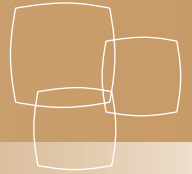




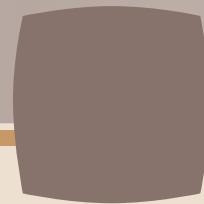
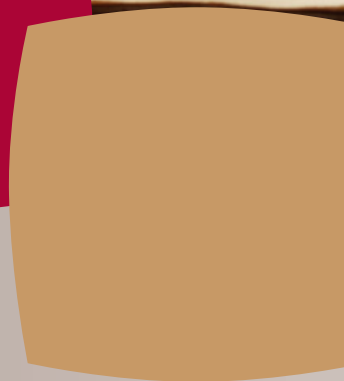
Competition Bureau
Canada

Bureau de la concurrence
Canada

Bulletin



Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the *Competition Act*



Canada 

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

Effective November 1, 2010

This publication replaces the following Competition Bureau publications:

Enforcement Guidelines — [Notifiable Transactions and Advance Ruling Certificates Under the Competition Act: Procedures Guide](#), 2000

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Cat. No. lu54-33/2010E-PDF

ISBN 978-1-100-17058-9

60817

2010-10-22

Aussi offert en français sous le titre Guide de procédure à l'égard des transactions devant faire l'objet d'un avis et des certificats de décision préalable aux termes de la Loi sur la concurrence.

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I. INTRODUCTION

This Procedures Guide (“Guide”) relates to notifiable transactions and advance ruling certificates under the *Competition Act* (the “Act”), and provides:

- an overview of the relevant provisions of Part IX of the Act and the *Notifiable Transactions Regulations* (the “Regulations”);
- an explanation of the general approach taken by the Competition Bureau (the “Bureau”) to pre-merger notification matters;
- guidance in determining how the Act may apply to a proposed transaction; and
- information regarding requests for, and issuance of, advance ruling certificates (“ARC”) under sections 102 and 103 of the Act.

This Guide supercedes all previous statements of the Commissioner of Competition (the “Commissioner”) and other Bureau officials regarding notification and ARC request procedures.

Merger transactions vary greatly in size, scope and structure. As such, this Guide cannot provide a comprehensive review of all notification issues that may arise. Firms contemplating notifying the Bureau of a proposed transaction are encouraged to seek advice from legal counsel. Guidance regarding the applicability or interpretation of Part IX of the Act or the Regulations can also be obtained by requesting a binding written opinion from the Commissioner pursuant to section 124.1 of the Act.

This Guide does not replace the advice of legal counsel and is not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question. Final interpretation of the law is the responsibility of the Competition Tribunal (the “Tribunal”) and the courts.

The Bureau may revisit certain aspects of this Guide in light of experience and changing circumstances.



2. NOTIFIABLE TRANSACTIONS

2.1 Purposes of Pre-Merger Notification

Part IX of the Act sets out the statutory framework for pre-merger notification, which requires parties to proposed transactions that exceed certain monetary thresholds to: (a) notify the Commissioner prior to completing the proposed transaction; (b) provide specified information; and (c) wait a specified period of time before completing the transaction.

The purposes of notification are to:

- (i) provide the Commissioner with advance notice of large proposed transactions;
- (ii) provide the Commissioner with a sufficient period of time to undertake an analysis of the impact of the proposed transaction;
- (iii) facilitate this analysis by ensuring that certain required information is submitted to the Commissioner with the notice; and
- (iv) avoid the difficulties associated with remedying a completed merger, where that merger is subsequently found to be anti-competitive.

2.2 Determining Whether a Proposed Transaction is Notifiable

Determining whether a proposed transaction is notifiable generally involves the four steps set out below. Where the first three steps are satisfied and there is no applicable exemption in step four, the transaction is notifiable. In certain cases, one or more of these steps may require further analysis before reaching a conclusion as to whether a transaction is notifiable.

Section 114 of the Act requires that all parties to a proposed transaction that exceeds the thresholds set out in sections 109 and 110 of the Act must notify the Commissioner prior to the completion of the transaction and supply the Commissioner with certain information. Section 123 of the Act sets out the waiting periods during which the parties to a proposed transaction are legally prohibited from closing the transaction.

Step 1: Determine whether the structure of the proposed transaction falls within section 110 of the Act

Section 110 of the Act addresses the following transaction structures:

- (i) the acquisition of any of the assets in Canada of an operating business¹;

¹ “Operating business” is defined in subsection 108(1) of the Act as a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work. For further information on the definition of operating business, please refer to Interpretation Guideline No. 1 - Section 108. Definition of “operating business”, on the Bureau’s website.

- (ii) the acquisition of voting shares of a corporation that carries on an operating business or controls a corporation that carries on an operating business;
- (iii) the amalgamation of two or more corporations, if one or more of those corporations carries on an operating business or controls a corporation that carries on an operating business;
- (iv) the creation of a combination of two or more persons² to carry on business otherwise than through a corporation, where one or more of those persons proposes to contribute to the combination assets that form all or part of an operating business carried on by those persons, or corporations controlled by those persons; and
- (v) the acquisition of an interest in a combination.

