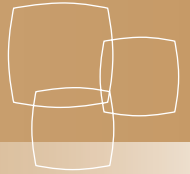
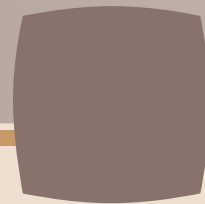
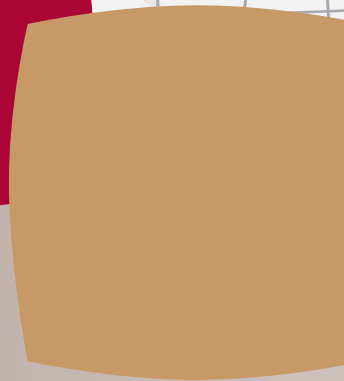
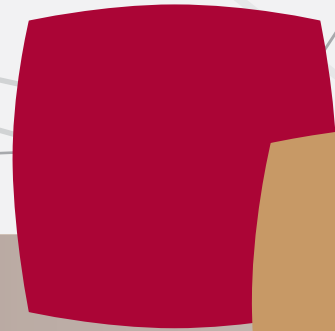




Bulletin



**Communication  
during Inquiries**



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# PREFACE

The Competition Bureau (the “Bureau”), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the “Act”), the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The Bureau has issued this Information Bulletin on *Communication during Inquiries* (the “Bulletin”) to promote transparency about the Bureau’s work and compliance with the Act.

Transparency regarding the Bureau’s enforcement approach and associated procedures improves predictability and helps businesses and consumers make informed decisions. It also increases confidence in the consistency and fairness of Bureau processes and, ultimately, Bureau decisions. Accordingly, the Bureau works continually to enhance understanding of its work through a wide range of initiatives, including the publication of new and updated guidance material.

The Bureau is required by law to conduct its investigations in private, and is bound by the confidentiality provisions of the Act. The Bureau must balance the benefits of transparency with its legal obligations and the preservation of its enforcement discretion.

Accordingly, this Bulletin does not provide a binding statement of how the Bureau will proceed in every case. While the Bureau will endeavour to follow the process described below, the Bureau will apply appropriate discretion depending on the facts of each case.

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

**John Pecman**  
Commissioner of Competition



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# I. INTRODUCTION

This Bulletin summarizes when and how the Bureau generally communicates with parties whose conduct is being inquired into pursuant to section 10 of the Act (“Parties”), industry participants, complainants and the general public after an inquiry has been commenced pursuant to section 10 of the Act (an “Inquiry”).

Subsection 10(3) and section 29 of the Act provide the statutory framework that guides the Bureau’s communications with Parties and other stakeholders during an Inquiry. Subsection 10(3) requires that all Inquiries be conducted in private. Section 29 imposes obligations on persons performing duties in the administration or enforcement of the Act, subject to certain exceptions.<sup>1</sup>

The preservation of enforcement discretion and legal privileges that apply to the Bureau’s work are very important to ensure that Inquiries are informed by all relevant sources and are approached on a case-by-case basis, taking into consideration the unique set of facts and considerations that apply in each case.

The specific facts of a case, situations of ongoing harm, situations that require immediate action, the nature of the information available, the nature of the Inquiry and other relevant circumstances may require the Bureau to take a different approach to its communication with Parties and other stakeholders during an Inquiry.

As such, this document is not a binding statement of how an Inquiry will be carried out, or when and how the Bureau will communicate with any particular Party or other stakeholder in any particular case. However, the Bureau will generally endeavour to follow the process described in this Bulletin.



<sup>1</sup> For further information, please consult the Bureau's Information Bulletin on the [Communication of Confidential Information under the Competition Act](#).

## 2. COMMUNICATION WITH PARTIES

The Bureau seeks to provide Parties with timely and predictable opportunities to engage in dialogue to resolve matters in a manner that preserves the Commissioner's discretion and other enforcement interests, including applicable privileges and statutory obligations.

Provided that doing so could not adversely affect the Commissioner's discretion or compromise an investigation, the Bureau is committed to ensuring that Parties are notified, as early as is appropriate, of:

- the commencement or discontinuance of an Inquiry;
- the provisions of the Act to which the Inquiry relates;
- the general nature of the conduct being inquired into; and
- the Case Officer at the Bureau that may be contacted with respect to the Inquiry.

