PART 6 - Process Matters

6.1 Compliance Approach

The Director's enforcement of the Competition Act emphasizes compliance. Increased compliance with the Act benefits all parties, and is best facilitated by ensuring that persons involved in or affected by mergers are fully informed with respect to the Director's enforcement policy. However, Merger Enforcement Guidelines are no substitute for early contact with the Bureau to discuss proposed or hypothetical transactions. Early contact usually provides helpful insights into:

- the competition issues that are likely to be raised by a particular transaction;
- the manner in which the assessment of these issues can be best facilitated;
- the time that will likely be required to complete the review of the merger; whether the transaction is a good candidate for an Advance Ruling Certificate[59];
- whether short form or long form prenotification is likely to be required; and
- whether restructuring will likely be necessary to ensure that competition will not be prevented or lessened substantially[60].

6.2 Prenotification

Part IX of the Act requires that the Director be notified of proposed transactions where two thresholds are exceeded, relating to:

(i) the combined size of the merging parties and their affiliates; and,

(ii) the size of the transaction.

With respect to the first threshold, section 109 requires notification of a proposed transaction only when the transacting parties, together with their affiliates[61], have assets in Canada or have gross annual revenues from sales in, from, or into Canada that exceed $400 million.

The second threshold is addressed in section 110, where four types of notifiable transactions are distinguished: asset acquisitions, share acquisitions, corporate amalgamations, and business combinations otherwise than through a corporation, e.g., a joint venture. With respect to asset acquisitions, unless a transaction falls within one of the exemptions set out in sections 111 to 113[62], notification is required for a proposed

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[59] The Director's approach to advance ruling certificates is discussed in the Advance Ruling Certificates bulletin, released by the Bureau in December 1988.
[60] Additional information regarding the compliance approach is set forth in the Bureau's Program of Compliance bulletin, released by the Bureau in June 1989.
[61] Affiliates, for purposes of the Act, are defined in section 2 (2) on the basis of de jure control. Cf. Part 1 of these Guidelines.
[62] Cf., Appendix 3.

acquisition of any of the assets in Canada of an operating business[63], if the aggregate value of the assets or the gross annual revenue from sales in or from Canada generated by those assets exceeds $35 million.

With respect to share acquisitions, subject to the exemption provisions in sections 111 to 113, notification is required for a proposed acquisition of "voting shares"[64] of a corporation that carries on an operating business or that controls a corporation that carries on an operating business, where:

> (i) the corporation has assets in Canada, or gross annual revenues from sales in or from Canada, that exceed $35 million; and,
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> (ii) the acquiror will have a greater than 20 percent voting interest in a public company or a greater than 35 percent voting interest in a completely private company.

Where the proposed acquiror already has a greater than 20 percent or 35 percent voting interest prior to the proposed transaction in question, but less than a 50 percent voting interest, notification is also required where that acquiror together with its affiliates will have a greater than 50 percent voting interest in the target corporation subsequent to the transaction[65].

Amalgamations are also subject to the exemptions in sections 111 to 113. Notification is required for a proposed amalgamation of two or more corporations where:

> (i) the value of the assets in Canada or the annual gross revenue from sales in or from Canada of the continuing corporation exceeds $70 million; and,
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> (ii) one or more of the amalgamating corporations carries on an operating business or controls a company that carries on an operating business.

Notification is required in respect of a proposed combination of two or more persons to carry on business, otherwise than through a corporation, if one or more of those persons propose to contribute assets of an operating business to the combination, and if the value of the assets in or sales in or from Canada of the combination exceeds $35 million. The various exemptions set forth in sections 111 to 113 apply equally to combinations.

In all cases, notification must be made by the person proposing the transaction. For amalgamations, combinations and other circumstances where the transaction is proposed

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[63] The term "operating business" is defined in subsection 108(1) as "a business or undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work.

[64] The term "voting share" is defined in subsection 108(1) as "any share that carries voting rights under all circumstances or by reason of an event that has occurred and is continuing"

[65] Provision is made in section 115 for a proposed acquiror to notify with respect to both voting thresholds at the same time if it is anticipated that sufficient additional shares to cross the fifty percent threshold will be purchased within one year of notice being given for an acquisition that results in a crossing of either the 20 percent or the 35 percent thresholds.

by more than one person, one of the parties may be authorized by the others to give notice and supply information on their behalf.

The prenotification provisions cover both direct and indirect acquisitions. Accordingly, if a foreign or Canadian company purchases a foreign company and thereby indirectly acquires a Canadian operating business, the transaction is notifiable under the Competition Act, if the abovementioned thresholds are crossed. The same rules apply if a foreign company is buying a Canadian company.

