June 3, 2009

Colette Downie
Director General
Marketplace Framework Policy Branch
Industry Canada
C.D. Howe Building, East Tower, Room 1046A
235 Queen Street
Ottawa, ON K1A 0H5

Dear Ms. Downie,

RE: *Regulations Amending the Notifiable Transactions Regulations*

I am writing on behalf of the National Competition Law Section of the Canadian Bar Association (CBA Section) to comment on the *Regulations Amending the Notifiable Transactions Regulations* which were pre-published in *Canada Gazette Part I* on April 4, 2009.

The CBA Section believes that it would be beneficial to amend the *Notifiable Transactions Regulations* as follows:

- Modify the proposed addition of paragraph 16(1)(d) to better align the wording of the request for studies, surveys, analyses and reports with similar wording in item 4(c) of the Notification and Report Form used in the United States.
- Modify the current provisions in sections 4 and 5 relating to the calculation of parties' assets and revenues to avoid the double-counting of assets and revenues arising from intra-company transactions.
- Add new exemptions from pre-merger notification as recommended by the Wilson Panel.

Requirement to Provide Studies, Surveys, Analyses and Reports

In the final report of the Wilson Panel, *Compete to Win*, the Panel concluded that "it is desirable to conform Canadian legal requirements with those of the U.S., where practicably feasible, with a view to minimizing unnecessary procedural or substantive differences, given the high level of integration of business operations in the two countries."[1] This appears to be the primary rationale for changes to the merger review system, which now conforms in a number of important respects to the legal requirements in the U.S.

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1 *Compete to Win* (Government of Canada, June 2008) at p 53.

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The *Regulations Amending the Notifiable Transactions Regulations* propose to require that merger parties submit in initial notifications "all studies, surveys, analyses and reports that were prepared or received by a senior officer for the purpose of evaluating or analysing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into new products or geographic regions."[2]

This is very similar to a requirement in the U.S. that merger parties submit copies of "all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets."[3]

Although carrying out searches for these documents can be time-consuming and expensive, the CBA Section believes it is reasonable to request merger parties to provide this information. The documents are pre-existing and relevant to the Competition Bureau's assessment of the competitive effects of a proposed transaction. A less burdensome procedural alternative for parties involved in non-complex transactions is available through the Advance Ruling Certificate process.

However, there are small differences between the U.S. requirement and the proposed Canadian requirement. The Canadian proposal requires the production of documents "prepared or received by a senior officer" whereas the U.S. requirement refers to documents "prepared by or for any officer or director."

The CBA Section believes that the proposed Canadian requirement to produce documents "prepared or received by" certain individuals is an improvement over the equivalent U.S. language[4] and reflects the manner in which the U.S. requirement is interpreted in practice.

However, the term "senior officer", defined in section 2 of the *Regulations*, is broader than the U.S. practice of interpreting "officer" and does not include directors. We understand the U.S practice is to confine the scope of "officers" to positions designated by the by-laws or articles of incorporation or appointed by the board of directors (or to individuals designated in a similar way by an unincorporated entity).[5] The definition in the *Regulations*, however, includes positions that would not normally fall within that category, such as any "vice-president" or "general manager" or any individuals who perform their functions. The U.S. approach is more precise. Continuing to use the broader definition in the *Regulations* would mean that, on a cross-

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2 Subsection 8(4) of the *Notifiable Transactions Regulations.*

3 Item 4(c) of the Notification and Report Form required to be submitted pursuant to § 803.1(a) of the U.S. pre-merger notification rules.

4 The proposed Canadian requirement to produce any responsive document "received by" a senior officer appears to capture any responsive document found in his or her possession. This seems broader than the U.S. requirement, which only requires the production of documents that were specifically "prepared for" an officer or director. However, the CBA Section understands that in practice the U.S. enforcement agencies presume that any responsive document found in the files of an officer or director is responsive.

The proposed Canadian requirement would not capture documents "prepared for" a senior officer but not actually received by him or her. Although U.S. wording would include such documents, the CBA Section understands that, here too, in practice the U.S. enforcement agencies do not treat documents that were never received by an officer or director as responsive. The CBA Section also appreciates that the proposed Canadian requirement could simplify searches by eliminating the theoretical need to search files of individuals that may have prepared a document "for" a senior officer but did not actually provide it to the senior officer.

5 ABA Section of the Antitrust Law, Pre Merger Notification Practice Manual (4th edition) (2007) at 333.

border Canada-U.S. transaction, for example, the files of different categories of persons would have to be searched in Canada than in the U.S. for the initial filing. This seems contrary to the Wilson Panel's general recommendation to conform Canadian legal requirements with those of the U.S. in order to minimize unnecessary procedural differences. This divergent approach also risks creating confusion and uncertainty. On balance, the CBA Section believes consideration should be given to adopting the U.S. "officer and director" standard in the Canadian requirement.