It is important to note that the Bureau will not always provide Parties with notice prior to taking steps to enforce the Act. For example, it will continue to be appropriate for the Bureau to seek *ex parte* orders, such as orders under section 11 of the Act, search warrants under sections 15 and 16 of the Act, communications intercepts or production orders under the *Criminal Code*, and interim or temporary orders under sections 33, 74.11, 74.111, 100 or 103.3 of the Act.

Parties also have rights to information at various stages of the process. The Act provides that Parties are entitled to certain information, including:

- to be informed as to the progress of the Inquiry, upon written request (Subsection 10(2)); and
- to inspect a record or other thing produced pursuant to section 11, or from whom a record or other thing is seized pursuant to section 15 or 16, at any reasonable time and subject to such reasonable conditions as may be imposed by the Commissioner (subsection 18(2)).

Once the Commissioner has filed an application or action before a court or the Competition Tribunal (the "Tribunal"), or a charge has been laid, Parties will obtain information pursuant to applicable discovery and disclosure processes. Parties and other stakeholders may also access information available through the open court system in Canada.

In addition to the above obligations, the Bureau recognizes that dialogue with Parties generally facilitates resolutions and helps to avoid protracted litigation. The Bureau prefers to engage in dialogue with Parties who demonstrate a commitment to resolving the matter. For greater



certainty, a resolution to a matter could take many forms along a continuum ranging from the discontinuance of an inquiry to a consent or plea agreement, depending upon the circumstances relevant to an Inquiry.<sup>2</sup>

Section 2.1 of the Bulletin describes the process that the Bureau will generally follow with respect to dialogue with Parties who are not cooperating with the Bureau pursuant to the *Immunity Program under the Competition Act*<sup>3</sup> or the *Leniency Program*<sup>4</sup> (“Non-cooperating Parties”) in the course of Inquiries related to Parts VI and VII of the Act (“Criminal Inquiries”). Section 2.2 of the Bulletin describes the process that the Bureau will generally follow with respect to dialogue with Parties in the course of Inquiries related to Parts VII.1 or VIII of the Act (“Reviewable Conduct and Merger Inquiries”).

## 2.1 Criminal Inquiries

The following section relates to communications with Non-cooperating Parties whose conduct is being inquired into pursuant to subparagraph 10(1)(b)(iii) of the Act. The Bureau’s dialogue with parties who are cooperating with the Bureau during an Inquiry is governed by the *Immunity Program under the Competition Act*<sup>5</sup> or the *Leniency Program*<sup>6</sup> and may differ from the approach to a Non-cooperating Party for this reason.

Parties may approach the Bureau at any time to resolve a criminal matter prior to referral to the Director of Public Prosecutions (“DPP”) for prosecution.<sup>7</sup> The Bureau’s Immunity and Leniency Programs provide a clear framework for co-operation and the provision of information by cooperating parties during investigations related to Part VI of the Act. However, the DPP has the sole authority to engage in settlement, plea and sentencing discussions with counsel for an accused.

### 2.1.1 Commencement of Inquiry

Provided that doing so could not adversely affect the Commissioner’s discretion or compromise an investigation, as early as is appropriate once an Inquiry has been commenced, the Bureau will, where reasonably possible, contact Parties to notify them that they are the subject of an Inquiry. At that time, the Bureau will indicate the general nature of the conduct under Inquiry, identify the provision(s) of the Act under which the conduct is being examined and provide

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2 For further information on the continuum of resolutions, please consult the Bureau’s Information Bulletin on the [Conformity Continuum](#).

3 For further information, please consult the Bureau's Information Bulletin on the [Immunity Program under the Competition Act](#).

4 For further information, please consult the Bureau's Information Bulletin on the [Leniency Program](#).

5 For further information, please consult the Bureau's Information Bulletin on the [Immunity Program under the Competition Act](#).

6 For further information, please consult the Bureau's Information Bulletin on the [Leniency Program](#).

7 For greater certainty, this Information Bulletin applies to communications with the Bureau before the Commissioner has remitted evidence to the Attorney General of Canada pursuant to section 23 of the Act for consideration as to whether an offence contrary to the Act has been committed.

the contact details for the Case Officer assigned to the matter. Depending on the particular circumstances, the Bureau may contact Parties only after the Parties have been made aware of an investigation through other means such as the execution of a search warrant.

