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REGULATORY IMPACT ANALYSIS STATEMENT
(This summary is not part of the Regulations)

COMPETITION BUREAU

Canada

Competition Bureau

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Description

Part IX of the *Competition Act* (the "Act") requires that parties to certain proposed transactions that meet prescribed thresholds notify the Commissioner of Competition (the "Commissioner"), provide specified information and wait a prescribed period of time before completing the transaction.[1] The Notifiable Transaction Regulations (the "Regulations"), which were amended in 1999, specify the calculation method and the appropriate annual period to evaluate the total value of the assets or the gross revenues from sales that define prescribed thresholds. The Act provides that the proposed party-size threshold (section 109) and the transaction-size threshold (section 110) can be increased by regulation.

For a proposed merger to be notifiable, it must exceed both the party-size threshold and the transaction-size threshold. The thresholds are generally based on the monetary value of the transacting parties[2]. If on a combined basis the merging parties have assets in Canada or gross revenues from sales in from or into Canada of over $400 million, the party-size threshold is exceeded. If the assets or target firm being bought are valued over, or generate gross revenues from sales in or from Canada of over $35 million, then the transaction-size threshold is exceeded. If either one of the thresholds is not exceeded then the parties to the merger do not have to notify the Commissioner. However, the Commissioner has a statutory right to review all mergers that affect a Canadian operating business, regardless of their value.

The proposed amendment to the Regulations raises the transaction-size threshold from the current $35 million to $50 million. Under the current threshold, in force since 1987, acquisitions of assets ″110(2)›, acquisitions of voting shares ″110(3)› and combinations ″110(5) and 110(6)› must be notified if the total value of the assets or the gross revenues from sales of the acquired party exceed $35 million.[3]

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[1]Under subsection 114(2) of the Act, parties to a proposed transaction have the option to file the short-form information requirements or the long-form information requirements. Paragraph 123 (1)(a) of the Act provides that parties filing a short form shall not complete the proposed transaction before the expiration of a 14-day waiting period after receipt by the Commissioner of the prescribed information. For parties filing the long form, paragraph 123(1)(b) of the Act provides for a waiting period of 42 days after receipt of the prescribed information.

[2]Acquisitions involving the voting shares of a corporation or an interest in a combination have further considerations.

[3]The threshold of $70 million relating to amalgamations ″110(4)› will stay at its current level.

This proposed amendment is the result of formal and informal consultations with stakeholders[4] and is furthered by a recommendation of the House of Commons Standing Committee on Industry in June 2000 and, most recently, the House of Commons Standing Committee on Industry, Science and Technology, which recommended that the Government of Canada increase the merger transaction-size notification threshold. This amendment affects one threshold triggering merger notification; the amendment does not affect merger review. All mergers, notwithstanding their size, can be reviewed under the Act.

The proposed increase of the transaction-size threshold from $35 million to $50 million (CDN) will approximately match the price index increase since 1987. The equivalent threshold in the United States under the *Hart-Scott-Rodino Antitrust Improvements Act* was raised from $15 to $50 million (USD) in February 2001.

The party-size threshold of $400 million will stay the same. This threshold was considered relatively high, both with respect to the size of the Canadian economy and in comparison with its equivalent American threshold. In the United States, the equivalent threshold requires a merger notification filing where at least one of the persons involved in the transaction has $100 million or more in annual net sales or total assets worldwide, and the other has $10 million or more worldwide. Moreover, under American law, the party-size threshold is not considered and is eliminated in transactions valued in excess of $200 million.

Alternatives

More than 80% of notifiable transactions submitted to the Commissioner do not raise any issues under the Act. The purpose of the amendment is to reduce the number of notifiable transactions which are unlikely to raise competition issues, in order to reduce the compliance burden imposed on business. Another way to reduce the number of notifiable transactions is to create exemptions for other classes of transactions that are not likely to raise any competition issues. So far, the Competition Bureau's analysis has not identified a class of transactions for which exemptions should be created.

An automatic price indexation has also been advocated, however, this proposal would not enable the government to make a change to the threshold and assess the impact.

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[4]Stakeholders include the Canadian Bar Association, Business and Trade Associations, and the Canadian Chamber of Commerce.

Benefits and costs

The proposed increase to the transaction-size threshold will alleviate the burden for parties, and business in general, involved in small-scale transactions, as it will reduce by approximately 10 per cent the number of transactions that must be notified. It is estimated that the affected 10 per cent of notifiable transactions represent increased costs to businesses who engage in mergers with little likelihood of raising competition concerns.

The proposed increase to the transaction-size threshold will likely not increase materially the risk that the Commissioner would not be notified of a problematic transaction. During the 2000-2001 fiscal year, it would not appear that any of the notifiable transactions valued between $30 million and $50 million (i.e. were above the current threshold, but would have been below the proposed threshold) gave rise to competition concerns. On this basis, the change in the threshold would not materially hinder the Commissioner from being notified of any problematic transaction. In any event, the Commissioner has the statutory ability to review all mergers affecting Canadian operating businesses.

