



# Pre-Merger Notification Interpretation Guideline Number 12

Requirement to Submit a New Pre-Merger  
Notification and/or Advance Ruling Certificate  
Request Where a Proposed Transaction is  
Subsequently Amended

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*Aussi offert en français sous le titre Avis d'interprétation no 12 sur les préavis de fusion : Obligation de soumettre un nouveau préavis de fusion ou une nouvelle demande de certificat de décision préalable lorsqu'une transaction proposée est modifiée par la suite.*



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## Enforcement guidelines

April 25, 2014

## Preface

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 relating to the content described herein. 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 ("MNU"). [Footnote 1](#)

This Guideline describes common amendments to proposed transactions and discusses whether such amendments would typically require parties to file a new notification and/or request for an Advance Ruling Certificate ("ARC"). The Guideline applies where an amendment is made:

1. while the Bureau's review is ongoing and
2. after an ARC or a No-Action Letter has been issued by the Bureau, but prior to the closing of the proposed transaction.

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## 1. Background

All parties to a proposed transaction that exceeds the relevant monetary thresholds set out in sections 109 and 110 of the Act are required by section 114 to notify the Commissioner and supply the prescribed information set out in section 16 of the *Notifiable Transactions Regulations* ("notification") prior to completing the transaction. Further, in accordance with section 118 of the Act, each party is required to certify under oath or solemn affirmation that the information it has supplied in the notification is, to the best of its knowledge and belief, correct and complete in all material respects at the time of filing. The initial 30-day waiting period set out in paragraph 123(1)(a) will commence once the Commissioner has received a complete notification.

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 a request for an ARC. Parties should supply the Commissioner with all information relevant to the proposed transaction and its potential effect on competition. [Footnote 2](#)

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## 2. Policy

Where a proposed transaction is amended following receipt of an ARC request or a complete notification by the Commissioner, parties may be required to submit a new notification or ARC request, as applicable.

1. In situations where the information supplied with the original notification is not correct and complete in all material respects relative to the amended transaction, parties will be required to submit a new notification.
2. In situations where the amendment to the proposed transaction that is the subject of the original ARC request results in the Bureau having to conduct a more in-depth or different competitive effects analysis, parties will be required to submit a new ARC request.

In most cases, an amendment to a transaction will have the same impact on a notification and an ARC request. However, in some specific instances, the same amendment may have different implications for a notification than an ARC request because the Act prescribes the information that must be supplied with a notification, but does not stipulate the information that must be supplied with an ARC request.

Parties are encouraged to consult the MNU when considering delaying the submission of a notification or ARC request because of concerns that a particular aspect of a proposed transaction may not be final or may be subject to change, which may require a new notification or ARC request. The effect of submitting a new notification and/or ARC request on statutory waiting periods and service standards, as applicable, and filing fees is discussed in section 4 of this Guideline.

### 2.1 Notification

Section 118 of the Act requires that the information supplied with a notification be "*correct and complete in all material respects*" at the time of filing. Where a transaction is amended such that the information supplied with the original notification is not correct and complete in all material respects relative to the amended transaction, parties will be required to submit a new notification.

In determining whether the information supplied with a notification is correct and complete in all material respects relative to an amended transaction, the Bureau will consider, among other things:

1. the description of the proposed transaction and the parties;
2. the relationship of an added party to the other parties to the transaction (e.g., affiliate, customer, supplier or competitor);
3. whether a redistribution of assets or ownership interests among the existing parties to the transaction would increase the ownership interest to be acquired by a party by 10% or more, or would cause a party to exceed a new subsection 110(3) or (6) ownership threshold;
4. where a new asset is added, whether that asset is non-operational or ancillary to existing assets; and
5. where an operational asset is added, whether that asset creates or enhances a competitive overlap (horizontal or vertical) between the businesses of the parties to the transaction.

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## 2.2 ARC request

A new ARC request will be required<sup>[Footnote 3](#)</sup> where an amendment to a proposed transaction results in the Bureau having to conduct a more in-depth or different analysis regarding the competitive effects of the amended transaction.