A notifier has the option of supplying information set out in either section 121 (short form) or section 122 (long form). The information required under both sections includes:

- any legal documents that have been prepared in relation to the transaction;
- a description of the proposed transaction and its underlying objectives; information relating to the parties to the transaction, their principal businesses and the businesses of their affiliates;
- sales figures;
- asset values;
- principal categories of products produced;
- significant customers and suppliers; and,
- to the extent available, pro forma financial statements.

The main difference between the short and long form filings is that the long form requires considerably more information on affiliates and products.

Parties must wait seven days, where a short form filing is made, and 21 days in the case of a long form filing, before completing a proposed transaction. Where shares are to be acquired through a stock exchange, parties filing long form information may complete the transaction after 10 trading days, or such longer period, not exceeding 21 days, that may be allowed by exchange rules[66]. The waiting period runs from the time that complete information, as determined by the Director, is received by the Director. Pursuant to section 123, the abovementioned periods may be reduced by the Director.

Failure to notify in accordance with sections 114 or 123 is a criminal offense under section 65(2) and is subject to a fine of up to $50,000. In addition, the Director may apply to the Tribunal pursuant to section 100 for an order preventing the completion or implementation of the proposed merger until proper notification is filed.

Pursuant to section 119 a notification in respect of a merger lapses if the merger is not completed within one year or such longer period as the Director may specify in any particular case.

[66] Securities commissions and stock exchanges in Canada allow takeover bids to be conditional on compliance with Part IX of the Act.

Parties are encouraged to contact the Bureau's Prenotification Unit before filing, to discuss whether a short-form or long form filing should be made; to discuss the possibility of pursuing an Advance Ruling Certificate (as an alternative to prenotification)[67]; to expedite review of the transaction; or to seek any other assistance that may be required regarding the review process or the Director's interpretation of specific provisions of the Act.

6.3 Confidentiality

Section 29[68] of the Act prohibits the Director and his authorized representatives from communicating to another person information obtained pursuant to the provisions of sections 11, 15 and 16[69]; and information obtained pursuant to a prenotification filing or from a person requesting an advance ruling certificate. Section 29 also prohibits disclosure of the identity of any person from whom information has been obtained pursuant to the Act; and the communication of whether notice has been given or information obtained in respect of a particular transaction that has been prenotified under section 114. The prohibitions of section 29 do not apply in respect of information that has been made public. In addition, the Director may communicate information obtained to a Canadian law enforcement agency or for the purpose of the administration and enforcement of the Act.

In general, the Bureau will respect requests by merging parties that information not be sought from third parties about the likely effects on competition of mergers that have not been made public. However, such a request for confidentiality may seriously restrict the ability of the Director to assess fully the likely impact on competition of a merger, and may extend the period that would otherwise be required for the Bureau's review. Accordingly, information from third parties may be sought if the merging parties indicate an intention to proceed with their merger before the Director's assessment is completed and it has not been determined that the merger will not prevent or lessen competition substantially. In deciding whether to seek third party views, the Director will take into account whether the merging parties have provided an undertaking to ensure that the ability of the Tribunal to remedy the effect of the merger on competition would not be impaired. Parties who intend to proceed with their merger before the Director's assessment is completed face the risk that the Director will make an application for an interim order under section 100 or that the Director will bring an application for an order

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[67] See note 59 above.

[68] Section 29 states: (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration and enforcement of this Act: (a) the identity of any person from whom information was obtained pursuant to this Act; (b) any information obtained pursuant to section 11, 15, 16 or 114; (c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; or (d) any information obtained from a person requesting a certificate under section 102. (2) This section does not apply in respect of any information that has been made public.

[69] These sections provide for the obtaining of information through oral examination, production of documents, written returns, searches and seizure and computer searches

after the merger has been substantially completed, within the three year period permitted by section 97.

In addition to the provisions of section 29, where an inquiry is commenced by the Director, section 10(3) provides that all inquiries are to be conducted in private. Accordingly, the Director will not comment on whether a section 10 inquiry has been initiated, unless the existence of the inquiry has otherwise been made public.

Where an application is made to the Tribunal, the Director will advise the Tribunal of any request that has been made for confidentiality.

6.4 Substantial Completion

In general, substantial completion of a merger is considered to arise when:

> (i) an ability to materially influence the economic behaviour of the business that is the subject of the transaction has been acquired or established; and,
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> (ii) it is no longer possible for one of the parties to withdraw from the merger if an outstanding condition is not met or a regulatory approval is not obtained.

6.5 Timing

The time required by the Bureau to review a merger is largely a function of when the Bureau is provided with sufficient information to assess the likely effects of the merger on competition. Accordingly, the time periods set forth in this section are contingent on obtaining such information, and are only approximate guides.