As parties that must submit a merger notification pay a fee of $25,000, the proposed amendment would have an impact on the revenues generated by the Mergers Branch of the Competition Bureau. In 2000-2001, revenues collected amounted to $7.5 million. A 10% decrease in the number of notifiable transactions would correspondingly result in a 10% decrease in revenues of approximately $750,000 per annum. This estimated shortfall will be offset by the proposed increase to fees which, it is anticipated, will take effect at approximately the same time as the proposed increase in the notification threshold.

The affected transactions are small, generally non-problematic cases that currently involve very low costs. Since about 90% of the costs of reviewing mergers are related to complex and very complex cases, any savings related to the higher threshold are expected to be minimal and used to address workload associated with complex cases. Therefore, there will be little, if any, savings related to raising the threshold.

As a result of the above, it may be concluded that the current transaction-size threshold is overly-inclusive as it imposes an additional expense and regulatory burden upon merging firms while providing the Commissioner with notice of very few problematic transactions that would not be notified at the proposed $50 million dollar transaction-size threshold.

Consultations

In the process surrounding the last amendment to the Act (1995-1999), stakeholders and members of the legal community frequently suggested that the current thresholds should be raised. These requests were repeated when filing fees for the notifiable transactions came into force. As a result of consultations conducted by the Competition Bureau, including fora organized by the Merger

Notification Unit of the Competition Bureau where main stakeholders had the opportunity to comment on the proposal, the Competition Bureau concluded that only the transaction-size threshold should be increased for the time being. Generally, the proposal to increase the transaction-size threshold has been well-received.

On August 17, 2002, the regulation was pre-published in Part I of the Canada Gazette. Stakeholders were invited to send written comments to the Commissioner at that time. Five stakeholders provided written submissions (the "Stakeholder Submissions"). None of the Stakeholder Submissions objected to an increase to the transaction-size threshold. Stakeholder Submissions did suggest that: 1) the notification thresholds should be automatically indexed; 2) the amalgamation threshold should be increased; 3) the increase to the size of transaction threshold should be increased to $250 million for the oil and gas industry; and 4) the party-size threshold of subsection 109(1) should be increased as well.

On November 4, 2002, the Commissioner sent stakeholders[5] an invitation to participate in consultations on December 9, 11 and 13, 2002, in Vancouver, Toronto and Montreal, respectively (the "December Consultations"). On November 29, 2002, the Bureau sent a summary of all of the Stakeholder Submissions for review to all stakeholders who responded to the November 4th invitation.

While views were mixed on indexation, certain technical issues respecting indexation should be addressed before adopting such a regime. In addition, the need for indexing does not seem to be pressing in a low inflation era. As a result, the Competition Bureau concluded that the preferable approach was to monitor and update the threshold as required.

Many participants at the December Consultations recommended that the Commissioner raise the amalgamation transaction-size threshold to $100 million. However, it was evident that this view was not unanimous. Competition Bureau representatives and stakeholders engaged in a debate respecting the justification for setting the amalgamation threshold at double the value than that threshold for other transaction types. Stakeholders provided different viewpoints on this issue. Given the variety of structures used to effect mergers and acquisitions, the Competition Bureau is not convinced that setting the amalgamation threshold at double the general threshold produces an appropriate equivalence between different forms of transactions. As a result, it was not clear that the threshold for amalgamation should be changed.

The Competition Bureau received a written submission suggesting an increase to the size of transaction threshold to $250 million for the oil and gas industry. Nonetheless, it remains the Commissioner's view

[5] Stakeholders invited to submit comments and to attend the fora include: The Competition Law Section of the Canadian Bar Association, the Canadian Chamber of Commerce and Business and Trade Associations.

that industry-specific thresholds would result in a complex framework and that industry type is not necessarily indicative of the absence of competition concerns. Accordingly, the Competition Bureau is satisfied that this proposal would be problematic to administer and could result in the Commissioner not being notified of anti-competitive transactions.

Finally, it remains the Bureau's position that the present party-size threshold of subsection 109(1)is sufficiently high, especially when viewed in a national and international context, and that a higher threshold could result in problematic transactions not being notified.

Accordingly, after a careful and deliberate review of the Stakeholder Submissions and comments made at the December Consultations, the Commissioner maintains that only the transaction-size threshold should be amended from $35 million to $50 million.

Compliance and Enforcement

The amendment to the Regulations does not require new enforcement mechanisms. The government will continue to monitor compliance with the notifiable transactions through publicly available information.

Contact

For further information, please contact:

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RÉSUMÉ DE L'ÉTUDE D'IMPACT DE LA RÉGLEMENTATION
REGULATORY IMPACT ANALYSIS STATEMENT

(Ce résumé ne fait pas partie du Règlement)
(This statement is not part of the Regulations)

Ministère ou organisme:
Industrie Canada

Department or Agency:
Industry Canada

Titre du projet:
Règlement modifiant le Règlement sur les transactions devant faire l'objet d'un avis

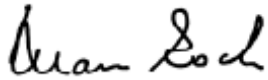
Title of Proposal:
Regulations amending the Notifiable Transactions Regulations

Fondement législatif:
Article 124 de la *Loi sur la concurrence*

Statutory Authority:
Section 124 of the *Competition Act*

Soumise en vue de:
L'approbation finale suite à la publication préalable du 17 août 2002.

Submitted for Consideration for:
For final approval following pre-publication On August 17, 2002.



Ministre de l'Industrie / Minister of Industry