In making this determination, the Bureau will consider, among other things, the factors set out in section 2.1 above, and:

1. whether the complexity designation and the information required to commence the service standard for the amended transaction differs from the original proposed transaction; and
2. where there is a redistribution of assets or ownership interests among the parties, whether the original ARC request contemplated such a redistribution.

## 3. Examples

Below are examples of common amendments to transactions and discussion about whether or not such amendments will typically require parties to file a new notification and/or ARC request.

### 3.1 Addition of a new party

#### *3.1.1 Notification*

Where a transaction is amended to add a new party, a new notification providing the prescribed information for the added party must typically be submitted as all parties to a proposed transaction that is subject to Part IX of the Act are required under section 114 to notify the Commissioner of the proposed transaction and supply the prescribed information.

There are, however, some circumstances where the addition of a new party is unlikely to require a new notification, as the original notification is likely to continue to be correct and complete in all material respects. These include amendments where:

1. the added purchaser proposes to acquire less than a 10% ownership interest;
2. the added party is an affiliate of an existing party, other than a significant affiliate<sup>[Footnote 4](#)</sup> whose prescribed information was not submitted with the notification;
3. the added party already controls the target;
4. the added party is a new vendor in a share transaction (see subsection 109(2) of the Act); and
5. the added party is a guarantor.

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### 3.1.2 ARC request

Where a proposed transaction that is the subject of an ARC request is amended to add a new party, the Bureau will require information relating to the added party to determine whether a more in-depth or different competitive effects analysis is required. In making this determination, the Bureau will consider, among other things:

1. the relationship of the added party to the other parties to the transaction. For example, the addition of a competitor, potential competitor, customer or supplier will typically require a new ARC request;
2. whether the added party is a purchaser or a vendor. For example, a new vendor, guarantor or affiliate of an existing party will typically not require a new ARC request;
3. the interest to be acquired by the added party and the ability of this new purchaser to influence the economic behaviour of the target business. For example, where the added party will be acquiring, absent any shareholder, pooling, voting or other agreement affecting how shares or interests are voted, an interest of less than 10% in the assets or combination that are the subject of the proposed transaction or of the voting shares of the target corporation, a new ARC request will typically not be required. Alternatively, where the added party will be acquiring an interest of 10% or more, absent a clear indication otherwise, the Bureau must consider the ability of the new purchaser to influence the economic behaviour of the business. This analysis will normally require a new ARC request. [Footnote 5](#)

### 3.2 Addition of a new asset

Where a proposed transaction is amended to include an additional asset, whether a new notification or ARC request will be required will depend on the nature of the asset.

For example, where the asset being added does not relate to the operational aspects of the business that is the subject of the proposed transaction (e.g., an administrative building in the case of a manufacturing business), or the asset being added is ancillary to the other assets being acquired, a new notification or ARC request will not typically be required. In evaluating whether an asset is non-operational or ancillary, the Bureau will consider both qualitative and quantitative factors, including the book value of the added asset and its size in relation to existing assets.

Where an operational asset is added, a new notification or ARC request will be required, unless the parties can demonstrate clearly and unequivocally that the new asset does not create or enhance any competitive overlap (horizontal or vertical) between the businesses of the parties, assuming properly defined product and geographic markets.

### 3.3 Addition of new voting shares or the redistribution of assets, voting shares or ownership interests [Footnote 6](#)

Where a proposed transaction is amended to:

1. increase the voting shares to be acquired by an existing party, whether through the addition of new shares or the redistribution of shares among purchasers; or

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2. increase the ownership interest of one or more purchasers as a result of a redistribution of interests in an asset or combination,

and the increase does not cause an existing party to obtain an additional 10% voting interest, or to exceed a new subsection 110(3) or 110(6) ownership threshold, a new notification or ARC request<sup>[Footnote 7](#)</sup> will not typically be required. Further, if the party acquiring the additional voting shares already holds more than a 50% voting interest, the acquisition of any additional voting interest by that party will not require a new notification or ARC request.