When parties have been notified that they are the subject of an Inquiry and in the absence of any other communication, the Bureau will, where reasonably possible, ordinarily contact Parties approximately every six months to confirm that the Inquiry is ongoing. If a decision is made to refer the matter to the DPP with a recommendation to prosecute, the Bureau will notify the Parties at or around the time that such a recommendation is made to the DPP.

### 2.1.2 Discontinuance of Inquiry and Alternative Case Resolution

If a decision is made to discontinue an Inquiry under section 22 of the Act, Parties will be notified. Where the Commissioner has not referred a matter to the DPP, the Bureau may determine that it is appropriate to resolve the matter by way of an alternative case resolution.<sup>8</sup> In that event, Parties will be contacted by the Bureau to discuss the issues or conduct identified and the appropriate alternative case resolution mechanism to address such conduct.

In the event of a discontinuance or alternative case resolution, the Bureau may indicate that it will actively monitor the situation for a period of time, with a view to re-opening the investigation in the future, if warranted.

Where the Bureau determines that its examination of the issues during an Inquiry may provide guidance to facilitate compliance with the Act, the Bureau may issue a position statement to the public summarizing its main findings, as outlined in section 3.3.2 of the Bulletin.

### 2.1.3 Dual-Track Inquiries

Certain conduct can be investigated under either the criminal or reviewable conduct provisions of the Act. For example, certain agreements between competitors can be considered under either the criminal cartel provision (section 45) or under the civil agreements provision (section 90.1).<sup>9</sup> Similarly, false or misleading representations to the public can be considered under either a criminal (section 52) or civil (section 74.01) provision.<sup>10</sup>

The choice of track will depend on the facts of each case. The Commissioner will seek to arrive at a timely decision on the appropriate section to be applied in evaluating the conduct. Provided that doing so could not compromise the Bureau's investigation, as early as is appropriate after a decision has been made, the Bureau will, where reasonably possible, contact the Parties to notify them about the decision regarding the track on which the Inquiry is being conducted.

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8 The Bureau's approach to alternative case resolution is outlined in its Information Bulletin on the [Conformity Continuum](#).

9 For further information, please consult the Bureau's [Competitor Collaboration Guidelines](#).

10 For further information, please consult the Bureau's Information Bulletin on [Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act](#).



Until a decision to pursue the matter on a criminal or civil track has been made, for the purposes of communication with the Parties, the Bureau will generally follow the process outlined for Criminal Inquiries, as outlined in section 2.1 of the Bulletin.

Figure 1 in Appendix A is intended to reflect the text set out in Section 2.1 above. Nothing in Figure 1 modifies or qualifies the text set out above.

## 2.2 Reviewable Conduct and Merger Inquiries

The following section relates to communications with Parties whose conduct is being inquired into pursuant to subparagraph 10(1)(b)(ii) of the Act.<sup>11</sup>

### 2.2.1 Commencement of Inquiry

Provided that doing so could not adversely affect the Commissioner's discretion or compromise an investigation, as early as is appropriate once an Inquiry has been commenced, the Bureau will, where reasonably possible, contact Parties to notify them that they are the subject of an Inquiry. At that time, the Bureau will indicate the general nature of the conduct under Inquiry, identify the provision(s) of the Act under which the conduct is being examined and provide the contact details for the Case Officer assigned to the matter. Depending on the particular circumstances, the Bureau may contact Parties only after the Parties have been made aware of an investigation through other means such as orders issued pursuant to section 11, supplementary information requests delivered in accordance with subsection 114(2), warrants issued pursuant to sections 15 and 16 of the Act, and interim or temporary orders sought pursuant to sections 74.11, 74.111, 100 or 103.3 of the Act.

When Parties have been notified that they are the subject of an Inquiry and in the absence of any other communication, the Bureau will, where reasonably possible, ordinarily contact Parties approximately every six months to confirm that the Inquiry is ongoing.

### 2.2.2 Discontinuance of Inquiry and Case Resolution Opportunities

Parties may approach the Bureau case team at any time during an Inquiry to engage in case resolution discussions.<sup>12</sup>

If a decision is made to discontinue an Inquiry under section 22 of the Act, Parties will be notified. Where the Commissioner has determined that it is appropriate to resolve the matter by way of an alternative case resolution other than a registered consent agreement, Parties may be contacted by the Bureau to discuss the issues or conduct identified and the appropriate alternative case resolution mechanism to address such issues or conduct.

