THE CANADIAN BAR ASSOCIATION

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Pre-Merger Notification Interpretation Guideline 12: Requirement to Submit New Pre-Merger Notification and/or ARC Request Where Proposed Transaction is Subsequently Amended

NATIONAL COMPETITION LAW SECTION
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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.

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I. SUMMARY

The proposed Draft Interpretation Guideline #12 (Draft IG #12) changes the current approach to when new filings are required which, in turn, could lead to significant delays in the closing of transactions and unnecessary filings. The CBA Section believes that the Competition Bureau should take a purposive approach to this issue to allow parties to amend their filings without penalty, when those amendments are unlikely to have any material impact on the competitive effects analysis.

Instead, certain aspects of Draft IG #12 represent a radical departure from current Bureau practice in addressing amendments to proposed transactions that occur following the filing of a notification or a request for an advance ruling certificate (ARC). The approach in Draft IG #12 appears more rigid and formalistic than has been our experience with the Bureau. The CBA Section believes that the Bureau's approach to date has worked satisfactorily and an interpretation guideline is unnecessary.

Moreover, the approach in Draft IG #12 does not align with the Competition Policy Review Panel's recommendation to ensure that the merger notification provisions do not impose regulatory obligations disproportionate to their potential to raise substantive issues[1].

For notification filings, Draft IG #12 effectively imposes an absolute obligation to refile based on even the most trivial change to a transaction. For example, in a private company share acquisition where Party A is acquiring a 40% interest (the investment which triggers the notification obligation under Part IX of the *Competition Act*), the addition of Party B, a minority

[1] See http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/Compete_to_Win.pdf/$FILE/Compete_to_Win.pdf at page 57.

investor acquiring a 1% interest, would require a new notification. The waiting period would have to recommence and a new filing fee paid. In the experience of CBA Section members, the Bureau has not taken such an absolutist view for such minor changes to proposed transactions.

If the Bureau proceeds with IG #12, the CBA Section believes that a reasonable objective test for requiring a new notification or ARC request should be established to avoid unnecessary notifications and to ensure deal certainty. For the addition of new parties, the test would measure the significance of the addition, by employing the 10% significant interest test in paragraph 1.10 of the Merger Enforcement Guidelines (MEGs). For an increase in ownership interests or redistribution of existing ownership interests, no new notification or ARC request should be required unless a new notification threshold in s. 110 is crossed.

For requests for an ARC or a no-action letter(NAL), instead of an amendment requiring the Bureau to "conduct a more in-depth or different analysis regarding the competitive effects of a proposed transaction" – a low threshold – Draft IG #12 should articulate the general principle that if a change to a transaction is not reasonably likely to materially influence the economic behaviour of the entity to be acquired or the assets to be acquired, such that a *substantially* different or *substantially more* in-depth competitive impact assessment is required, then no new filing or additional filing fee should be required. For the addition of new parties, the test would measure the significance of the change by employing the 10% significant interest test in paragraph 1.10 of the MEGs. For an increase in ownership interests or redistribution of existing ownership interests, no new notification or ARC request should be required unless a new notification threshold in s. 110 is crossed.

II. NEW FILING REQUIREMENTS

A. Notification Filing

Addition of a New Party

Section III.A.1 states that "[w]here a transaction is amended to add a new party, a new notification providing the prescribed information for the added party must be submitted in order for the notification in respect of the amended transaction to be considered complete….Further, a new notification will typically not be required where an affiliate of an existing party is added, other than the addition of a significant affiliate whose prescribed information was not submitted with the notification".

In the CBA Section's view, the Bureau should not impose an obligation to refile, except in limited circumstances. The potential consequence of requiring a new notification is serious. A transaction might face significant delays in closing which could, in some cases, cause a deal to be abandoned altogether.

In principle, a new notification should not be required if the person who originally certified the notification is satisfied, to the best of their knowledge and belief, that the original notification is correct and complete in all material respects. However, in practice, the CBA Section believes it is imperative for the Bureau to formulate a reasonable, objective and easily administered test for deciding whether a new notification is necessary.

For the addition of new parties, the test would measure the significance of the addition by employing the 10% "significant interest" threshold set out in paragraph 1.10 of the MEGs. Unless a new party is acquiring a 10% or greater interest in a target company, no new notification would be required.

One could argue that a person acquiring a new interest should not have to notify at all unless it crosses the 20%, 35% or 50% thresholds in s. 110. However, we can see the rationale for the Bureau asserting that this person is a "party" to the transaction notwithstanding that it may not cross one of the statutory thresholds. If the Bureau does take that approach, in our view the most defensible position would be that the new investor should notify and a new notification be filed, where the new interest does not cross a statutory threshold but could represent a significant interest.

Section III.A.1 states that a new notification will not be required where the added party is a new vendor in a share transaction or a guarantor. The CBA Section agrees that new vendors in a share transaction and guarantors should not trigger a new notification requirement, but believes this list should be considered illustrative and not exhaustive.

