Submission on

Interpretation Guidelines relating to Merger Pre-Notification and Procedural Guide

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 35,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

Submission on Interpretation Guidelines relating to Merger Pre-Notification and Procedural Guide

I. INTRODUCTION

The Canadian Bar Association's National Competition Law Section (the Section) acknowledges the work of the Bureau in preparing the draft Interpretation Guidelines relating to Merger Pre-Notification and Procedural Guide, issued May 17, 1999, and offers the following specific comments.

II. GUIDELINE NO. 1: SECTION 108 - DEFINITION OF AN OPERATING BUSINESS

Subsection 108(1) of the *Competition Act* (the *Act*) provides that "operating business means a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work." Only acquisitions of operating businesses in Canada are subject to pre-notification. The Guideline notes that the phrase "business undertaking", found in the *Act*, will be broadly interpreted to capture all arrangements through which businesses may be carried on, including non-profit or charitable undertakings. It is not clear why any goals of the *Competition Act* would be furthered by broadly interpreting the phrase to include, for instance, charitable undertakings. They are not, *prima facie*, "businesses", nor should mergers of charitable undertakings give rise to *Competition Act* issues.

Further, the Guideline states that whether a business undertaking is "operating" depends on the nature of the undertaking under consideration in each case, and that holding companies and passive investments are generally considered operating

businesses. Again, it is not clear why holding companies and passive investments will generally be considered operating businesses. Presumably a competition law issue will only arise where the underlying operating business is not passive in nature. If there is a merger of holding companies which do not control any operating businesses in Canada, it is not clear why pre-notification should be required. Consequently, the Section suggests that the provision be re-worded to read "holding companies and passive investments will only be considered to be operating businesses where they control operating businesses."

The Guideline further provides that "employees employed in connection with the undertaking" are not limited to those persons employed by the operating business itself, but may include as well third parties with a contract for services. It is not clear why such an interpretation is appropriate. Use of the word "employees" connotes a certain legal relationship. If any person performing work in support of a business undertaking were sufficient, the word "employee" would not have been used in the statute. The employee must be an employee of the business to give normal meaning to the statutory language. As well, the Guideline should make it clear that those incidentally employed (accountants, lawyers, auditors, security firms, etc) to provide services will not be considered to be employed in connection with the undertaking.

The Guideline sets out that the words "ordinarily report for work" do not require that the employee report full-time. "Ordinary" reporting will depend upon the nature of the undertaking, and will therefore include, for instance, undertakings only requiring a once a month report. This analysis make sense in principle. However, at a minimal level of reporting and contact (a good example is the once per month standard used in the Guideline) there should be a presumption that there is no ordinary reporting. In the absence of peculiar circumstances, reporting less frequently would not be ordinarily reporting for work. It would be helpful if the Bureau would state that presumptive standard.

Finally, the Guideline also provides that assets of an operating business include dormant or mothballed facilities, as long as there are active portions of the business. A mothballed facility is not, on its face, an "operating business". Therefore, it is inappropriate to include mothballed facilities which could be operated in the future but clearly are not being operated in the present, given the statutory language is "operating business". Further, inclusion of mothballed facilities in the definition of an "operating business" is inconsistent with the requirement that the undertaking have employees who ordinarily report to work in connection with that undertaking.

The Section believes that the use of examples in this Guideline would assist practitioners and businesses.

III. GUIDELINE NO. 2: SECTION 114 - NUMBER OF NOTICES - MULTIPLE STEP OR CONTINUOUS TRANSACTIONS

This Guideline deals with situations in which parties propose a multi-step transaction, and deals with the question of how many notices (and indeed filing fees) will be required in respect of such transactions.

The Guideline notes that, depending on the facts, a series of proposed transactions may be regarded either as one continuous or multi-step transaction, with only one filing and filing fee, or as several independent transactions requiring multiple filings. Transactions may be considered one continuous transaction if all steps in a series of proposed transactions constitute a sufficiently connected sequence of events. In order to demonstrate this, parties are to provide the legal documents to show clearly, comprehensively and unequivocally that the series of proposed transactions is structured without conditional future contingencies which may prevent the entire series of steps being completed within a specified reasonable time frame. The Guideline notes that Court-approved actions such as plans of arrangements, may be considered to be a continuous transaction.

The governing principle here appears to be that transactions may be considered a single transaction when subsequent steps are not contingent. [As an aside, the Section would suggest the language should be "typically will be considered"] This determination will be relatively straightforward in most cases and will be helpful to counsel. However, it is not clear why the words "clearly, comprehensively and unequivocally" have been selected. A better approach, would be to require parties to demonstrate on a commercially reasonable basis that the subsequent steps will not be contingent. Further, virtually all transactions will contain some "out" or "escape" clauses, typically if certain external or internal conditions are not met. These normal-course commercial clauses should not be viewed as creating contingencies such that the Bureau will not regard the matter as a single transaction.