Treatment of Transactions Between Affiliates

Sections 4 and 5 of the current *Regulations* provide for the deduction of assets and revenues relating to intra-company transactions and accounts. The principle is that the measurement of the size of the parties should be based on transactions involving third parties and that there should be no double-counting of assets or revenues by including assets or revenues relating to intra-company transactions.

Unfortunately, the word "duplication" in the *Regulations* is susceptible to narrow interpretation and can, and in the experience of members of the CBA Section, has, required merger parties to adopt approaches to the calculation of assets and revenues that diverge from Canadian generally accepted accounting principles. This creates uncertainty and can lead to double-counting.

A restrictive interpretation of section 4 and 5 of the *Regulations* has meant that some intra-company transactions between affiliates are included in the sales and assets thresholds even though generally accepted accounting principles (as mandated by section 3 of the *Regulations*) require that all amounts arising from intra-company transactions be eliminated on consolidation. For example, the Competition Bureau has advised members of the CBA Section that a sale from a U.S. parent to a Canadian subsidiary would be a "sale into Canada" unless it could be shown that the product was subsequently resold (or if an input somehow accounted for) in Canada and accounted as the subsidiary's sale. This presents a host of practical difficulties as merger parties cannot rely on audited financial statements. In addition, from a policy viewpoint, it makes little sense to track sales and assets within the corporate family as they have no effect on external customers or the market.

The CBA Section believes that the *Regulations* should follow the same principles as Canadian generally accepted accounting principles when preparing consolidated financial statements and eliminate all intra-company accounts and revenues. This change could be made relatively easily. The CBA Section proposes the following statutory language to better achieve the policy objective underlying the legislation:

> 4 (1) For the purposes of sections 109 and 110 of the Act, in determining the aggregate value of assets, the following amounts shall be deducted:
>
> (a) any amount arising from transactions between affiliates;
>
> (b) any amount that represents an ownership interest in an affiliate; and
>
> (c) any amount that would be eliminated or deducted in preparing consolidated financial statements in accordance with Canadian generally accepted accounting principles.
>
> 5 (1) In determining the gross revenues from sales, any amount arising from transactions between affiliates or any amount that would be eliminated or deducted in preparing consolidated financial statements in accordance with Canadian generally accepted accounting principles shall be deducted.

Additional Exemptions from Notification

The CBA Section believes that it would be appropriate and consistent with the recommendations of the Wilson Panel to include in the *Regulations* additional exemptions from pre-merger notification. The Wilson Panel concluded that:

> In addition to or in lieu of increasing financial thresholds, consideration should be given to creating more exemptions from merger notification for classes of merger transactions that do not raise competition concerns. Such changes can be effected relatively expeditiously by prescribing regulations under section 124 of the Competition Act.[6]

The CBA Section endorses this recommendation and believes that consideration should be given to adding to or expanding exceptions relating to, amongst other things, real estate acquisitions, acquisitions in the upstream oil and gas sector, income trust conversions, sale and leaseback transactions and corporate reorganisations where ultimate control remains unchanged. These proposals are addressed in more detail in the CBA Section's May 13, 2009 letter to the Senate Banking, Trade and Commerce Committee, a copy of which is enclosed for reference.

The CBA Section would be pleased to discuss any of these proposals with you in more detail if that would be of assistance.

Yours very truly,

(Original signed by Tamra Thomson for John Bodrug)

John Bodrug
Chair, National Competition Law Section

c: Adam Fanaki, A/Senior Deputy Commissioner of Competition, Competition Bureau
Daniel Campagna, Head, Merger Notification Unit, Competition Bureau

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6 *Compete to Win* at p 57.

May 13, 2009

The Honourable Michael A. Meighen, Senator
Chair, Senate Committee on Banking, Trade and Commerce
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Meighen:

Re: *Competition Act* Amendments – Bill C-10

I am writing on behalf of the National Competition Law Section of the Canadian Bar Association (the CBA Section) in connection with the examination by the Senate Banking Committee on the amendments to the *Competition Act* included in Bill C-10, the 2009 Budget Implementation Bill, which was passed earlier this year. The CBA Section commends the Senate Committee for studying these recent amendments as they have wide ranging implications for Canadian businesses of all sizes and are widely regarded as the most significant changes to the *Competition Act* in more than twenty years.

The CBA Section advocated that the amendments to the *Competition Act* in Bill C-10 be given separate and careful consideration as a stand alone bill. (See our letter to the Ministers of Finance and Industry dated February 13, 2009.) While the CBA Section supported a number of the proposed amendments, we expressed concern about unintended consequences, including the imposition of significant and unnecessary costs on Canadian businesses of all sizes.

The CBA Section is not now seeking to revisit the substantive merits of the amendments to the *Competition Act*. However, even accepting the intent of the amendments, the CBA Section believes it would be helpful for the Canadian business community and the Canadian economy to amend the *Competition Act* and related regulations to provide additional exemptions to remove unnecessary and unintended uncertainty about some aspects of the new criminal offence in section 45 of the *Competition Act* relating to agreements between competitors, and to add additional exemptions to the new merger review process to more fully align it with the U.S. merger review regime on which the new Canadian process is modelled.

