



THE CANADIAN CHAMBER OF COMMERCE  
LA CHAMBRE DE COMMERCE DU CANADA

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*The Voice of Canadian Business™*  
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## Submission to the Competition Bureau

### COMMENTS ON THE DRAFT REVISED MERGER REVIEW PROCESS

**May 26, 2009**



## **CANADIAN CHAMBER SUBMISSION ON THE DRAFT MERGER REVIEW GUIDELINES**

The Canadian Chamber of Commerce (“**Canadian Chamber**”) welcomes the opportunity to provide comments on the Competition Bureau’s draft guidelines on *The Revised Merger Review Process* (the “**Draft Guidelines**”).

The Canadian Chamber is Canada’s largest and most representative business association. Through a unique two-way consultative process, the Canadian Chamber represents approximately 170,000 members through our network of over 350 local chambers of commerce and boards of trade located in every province, territory, and federal electoral constituency.

### Overview/General Impressions

The Canadian Chamber appreciates the Bureau’s clarification of the merger review process in light of the recent amendments to the Competition Act (the “**Act**”) relating to pre-merger notification. Mergers are an important part of Canadian business, and it is essential that the Competition Bureau have a transparent process for the timely, efficient and effective assessment of the potential competitive effects of a proposed merger and that the Bureau communicate any concerns to the parties when known.

The Draft Guidelines demonstrate a commitment by the Commissioner and all Bureau staff to open dialogue and discussion. This is welcome; indeed, it is essential to ensure a transparent, efficient and effective merger review process. The Canadian Chamber also notes and appreciates the balanced tone of the Draft Guidelines and the express statements regarding the intended flexibility of the merger review process.

The Canadian Chamber has a number of comments, concerns and recommendations for improvements on the Draft Guidelines:

### The Draft Guidelines Should More Clearly Reflect Canada’s Unique Merger Review Process

Representatives of the Canadian Chamber participated in roundtable discussions that the Competition Bureau hosted recently regarding the Draft Guidelines. The open discussion at the roundtable was appreciated and the clear statements by Bureau staff (including the Acting Commissioner of Competition) that the Bureau does not view the new merger notification process as a wholesale adoption of the U.S. second request process were welcomed. However, that discussion made clear that the Draft Guidelines don’t go far enough to clearly state that the Canadian process is unique.



For example, the Bureau has rejected the U.S. approach of using a “model” second request; rather each supplemental information request will be focused on specific issues and be unique to the relevant merger. This approach in part reflects the reality that the Bureau has more limited resources to manage a “second request” process than its U.S. counterparts. The Bureau also intends to engage the parties in the identification of potential issues and provision of draft information requests prior to their issuance. The practices also are a departure from U.S. agencies’ practices regarding second requests.

Creating a merger review process that reflects Canada’s unique legal system and our tradition of a balanced, restrained approach to the enforcement of business framework laws is appropriate. The Canadian Chamber believes that the Draft Guidelines would be improved by the inclusion of more express statements to this effect, and in particular to explicitly identify the Bureau’s approaches and policies that distinguish it from the U.S. second request process. Otherwise, advisors and the business community will continue to regard the new merger review process as simply an adoption of a US-styled second request system (including its failings).

#### Information Requests and Section 11 Orders

The Canadian Chamber appreciates that the new process contemplated by the amendments to the Act and the Draft Guidelines is designed to provide the Bureau with information it requires to conduct merger reviews in a timely fashion. The Canadian Chamber remains concerned, however, about the role of section 11 orders in the process.

The Draft Guidelines suggest that additional information generally will be secured from merging parties pursuant to a supplemental information request. Information which the Bureau requires from third parties, if not provided voluntarily, will be obtained by way of a section 11 order. However, the Draft Guidelines clearly leave open the possibility that section 11 orders may still be used to obtain information from merging parties.

Given the extensive requirements of the supplemental information request, the Canadian Chamber believes that section 11 orders should rarely, if ever, be used to obtain information from the merging parties, as the Act now contemplates a defined procedure by which such material may be secured. Our view is consistent with statements made by the Acting Commissioner of Competition at recent round-table discussions about the Draft Guidelines, at which she confirmed that if a supplementary information request is issued, a section 11 order would be sought only in extraordinary circumstances. This policy should be explicitly stated in the Draft Guidelines together with a clear statement of the types of circumstances in which a section 11 order may be obtained against merging parties.

In addition, the Canadian Chamber remains concerned about the use of section 11 orders to obtain information from third parties in merger cases and urges the Bureau to only resort to such measures where absolutely necessary. If a third-party section 11 order is required, it should be carefully limited in scope to reduce the burden placed upon third parties.



### Service Standards/Timing Issues

Other than a brief mention in footnote 3, the Draft Bulletin is silent on the treatment of the service standards set out in the Bureau's Fees and Service Standards Handbook under the new merger review process.

On its face, there would seem to be some incompatibilities between the timeframes contemplated in the service standards and those now contained in Part IX of the Act. For example, under the current service standard guidelines, the Bureau may take up to 10 weeks to complete its review of a "complex" transaction and five months for a "very complex", in each case after the parties have provided relevant information to the Bureau. How will changes in the process for notifying transactions affect these service standards? Will (or should) the standards be relevant if a supplementary information request is not issued, or even if it is issued?