If the proposed transaction is of a type described above, the parties should consider whether the party-size and transaction-size thresholds have been exceeded.

Step 2: Determine whether the parties exceed the party-size threshold in section 109 of the Act

For purposes of pre-merger notification, section 109 of the Act requires that the parties to the proposed transaction, together with their affiliates³, must collectively have assets in Canada or annual gross revenues from sales in, from or into Canada that exceed \$400 million. The Regulations outline the procedure for calculating the value of assets and gross revenues from sales.

Where the proposed transaction involves the acquisition of voting shares, subsection 109(2) of the Act specifies that the parties to the proposed acquisition of shares are: (1) the person(s) who propose to acquire the shares; and (2) the corporation whose shares are being acquired.

Step 3: Determine whether the proposed transaction exceeds the applicable transaction-size threshold specified in subsections 110(2) to 110(6) of the Act

Generally, for purposes of pre-merger notification, the aggregate value of the assets in Canada, or the annual gross revenues from sales in or from Canada generated from those assets, must exceed the transaction-size threshold amount (the “TSTA”). The 2009 amendments to the Act increased the TSTA to \$70 million and introduced an indexing mechanism⁴ for subsequent years to adjust the TSTA based on changes in the level of Nominal Gross Domestic Product

² “Person” is defined in subsection 108(1) of the Act.

³ Affiliate means an affiliated corporation, partnership or sole proprietorship as described in subsection 2(2) of the Act.

⁴ The indexing mechanism is set out in subsection 110(8) of the Act. Alternatively, a threshold amount may be prescribed by regulation. If no amount is prescribed or published in a particular year, the threshold from the previous year remains in effect.

at market prices. The TSTA when determined for a particular year by the Minister of Industry will be published in the *Canada Gazette*⁵ and posted on the Bureau's website⁶.

Based on the transaction structure, step 3 will be satisfied where:

(i) Asset Acquisition: the aggregate value of the assets in Canada or the annual gross revenues from sales in or from Canada generated from those assets would exceed the TSTA.

(ii) Voting Share Acquisition⁷:

(a) the aggregate value of the assets in Canada of the acquired corporation, or the annual gross revenues from sales in or from Canada generated from those assets, would exceed the TSTA; and

(b) if it is an acquisition of voting shares that are:

a. publicly traded, the proposed acquisition must result in the acquiring party, together with its affiliates, holding in excess of 20% of the target corporation's voting interests, unless the acquiring party already owns more than a 20% voting interest, in which case the proposed acquisition must result in the acquiring party holding in excess of 50% of the target corporation's voting interests; or

b. not publicly traded, the proposed acquisition must result in the acquiring party, together with its affiliates, holding in excess of 35% of the target corporation's voting interests, unless the acquiring party already owns more than a 35% voting interest, in which case the proposed acquisition must result in the acquiring party holding in excess of 50% of the target corporation's voting interests.

(iii) Amalgamation⁸:

(a) the aggregate value of the assets in Canada of the continuing corporation, or corporations controlled by it, or the annual gross revenues from sales in or from Canada generated from those assets would exceed the TSTA; and

(b) each of at least two of the amalgamating corporations, together with its affiliates, have assets in Canada, or annual gross revenues from sales in, from or into Canada, that would exceed the TSTA.

(iv) Combination: the aggregate value of assets in Canada of the combination or the annual gross revenues from sales in or from Canada generated from those assets would exceed the TSTA.

5 See subsection 110(9) of the Act.

6 <http://www.competitionbureau.gc.ca>

7 "Voting share" is defined in subsection 108(1) of the Act. Please also refer to Interpretation Guideline No. 5 - Subsection 110(3). Acquisitions of Non-Voting Shares and Convertible Securities, on the Bureau's website.

8 For further information on amalgamations, please refer to Interpretation Guideline No.6 - Section 110(4). Amalgamations, on the Bureau's website.

(v) Acquisition of an Interest in a Combination:

- (a) the aggregate value of the assets in Canada of the combination, or the annual gross revenues from sales in or from Canada generated from those assets, would exceed the TSTA; and
- (b) the acquiring party, together with its affiliates, as a result of the proposed acquisition would be entitled to receive more than 35% of the profits of the combination or of its assets on dissolution, or more than 50% where the acquiring party's interest already exceeds 35%.

Step 4: Exemptions

Where Steps 1 to 3 have been satisfied, the proposed transaction is notifiable unless there is an applicable exemption. Sections 111⁹, 112¹⁰ and 113¹¹ of the Act set out certain statutory exemptions, including general exemptions from the requirement to notify where all parties to a transaction are affiliates¹² of each other, or where the Commissioner has issued an ARC pursuant to section 102 of the Act. Section 15 of the Regulations contains an exemption for asset securitization transactions, as defined in section 2 of the Regulations.