Agreements Among Competitors

Bill C-10 enacted a new offence that will make illegal certain categories of agreements between competitors even in the absence of market power. This new offence (when it becomes effective

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in March 2010) will certainly assist in prosecuting and deterring hardcore price fixing and market allocation cartels in Canada. However, since market power is no longer an element of the offence, the broad language of the provision risks prohibiting even some forms of cooperation between small business persons who clearly cannot impact the market. Uncertainty about the scope of the new offence may discourage Canadian firms from pursuing collaborative activities and joint ventures that foreign competitors may confidently pursue with impunity. Further, the current economic environment is not a good time to impose significant costs and uncertainty on Canadian businesses.

The Competition Bureau is preparing guidelines on collaborations between competitors that will set out its enforcement approach to the new criminal offence in section 45 (as well as the new non-criminal challenges to agreements between competitors). The CBA Section is consulting with the Bureau on this initiative and commends the Bureau's efforts in this regard. The guidelines will go a long way in reducing uncertainty about the risk of criminal prosecution for agreements among competitors. However, Bureau guidelines are not binding on Canadian courts. Canadian businesses, both large and small, will continue to face significant uncertainty that could most effectively be relieved by statutory amendments. In particular, if an agreement between competitors – even small businesses with no market power – contravenes the new section 45, the parties would be exposed to private actions (including class actions) by anyone who asserts that they were damaged by the agreement. In addition, parties to the agreement may seek to avoid their contractual obligations on the basis that the agreement is illegal. Our understanding is that, with respect to section 45, the Bureau's guidelines will focus on circumstances in which the Bureau will recommend to the Public Prosecution Service of Canada that criminal proceedings be commenced, not on providing guidance to businesses on the full scope of section 45. Even if they did, the Bureau's views would not be binding on a court.

Schedule A to this letter sets out examples of ordinary course business agreements which the CBA Section believes were not intended to be prohibited by the new section 45 offence, but which in our view will have an uncertain legal status under the new section 45.

Schedule B describes amendments which the CBA Section suggests would be appropriate to alleviate the unintended uncertainty arising from the new section 45.

Merger Review Process

With respect to the new merger provisions of the *Competition Act*, an important principle underlying the amendments was to create a process that closely aligns with the merger review process in the United States. The CBA Section raised a number of concerns about the cost and delay imposed by a U.S. style "second request" process. (See our letter of February 3, 2009 to Industry Canada.) Again, we are not seeking to revisit the merits of adopting a second request process in Canada, as was effectively done by Bill C-10. However, having adopted that process, the CBA Section believes that it would be appropriate and consistent with the purpose of Bill C-10 to align not only the burdens of the U.S. system but also the exemptions in circumstances where the U.S. antitrust authorities have determined that, for certain categories of transactions, competition issues are insufficiently likely to warrant imposing the costs of the merger notification regime on the parties. This view is consistent with the Wilson Panel Report, which suggested that:

> In addition to or in lieu of increasing financial thresholds, consideration should be given to creating more exemptions from merger notification for classes of merger transactions that do not raise competition concerns. Such changes can be effected relatively expeditiously by prescribing regulations under section 124 of the Competition Act.[1]

Schedule C sets out some exemptions that exist in the U.S. for which there is no counterpart in Canada or for which the Canadian counterpart is more limited. The CBA Section submits that it would be appropriate to adopt equivalent exemptions in the Canadian merger review process.

Investment Canada Act – National Security

Bill C-10 also amended the *Investment Canada Act* (ICA) to permit the review of foreign investments that could be injurious to Canada's national security. The CBA Section has no objection to this amendment in principle. But serious unanswered questions remain in relation to the manner in which the provision will be implemented in practice.

The ICA does not define "national security" nor, as we understand, are there any plans to define the term in regulations or guidelines. This absence of guidance is likely to create considerable uncertainty for foreign investors as a wide range of transactions could give rise to potential national security issues. In the U.S., for example, the Committee on Foreign Investment in the United States has issued guidance on circumstances in which foreign investments could give rise to national security concerns. Moreover, there is no process for the voluntary submission of an application under the ICA and clearance prior to implementation (as there is in the U.S.).

As a result, foreign investors may be uncertain whether an investment could trigger a national security review, and unable to seek confirmation or comfort from the government that a proposed investment will not give rise to a national security concern. This uncertainty may discourage needed foreign investment.

This uncertainty can and should be addressed, at minimum by guidelines on the definition of national security and the government's general enforcement approach, and the establishment of a process for voluntary submissions of applications for review.

We hope that the Senate Committee will see fit to include the CBA Section's recommendations in its report. We would be pleased to amplify on any of these proposals in our presentation to the Senate Committee.