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<sup>11</sup> Different considerations may apply with respect to parties under inquiry with respect to a hostile transaction. For further guidance on disclosure of information with respect to a hostile transaction, please consult [Hostile Transactions: Bureau Policy on Disclosure of Information](#).

<sup>12</sup> For further information on the continuum of resolutions, please consult the Bureau's Information Bulletin on the [Conformity Continuum](#).

In some circumstances, it may be appropriate for the Commissioner to commence proceedings without an opportunity to discuss resolution with a Party in advance. Doing so should not preclude such discussions afterwards, provided that the Party demonstrates a continuing commitment to resolve the matter.

In an effort to facilitate resolution and avoid protracted litigation and assuming that the Party demonstrates a continuing commitment to resolve the matter, the Bureau will generally invite Parties to participate in “without prejudice” resolution discussions:

- As soon as practicable once an Inquiry has been commenced, the Bureau case team<sup>13</sup> will invite Parties to discuss case resolution on a “without prejudice” basis.
- If the matter is not resolved at an early stage, once the Bureau has completed its assessment and identified potential options to address the conduct or its impact on competition, the Bureau case team will again invite Parties to discuss case resolution on a “without prejudice” basis.
- Where still no resolution has been reached, and where the Commissioner is contemplating the launch of court or Tribunal proceedings, the Bureau case team will invite Parties to a meeting, at which the Commissioner will generally be present, to further discuss resolution on a “without prejudice” basis.

It should be noted that while the Bureau will invite Parties to participate in these resolution discussions, there is no requirement for Parties to do so.

In the event of discontinuance or alternative case resolution, the Bureau may indicate that it will actively monitor the situation for a period of time, with a view to re-opening the investigation in the future, if warranted.<sup>14</sup>

Where the Bureau determines that its examination of the issues during an Inquiry may provide guidance to facilitate compliance with the Act, the Bureau may issue a position statement to the public summarizing its main findings, as outlined in section 3.3.2 of the Bulletin.

### 2.2.3 Communication with Legal Counsel

The Bureau may involve lawyers from Competition Bureau Legal Services, other Department of Justice counsel or private counsel to assist with reviewable conduct and merger inquiries and investigations. These lawyers represent the Commissioner and the Bureau as legal counsel and may participate in meetings, telephone calls, the exchange of correspondence and other forms of communication with Parties on behalf of the Commissioner and Bureau.

A decision by the Bureau to involve lawyers in a matter affects all subsequent communications lawyers for the Parties may have with the Commissioner and Bureau personnel. Codes of

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<sup>13</sup> The case team will generally include investigating officers, Bureau management, legal counsel and, where applicable, economic advisors.

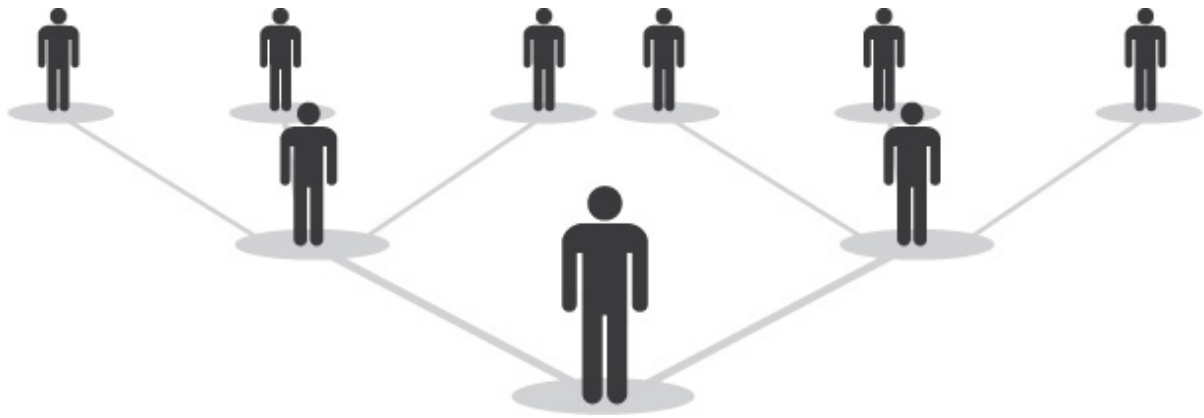
<sup>14</sup> For merger-related matters, section 97 of the Act prescribes a one-year limitation period after the merger has been substantially completed.

professional responsibility for lawyers restrict lawyers' ability to communicate with persons who are represented by legal counsel. Accordingly, once lawyers for Parties are notified in writing that counsel for the Commissioner or Bureau has been appointed on a matter, they should not communicate directly with the Commissioner or Bureau personnel or attempt to negotiate or compromise a matter with the Commissioner or Bureau personnel, except through, or with the consent of, the lawyers representing the Commissioner and Bureau.