Section III.A.1 also states that "a new notification will typically not be required where an affiliate of an existing party is added, other than the addition of a significant affiliate whose prescribed information was not submitted with the notification". The CBA Section questions why the addition of an affiliate as a party would ever require a new notification. If the affiliate is relevant to the analysis of the competitive impact of the transaction, information on that

affiliate would already be included in the original notification. If the affiliate is not relevant, then no new notification filing should be required as any information on that affiliate would not be relevant to the analysis of the competitive impact of the transaction and therefore the filing would still be correct and complete in all material respects.

Addition of New Assets

Section III.A.2 states that the addition of an asset will "typically" require a new notification, but it is possible that a new notification would not be required if the asset being added is "ancillary" to the other assets being acquired.

In the CBA Section's view, the concept of "ancillarity" in Section III.A.2 does not establish a sufficiently broad category of additional assets that would not necessitate a new notification filing. If additional assets are not relevant to the competitive impact of the proposed transaction because they do not relate to the operational aspects of the business (e.g., an administrative building) or because they are competitively insignificant, they should be regarded as ancillary, and therefore no new notification should be required.

Addition of New Voting Shares or Redistribution of Assets, Voting Shares or Ownership Interests

Section III.A.3 states that where a transaction is amended to increase the voting shares to be acquired by an existing party, whether through the addition of new shares or the redistribution of shares among existing purchasers, the description of the transaction will typically not be correct in all material respects and a new notification will be required. There is an exception for acquisitions of less than 5% except where a notification threshold is crossed.

The CBA Section agrees with the further exception where a party acquiring the additional voting shares was already over the 50% voting interest threshold.

The CBA Section regards use of a 5% increment as excessively low and having no foundation in the MEGs. For example, there is no reason why an increase in a shareholding level from 21% to 26% should necessitate a new notification filing. A *de minimis* incremental shareholding would not normally result in a material change in a party's ability to materially influence the economic behaviour of the entity to be acquired. There would typically be no substantially different or substantially more in-depth analysis required and none of the relevant information relating to the Bureau's analysis of the transaction (such as customer and supplier lists or 6.1

documents) would change. Moreover, in this example, the low incremental share acquisition does not even trigger a notification threshold in s. 110.

As a general principle, therefore, a new notification should not typically be required for such a minor addition of voting shares or minor redistributions of assets or ownership interests, as the notification would already be materially correct and complete in most instances. A new notification could be required where the change to the transaction would result in a material change in a party's ability to materially influence the economic behaviour of the entity to be acquired, such that a substantially different or substantially more in-depth competitive assessment is required.

However, for existing investors who have already notified for a 20% or 35% threshold in s. 110, given that s. 110 does not require a person who acquires a greater than 20% voting interest in a public corporation, or a greater than 35% voting interest in a private corporation to notify again unless acquiring more than 50% of the voting shares, it is not appropriate to require a new notification for the existing investor unless the 50% threshold is crossed.

Draft IG #12 should be amended so that no new notification of an existing party's increase in proposed ownership interests or the redistribution of proposed ownership interests is required, unless a new notification threshold in s. 110 is crossed.

Removal of an Asset or Party

Section III.A.4 states that where an asset or party is removed from a proposed transaction, the information supplied with the notification will typically be correct and complete in all material respects relative to the amended transaction, and a new notification will *typically* not be required.

Apart from the exception noted (where the removal of a party results in an increase in the ownership of another purchaser –addressed in Section III.A.3), it is difficult to conceive of any situation where the removal of an asset or a party would cause a notification to be incorrect or incomplete in a material respect and require a new notification. In fact, it is more likely that some previously supplied information would no longer be required. The CBA Section recommends that the word "typically" be deleted from the paragraph in III.A.4 and the limited exception be specifically noted.

B. ARC Requests

Section B of Draft IG #12 states that where an amendment results in the Bureau having to conduct a more in-depth or different analysis on the competitive effects of an amended transaction, a new ARC request typically will be required.

The CBA Section accepts the need to produce additional information to the Bureau to support an ARC request for material amendments to a transaction. Indeed, it is in the parties' interests to provide all relevant information to the Bureau because the ARC or NAL is only as valid as the information on which it is based.

In the CBA Section's view, the general principle should be that no new ARC request and no new filing fee be required for changes to a transaction unless a *substantially* different or *substantially more* in-depth analysis is required. Only when the change to a transaction has so fundamentally altered the nature of the competitive analysis should a new ARC request and potentially a new filing fee be required.

This approach is supported by s. 103 of the Act, which prevents the Commissioner from challenging a transaction for which an ARC has been issued if *substantially* completed within a year of issuance and "on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued". That is, if the basis for the conclusion that an ARC could be issued has not changed substantially, the ARC remains valid.