Yours very truly,

(Original signed by Tamra Thomson for John Bodrug)

John Bodrug
Chair, National Competition Law Section

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[1] *Compete to Win* at p 57. The CBA Section believes that consideration should also be given to classes of exemption not currently available in the U.S., but which are meritorious in and of themselves. The Wilson Report was clearly not limiting consideration of potential exemptions to U.S.-exemptions only.

Schedule A

Categories of Pro-Competitive or Competitively Neutral Competitor Agreements With Uncertain Status Under New Section 45 of the Competition Act

The new criminal offence in relation to agreements between competitors in section 45 of the *Competition Act* is intended to apply only to so-called "hardcore" cartels, which subsection 45(1) defines to be an agreement with a competitor[2] in respect of a product:

(a) to fix, maintain, increase or control the price for the supply of the product;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Subject to the defence discussed below, these types of agreements are now "per se" illegal even if they have no impact on competition or even if they are pro-competitive. On its face, the categories of agreements subject to the new *per se* prohibition seem limited. However, identifying agreements that meet the above criteria and which truly merit *per se* treatment is in fact quite controversial.[3]

A practical difficulty associated with a statutory *per se* prohibition is ensuring that it is sufficiently narrow to capture only "hardcore" cartels, and does not extend to, or even cast a chill on, potentially efficiency-enhancing agreements or arrangements. The new subsection 45(4) of the *Competition Act* attempts to accomplish this goal by creating a so-called "ancillarity defence":

> 45(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if
> (a) that person establishes, on a balance of probabilities, that,
> (i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
> (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
> (b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Like the *per se* prohibition that it qualifies, this ancillarity defence attempts to capture in statutory form certain principles that have developed in U.S. jurisprudence under section 1 of the U.S. *Sherman Act*.[4]

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2 Pursuant to s. 45(8), a "competitor" includes "a person who it is reasonable to believe would be likely to compete with respect to a product" in the absence of an agreement *etc.* to which s. 45 applies.

3 See, *e.g.*, National Competition Law Section Canadian Bar Association, *Submission on Reform of Section 45 of the* Competition Act *(Conspiracy)*, February 2003, at 23*ff* and National Competition Law Section Canadian Bar Association, *Comments on the Competition Bureau's Discussion Paper* Options for Amending the Competition Act, October 2003, at 29*ff*.

4 *Sherman Act*, 15 U. S. C. §1. Under U.S. antitrust law, an ancillarity exception to Section 1 antitrust liability may apply where a generally pro-competitive agreement involves an ancillary restraint that is related, to some degree, to achieving the pro-competitive benefits of the main agreement. While the restraint itself may be *per se* illegal, the fact that it is ancillary to a pro-competitive agreement may shift the analysis of the restraint from *per se* illegality to the rule of reason – i.e., a full assessment of whether the competitive effects of the agreement. See, *e.g.*, *Polk Bros. Inc. v. Forest City Enterprises, Inc.*, 776 F.2D 185 at 188-189 (1985); and *Rothery Storage & Van Co. et al. v. Atlas Van Lines, Inc.*, 792 F.2D 210 at 229 (1986). See also the *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) published by the U.S. Federal Trade Commission and the U.S. Department of Justice, which indicate that they will apply

However, given the differences between the new section 45 and section 1 of the *Sherman Act*, it remains to be seen whether and the extent to which Canadian courts will be guided by U.S. jurisprudence in interpreting subsection 45(4). Moreover, the U.S. experience demonstrates that it can take many years for the courts to resolve uncertainties in the legislation. For example the *Sherman Act* was passed in 1890, but it was only in 2006 that the U.S. Supreme Court confirmed that it is not *per se* illegal under section 1 of the *Sherman Act* "for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products".[5]

In our view, the following are examples of the types of agreements which Parliament likely did not intend to be prohibit or make illegal, but which have an uncertain legal status under the new section 45 because of the breadth of the section's literal wording:

- *Joint ventures, strategic alliances and other forms of efficiency enhancing co-operation between competitors*, such as co-production arrangements, co-marketing arrangements, code-sharing arrangements and numerous other types of efficiency enhancing arrangements between competitors, particularly in sectors characterized by high economies of scale, high research and development costs and network industries such as telecommunications where cooperation among competitors is commonplace.

- *Joint bidding arrangements*, even those that comply with the *Competition Act*'s bid-rigging provision (s. 47), such as joint bids by competitors who are too small individually to bid on a particular project on their own or who are otherwise unable or unwilling to shoulder the risk of an individual bid.

- *Syndication arrangements among financial services providers*, whereby financial institutions combine to finance merger and acquisition transactions, or where insurers combine to insure against very large risks, again in circumstances where they are too small individually to do so on their own or they are otherwise unable or unwilling to shoulder the risk of doing so individually.