Persons who have submitted prenotification filings are generally informed on the day that the relevant waiting period expires either that the transaction does not raise concerns under the substantive provisions of the Act or that the Bureau's assessment is not yet complete. Merging parties who have notified the Bureau with respect to a merger that falls below the prenotification thresholds are generally informed, either that the transaction does not raise concerns under the Act or that the merger requires further review, within three weeks of providing the Director with sufficient information to make this preliminary determination. Regardless of whether a merger is subject to the prenotification provisions of Part IX of the Act, the Bureau ordinarily endeavors at this time to communicate to the merging parties any preliminary concerns that have been identified. Similarly, it generally endeavors to communicate with the parties as additional issues are identified.

Where parties are informed that no concerns have been identified, they can generally proceed with their transaction without facing a significant risk that the merger will be challenged within the three year period permitted by section 97, unless new information which would affect the Director's decision comes to the Bureau's attention. By contrast, where the parties are informed that the review of the merger has not been completed, they

may be requested to provide an undertaking not to proceed with the closing of their transaction without giving the Bureau a minimum of ten working days notice of an intention to do so. Where such an undertaking is not provided:

> (i) any attempt to complete or implement the merger may cause the Director to bring an application for an interim order pursuant to section 100 of the Act; or,
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> (ii) subsequent to the merger, an application challenging the merger may be brought pursuant to section 92, together with an application pursuant to section 104 for an interlocutory order.

When competition concerns have been identified, they are conveyed to the notifying party and additional information is generally requested. The time that it takes for the review of the merger to be completed is then largely a function of the speed with which this information is provided.

In general, at this stage parties are advised to provide a thorough competitive assessment document, if they have not already done so, together with responses to a detailed information request. The competitive assessment document should address the matters highlighted in these Guidelines. To the extent that documentation prepared for the purpose of making the decision to merge exists, it should also be provided to the Bureau, together with identification of its authorship.

In most cases, a determination can be made of whether a merger prevents or lessens competition substantially within eight weeks after the merging parties have provided all requested information. This period of time is required in order to review this information, to review information relating to the industry that is already in the Bureau's files, and to gather and review information provided by customers, suppliers, competitors, experts, others in the industry and government departments that have information pertaining to the market(s) in question. Where information is not provided upon request by merging parties or others, the Director may initiate a formal inquiry and seek to exercise the powers provided under sections 11, 15 or 16 of the Act.

In those cases where a determination cannot be reached within this time frame, additional information may be sought with respect to contentious issues. At this stage, the timing of a final determination can vary significantly from case to case. In the Bureau's experience, the most complex of these cases can require up to six months after all requested information has been obtained from the merging parties, before the Director's position is finalized. This additional time has in part been attributable to continued discussions initiated by the parties to the merger. The Director will be briefed throughout the assessment process, and will provide merging parties with an opportunity to discuss a determination before it is finalized.

6.6 Information Exchanges Between Merging Parties

Information exchanged during merger negotiations which do not ultimately lead to a merger[70] could raise questions which may require examination pursuant to the conspiracy provisions of section 45 of the Act. This risk can be reduced by limiting the information exchanged to that which is reasonably necessary to make a decision to merge, and by ensuring to the extent possible that such information is restricted to persons involved in negotiating the transaction, e.g., lawyers, accountants, chief executive officers or merger counsellors. Unless there are legitimate reasons why commercially sensitive information needs to be shared in both directions, such risk can also be reduced by ensuring that information flow is one way.

6.7 Investment Canada

Investment Canada reviews certain acquisitions in Canada by non-Canadians in terms of a "net genefit to Canada" test. One of the six factors considered in the assessment of this test is the likely effect of the merger on competition. Investment Canada generally seeks, but is not bound by, the Director's assessment of the likely implications of a transaction on competition. Similarly, decisions reached pursuant to the Investment Canada Act do not bind the Director.

As a matter of practice, the Bureau receives all Investment Canada filings and attempts to complete the competition evaluation of Investment Canada cases that do not appear to raise concerns under the Competition Act within l5 days of receiving notification from Investment Canada. Where the documentation provided in the parties' filing to Investment Canada is insufficient to enable a proper assessment to be made under the Competition Act, the companies involved are ordinarily approached directly. The Director will normally communicate to Investment Canada officials a conclusion that the competition factor should be given a positive, neutral or negative weight in Investment Canada's overall net benefit assessment[71]. Investment Canada may conclude that the merger is of net benefit to Canada notwithstanding that the competition factor has been given a negative weighting.

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[70] It should be noted that even where a such negotiations lead to a agreement to merge, section 98 of the Act contemplates that the Director can elect to proceed pursuant to section 45 rather than the merger provisions.

[71] A negative weighting may be given even if the merger does not prevent or lessen competition substantially.