2.3 Further Acquisition of Voting Shares or Interest in a Combination

As noted above, where a person has already exceeded the 20% or 35% threshold for an acquisition of voting shares, or the 35% threshold for an acquisition of an interest in a combination, another Notification (as defined below) under section 114 of the Act will generally be required if the same person will exceed the 50% threshold after making a further acquisition of either voting shares or an interest in a combination. However, where a person intends, at the time of the initial acquisition, to make such a future acquisition, subsection 115(2) of the Act provides that a notice of the intended future acquisition may be given along with the initial Notification. Where such notice is provided, the parties will not be required to supply a Notification under section 114 for the future acquisition if two conditions are met: (i) the future acquisition is carried out in accordance with the notice given under subsection 115(2); and (ii) an additional notice is given in writing to the Commissioner within 21, and at least seven, days before the future acquisition. Pursuant to subsection 115(4) of the Act, the exemption under subsection 115(3) will not apply to a future acquisition that is not completed within one year after the date of notice given under subsection 115(2).

9 Please refer to Interpretation Guideline No.7 – Paragraph 111(d). Creditor Acquisitions, available on the Bureau's website.

10 Please refer to Interpretation Guideline No.4 – Section 112. Exemption for Combinations that are Joint Ventures, available on the Bureau's website.

11 Please refer to Interpretation Guideline No.11 – Corporate Spin Offs, available on the Bureau's website.

12 Please refer to footnote 3.

2.4 Information to be Supplied with the Notification

Subsection 114(1) of the Act provides that parties to a notifiable proposed transaction are required to notify the Commissioner and supply the prescribed information set out in section 16 of the Regulations (collectively, the “Notification”).

2.4.1 Form

The Act does not specify the form in which a Notification must be made; however, to assist parties in compiling the prescribed information, and to assist the Merger Notification Unit (the “MNU”) in making a timely determination of whether the Notification is complete, the Bureau has developed a template form. This form sets out the information required to be submitted pursuant to section 16 of the Regulations, and allows most material to be attached as identified appendices. Parties that are required to submit a Notification are strongly encouraged to use the Bureau’s form, which is available on the Bureau’s website¹³.

Each party is required to certify under oath or solemn affirmation that the information it has supplied is correct and complete in all material respects pursuant to section 118 of the Act. A form of certificate for certifying completeness of the Notification is also available on the Bureau’s website.

In addition to the prescribed information, the form allows for the submission of additional information that may be relevant to the Commissioner’s assessment of the proposed transaction. Parties submitting a Notification are encouraged to volunteer such additional information where it could assist the Commissioner in making a timely decision on whether a transaction should be subject to further proceedings under the Act. The *Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters* (the “Handbook”), which is available on the Bureau’s website¹⁴, contains lists of suggested additional information, to correspond to the complexity level of the transaction.

2.4.2 Information that Cannot be Supplied

Where information that is required to be supplied is

- (i) not known,
- (ii) not reasonably obtainable,
- (iii) cannot be supplied because of the privilege that exists between lawyers and notaries and their client, or
- (iv) cannot be supplied because of a confidentiality requirement established by law,

¹³ <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01705.html>

¹⁴ <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03295.html>

the notifying party may rely on subsection 116(1) and, instead of supplying the information, inform the Commissioner under oath or solemn affirmation as to precisely what information has not been supplied and the reason why it has not been supplied.

2.4.3 Irrelevant Information

Subsection 116(2) of the Act provides that a party submitting a Notification may withhold information that it would otherwise be required to produce on the grounds that the information is not relevant to a competition assessment; provided, however, that the party informs the Commissioner under oath or solemn affirmation of the basis for its determination of non-relevance and identifies the information that is not being supplied. Section 116 affidavits that merely state that information has not been supplied because it is not relevant are unsatisfactory and will not be accepted by the MNU.

In addition, parties relying on subsection 116(2) must provide sufficient information about themselves and their affiliates, including names of affiliates and the nature of their businesses, to allow the MNU to make a determination of whether the omitted information is relevant. Parties that fail to do so assume the risk that their Notification may be considered incomplete, and that commencement of the waiting period will be delayed until additional information is received.

2.4.4 Previously Supplied Information

Pursuant to subsection 116(2.1) of the Act, where information required under section 114 of the Act has been supplied previously to the Commissioner, the notifying party may, instead of supplying that information again, inform the Commissioner under oath or solemn affirmation of the matters in respect of which information has previously been supplied and when it was supplied. Where the information was supplied in respect of another matter, parties are requested to provide the corresponding Bureau file number.

2.4.5 Omitted Information may be Required

Pursuant to subsection 116(3) of the Act, where a person chooses not to supply the Commissioner with information required under section 114 and so informs the Commissioner in accordance with subsection 116(2) (not relevant) or (2.1) (previously supplied), the Commissioner, or a person authorized by the Commissioner, may, within seven days after having been so informed, notify that person that the information is required. In such a case, the person shall supply the Commissioner with the information and the applicable waiting period will only begin upon receipt of that information.

2.4.6 Information Requested does not Exist

In certain instances, a notifying party may determine that information requested as part of the Notification does not exist. For example, where a notifying party does not have any affiliates with significant assets in Canada or significant gross revenues from sales in, from or into Canada, the notifying party should indicate in its Notification that the information does not exist. Leaving the corresponding area on the form blank or writing “n/a” is insufficient and may result in delay, as the MNU must contact the notifying party for clarification.