- *Dual distribution arrangements and agreements between franchisors and franchisees*, whereby a manufacturer or franchisor that competes, through the direct sale to customers or through corporate-owned stores, enters into agreements or other arrangements with its downstream distributors or franchisees (*i.e.*, "competitors" within the meaning of the new s. 45). A risk of violating the new section 45 may arise:

  - For an attempt by such a manufacturer or franchisor to limit the scope of its distributors' or franchisors' sales, either by territory or by customer type, or to set the price at which the distributor or franchisee would purchase its products;

  - For agency agreements in which the principal competes with its agents and sets the price at which the agents sell its products;

  - For either of the above types of arrangements, even if the downstream party (*i.e.*, the distributor, franchisee or agent) does not compete with the upstream party (*i.e.*, the manufacturer, franchisor or principal) through the sale of the upstream party's products, but rather through the sale of products of the upstream party's competitors.

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rule of reason rather than *per se* analysis for an agreement aimed at "an efficiency-enhancing integration of economic activity" if the agreement "is reasonably related to the integration and reasonably necessary to achieve its pro-competitive benefits". *Ibid*., at 8.

5 *Texaco Inc. v. Dagher et al.*, 547 U.S. 1 (2006).

- *Joint purchasing arrangements and arrangements with respect to the joint licensing of intellectual property rights*, notwithstanding the potential efficiency enhancing effects of such arrangements and the absence of anti-competitive effect, for example where the purchasers do not, individually or together, enjoy market power.[6]

- *Any form of cooperation between small businesses, which arrangements could not, due to the small size of the businesses, cause any injury to competition.* For example, would two accountants who share office space (but carry on business independently, whether as sole proprietors or through independent corporate entities) and agree to limit their service offerings to the general public through distinct specializations (*e.g*., accounting services to small businesses and individuals, respectively) be susceptible to prosecution, or would their arrangement be considered ancillary to a (legitimate) agreement to share space? The same issue could arise for a group of small, local retailers who agree to jointly advertise certain products, including a price point

- *Agreements with respect to the sale of products to competitors, including "swap agreements," even when entered into in the ordinary course of business*. Provided that such an arrangement is between competitors and involves the purchase by one from the other of a product in respect of which they compete,[7] such an arrangement, which would necessarily "fix" the price for the supply of a product between competitors, could contravene the new criminal *per se* criminal provision. Such agreements, however, are commonplace in certain sectors. In the petroleum sector, for example, petroleum producers frequently enter into "swap arrangements," whereby they agree to swap gasoline with one another in different geographic areas rather than incurring significant transportation costs or the very substantial expense and risk of building new refineries for those regions.

- "*Non-compete" arrangements between competitors, including between companies and between a company and a former employee who might otherwise compete with the company.* Such provisions are commonplace, for example in merger or acquisition agreements involving competitors, or between a company and a employee, and raise potential issues under the new section 45 to the extent that they may have the effect of allocating sales, territories, customers or markets, including by preventing individuals from competing with former employers.

- *Standard setting, patent pool and cross-licensing arrangements*, which can be highly beneficial, for example by resolving "patent thicket" issues and facilitating the development and marketing of innovative products. However, each of these necessarily involves agreements among a number of parties, including parties that might otherwise compete (or potentially compete), thereby giving rise to the question of potential application of the new *per se* criminal conspiracy provision to such arrangements.

- *Agreements in relation to research and development, development of standards, exchange of credit information or statistics,* which agreements are currently the subject of a defence in subsection 45(3) that will be repealed once the new section 45 comes into force. For example, it is uncertain whether an agreement among competitors to develop baby bottles produced without Bisphenol A might be susceptible to challenge under the new section 45 as potentially preventing

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6 Whether buying group arrangements are susceptible to prosecution under the new *per se* criminal conspiracy provision may depend on the interpretation given to the phrase "supply of a product" in s. 45(1)(c).

7 Such an agreement may be entered into because the "purchasing competitor" has a shortage of supply, or because it can more efficiently service certain customers, such as customers in a particular region, by purchasing and re-selling the product of the "selling competitor".

or lessening competition in the development of new Bisphenol A-free bottles or in the production of baby bottles in a particular format.

- *Agreements among competitors to reduce carbon emissions*. Given the marketability of carbon emissions through carbon offset schemes, it is uncertain whether such an agreement could be challenged under the new section 45 on the basis that it is an agreement to prevent or lessen output of a product. (An undesirable product, can still be a product.)

This is a non-exclusive list of potentially efficiency enhancing (or plainly innocuous) agreements that have uncertain legal status under the new section 45. Even if these agreements contain one or more of the "hardcore cartel" features set out in subsections 45(1)(a)-(c), they might be exempt from criminal prosecution (but subject to potential scrutiny under s. 45's civil counterpart, s. 90.1) under the ancillarity defence in s. 45(4). However, the precise scope of the defence, is unclear, including the circumstances in which price, supply or market allocation will be found to be "directly related to, and reasonably necessary for giving effect to, the objective of [a] broader or separate agreement or arrangement." This lack of clarity creates uncertainty for business persons and the risk of a "chilling effect" on potentially efficiency enhancing conduct in Canada.

