



Pre-Merger Notification Interpretation Guideline Number 13

Satisfying the Information Requirements set out in
section 16 of the Notifiable Transactions Regulations
and Completeness of Notification

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Cat. No. Iu54-35/13-2011E-PDF
ISBN 978-1-100-18449-4
60922

2011-06-20

Aussi offert en français sous le titre Avis d'interprétation no 13 sur les préavis de fusion : Le respect des exigences concernant les renseignements prévus à l'article 16 du Règlement sur les transactions devant faire l'objet d'un avis et l'exhaustivité de l'avis



Enforcement guidelines

June 20, 2011

Notice

This publication replaces the following Competition Bureau publication:

Enforcement Guidelines — Notifiable Transactions under Part IX of the *Competition Act* — Interpretation Guidelines, April 25, 2000

This Interpretation Guideline is issued by the Commissioner of Competition ("Commissioner"), who is responsible for the administration and enforcement of the [Competition Act](#) ("Act"). The purpose of this Guideline is to assist parties and their counsel in interpreting and applying the provisions of the Act relating to notifiable transactions. This Guideline sets out the general approach taken by the Competition Bureau ("Bureau") and supersedes all previous statements made by the Commissioner or other Bureau officials. This Guideline is not intended to be a binding statement of how discretion will be exercised in a particular situation and should not be taken as such, nor is it intended to substitute for the advice of legal counsel to the parties, or to restate the law. Guidance regarding a specific proposed transaction may be requested from the Merger Notification Unit^{[Footnote 1](#)}.

Background

Subsection 114(1) of the Act requires that all parties to a proposed transaction that exceeds the relevant 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 set out in section 16 of the Regulations ("Notification").

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.^{[Footnote 2](#)}

This Guideline addresses various information requirements set out in section 16 of the *Notifiable Transactions Regulations* ("Regulations")^{[Footnote 3](#)} that are often misinterpreted and discusses how parties can best satisfy these requirements to avoid a determination by the MNU that their notification is incomplete. Where parties have questions regarding the information required to be supplied with a Notification, they are strongly encouraged to consult the MNU in advance of submitting a Notification. Parties may also wish to consult the Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the *Competition Act* ("Procedures Guide").^{[Footnote 4](#)}

Policy

1. Information required to be submitted with a notification

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 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 website.^{[Footnote 5](#)}

Each informational requirement must be fully addressed. In certain instances, a notifying party may determine that information requested as part of the Notification does not exist, in which case 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. Where required information is not being provided for another reason, such as one of the reasons set out in section 116 of the Act, the notifying party must ensure that it has fully complied with the requirements of the applicable subsection.^{[Footnote 6](#)}

a. Significant affiliates

Subparagraph 16(1)(c)(iii) requires that, for each party, "a list of its affiliates that have significant assets in Canada or significant gross revenues from sales in, from or into Canada..." be provided. For purposes of determining whether an affiliate or affiliates of a party can be excluded on the basis of not being considered significant, the Bureau generally considers assets in Canada or gross revenues from sales in, from or into Canada not to be significant if they are worth \$500,000 or less for each excluded affiliate and the total value of all of the excluded affiliates is \$1,000,000 or less.

b. Principal businesses

Subparagraph 16(1)(c)(iv) requires that a description of the principal businesses of each party and of its affiliates be provided. While "principal businesses" is not defined in the Regulations, the description by a notifying party of its principal businesses should be consistent with how the principal businesses are identified and described in documents prepared by the notifying party, and/or its affiliates, in the ordinary course of business. Such documents include annual reports, financial statements, annual information forms (or 10-K reports for U.S. corporations), prospectuses and other documents filed with securities commissions, stock exchanges or other similar authorities in Canada or elsewhere.

c. Interim financial statements

Clause 16(1)(c)(iv)(A) requires that the notifying party provide its most recent annual report and the most recent annual report of each of its affiliates. Where an annual report is not available or the financial statements are different from those contained in the report, the notifying party must provide for itself and each of its affiliates, audited financial statements relating to all principal businesses for the most recently completed fiscal year and financial statements for subsequent interim periods. Financial statements for subsequent interim periods must be provided whenever available, and not only if the annual report is not available or if the financial statements are different from those contained in the report.

4 Pre-Merger Notification Interpretation Guideline Number 13
Satisfying the Information Requirements set out in section 16 of the Notifiable Transactions Regulations and Completeness of Notification

d. Information relating to customers and suppliers

Clause 16(1)(c)(iv)(C) requires the notifying party to provide for itself and each of its affiliates, the twenty **most important current** suppliers and customers for each principal category of products. In addition, the contact name, telephone number and address of those suppliers and customers must be provided together with the annual volume or dollar value of purchases from and sales to those suppliers and customers.

Full contact names, or at least a surname and a form of address (Mr., Ms, Dr., etc.), telephone numbers and addresses must be provided. Notifying parties are expected to make reasonable enquiries to determine this information before making a claim pursuant to subsection 116(1) of the Act that certain of the required information is not known or not reasonably obtainable.^{[Footnote 7](#)}

The **most important** suppliers and customers should be determined based on annual volume or dollar value.

Notifying parties often submit customer and supplier information that relates to the most recent completed fiscal year instead of information relating to **current** customers and suppliers. While information regarding annual volumes or dollar values associated with each customer or supplier must be as current as possible, a Notification that includes customer and supplier information that relates to the most recent completed fiscal year, as opposed to current information, will not typically be determined to be incomplete on this basis. However, notifying parties should consider, as a best practice, providing customer and supplier information for a 12-month rolling period, as of the last month prior to the submission of the Notification, or supplementing information relating to the most recently completed fiscal year with year-to-date information.