2.5 Waiting Periods

Paragraph 123(1)(a) of the Act provides that parties submitting a Notification under subsection 114(1) shall not complete the proposed transaction before the expiration of 30 days after receipt of a complete Notification by the Commissioner. Where either waiting period set out in subsection 123(1) of the Act ends on a holiday, the waiting period is extended until the end of the next day that is not a holiday¹⁵.

Further, subsection 114(2) provides that the Commissioner may, within 30 days after receiving a Notification, require the notifying parties to supply additional information that is relevant to the assessment of the proposed transaction. Pursuant to paragraph 123(1)(b), the issuance of a Supplementary Information Request (“SIR”) triggers a second 30-day waiting period during which the proposed transaction cannot be completed. This second 30-day waiting period begins once the parties have provided a complete response¹⁶ and have certified compliance with the SIR. The Bureau has issued the *Merger Review Process Guidelines*¹⁷, which describe the process the Bureau will follow when a decision to issue a SIR has been made.

Following expiration of the applicable waiting period(s), parties are free to complete the proposed transaction unless they have entered into a timing agreement with the Bureau that would preclude them from completing the proposed transaction for a certain period of time or, on application by the Commissioner, the Tribunal has issued an interim order preventing completion of the transaction.

In the following three instances, parties may complete their proposed transaction without waiting the full applicable waiting period set out in subsection 123(1) of the Act:

- (i) pursuant to subsection 123(2), the Commissioner, or a person authorized by the Commissioner, may notify the parties, prior to expiration of the applicable waiting period, that the Commissioner does not intend, at that time, to make an application under section 92 of the Act in respect of the proposed transaction. Such a notification to the parties will be in the form of a “No-Action Letter”;

¹⁵ Please refer to Section 4.2.1 of this Guide for the definition of holiday.

¹⁶ Where the Commissioner is of the view that the responses provided are incomplete, the Commissioner may apply to a court or the Tribunal for an order under section 123.1 of the Act.

¹⁷ <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03128.html>

- (ii) paragraph 113(b) of the Act provides that the issuance of an ARC exempts the transaction from the notifiable transactions provisions in Part IX of the Act. Thus, where a Notification is filed together with an ARC request, the issuance of an ARC prior to the expiration of the applicable waiting period automatically terminates that period; or
- (iii) where information has been supplied in an ARC request, and where that information is substantially similar to the information required under subsection 114(1), the Commissioner, or a person authorized by the Commissioner, may, pursuant to paragraph 113(c) of the Act, waive the notification requirement under subsection 114(1) and, consequently, the applicable waiting period.

Where parties to a proposed transaction complete, or are likely to complete, a proposed transaction before the end of the applicable waiting period, the Commissioner may apply to the Tribunal for an order under section 123.1 of the Act. Possible sanctions under section 123.1 include administrative monetary penalties of up to \$10,000 for each day on which the parties have failed to comply with section 123. The Tribunal may also order the parties not to implement the merger, or to dissolve it in whole or in part.

2.6 Transactions to Which Subsection 114(3) of the Act Applies

Subsection 114(3) of the Act was added to the notification provisions in 1999 to ensure that information required from the target of an unsolicited or “hostile” takeover bid is submitted sufficiently in advance of the expiration of the waiting period. Such timely filing of the information from all parties to a proposed acquisition assists the Bureau in carrying out its assessment of the transaction as expeditiously as possible.

In a hostile takeover situation, where the Commissioner receives a Notification from an acquirer prior to receiving information from the corporation whose shares are being acquired (the “target”), paragraph 114(3)(a) of the Act requires the Commissioner to notify the target immediately that a Notification has been received from the acquirer. Paragraph 114(3)(b) of the Act requires the target to supply the prescribed information within 10 days after being so notified by the Commissioner.

In cases where subsection 114(3) of the Act applies, subsection 123(3) of the Act provides that the waiting period is determined without reference to the day on which the prescribed information is received from the target. In other words, the initial waiting period begins after the Commissioner has received the Notification from the acquirer and, where SIRs have been issued, the subsequent waiting period begins after the Commissioner has received the information requested from the acquirer and the acquirer has certified completeness of its response.

2.7 When Should Parties Notify?

Parties must ensure that a complete Notification is filed sufficiently in advance of the proposed transaction's closing date in order to account for the expiration of the applicable waiting period(s). Generally, parties are encouraged to contact the Bureau at the earliest stage reasonably possible, and certainly as soon as they have an agreement or, in the case of a hostile takeover, definite plans.

When determining filing dates for proposed transactions, parties may wish to consider the following factors:

- (i) While paragraph 123(1)(a) of the Act sets out a minimum 30-day waiting period, the issuance of a SIR pursuant to paragraph 123(1)(b) triggers a second waiting period during which the proposed transaction cannot be completed. The second waiting period ends 30 days after the parties have provided a complete response and have certified compliance with the SIR.
- (ii) While subsection 123(1) of the Act sets out a minimum time period between filing and completion, the Act does not provide a maximum time period for the Bureau to complete its assessment of a proposed transaction. Therefore, parties should be aware that the statutory waiting periods under subsection 123(1) may not match the service standard periods set out in the Handbook. While parties can legally complete their transaction after the end of the applicable waiting period, even if the Bureau has not completed its assessment, they do so at their own risk. Section 97 of the Act provides a one-year period following completion of a transaction during which the Commissioner may choose to challenge the transaction before the Tribunal.
- (iii) Where a party files its materials to coincide with the minimum statutory waiting period and the Commissioner determines that the proposed transaction raises competition issues, the Commissioner may seek from the Tribunal an order temporarily preventing completion of the transaction. Accordingly, parties may wish to consider planning their transactions to take into account the possibility of a more extended review, according to the complexity level of the transaction¹⁸.

