



# Hostile Transactions Interpretation Guideline Number 2

Bureau Policy on Running of Subsection 123(1)

Waiting Periods

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## Enforcement guidelines

July 21, 2011

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](#).

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## Background

The 1999 amendments to the *Competition Act* ("Act") included the addition of subsection 114(3) to the pre-merger notification provisions to ensure that information required from the target of an unsolicited or "hostile" takeover bid ("unsolicited bid") is received by the Competition Bureau ("Bureau") sufficiently in advance of the expiration of the statutory waiting period. Such timely filing of information from all parties to a proposed acquisition assists the Bureau in reviewing the transaction as expeditiously as possible.

In the context of an unsolicited bid, where the Commissioner of Competition ("Commissioner") receives notice and the prescribed information under subsection 114(1) of the Act from the bidder prior to receiving information from the corporation whose shares are being acquired ("target"), paragraph 114(3)(a) of the Act requires the Commissioner to immediately notify the target that the prescribed information has been received from the bidder. Paragraph 114(3)(b) of the Act requires the target to supply the Commissioner with the prescribed information within 10 days after being so notified.

Where subsection 114(3) of the Act applies, subsection 123(3) of the Act provides that the waiting periods referred to in subsection 114(1) shall be determined without reference to the day on which the information required under section 114 is received from the target (being either the prescribed information required pursuant to subsection 114(1) or additional information required under subsection 114(2)). Thus, the initial 30-day waiting period begins after the Commissioner has received a complete notification from the bidder. Similarly, where supplementary information requests ("SIRs") are issued, the subsequent 30-day waiting period begins after the Commissioner has received the information requested from the bidder and the bidder has certified that its response is correct and complete in all material respects, assuming the Bureau has not challenged the completeness of those responses. Accordingly, in the context of an unsolicited or hostile transaction, the target is not able to affect the commencement of the relevant waiting period under subsection 123(1).

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## Policy

The applicability of subsections 114(3) and 123(3), respectively, requires that the proposed transaction constitute an unsolicited bid when the relevant waiting period under subsection 123(1) is to be commenced. If the proposed transaction does not constitute an unsolicited bid at that time, the relevant waiting period in subsection 123(1) will apply, without impact from subsection 114(3).

For further clarity, where there is a change in status of an unsolicited bid such that it is no longer unsolicited during the running of either waiting period under subsection 123(1), such change in status will have no effect on the running of that waiting period (i.e., the applicable waiting period will not be halted or restarted owing to the change in status of the transaction).

## Discussion

### **1. Where a proposed transaction ceases to be an unsolicited bid within the initial 30-day waiting period.**

Where subsection 114(3) of the Act applies at the time a bidder submits its pre-merger notification filing, and during the initial 30-day waiting period the proposed transaction ceases to be an unsolicited bid, the Bureau is of the view that this has no effect on the running of this waiting period.

### **2. Where a proposed transaction ceases to be an unsolicited bid after the issuance of a SIR, but prior to the bidder having certified completeness of its response to the SIR.**

At the time the bidder certifies completeness of its response to the SIR, the Bureau will assess whether the proposed transaction is an unsolicited bid. If the Bureau is of the view that it is, the subsequent 30-day waiting period will commence when the bidder has certified that its response to the SIR is correct and complete in all material respects in accordance with subsection 123(3), provided the Bureau has not challenged the completeness of the response. However, where the Bureau determines that the proposed transaction is not an unsolicited bid at the time that the bidder certifies completeness, the Bureau is of the view that subsections 114(3) and 123(3) are not applicable, and the subsequent 30-day waiting period does not commence until all parties, including the target, have submitted certified complete responses to their respective SIR and the Bureau has not challenged the completeness of any of those responses.

### **3. Where a proposed transaction ceases to be an unsolicited bid within the subsequent 30-day waiting period.**

In the Bureau's view, where a proposed transaction ceases to constitute an unsolicited bid after the commencement of the subsequent 30-day waiting period under paragraph 123(1)(b), this will have no effect on the running of that period

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**Footnote**

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.