

*Reply Attention of* J. William Rowley QC  
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*Our File No.* 69459  
*Date* May 29, 2009

Competition Bureau  
50 Victoria Street  
Gatineau, QC  
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Attention: Ms. Melanie Aitken, Interim Commissioner of Competition

Dear Melanie:

**Re: Draft Guidelines on The Revised Merger Review Process**

I am writing on behalf of the Merger Streamlining Group, whose membership comprises multi-national firms with a common interest in promoting the efficient and effective review of international merger transactions.<sup>1</sup>

The Group has reviewed the Competition Bureau's (the "**Bureau's**") *Draft Guidelines on The Revised Merger Review Process* (the "**Draft Guidelines**") and appreciates the opportunity to participate in the Bureau's consultation process. The Group commends the Bureau on its commitment to ensuring that the enforcement and administration of the amended *Competition Act* is as effective and transparent as possible. While the Draft Guidelines represent an important contribution to the predictability of merger enforcement in Canada, the Group is concerned that the Supplementary Information Request process, as outlined in the Draft Guidelines, could be overly burdensome for both the Bureau and merging parties and could contravene the International Competition Network's (the "**ICN's**") *Recommended Practices for Merger Notification Procedures* (the "**Recommended Practices**").

## **The Work of the Merger Streamline Group**

The cornerstone of the MSG's activity has been to work with competition agencies and governments to help implement international best practices in merger control as articulated by the International Competition Network, an organisation in which the Bureau has

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<sup>1</sup> The current members of the Group include Bombardier, Flextronics, General Electric Company, Goldman Sachs International, Oracle, PriceWaterhouseCoopers, Philips, Rio Tinto, SABMiller plc and United Technologies.

played a leading role. A significant number of the members of the Group are associated with the ICN as Non-Governmental Advisors (NGA's). The Group's work projects have included two major surveys on compliance with the Recommended Practices as well as submissions to the US Antitrust Modernisation Commission, the European Commission, the Korean Fair Trade Commission, the Japanese Fair Trade Commission, the Indian Government, the Chinese Legislative Affairs Office and other government agencies to promote reforms consistent with the ICN Recommended Practices.<sup>2</sup>

## The Supplementary Information Request Process

ICN Recommended Practice VI-E states that "Competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties in connection with merger investigations."<sup>3</sup> The commentary to this recommended practice suggests that:

Information requests should be reasonably tailored to obtain the information the competition agency needs to complete its investigation and to take any necessary enforcement actions. Such requests should be focused on the aspects of the proposed transaction that raise potential competitive concerns.

The merger review process described in the Draft Guidelines is very similar to the process followed by the United States Federal Trade Commission ("FTC") and Department of Justice ("DOJ") under the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* (the "HSR Act"). The second request process under the HSR Act has raised significant concerns due to the costs and burdens it imposes on both merging parties and the reviewing agencies, and the extended period of time that is required to complete a merger investigation. For example, a 2003 survey by the American Bar Association Section of Antitrust Law found that the average costs of complying with a second request were US\$3.3 million.<sup>4</sup> Responding to second requests in more complex investigations can cost substantially more than the US\$3.3 million average.<sup>5</sup> A 2003 survey by PricewaterhouseCoopers found that the costs to merging parties of a merger review in the United States were at least double the costs in any other jurisdiction.<sup>6</sup> In addition, the average length of an HSR investigation is six months or more. The Group believes that the

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<sup>2</sup> A summary of the Group's work to date is available on-line at:  
<http://mcmillan.ca/PracticeArea.aspx?ParID=bdbdc2a3-d34f-4535-b884-17a54f1391e9>

<sup>3</sup> The Recommended Practices are available online at:  
<http://www.internationalcompetitionnetwork.org/index.php/en/publication/294>.

<sup>4</sup> "Data Regarding the Burden Involved in Responding to HSR Second Request Investigations" (Letter to Antitrust Modernization Commission, dated February 22, 2007), available at:  
[http://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/merger\\_pdf/070222\\_aba\\_mergers.pdf](http://govinfo.library.unt.edu/amc/public_studies_fr28902/merger_pdf/070222_aba_mergers.pdf).

<sup>5</sup> See, for instance, Steven C. Sunshine & David P. Wales, Statement at AMC Merger Enforcement Hearing, at 4 (Nov. 17, 2005).

<sup>6</sup> PricewaterhouseCoopers, "A Tax on Mergers? Surveying the Times and Costs to Business of Multi-Jurisdictional Mergers Reviews, at 42 (June 2003).