Parties that are interested in having the Bureau commence its review of a proposed transaction prior to triggering a statutory waiting period are encouraged to contact the Bureau, and may wish to consider submitting an ARC request only or together with a draft Notification that contains the prescribed information but has not been certified and therefore does not meet the statutory requirements. This may be useful in particularly complex transactions, where it would be inherently difficult for the Bureau to complete its review or sufficiently narrow any anti-competitive concerns within the initial 30-day waiting period. Such an approach may also be useful where parties are seeking to defer market contacts. In this situation, the Bureau may exercise its discretion to agree to defer market contacts, but parties must appreciate that the statutory waiting period and the applicable service standard will not commence until the statutory requirements and the requirements in the Handbook, are satisfied.

¹⁸ For more information about complexity definitions and associated service standard periods, please consult the Handbook.

Prior to filing a Notification, parties should be reasonably certain of their intentions regarding completion of the proposed transaction. Parties who submit a Notification and subsequently abandon the proposed transaction create an unnecessary burden for themselves and for the Bureau, and they are not likely to be entitled to a refund of the fee, except in very limited circumstances. For more information about the Bureau's refund policy, please consult the Handbook.

2.8 Failure to Notify

Parties that complete a notifiable transaction without submitting a Notification under subsection 114(1) may have committed a criminal offence under subsection 65(2) of the Act, and may be liable to a maximum fine of \$50,000. In addition, parties may have contravened section 123, which prohibits completing a transaction prior to expiry of the applicable waiting period, and may be subject to an order under section 123.1 of the Act.

Where a transaction has been completed in violation of the Act, it is important to bring the matter to the attention of the MNU and submit a Notification, together with the applicable filing fee¹⁹ and an explanation for the failure to notify, as soon as possible. The explanation should be submitted by an officer or director of the party, setting out the reasons why the Notification was not filed in a timely manner, how and when the failure was discovered, and what steps have been taken to prevent a violation of the Act in the future.

2.9 Interpretation Guidelines

The Bureau has published a series of Interpretation Guidelines that are intended to assist parties and their counsel in interpreting and applying the provisions of the Act relating to notifiable transactions.

The following interpretation guidelines are available on the Bureau's website at:

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01747.html>:

- Interpretation Guideline No.1 - Section 108. Definition of "operating business"
- Interpretation Guideline No.2 - Section 114. Number of Notices - Multiple Step or Continuous Transactions
- Interpretation Guideline No.3 - Paragraph 111(a). Exemptions for Acquisitions in the Ordinary Course of Business
- Interpretation Guideline No.4 - Section 112. Exemption for Combinations that are Joint Ventures
- Interpretation Guideline No.5 - Subsection 110(3). Acquisitions of Non-Voting Shares and Convertible Securities

¹⁹ Where the failure to notify has been discovered in the course of a subsequent transaction related to the transaction for which there has been a failure to notify, parties will be required to submit a filing fee in respect of the transaction where the failure to notify occurred, as well as in respect of the subsequent transaction.

- Interpretation Guideline No.6 - Subsection 110(4). Amalgamation
- Interpretation Guideline No.7 - Paragraph 111(d). Creditor Acquisitions
- Interpretation Guideline No.8 - Section 103. “Substantially Completed” and Section 119 “Completed”
- Interpretation Guideline No.9 - Shareholder Agreements
- Interpretation Guideline No.10 - Notifiable Transactions Regulations - Transactions and Events in Section 14
- Interpretation Guideline No.11 - Corporate Spin-Offs



3. ADVANCE RULING CERTIFICATES

3.1 Overview

Parties to a proposed transaction may apply for an ARC in lieu of, or in addition to, submitting a Notification. Pursuant to section 102 of the Act, where the Commissioner is satisfied by a party or parties to a proposed transaction that there are insufficient grounds to apply to the Tribunal for a remedial order under section 92, the Commissioner may issue an ARC²⁰. The issuance of an ARC is discretionary; however, an ARC cannot be issued for a transaction that has been completed. Where an ARC is issued, paragraph 113(b) of the Act exempts the named transaction from the notification provisions of Part IX.

Under section 103 of the Act, where the Commissioner issues an ARC and where the proposed transaction to which the ARC relates is substantially completed within one year after the ARC is issued, the Commissioner cannot apply to the Tribunal solely on the basis of information that is the same or substantially the same as the information upon which issuance of the ARC was based; however, where the Commissioner receives additional information that differs substantively from the basis on which the ARC was issued, the Commissioner may apply to the Tribunal for an order under section 92 of the Act. Thus, it is critical that parties provide full disclosure of all information relevant to the proposed transaction and its effect on competition at the time an ARC is requested.

