACTION LETTERS

During the May 4, 2009 roundtables on the new merger review process, the Bureau demonstrated a desire to listen to the CBA Section's views about the continuance of some Canadian practices in the new merger review process regime. One practice that was the

subject of some debate within the CBA Section and with the Bureau was the issuance of no-action letters. No-action letters are not a feature of the U.S. regime. CBA Section members are divided on whether the Bureau should continue to issue no-action letters.

The issuance of no-action letters commenced in the 1980s when statutory waiting periods were very short (7 days and 21 days) and there was a three year post-closing challenge period. In this statutory regime, parties believed there was a material risk that a transaction could be challenged post-closing and often waited for affirmative comfort prior to consummating their transactions. When the waiting periods were lengthened in the late 1990s to 14 days and 42 days, the statutory regime was also amended to allow the Commissioner to obtain a 30–day injunction to delay closing in the event the review was not complete. Accordingly, the desire for affirmative comfort continued.

The statutory basis in respect of which the practice of issuing no-action letters developed has now shifted significantly. Now, like the U.S. antitrust agencies, the Bureau has the unilateral and discretionary statutory right to substantially extend the pre-closing review period and to obtain substantial additional information from the parties. Provided the parties have made full disclosure of potential issues, the new merger review regime eliminates any basis for the Bureau to suggest that parties not implement their transaction upon expiry of the 30 day waiting period where it has not issued an SIR. Given that the right to extend the review process and obtain information from the parties is now wholly in the discretion of the Commissioner, it would be reasonable for merger parties to expect that the risk of a post-closing challenge is greatly reduced where the Commissioner has opted to let the initial waiting period expire, relative to the situation under the prior merger review process.

Some CBA Section members advocate that if the Bureau were to continue issuing no-action letters after the expiry of the initial review period, this would suggest that the expiry of the waiting period is not meaningful, which would be inconsistent with Parliament's intent. On this basis, the issuance of no-action letters should therefore no longer be a common practice in Canada.

Other CBA Section members see continued value in a positive indication that the Bureau does not intend to challenge the proposed transaction. If that is the position the Commissioner has reached, it should not be a burden for the Bureau to issue a no-action letter – such letters are short and mostly standard form. In any event, until the Commissioner issues a clear statement that she will not challenge mergers where the waiting period has expired without her commencing a challenge (or at least advising the parties of her intent to challenge) the proposed transaction (subject only to the qualifications normally found in a no-action letter), no-action letters will continue to provide comfort that the expiry of the waiting period alone does not.

One point of consensus among CBA Section members is that it remains appropriate to issue a no-action letter where parties have proceeded solely by requesting an ARC and the Commissioner does not believe it is appropriate to issue an ARC but is prepared to issue a no-action letter, together with a waiver of the obligation to notify.

VIII. TRANSPARENCY AND ACCOUNTABILITY

(a) Conform Fees and Service Standards to Two–Stage Regime

The draft Guidelines suggest that the *Competition Bureau Fee and Service Standards Handbook* as it relates to merger review will not be withdrawn but they do not confirm (as the CBA Section believes they should) that the Bureau's service standards for substantive review of merger transactions will be revised to align with the new statutory waiting periods. Further there was some suggestion by Bureau officials at the above-noted roundtable that the internal classification system of non-complex, complex and very complex will remain.

The Treasury Board Policy on Service Standards for External Fees states "service standards represent the government's commitment to those who use its services, in a framework of transparency and accountability" and service standards adopted by agencies charging a fee must be "measurable; and relevant at the level of the paying stakeholder." The Bureau should conform its internal service standards for merger review with the new statutory waiting periods deliberately designed by Parliament to reflect actual review timeframes. To do otherwise would be inconsistent with the Government's commitment to providing

transparency and accountability to Canadian businesses and would undermine the utility of the Treasury Board Policy as it applies to merger review under the Act.

For greater certainty, the CBA Section welcomes the Bureau's continuing commitment to clear the vast majority of mergers in the first two weeks of the initial waiting period. It is not inconsistent with the new merger regime to grant early termination of the waiting period.

(b) Transparency

The draft Guidelines indicate that the Bureau will not issue SIRs frequently. The frequency of SIRs, however, presumably relates to the nature of the mergers proposed in any given time period. We are aware anecdotally that several have been issued already, even though the new law came into force only on March 12, 2009.

In any event, in the interests of transparency, it would be helpful for the Bureau to undertake (in the draft Guidelines) to publish in its Annual Report the number of SIRs issued each year, number of notifications pulled and re-filed, number of timing agreements, and number of ARCs issued. The Bureau should also consider providing additional information to give further insight on the scope of such SIRs, such as the number of questions asked, number of pages of documents produced, number of custodians, size of data files collected and time required to respond to requests.

IX. CONCLUSION

The CBA Section thanks the Bureau for the opportunity to submit these comments and hopes they are of assistance. The CBA Section would be pleased to discuss its comments further at the Bureau's convenience.