Addition of New Party

Section III.B.1 states that where there is a new party to the transaction, a new ARC request will not be required where the party will hold less than a 5% interest but will be required "absent a clear indication otherwise" where the new party's interest exceeds 5%.

In our view, requiring a new ARC request when an investor acquires more than a 5% interest is overly burdensome. From a practical perspective, if the parties to a proposed transaction waited to bring in the new party until after the original transaction closed, they would not need to y notify the Bureau. We urge the Bureau to adopt a more reasonable threshold of materiality for percentage ownership required to trigger a new ARC request. Consistent with the approach to notifications, we recommend employing the 10% "significant interest" threshold in

paragraph 1.10 of the MEGs. Unless a new party is acquiring a 10% or greater interest in a target company, no new ARC request would be required.

Section III.B.1 states that the addition of a competitor, potential competitor, customer or supplier of a party "typically" will require a new filing. These categories are exceptionally broad. The addition of a minor customer or supplier as a party will likely have little if any bearing on the competitive impact assessment of the transaction. Further guidance on the scenarios in which the addition of a customer or supplier would require a new filing should be provided (e.g., genuine concern about vertical merger (foreclosure) issues).

Addition of New Assets

Section III.B.2 states that the addition of a new asset to a proposed transaction "typically" will require the Bureau to conduct a more in-depth or different competitive effects analysis and as a result, a new ARC request will be required. The only exception cited by the Bureau is if the additional asset is ancillary.

As for notification filings, the concept of "ancillarity" in Section III.B.2 does not establish a sufficiently broad category of additional assets that would not necessitate a new notification filing. If additional assets are not relevant to the competitive impact of the proposed transaction because they do not relate to the operational aspects of the business (e.g., an administrative building) or because they are competitively insignificant, they should be regarded as ancillary, and therefore no new notification should be required.

Addition of New Voting Shares or Redistribution of Assets, Voting Shares or Ownership Interests

Section III.B.3 states that where a transaction amendment would increase the voting shares of an existing party, the Bureau will analyze whether that party may influence the economic behaviour of the target business and by implication that a new ARC request will be required. The only exceptions are where the party increases its voting interest by less than 5% and where the party acquiring the additional voting shares was previously acquiring more than a 50% interest.

This section should expressly state that a new ARC request would not be required where there has been no material change in a party's ability to materially influence the economic behaviour of the entity to be acquired.

Similar to notification filings, a bright line should be set. Draft IG #12 should be amended so no new ARC request is required for an existing party's increase in proposed ownership interests or the redistribution of proposed ownership interests, unless a new notification threshold in s. 110 is crossed.

Removal of an Asset or Party

Section III.B.4 states that where the removal of an asset or a party from a proposed transaction will not require a more in-depth or different competitive effects analysis, no new ARC request will be required. As with Section III.A.4, it is difficult to imagine how removal of an asset could ever require additional analysis and it would be the rare case where removal of a party would require the Bureau to conduct a substantially different or substantially more in-depth analysis.

III. NEW FILING FEE

The legislation establishing user fees (*User Fees Act*, S.C. 2004, c.6) (UFA) defines a "user fee" as a "fee, charge or levy for a product, regulatory process, authorization, permit or licence, facility, or for a service that is provided only by a regulating authority, that is fixed pursuant to the authority of an Act of Parliament and *which results in a direct benefit or advantage to the person paying the fee*" [emphasis added]. Section 4 of the UFA states that before a regulating authority "fixes, increases, *expands the application of* or increases the duration of *a user fee*", it must, among other things, "explain to clients clearly how the user fee is determined and identify the cost and revenue elements of the user fee" and "establish standards which are comparable to those established by other countries with which a comparison is relevant and against which the performance of the regulatory authority can be measured" [emphasis added]. Section 20 of the *Department of Industry Act*, S.C. 1995, c. 1 permits the Minister to fix fees for "regulatory processes or approvals" provided by Industry Canada.

In the CBA Section's view, where merging parties have made an ARC request or notification filing, the parties have triggered a regulatory process to receive Bureau clearance prior to closing – that is the "benefit" of the filing. The parties do not receive two distinct "benefits" – one for the original filing and one for the amended filing. In these circumstances, a second filing fee should not be required. Industry Canada has not chosen to charge different fees for transactions depending on their size or their complexity. The implication is that the Bureau should not be charging another fee for an amended notification or an amended ARC request.

We agree that it is inappropriate to charge a new filing fee where both an ARC request and a notification were filed and only changes to one of those documents is required.

IV. STATUTORY REFERENCES

Section I and III.A should be revised to make it clear that that the person certifying the notification attest, to the best of their knowledge and belief, that it is correct and complete in all material respects.

V. CONCLUSION

We trust that our comments will be of value to the Bureau in finalizing the Interpretation Guideline.