Schedule B

Section 45 Exemption Proposals

A. Background

- The Competition Policy Review Panel recommended reform of Canada's conspiracy law in order to address enforcement difficulties under the former law, but also in order to bring Canada's conspiracy law in line with that of its trading partners.

- Effective March 12, 2010, Bill C-10 repeals the existing conspiracy offence under section 45 of the Competition Act (which requires that an agreement unduly lessen competition) and replaces it with a prohibition on certain categories of agreements between competitors (even if they have no effect on competition or even if they promote competition).

- However, it is important to note that Canada's trading partners have a broader set of exemptions and defences than will exist under the new section 45. For example, in the United States there is a long list of statutory exemptions (e.g., for standards-setting organizations, agricultural marketing boards, air transport alliance agreements), a number of judicially developed exemptions (e.g., baseball), and more than 100 years of jurisprudence interpreting the "ancillary restraints" doctrine. In the European Union, agreements are exempt from the conspiracy law if they meet the requirements of Article 81(3) of the EC Treaty[1], and the European Commission has issued "block" exemptions that exempt certain general categories of agreement (e.g. vertical agreements, technology transfer agreements), as well as certain types of industry-specific agreements (e.g. airline alliances, motor vehicle distribution agreements) from the conspiracy law provided that specified criteria are met.

- There are a number of reasons why a broader set of exemptions is desirable, including:

    - There is a significant risk that the new criminal provision as drafted will apply to "non-harmful competitor alliances" (Note: This is the wording used by an Industry Canada representative in recent testimony before a Senate committee on Bill C-10.)

    - The risk of civil actions creates significant uncertainty for business persons at a time when the Canadian economy can least afford it. Private parties can sue for damages for conduct contrary to the new section 45 and may seek to avoid contracts by arguing that formerly legal contracts are now illegal because they violate section 45. Even if Competition Bureau guidelines and advisory opinions provide certainty about the risk of criminal prosecution, civil courts, which have become the primary venue for competition litigation in Canada in recent years, are not bound by Bureau guidelines or advisory opinions, and civil plaintiffs (including class action plaintiffs) are not subject to the same public interest discipline as the Department of Public Prosecutions (DPP). Accordingly, lack of clarity in the text of the law creates a significant risk that it will be interpreted and applied by the civil courts in a manner that neither Parliament nor the Bureau would intend.

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[1] An agreement may qualify for an exception to the 81(1) prohibition of restrictive agreements/practices under 81(3) if it contributes to production or distribution of goods or promotes technical or economic progress, while allowing consumers a fair share of the resulting benefits and does not (a) impose restrictions which are not indispensable to the attainment of these objectives; or (b) eliminate competition in respect of a substantial part of the products in question. Formerly, the Commission reviewed agreements and granted exemptions under 81(3); however, since 2004, parties have been directed to self-assess under this provision. A number of block exemptions remain in effect.

- A clear set of exemptions will help limit (or eliminate) strategic or "nuisance" litigation aimed at efficiency-enhancing or pro-competitive agreements between competitors.

- Any exemption granted should exempt a party from both criminal liability and liability for civil damages (private actions). In some instances, it may also be appropriate to exempt parties from scrutiny under the new non-criminal provisions in section 90.1 of the Competition Act pursuant to which the Bureau can seek a prohibition order against any agreement between competitors that lessens or prevents competition substantially.

B. Exemptions

1. *General Exemptions*

- There should be an explicit exemption for agreements between a **principal and his or her agent** under both section 45 and 90.1.

- Sections 45(6) and 90.1(7) contain a defence for **agreements between affiliates**. However, the definition of “affiliate” in the *Competition Act* is very narrow, and could lead to situations where agreements among entities that are commonly controlled or held within the same corporate group (i.e., entities that form part of a single economic unit), are considered illegal. For example, an agreement between a partnership and its corporate parent may not be an agreement between affiliates under the current definition in the *Competition Act*. Also, there are no affiliation rules for trusts, associations or cooperatives; and the affiliation rules that do exist for corporations, partnerships and sole proprietorships are asymmetrical. The CBA Section has previously proposed a more expansive definition of the term “affiliate” in the *Competition Act*.[2] An expanded definition of affiliate is necessary to ensure that agreements among affiliated parties are exempt from conspiracy law, regardless of the form of business organization involved.

- The **regulated conduct defence (RCD)** contained in section 45(7) needs to be clarified. The current language provides that the common law respecting the RCD under the pre-amendment section 45 remains in effect. However, the common law includes the *Garland*[3] case, in which the Supreme Court of Canada stated that the RCD applies to shield provincial law from the application of federal criminal law only where the federal law contains “leeway” language such as the term “unduly” or “in the public interest”. The amendment to section 45 of the Act removes the term “unduly”, and therefore the availability of the defence in relation to provincial regulation is suspect. While a court may conclude that Parliament’s intent was to preserve the defence for provincial regulators and “regulatees”, there is no certainty that this will occur. The loss of this defence could be quite significant, particularly in the agricultural context, since many prior cases have involved challenges to provincial agricultural marketing schemes which often include mechanisms for joint setting of prices by producer groups. We recommend that 45(7) be reworded to state the conduct that is required or authorized under valid federal or provincial regulation is exempt from the application of section 45(1), and that no reference be made to the common law.