A request for, or issuance of, an ARC will not prevent an inquiry under section 10 of the Act that the Commissioner may cause to be made in respect of any other provision of the Act.

Where an ARC is denied, a No-Action Letter may be issued by the Commissioner, or a person authorized by the Commissioner, indicating that the Commissioner does not, at that time, intend to make an application under section 92 in respect of the proposed transaction.

²⁰ Where parties to a transaction require approval from agencies other than the Bureau prior to closing their transaction, the issuance of an ARC does not derogate from the need to obtain these other approvals.

3.2 Factors Relevant to the Consideration of an ARC Request

Factors to be considered by the Bureau in assessing an ARC request include, but are not limited to, those set out in sections 93 to 96 of the Act. The *Merger Enforcement Guidelines*, which are available on the Bureau's website, provide general guidance on the Bureau's analytical approach to merger review. They describe, to the extent possible given the wide variety of factual circumstances, how the Bureau will conduct its analysis of merger transactions.

3.3 Information to be Submitted with an ARC Request

Unlike the notification provisions in Part IX of the Act, the Act does not stipulate the information that must be supplied to the Commissioner in support of an ARC request. Given that the decision to issue an ARC will be based largely on information received from the party or parties requesting the ARC, parties should supply the Commissioner with all information relevant to the proposed merger and its effect on competition.

An ARC request in respect of a non-complex transaction with no or minimal overlap requires significantly less information than one relating to a non-complex transaction with moderate overlap. Where moderate overlap exists, the information provided should be similar to the information requirements under section 16 of the Regulations²¹. In addition, the parties should focus on the matters listed in section 93 of the Act. The submission of relevant market share information and any related industry studies may also assist in satisfying the Commissioner that there is no competition issue and that an ARC should be issued. Parties requesting an ARC should suggest the wording for a "Re:" line that adequately identifies the transaction and could be used on the ARC.

Where the information supplied with an ARC request is substantially similar to the information required under subsection 114(1) of the Act, the Commissioner may, pursuant to paragraph 113(c) of the Act, waive the requirement to file a notice and supply information under subsection 114(1). Thus, where the possibility exists that an ARC request made in relation to a notifiable transaction could be rejected, parties may also wish to submit a Notification in order to commence the statutory waiting period. The Commissioner is likely to waive notification where the examination of the proposed transaction has been completed and additional information is not required.

3.4 When to Request an ARC

Given that an ARC is available only for proposed transactions, an ARC request should be made as soon as reasonably practicable to ensure that the Bureau has sufficient time to complete its review, having regard to the Bureau's service standards. A prompt request will enable the parties to respond to any concerns or questions the Commissioner may have so that an ARC

21 For further information about the information requirements for non-complex transactions with no or minimal overlap or moderate overlap, please refer to the Handbook.

or No-Action Letter may be issued before the transaction is scheduled to be completed. The Commissioner is obliged under subsection 102(2) of the Act to consider the matter expeditiously. With the full assistance of the parties, the Commissioner is generally able to issue the ARC or No-Action Letter in a timely fashion.

Where a proposed transaction is not notifiable, and parties wish to receive written confirmation that the Commissioner will take no further action in the matter, they should submit an ARC request along with the appropriate fee. Where an ARC is denied, a No-Action Letter may be issued by the Commissioner, or a person authorized by the Commissioner, indicating that the Commissioner does not, at that time, intend to make an application under section 92 in respect of the proposed transaction.



4. PROCEDURAL MATTERS

4.1 Merger Notification Unit

The MNU is responsible for the receipt and initial processing of Notifications and ARC requests, as well as requests for written opinions under section 124.1 of the Act relating to Notifiable Transactions. The MNU also handles other issues regarding the application and interpretation of Part IX of the Act, filing procedures and the notification form, and will provide non-binding verbal assistance in this regard. Where parties are uncertain about whether a proposed transaction is notifiable, whether an exemption is applicable, or the type of information that must be provided to the Bureau, parties are encouraged to contact the MNU for guidance. This informal advice is not binding on the Commissioner, but is provided to facilitate compliance with the law. Parties involved in matters that raise complicated fact scenarios or legal issues are encouraged to seek private legal counsel.

Where a question relating to Part IX of the Act is detailed and complex in nature, it may be preferable for parties to submit their question in writing and to request a written opinion pursuant to section 124.1 of the Act, subject to a fee²². Such written opinions are binding on the Commissioner and remain binding as long as the material facts on which the opinion was based remain substantially unchanged and the transaction is carried out substantially as proposed.

The MNU can be contacted at:

Merger Notification Unit
Mergers Branch, Competition Bureau
Telephone: 819-953-4297 or 819-953-7092
Toll-free: 1-800-348-5358
Fax: 819-953-6169
E-mail: mergernotification@cb-bc.gc.ca

²² For further information regarding written opinions relating to Part IX of the Act, please refer to the Handbook.

4.2 Submission of a Notification or ARC Request

4.2.1 Definitions

For the purpose of this Guide, the following definitions shall apply:

- (i) “business day” means any day that is not a holiday;
- (ii) “business hours” means the hours from 9:00 a.m. to 5:00 p.m. Eastern Time on business days; and
- (iii) “holiday” means any of the following days: Saturday, Sunday, New Year’s Day, Good Friday, Easter Monday, Victoria Day, Québec National Holiday (June 24th), Canada Day, Labour Day, Thanksgiving, Remembrance Day, Christmas Day and Boxing Day. Furthermore, if New Year’s Day, June 24th or Canada Day fall on a Sunday, the following Monday is considered to be a holiday.