United States second request process is not in compliance with either ICN Recommended Practice VI-E or the fifth of the ICN *Guiding Principles for Merger Notification and Review* (“**Guiding Principles**”) (“Efficient, timely and effective review.”)<sup>7</sup>

The Group is concerned that the Supplementary Information Request process in Canada could impose similar costs on merging parties. While the Draft Guidelines suggest that the Bureau is mindful of concerns about the burdens that may be imposed on merging parties, the default positions on the number of custodians to be searched (30 per party), the time period for responsive documents (2 years prior to the date of the Supplementary Information Request), and the time period for data responses (3 years prior to the date of the Supplementary Information Request) are comparable to those employed by the US agencies.<sup>8</sup> As a result, unless the Bureau employs Supplementary Information Request questions that are significantly fewer or narrower than the standard US second request specifications, it is likely that merging parties will incur substantial costs in responding to Supplementary Information Requests in Canada. To the extent that the new Canadian Supplementary Information Request process mirrors the US second request process in imposing excessive burdens on merging parties, the Group believes that this process will not be compliance with the ICN Recommended Practices and Guiding Principles.

The Group would therefore encourage the Bureau to limit Supplementary Information Requests strictly to information that is necessary for the Bureau to complete its review of a transaction (recognising that additional discovery rights will arise if Competition Tribunal proceedings are initiated). This could include targeting far fewer than 30 custodians in most cases that do not involve multiple markets, and using fewer and more focused document and data requests than are standard in US second requests.

The Group commends the approach you articulated in a statement at the Canadian Bar Association Competition Law Section Spring Forum on 12 May 2009 in which you indicated that the Bureau “will work hard, be creative and do all we can do to reduce the burden of any supplementary information requests that are issued.”<sup>9</sup> The Group would encourage the Bureau to articulate this commitment clearly in the Merger Review Process Guidelines.

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<sup>7</sup> See: Merger Streamlining Group, Submission to the Antitrust Modernization Commission on Merger Enforcement. (February 2006) at page 5. Available online at: <<http://www.mcmillan.ca/PracticeArea.aspx?ParID=bdbdc2a3-d34f-4535-b884-17a54f1391e9>>.

<sup>8</sup> For comparable US guidelines see US Federal Trade Commission (FTC), *Reforms to Merger Review Process* (16 February 2006) at 9 (“Custodian Presumption”) online: <<http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>>; US Department of Justice (DOJ), *Merger Review Process Initiative* (last revised December 2006) at 8 (“Negotiated Frameworks Tailored to Goals of Investigation”) online: <<http://www.usdoj.gov/atr/public/220237.pdf>>. The FTC uses a 35 custodian maximum while the DOJ uses a 30 custodian maximum, but can require that 5 additional custodians be searched.

<sup>9</sup> Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition. Canadian Bar Association, Competition Law Section, 2009 Spring Forum (Toronto, Ontario, 12 May 2009). Available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03066.html>.

## Use of Voluntary Information Requests

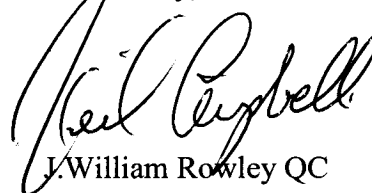
The Group notes that the Draft Guidelines suggest that the default approach where a transaction is likely to raise competition issues and the Bureau requires additional information will be to issue a Supplementary Information Request.<sup>10</sup> In the past, the Bureau frequently relied on voluntary information requests to obtain information from merging parties, and in many cases relied on voluntary information requests instead of requiring the merging parties to submit long-form merger notifications. The Group believes that the Bureau's past use of voluntary information requests was efficient and effective for the Bureau and for merging parties. The Group would encourage the Bureau to consider continuing to rely on voluntary information requests, where possible, rather than Supplementary Information Requests in order to reduce the burdens associated with the merger review process, and the Group would encourage the Bureau to include guidance to this effect in the Draft Guidelines.

## Concluding Observations

The Group urges Canada to maintain its leadership role regarding adoption and implementation of the ICN Recommended Practices and Guiding Principles by developing an approach to the use of Supplementary Information Requests that is substantially more focused and less burdensome than the US second request process and the apparent orientation of the Draft Merger Process Guidelines.

I would value an opportunity to discuss these issues in more detail if that would be of interest.

Yours truly,



J. William Rowley QC

/SOC  
Attach.

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<sup>10</sup> At page 5, the Draft Guidelines state that “[w]here the transaction appears likely to raise competition issues, the Bureau will determine whether additional information is required from the merging parties (normally by way of a supplementary information request)...”.