- There is no statutory RCD in the new 90.1, and this omission may be interpreted as a decision by Parliament to deprive the parties to a proceeding under section 90.1 of this defence. There is common law support for the availability of a **regulated conduct defence** in the context of the

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2 See May 19, 2005 letter from the Canadian Bar Association National Competition Law Section to the Assistant Deputy Commissioner of Competition for Legislative Affairs, proposing various "technical amendments" to the *Competition Act*.

3 *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112.

reviewable practices provisions of the Competition Act.[4] The Bureau's enforcement bulletin on the RCD states that the Bureau will "consider RCD caselaw in its examination of reviewable matters", even though it will not consider RCD caselaw to be dispositive. The practical import of this omission may be to subject both regulators and regulated parties to proceedings before the Competition Tribunal in connection with the legitimate exercise of regulatory power.

- There should be **joint petitioning/lobbying** defence akin to the U.S. Noerr-Pennington doctrine. While there is arguably some common law support for a defence today (e.g., by virtue of commercial speech rights and under the RCD where it is clear that any anti-competitive effect is the result of regulatory action, not the petitioning), it would be helpful to avoid any chilling effect on legitimate representations to government by expressly providing this exemption in the legislation itself.

- Section 45(6)(b) contains a defence for **agreements between federal financial institutions** "described in subsection 49(1)". The intent seems to be that an agreement contemplated by section 49(1) is not also subject to section 45. However, subsection 49(2) states that subsection 49(1) "does not apply" to specified agreements, such as certain types of agreements disclosed to customers. Accordingly, it is not clear whether a type of agreement exempted by subsection 49(2) is still intended to be subject to section 45. Also, the intended application of section 45 if one of the parties to the agreement is not a federal financial institution is unclear. Nor is it clear why different rules ought to apply to provincial financial institutions in this regard. It would be helpful to clarify Parliament's intent with regard to the application of section 45 to these types of agreements, and possibly examine whether special provisions in the *Competition Act* dealing with federal financial institutions are necessary.

2. *Proposal for exemption-granting power and categories of exemptions that might be granted*

- In addition to these general exemptions, in order to provide an expeditious means to address unintended consequences of the new section 45 offence, we propose that the Commissioner of Competition or possibly the Competition Tribunal or the Governor in Council be given the power to grant exemptions on a "block" or category basis.

- In a paper prepared for the Commissioner in 2001, Adam Fanaki, Rob Russell and Davit Akman advocated a model in which "clearance certificates", which would preclude criminal prosecution under section 45, could be granted by the Commissioner on a case by case basis to agreements notified to the Bureau. The authors recognized that a notification system would reduce the inflexibility and over breadth of the *per se* criminal prohibition and diminish the investigative burden on the Bureau: Russell, Fanaki & Akman, *Legislative Framework for Amending Section 45 of the Competition Act* (2001).

- As we recommend a power to establish block or category exemptions principally to provide a safety valve for expeditiously dealing with categories of agreements that may be found to be illegal under the new section 45 but which are not in fact anti-competitive, in our view block exemptions would be preferable and more efficient than clearances relating only to particular agreements. A particular block exemption could provide an exemption from both section 45 and 90.1, or simply from section 45. Providing an explicit exemption would provide greater certainty to the business community by protecting such agreements from strategic civil litigation. Some generic categories of agreements that might be considered for block exemptions are:

[4] See *e.g., Law Society of Upper Canada v. Canada (Attorney General)* (1996), 67 C.P.R. (3d) 48 (Ont. Ct. Gen. Div.), where the Director (now the Commissioner) conceded this point. The *Garland* case also arguably creates a clearer basis for the application of the RCD in the context of the reviewable practices provisions, since most of these provisions contain "leeway" language in the form of a "substantial lessening of competition" or "adverse effect on competition" test.

- Dual distribution agreements
- R&D agreements
- Standards-setting agreements
- Technology transfer (IP licensing) agreements
- Environmental agreements
- Agreements to share credit information, or information relevant to the assessment of risk under insurance contracts
- Buying group agreements

- Finally, there are agreements particular to specific industries that should be considered for exemption, namely:
  - Airline alliances
  - Joint underwriting of insurance (where no individual company would insure a large risk)
  - Banking syndicates (the Competition Act includes an underwriting exemption, but not an exemption for lending syndicates)
  - Agricultural producer agreements entered into pursuant to valid regulation (to the extent there is any uncertainty regarding the application of the RCD)

3. *Limitation Period*

We would further recommend that a five year limitation period be adopted for section 45, which would bring the Canadian law on agreements in restraint of trade in line with the U.S. law and the five year limitation period under the equivalent provision in section 1 of the *Sherman Act*.