In all other instances, the Bureau will consider whether the original notification is correct and complete in all material respects relative to the amended transaction, in particular the description of the proposed transaction. In the case of an ARC request, a more in-depth or different competitive effects analysis is often required to determine whether the amendment impacts the ability of one or more of the existing parties to the transaction to influence the economic behaviour of the target business.

### **3.4 Removal of an asset or party**

Where an asset or party is removed from a proposed transaction, a new notification and/or ARC request is not normally required as:

1. the information supplied with the notification will continue to be correct and complete in all material respects relative to the amended transaction; and
2. such a change will not affect the competitive effects analysis.

However, as discussed in section 3.3 above, where the removal of a party results in an existing purchaser increasing its ownership interest, a new notification and/or ARC request may be required.

## **4. Submitting a new notification or ARC request**

When submitting a new notification, parties may rely on subsection 116(2.1) of the Act to avoid resubmitting information that has previously been supplied to the Commissioner, provided that the requirements of that subsection are met.

Where the amendment to a transaction involves the addition of a party, receipt of a notification from the added party containing an accurate description of the amended transaction and the parties to the transaction (as well as other prescribed information in respect of the added party), and a certification under sections 116(2.1) and 118 of the Act, will typically be sufficient. The initial 30-day waiting period will only commence upon receipt of the complete filing from the added party.

### **4.1 Commencement of initial waiting period where a new notification is required**

Where a new notification is required, the amended transaction will be considered a new transaction and the initial 30-day waiting period will only commence upon receipt by the Commissioner of a complete filing in respect of the amended transaction.

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## 4.2 Requirement to pay filing fee

Where a new notification and/or ARC request is required, parties must also pay the applicable filing fee, except where parties have filed both a notification and an ARC request and the amendment to the transaction only requires one of them to be resubmitted. In this latter instance, because either the initial ARC request or notification does not need to be updated with respect to the amended transaction, a new filing fee is not payable as the *Competition Bureau Fees and Service Standards Policy for Mergers and Merger-Related Matters* ("Merger Fees Policy") provides that only one fee applies where both a notification and an ARC request are submitted with respect to the same proposed transaction.<sup>[Footnote 8](#)</sup>

Parties may also want to consider whether they are entitled to rely on the Bureau's refund policy. Where parties withdraw their notification and/or ARC request within two business days of receipt by the Bureau, parties may be entitled to a refund. For further information on the Bureau's refund policy, please refer to the Merger Fees Policy.

**For further information, please contact:**

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## **Footnotes**

### Footnote 1

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

### Footnote 2

Detailed guidance on the Bureau's policy regarding information typically required in an ARC request is outlined in section 3.3 of the [\*Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters\*](#).



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Footnote 3

The decision to seek an ARC is in the discretion of parties to a proposed transaction. For the purpose of this Guideline, it is assumed that following an amendment to a proposed transaction, the parties thereto will continue to seek an ARC. Accordingly, references to a new ARC request being "required" should be read in this manner.

Footnote 4

Subparagraph 16(1)(c)(iii) of the *Notifiable Transactions Regulations* 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 the purposes of determining whether an affiliate, or affiliates, of a notifying party can be excluded on the basis of it not being considered "significant", the Bureau generally considers that an affiliate is not "significant" if neither the book value of its assets in Canada nor its annual gross revenues from sales in, from or into Canada exceeds \$500,000, and neither the total value of assets nor the total value of revenues of all of the excluded affiliates exceeds \$1,000,000.

Footnote 5

Refer to the discussion of significant interest, partial interests and interlocking directorships in the *Merger Enforcement Guidelines* for further details regarding factors that the Bureau may consider in conducting its analysis.

Footnote 6

This section relates only to existing purchasers; it does not contemplate the addition of new purchasers. Refer to the discussion of significant interest, partial interests and interlocking directorships in the *Merger Enforcement Guidelines* for further details regarding factors that the Bureau may consider in conducting its analysis.

Footnote 7

In the case of an ARC request, the existence of a shareholder, pooling, voting or other agreement affecting how shares or interests are voted may affect that determination.

Footnote 8

See the [\*Competition Bureau Fees and Service Standards Policy for Mergers and Merger-Related Matters\*](#); also refer to the [\*Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters\*](#).