It is not uncommon for notifying parties to provide the twenty most important current Canadian suppliers and customers in their Notification. A Notification that includes such information will typically not be determined to be incomplete on this basis, as Canadian customers and suppliers are often more relevant for the purposes of the Bureau's analysis.

Notifying parties sometimes provide a list of fewer than 20 customers or suppliers, indicating that they do not maintain contact information for the remaining small customers or suppliers. A Notification that includes information in respect of fewer than 20 customers or suppliers will not typically be determined to be incomplete, provided that the customers or suppliers listed account for at least 95% of sales or purchases.

With respect to supplier information, a notifying party can typically omit from its Notification information relating to its general suppliers (e.g. landlords, utilities, legal services providers, office supply companies, etc.), as this information is typically not relevant to whether or not the proposed transaction would likely prevent or lessen competition substantially. Where a notifying party chooses to omit information relating to general suppliers and only provide information relating to suppliers that are relevant to industries in which the parties to the proposed transaction are involved, the notifying party should make the appropriate claim pursuant to subsection 116(2) of the Act.^{[Footnote 8](#)}

e. Officer or director

Paragraph 16(1)(d) requires that the following information be provided:

16. (1)(d) "...in respect of each party, and each of its affiliates referred to in subparagraph (c)(iii), all studies, surveys, analyses and reports that were prepared or received by an officer or director of the corporation — or in the case of an unincorporated entity, an individual who serves in a similar capacity — for the purpose of evaluating or analysing the proposed transaction with respect to market shares..."

The Regulations do not define "officer" or "director". A person will typically be considered an officer or director where that person's position is either designated by the bylaws or articles of the corporation or that person is appointed by the Board of Directors. With respect to non-corporate entities, a person whose position is designated in a similar manner will similarly typically be considered an officer or director.

f. Produced, supplied, distributed and capacity

Various paragraphs of section 16 of the Regulations use the terms "produced", "supplied", "distributed", and "capacity". These terms should be interpreted broadly and, if there is any doubt, parties are strongly encouraged to consult the MNU in advance of submitting a Notification.

g. Hyperlinks

Subsection 16(2) provides that:

16. (2) Instead of being supplied with a report or financial statement referred to in clause (1)(c)(iv)(A), the Commissioner may be supplied with the address of an Internet site from which a copy of those documents can be obtained without charge, which is operational at the time the address is supplied and which remains operational prior to the expiry of the period referred to in subsection 123(1) of the Act.

Subsection 16(2) facilitates the electronic submission of documents prescribed by clause 16(1)(c)(iv)(A) by referencing the addresses of Internet sites from which a copy of each document can be obtained. Where the Internet address provided as a source is inoperative at the time the Notification is verified for completeness, or the document(s) that is linked to it is incomplete, or payment is required to access the document(s), the notifying party will be advised as expeditiously as possible to make these documents available by either referencing an operative Internet address or by providing electronic or paper copies to the MNU. The Notification will be considered incomplete and the applicable waiting period will not commence until such time the documents are made available to the Bureau.

2. Confidentiality claims pursuant to subsection 116(1) of the Act

For the purpose of subsection 116(1), it is the Bureau's position that a confidentiality requirement established by law includes a statutory or common law confidentiality requirement (such as solicitor-client privilege), but not a contractual confidentiality requirement. If a party claims that information cannot be provided because such disclosure would create a significant risk that confidential information will be used for an improper purpose or that information that must, for commercial reasons, be kept confidential will be disclosed to the public, it is up to the party making the claim to provide evidence and explain why the protections under section 29 of the Act are not sufficient.

3. Incomplete notifications

A Notification that includes documents or appendices that have not been provided in their entirety or where any portion of an affidavit (including the signature) is omitted, the Notification will typically be considered incomplete. In such cases, the notifying party will be advised as expeditiously as possible, the Notification will not be considered complete, and the applicable statutory waiting period will not commence until all required information is received.

Where the omission is inadvertent, and only a small number of pages are missing (or unreadable), the Bureau's discretion to exercise some flexibility may be warranted, depending on the particular facts and at the discretion of the Bureau. In such instances, the notifying party will be given up to 24 hours from when the MNU notifies them of the omission, to provide the inadvertently omitted information without impacting the date upon which the Notification is determined to be complete. If the notifying party does not fully respond within this 24 hour period, the Notification will not be determined to be complete until the omitted information is received.

For further information, please contact:

Merger Notification Unit

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Toll-free: 1-800-348-5358
Fax: 819-994-0998

E-mail: ic.avisdefusionmergnotification.ic@canada.ca

Footnotes

Footnote 1

For further information, please refer to the [Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the *Competition Act*](#) at p.14.

Footnote 2

In the case of a hostile transaction or an unsolicited bid 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. Thus, the initial waiting period begins after the Commissioner has received a complete Notification from the acquirer.

Footnote 3

[Notifiable Transactions Regulations \(SOR/87-348\)](#)

Footnote 4

[Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the Competition Act.](#)

Footnote 5

[Notifiable transactions—Form and certificate.](#)

Footnote 6

For further information, please refer to section 2.4 of the Procedures Guide.

Footnote 7

Any required information that cannot be supplied because it is not known or not reasonably obtainable must be identified pursuant to subsection 116(1) of the Act. Parties are encouraged to identify missing information at or near the place in the notification form where such information would have been provided, with a cross-reference to a statement under oath or solemn affirmation that complies with section 116.

Footnote 8

For further information, please refer to section 2.4 of the Procedures Guide.