Schedule C

Merger Notification Exemption Proposals

The CBA Section submits that exempting additional classes of non-problematic merger transactions from the application of the pre-merger notification provisions of the *Competition Act* would materially increase the effectiveness and efficiency of completing merger transactions in Canada. Parties to these categories of merger transaction would face lower transaction costs in the form of reduced legal and filing fees. The Competition Bureau, for its part, would not be required to divert time and resources to processing the clearance of a large number of non-problematic merger transactions.

The Competition Bureau would continue to maintain jurisdiction to initiate a review over exempted merger transactions; merger parties would simply not be required to submit merger notifications in these cases. In the rare case where an exempted transaction may give rise to concern that it might result in a substantial lessening or prevention of competition, it will likely either be voluntarily notified to the Competition Bureau (because merging parties will not want to take the risk of a post-closing investigation and remedial order) or be brought to the attention of the Bureau by concerned customers, suppliers or competitors. The risk that a truly problematic merger will go undetected is very small.

As noted in the Wilson Report, exemptions can and should be introduced by way of amending regulations to the *Competition Act*. As this Committee may know, consequential amendments to the Notifiable Transactions Regulations (to implement changes required as a result of Bill C-10) were published in the Canada Gazette on March 4, 2009. Given the technical complexity of drafting exemptions, it may not be possible for the CBA Section or the Bureau to propose new exemptions within the 60 day commentary period for these regulations. However, the CBA Section believes that additional exemptions should be added to the Act by way of regulation as soon as possible.

These exemptions should include, but need not be limited to, certain classes of transaction that are subject to exemption in the United States. Currently, there are nearly 30 exemptions from pre-merger notification in the United States, compared with 11 in Canada.[1] Several of the U.S. exemptions relate to the unique features of the U.S. pre-merger notification regime,[2] but many of those that do not or which do not currently have an equivalent exemption in the Competition Act could be the subject of a new exemption in Canada. Amongst those that we believe ought to be considered are:

- Acquisitions of goods and realty in the ordinary course of business. There is currently a similar exemption in paragraph 111(a) of the Competition Act, but it is narrower than the U.S. exemption. Notably, the U.S. exemption permits the acquisition of all of the assets of an operating division or segment of a business, whereas the Canadian exemption does not – e.g., where the seller sells a portfolio of mortgages or leases but remains in the mortgage or leasing business an exemption applies in the U.S. but not in Canada.

- Certain acquisitions of real property assets. This U.S. exemption exempts the acquisition of office and residential property from pre-merger notification. The Competition Bureau has never challenged such acquisitions as anti-competitive and, although the rare transaction could give (and we understand has given) rise to potential issues worth investigating, the CBA Section submits that it is not necessary to require merger parties to large real estate transactions to notify and pay a $50,000 filing fee in respect of every such transaction.

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1 Exemptions from pre-merger notification are contained in sections 111 and 113 of the Competition Act and in the Notifiable Transactions Regulations.

2 E.g., the acquisition of foreign assets may be exempt from pre-merger notification in the US but the Canadian system of pre-merger notification always requires that Canadian assets be acquired.

- Acquisitions of investment rental property assets. The Competition Bureau has never challenged any such acquisitions as anti-competitive.

- Acquisitions of carbon-based mineral reserves. This U.S. exemption covers acquisitions of reserves of oil, natural gas, shale or tar sands, or rights to reserves of oil, natural gas, shale or tar sands together with associated exploration or production assets as well as acquisitions of reserves of coal, or rights to reserves of coal and associated exploration or production assets. The Competition Bureau has never challenged an "upstream oil and gas" transaction as anti-competitive and we submit these categories of transaction should not be the subject of mandatory merger review.

The CBA Section also believes that a number of other exemptions should also be evaluated for potential inclusion in the Competition Act. Although they have no U.S. equivalent, they do not raise substantive antitrust issues and ought to be exempted:

- Income trust conversions. These transactions involve the conversion of a corporation into a trust where there is no de facto change of control. The Competition Bureau has never challenged any such conversion as anti-competitive.

- Sale and leaseback transactions. These are financial transactions whereby there is no de facto change of control and pursuant to which the vendor retains beneficial control. The Competition Bureau has never challenged any such acquisition as anti-competitive.

- Corporate re-organisations involving subsidiary entities in which there are unaffiliated minority shareholders. Paragraph 113(a) of the Competition Act exempts transactions where all parties are affiliates, but corporate re-organisations involving non-affiliates, even those where ultimate control remains unchanged, can be subject to pre-merger notification.[3] The Competition Bureau has never challenged any such corporate reorganisations as anti-competitive.

[3] Paragraph 10(1)(e) of the Investment Canada Act exempts from the application of that Act "the acquisition of control of a Canadian business by reason of an amalgamation, a merger, a consolidation or a corporate reorganization following which the ultimate direct or indirect control in fact of the Canadian business, through the ownership of voting interests, remains unchanged."