The Canadian Chamber on balance believes that merging parties are well served by the existence of service standards, but is very concerned about the uncertainty created with the new merger notification process. In our view, the Draft Guidelines would be improved by inclusion of discussion about how the Bureau's services standards (and service standard process) will operate having regard to the new merger notification regime, and in particular more detailed discussion (other than a one sentence footnote) about the Bureau's commitment to completing its review of non-complex cases within 14 days and liberally using its early termination authority for these cases, so that the subject merger can be completed quickly.

Also, what is the implication of the Bureau not issuing a supplementary information request, but not having completed its review of the proposed merger? Should the parties feel confident to close (as typically is the case in U.S.)? Will the Bureau inform the parties that its review is continuing? Lack of clarity on issues such as these creates uncertainty for business

### Supplementary Information Requests

The remainder of the Canadian Chamber's comments concern the supplementary information request process.

#### A. Issuing a S.I.R.

The Draft Guidelines make clear that supplementary information requests will be issued rarely. This is welcome. However, the Canadian Chamber believes the Draft Guidelines would provide more guidance if they included discussion about the types of transactions or circumstances in which a supplementary information request is likely to be issued. This would provide more certainty to business.



## B. Prior Consultations

The Draft Guidelines note that dialogue with merging parties prior to issuance of a supplementary information request “may assist” in narrowing the scope of a possible request. The Canadian Chamber has noted and is pleased that, as a matter of practice, to date the Bureau has provided a draft supplementary information request to the merger parties to whom it has issued a request.

The Canadian Chamber believes that the Draft Guidelines would be improved by an explicit statement that the prior consultation will be the rule; in only exceptional cases should the Bureau not have these discussions. And, the Bureau should ensure that a draft supplemental information request is provided to the parties sufficiently far in advance of the end of the initial 30-day period waiting that the parties have time to provide meaningful comments on the draft request before it is issued. This objective should be explicitly stated in the Draft Guidelines.

## C. Withdrawing a Filing

An additional area that lends itself to (and which might usefully be considered in the Draft Guidelines) is the Bureau’s view of strategies such as withdrawing and re-filing notifications which are widely used in U.S. HSR practice (and which may now be relevant, given the clear similarities between the new merger review process and that in the U.S.).

As acknowledged by the Acting Commissioner of Competition at the recent roundtable discussions, there is no legal prohibition against withdrawing a filing and there are many valid business reasons for parties to do so. The Draft Guidelines would benefit from an explicit discussion about withdrawing and re-filing, and whether a second fee needs to be paid if a filing is re-filed with the Bureau.

## D. Scope of Requests

The Canadian Chamber does not have specific comments about the scope of the restrictions contemplated on section 3.3, save to say that they appear to be largely drawn from U.S. agency practice. It is worth considering whether certain features of that jurisdiction’s practice are appropriate for application in the Canadian context – for example, the maximum “limitation” of custodians to be searched in preparing a response to 30 individuals. It would be useful to know whether the Bureau consulted with its U.S. counterparts on the relevance of the number “30” and whether in practice U.S. authorities default to 30 or treat it as the exception. Perhaps U.S. learning is that 30 days is too many. And, it may be that 30 are too many in a Canadian context given what may comparatively smaller management teams in Canadian businesses. For the same reason, the Draft Guidelines’ statement that the custodian limitation in a supplementary information request will be harmonized with that agreed to by U.S. agencies in mergers involving businesses that are run on a North American basis may be of limited practical significance.



#### E. Need for Timing Milestones

The Canadian Chamber appreciates the Bureau's receptiveness to consultation with merging parties throughout the merger review process (up to and including the supplementary information request stage), particularly on the issue of timing of various stages of review, as contemplated in section 3.5. A number of the timing "milestones" contained in section 3.5 could, however, be made more specific. For example, clarification about when in the initial 30 day period the Bureau would issue a supplementary information request (presumably the Bureau would wait until later in the initial 30 day period to do so, as opposed to early on) would be useful. It should also be feasible for the Bureau to commit to times for providing updates on the status of a review.

#### F. Review/Appeal Procedures

The Canadian Chamber agrees with the concept of some sort of oversight of the conduct of the supplemental information request internal review and approval process (section 3.4). However, the process contemplated by the Draft Bulletin raises some issues, as it arguably does not constitute a meaningful neutral review. It is unclear, for example, why a neutral review process would include two individuals with carriage of the file. The Canadian Chamber urges the Bureau to consider instead a review process under which a third party arbiter be engaged to resolve all disputes that may arise in the context of compliance with a supplementary information request.

Moreover, the formal appeal procedure contemplated in section 3.8 with respect to challenging the scope of a supplementary information request does not appear to contain timeframes that are practical given the applicable waiting period – in particular, the potential for delay that is inherent in providing the Reviewer with five days in which to decide whether additional information is required, and then a further seven day period for issuance of a decision after all requested information is provided from the party. A similar observation may be made about the similar procedure that is applicable to challenges over non-compliance, though in the latter case, the Commissioner has resort to judicial remedies.

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The Canadian Chamber appreciates the opportunity to submit these comments. We would be pleased to discuss them with you in greater detail.