4.2.2 Submitting a Notification and/or ARC Request

Notifications and ARC requests may be submitted in paper form or electronically to the MNU during business hours. Notifications and ARC requests may be sent to the MNU in paper copy or electronically, and shall be deemed to be received when delivery is effected to the Bureau Mail Room or the Bureau Mail Server in Gatineau, Québec during business hours. ARC requests that are not voluminous may also be sent by facsimile, and will be deemed to be received when transmission is successfully effected to the MNU during business hours. Any Notification or ARC request received after 5:00 p.m. Eastern Time on a business day, or at any time on a holiday, shall be deemed received by the Commissioner on the next business day²³.

A sample cover letter setting out information that is helpful to the MNU when submitting a Notification or ARC request is attached at Appendix “A”.

4.2.2.1 Paper Copy Notifications and ARC Requests

Paper copy Notifications and ARC requests should be sent to:

Commissioner of Competition
c/o Merger Notification Unit
Mergers Branch, Competition Bureau
50 Victoria Street
Gatineau, Quebec
K1A 0C9

Parties are only required to submit one copy of a Notification or ARC request.

²³ If a Notification or ARC request is received by the Bureau Mail Server between 5:00 pm and midnight on a business day, but it can be demonstrated that it was sent before 4:30 p.m. on that day, it will be deemed received by the Commissioner on that day.

4.2.2.2 Electronic Notifications and ARC Requests

Electronic Notifications and ARC requests should be sent to the following email address: mergenotification@cb-bc.gc.ca.

It is not necessary to send a paper copy of a Notification or ARC request that has been submitted electronically. However, in respect of Notifications, the original affidavits required pursuant to section 118 of the Act (and section 116 if applicable) must be received by the MNU within 48 hours of receipt of the electronic Notification.

Notifications and ARC requests submitted electronically must comply with the following format and size requirements:

- (a) The maximum size limit is 25 megabytes per individual email. If a Notification or ARC request is greater than the maximum size, it can be submitted through a series of emails. Please indicate the total number of emails that comprise the Notification or ARC request.
- (b) Acceptable File Formats:
 - Adobe Acrobat PDF format is preferred;
 - word processing files shall be in either MS Word or WordPerfect;
 - spreadsheets shall be in either MS Excel format or Lotus 123, in a configuration that is readily printable; and
 - presentations shall be in either MS PowerPoint or Lotus Freelance Graphics.

4.2.2.3 Facsimile Transmission of ARC Requests

In addition, where an ARC request is not voluminous, it may be faxed to the MNU at 819-953-6169 during business hours. Please send voluminous documents by courier or electronically and avoid using fax transmission. If the document must be faxed owing to timing concerns, please inform the MNU in advance.

4.2.2.4 Notification may be Submitted by One Party or Multiple Parties

Subsection 114(4) of the Act allows one party to assemble the information of all parties and submit a Notification jointly and on behalf of all parties. Alternatively, each party can submit a portion of the Notification. In this case, the Notification will be considered complete only when the prescribed information as set out in section 16 of the Regulations has been received from all parties²⁴. Regardless of whether a single submission is made or each party submits its portion of the Notification, each party must certify under oath or solemn affirmation that the information it has supplied is correct and complete in all material respects.

²⁴ The one exception is in the case of a hostile acquisition of voting shares, where subsection 114(3) of the Act applies.

Where various parties submit a portion of the Notification, such parties must ensure that at least one party provides the basic information applicable to the proposed transaction (e.g. the transaction description) and that each portion of the Notification is received by the Bureau at approximately the same time, with a cover letter identifying the other parties that will be filing, who will be submitting the fee, and when the Bureau can expect to receive these items.

4.2.3 Fees

Notifications and ARC requests must be submitted with the applicable fee. For information about the Bureau's fees please refer to the Handbook, which is available on the Bureau's website.

4.2.4 Receipt and Acknowledgment of Notifications and ARC Requests

The MNU processes all Notifications and ARC requests received by the Bureau, including confirming to the parties receipt of a submission, reviewing Notifications for completeness, reviewing ARC requests to ensure sufficient information has been provided for the Bureau to commence its review, and assigning a matter number.

Parties submitting a Notification or ARC request can expect to receive the following correspondence from the MNU: (1) where a submission is made electronically, a reply email confirming receipt; (2) a formal acknowledgment confirming receipt of the Notification or ARC request; (3) formal confirmation that a Notification is complete, indicating start and end dates of the initial statutory waiting period or, in respect of an ARC request, confirmation that the Bureau has received sufficient information to commence its review; and (4) an official receipt for the payment of the filing fee.

If a Notification or ARC request is considered incomplete or deficient, the MNU will contact the appropriate party to determine how to remedy the situation.

Following its review of a Notification and/or ARC request, the MNU transfers the file to the case officer(s) responsible for the merger assessment, who will determine the complexity level of the transaction for service standard purposes.