Figure 2 in Appendix A is intended to reflect the text set out in Section 2.2 above. Nothing in Figure 2 modifies or qualifies the text set out above.



## 3. COMMUNICATION WITH OTHER STAKEHOLDERS



### 3.1 Industry Participants

At any stage of an Inquiry, the Bureau may approach industry participants to gather information relevant to its Inquiry. This information could be general product or market information, but could also include information directly related to the conduct or merger under Inquiry. Information provided by a third party is treated as confidential subject to certain exceptions set out in section 29 of the Act.<sup>15</sup>

Industry participants are not, by virtue of that status alone, entitled to receive any information about an Inquiry. The Bureau may disclose some information about its investigation to gather relevant information. It is the Commissioner’s view that this kind of disclosure falls within the exception in section 29 of the Act, which permits communication of such information “for the purposes of administration or enforcement of this Act”.<sup>16</sup>

Where information from industry participants is needed in relation to an Inquiry, the Bureau will communicate with industry participants to help them understand the nature of the information sought and, in general terms, why the information is needed.

### 3.2 Complainants

The Bureau gathers information regarding possible anti-competitive conduct from a variety of sources, including from complainants. Complainants generally contact the Bureau through its Information Centre, and can also file a six-resident application under section 9 of the Act.

Complainants who have applied to the Commissioner under section 9 of the Act have a right to be informed as to the progress of the Inquiry pursuant to Subsection 10(2) of the Act, upon written request.

<sup>15</sup> For further information on the Bureau’s approach to the treatment of confidential information, please refer to the Bureau’s [Information Bulletin on the Communication of Confidential Information under the Competition Act](#).

<sup>16</sup> *Competition Act*, s. 29(1).

If an Inquiry is discontinued, the Bureau will generally inform the complainant(s), as follows:

- If the Inquiry was commenced pursuant to an application under section 9 of the Act, the Commissioner is required to inform the complainants of the decision to discontinue the Inquiry and the reasons for doing so.
- Where an Inquiry was commenced following a complaint to the Bureau that was not an application under section 9 of the Act, as a matter of general practice, the Bureau will, where reasonably possible, inform the complainant(s) of a discontinuance decision.

If a prosecution or civil proceedings result from a Bureau Inquiry, that fact will become a matter of public record and the Bureau will generally make the public and complainants aware of such developments through Bureau announcements or position statements, as described in the following section.

### 3.3 The General Public

The Bureau believes that an important public interest is served by making information readily available to Canadians about its administration and enforcement of the Act. Information dissemination plays a critical role in ensuring transparency and accountability of the Bureau's activities. Public statements are also an effective mechanism to educate Canadians about their rights and obligations under the Act to encourage compliance with and deter conduct contrary to the Act. The Bureau's practice with respect to communications with the public engages the Commissioner's statutory mandate, the common law "open court principle"<sup>17</sup> and the confidentiality requirements under the Act.

The Bureau's ability to inform the general public about ongoing Inquiries is restricted by Subsection 10(3) and section 29 of the Act, as well as by applicable legal privileges, such as investigative and public interest privilege. Typically, the Bureau does not make Inquiries known by way of announcement to the general public.

The fact that the Bureau is reviewing a matter will sometimes be made public by a complainant, another party or publicly available court documents. Where a matter has become known to the general public, the Bureau may confirm that it has an ongoing Inquiry.

#### 3.3.1 Bureau Announcements

The Bureau makes announcements to the public in the form of news releases, information notices and its monthly publications "CB In Brief" and "Monthly Report of Concluded Merger Reviews." Announcements are disseminated via a range of channels, including news wire, social media, Rich Site Summary (or RSS) feed and ListServ®. The most suitable type of announcement for a particular item is determined on a case-by-case basis. The Commissioner and Bureau staff also make statements to the public in the form of speeches, presentations and interviews.