If the Bureau's assessment of the proposed transaction has not been completed by the end of the waiting period and a SIR has not been issued under subsection 114(2) of the Act, the MNU will send the notifying parties a letter on the last day of the waiting period, indicating that the waiting period ends on that date and that the assessment is incomplete.

4.2.5 Withdrawing and Resubmitting a Notification (“Pull and Refile”)

Parties seeking to withdraw a Notification must advise the MNU, in writing, of their desire to withdraw the Notification. If a Notification is withdrawn more than two business days after it was initially received by the Bureau, and the parties thereafter resubmit a Notification (“Subsequent Notification”) under subsection 114(1) of the Act in respect of the same proposed transaction, no fee will be required for the Subsequent Notification if the following conditions are met:

- (i) the Subsequent Notification, specifically as it relates to the prescribed information pursuant to clause 16(1)(c)(iv)(A) and paragraph 16(1)(d) of the Regulations, is current to the date it is received by the Bureau²⁵;
- (ii) the Subsequent Notification is certified pursuant to section 118 of the Act;
- (iii) the Subsequent Notification is received by the Bureau within five business days of the initial notification having been withdrawn;
- (iv) there has been no material change in respect of the proposed transaction; and
- (v) it is the first Subsequent Notification.

If any one or more of these conditions are not met, the Subsequent Notification will be considered a fresh notification and will be subject to the applicable fee and notification requirements.

4.2.6 Foreign Language Documents

The two official languages of Canada are English and French, and the Bureau accepts Notifications and ARC requests in either language. It is not necessary to translate pre-existing documents for the purpose of a Notification; however, if, at the time of filing, there is an English or French language outline, summary, extract or verbatim translation of any part of a foreign language document required to be submitted pursuant to subsection 114(1) of the Act, all such English or French language versions (or one complete translation) shall be filed along with the foreign language document.

Documentary materials or information in a foreign language required to be submitted in response to a SIR pursuant to subsection 114(2) of the Act shall be translated into either English or French. The foreign language document must be submitted with the English or French translation attached thereto.

²⁵ All parties, other than a target that is the subject of an unsolicited bid under subsection 114(3) of the Act are required to submit a Subsequent Notification.

4.3 Submission of Responses to Voluntary Information Requests

During the course of its review of a proposed transaction, the Bureau may request that parties provide additional information on a voluntary basis to assist in completing its review. Responses to such requests may be sent to the case officer(s) in paper form or electronically. Parties intending to submit their response electronically should contact the case officer in advance.

4.4 Confidentiality

Pursuant to subsection 29(1) of the Act, information provided voluntarily or pursuant to sections 102 or 114 of the Act is confidential; however, subsection 29(1) does permit the communication of such information to Canadian law enforcement agencies or for the purposes of the administration or enforcement of the Act. Subsection 29(2) of the Act provides that the confidentiality provisions do not apply in respect of any information that has been made public.

Further information on the Bureau's approach with respect to the communication and use of confidential information obtained in the course of a merger review can be found in the "Information Bulletin on the Communication of Confidential Information under the *Competition Act*," which is available on the Bureau's website²⁶.

26 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01277.html>



5. HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Web site

[www.competitionbureau.gc.ca]

Address

[Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9]

Telephone

[Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired) 1-800-642-3844]

Facsimile

[819-997-0324]



APPENDIX I: COVER LETTER CHECKLIST

Cover letters submitted with Notifications and ARC requests assist in processing documents in a timely manner. The MNU requests that the following information be included in the cover letter.

Attention: Merger Notification Unit

Please ensure that all correspondence, including envelopes and courier packages, clearly indicates that it is to be directed to the attention of the Merger Notification Unit.

“Re:” Lines and Matter Numbers

The “Re:” line is often used to determine how to identify and capture the file for correspondence and databank purposes. It is helpful if all parties to a proposed transaction use the same Re: line, which should clearly indicate who is acquiring whom or what (e.g., “Xcorp acquisition of Ycorp” or “Zcorp sale of receivables to ABC Trust”). In subsequent correspondence, please identify the case by referring to the matter number provided by the MNU in the acknowledgment letter for each Notification and/or ARC request.

What is being Submitted or Requested

Please state clearly on the first page of the cover letter what is being submitted and what is being requested.

Who Acts for Whom; Who Will be Submitting What

Where a Notification or ARC request will be submitted in parts at different times or from different sources, each cover letter should indicate who will be submitting what on behalf of which party, and when any additional information may be expected and from whom. Please provide names and phone numbers of contact persons.

Fees and Official Receipts

Please indicate in the cover letter whether the payment will be made by cheque or wire transfer and, if by cheque, whether the cheque is enclosed and in what amount. If the cheque is not enclosed, please indicate when the MNU can expect to receive it. Please include the name that should appear on the official receipt.

Closing Date

Please indicate the date on which the parties are seeking to close the proposed transaction.

Confidentiality

Please indicate whether the proposed transaction has been made public or when the parties expect to announce it.

Multiple-Step Transactions

If the Notification or ARC request relates to a proposed transaction with a complex, multiple-step structure, please indicate why the transaction should require only one notice and, hence, one fee.