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<sup>17</sup> The open court principle holds that judicial proceedings should be as open as possible to foster transparent decision-making and increase public confidence in the administration of justice.

The Bureau's internal processes seek to ensure that external communications appropriately balance confidentiality concerns with other public interest considerations. Consistent with the open court principle, information about legal proceedings resulting from a Bureau Inquiry and subsequent judicial and Tribunal decisions are announced to the public.

In certain limited circumstances, to ensure factual accuracy, the Bureau may allow cooperating parties to review an announcement before it is published. Similarly, Parties may be given the opportunity to review an announcement to identify any confidential information that they believe should be removed. However, the Bureau will make the final determination regarding the content of the announcement.

### 3.3.2 Position Statements

To increase transparency about its work, the Bureau may issue a position statement describing its analysis in a particular Inquiry and the reasons underlying its final conclusions. In determining whether to publish a position statement, and what information to publish, the Bureau will be guided by the confidentiality requirements of section 29 and Subsection 10(3) of the Act and will also consider other factors, such as whether:

- the release of more comprehensive information will provide useful insight or education to the public and business community, thereby encouraging greater compliance with the law;
- the issues are sufficiently important or complex;
- clarification of a point of law or policy is needed (for example, where the Bureau has taken a new approach);
- the matter in question has generated substantial public interest; or
- the practice in question has a significant impact on Canadians or other stakeholders.

To ensure factual accuracy, the Bureau may allow cooperating parties to review a position statement before it is published. Similarly, Parties may be given the opportunity to a review position statement to identify any confidential information that they believe should be removed. However, the Bureau will make the final determination regarding the content of the position statement.

### 3.3.3 Guidelines and Bulletins

The Bureau publishes interpretation guidelines and information bulletins that provide the Bureau's approach to economic analysis and enforcement action under specific sections of the Act. They are frequently revised and updated to reflect changes to the law, economic thinking, Bureau procedures or policies, or stakeholder input.

These guidelines promote transparency and consistency in the Bureau's work, and provide certainty and predictability for businesses and consumers. Revisions and new guidance are frequently provided in draft form for review and comment by stakeholders.



## HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), 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:

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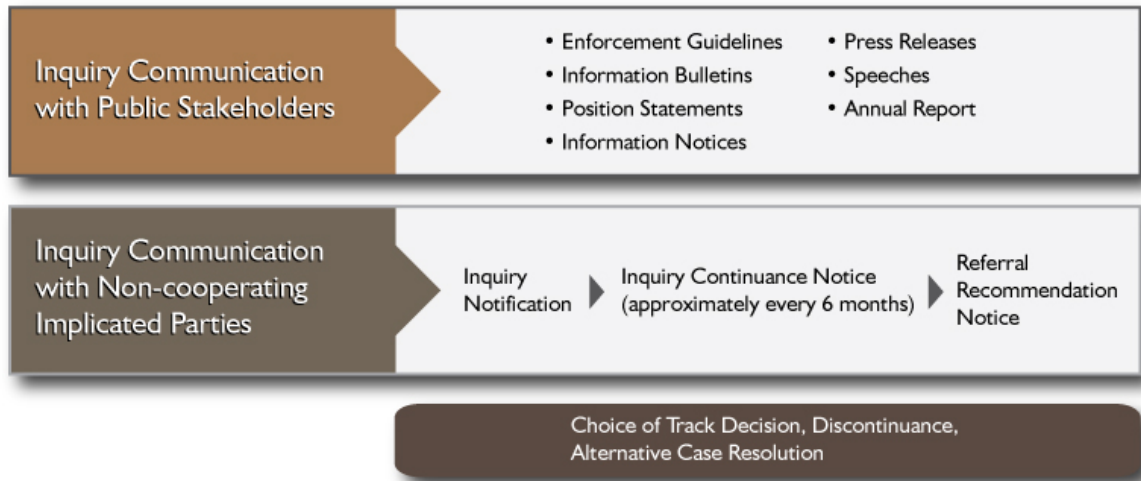
### Facsimile

[ 819-997-0324 ]



# APPENDIX A

### Figure 1 — Criminal Inquiries



### Figure 2 — Merger and Reviewable Conduct Inquiries