Reference in the Guideline to a "specified reasonable time frame" adds some uncertainty. In the Section's view it would be useful to understand what time frame the Bureau might regard as likely to be reasonable, at least as a *prima facie* starting point.

Finally, in a multiple-step transaction more than two parties may be involved. The Section assumes that the "Notifier" and the "Acquiree" will be viewed by the Bureau as the final parties to the transaction. As well, it is assumed that the parties to the multiple-step transaction are to provide information with respect to all parties involved in the transaction. The Guidelines should explicitly state whether this is the case and, to the extent necessary, indicate any other instructions applicable to filings involving multiple-step multi-party transactions.

IV. GUIDELINE NO. 3: PARAGRAPH 111(A) - EXEMPTIONS FOR ORDINARY COURSE BUSINESS ACQUISITIONS

Paragraph 111(a) of the *Act* provides that transactions are exempt from notification where they involve the acquisition of real property or goods in the ordinary course

of business, if the persons or persons proposing to acquire the assets would not, as a result of the acquisition, hold all or substantially all of the assets of a business or of an operating segment of a business. The Guideline notes that acquisitions of real property and goods will be exempt from pre-notification "if they are normal everyday business transactions which would not likely raise competition concerns."

The Bureau's view - that transactions are only exempt from pre-notification if they would not likely raise competition concerns - is not justifiable under the statutory language. It is also somewhat circular. It makes sense, in theory, to exempt all transactions from notification which would not likely raise competition concerns. However, the pre-notification regime seeks to draw bright lines upon objective criteria, rather than assessment of competitive overlap. The Bureau's view is inconsistent with the objective approach to pre-notification.

Further, the Guideline notes that "whether a proposed transaction is exempt under paragraph 111(a) depends on whether the asset being acquired will be used to produce or generate revenue (productive assets) or whether the asset will be used to support the production or generation of revenue (supportive assets)". The Guideline notes that a productive asset is not acquired during the ordinary course of business, while a supportive asset is.

In practice, this distinction is not likely to be helpful or clear. Further, it ignores the statutory language of paragraph 111(a): "if the person or persons who propose to acquire the assets would not, as a result of the acquisition, hold all or substantially all of the assets of a business or of an operating segment of a business." The Bureau is proposing a very restrictive interpretation of the phrase "in the ordinary course of business" that does not accord with the plain wording of the statute.

As a practical matter, there is no clear demarcation between "supportive" and "productive" assets, nor any statutory or theoretical justification for the conclusion that productive assets are not acquired in the ordinary course of business. As an

example of the difficulty in applying in the "supportive" vs. "productive" distinction, it would appear that the assets referred to in Example 3 of the Guideline itself may be better characterized as "supportive" rather than "productive", although the Guideline characterizes them as "productive".

The draft Guideline also states that "the acquisition of office furniture and computer equipment is exempt if it is to be used by the purchasing party in support of its revenue-generating activities". This statement suggests that, if the furniture and equipment is to be resold rather than used by the purchasing party, it is not exempt. Thus, if Business Depot made a large purchase of office furniture or computer equipment from a manufacturer for the purpose of resale, and the assets had a book value over $35 million, then the transaction would be notifiable (and subject to a $25,000 filing fee). However it is difficult to see how such transactions could be considered not to have been made in the ordinary course of business under any reasonable definition of that term. One supposes that the office furniture and computer equipment in this example could arguably be considered "inventories", and therefore a supportive asset pursuant to the last sentence of the first paragraph of the policy. However, it is difficult to distinguish between "inventory" such as computers on the shelf in Business Depot and real property owned by a real estate company that is in the business of buying and selling real property. If the Bureau intends to exclude from "productive" assets goods that are to be resold, it cannot consistently exclude real estate that is to be resold. Further, if such goods are excluded, it is difficult to understand what categories of assets remain as "productive" and how they can be distinguished from "supportive" assets.

The paragraph 111(a) exemption was designed to permit the acquisition of property (whether "productive" or "supportive") in circumstances in which the vendor is selling inventory, or in which both the vendor and the purchaser continue in all of their established businesses. This would include circumstances in which the purchaser and the vendor were competitors before the transaction, and continue as competitors after. The Section recognizes that in some cases a sale of certain assets

by one competitor to the other may lead to a transaction not being notifiable even though one competitor is strengthened at the expense of another. In these circumstances, the transaction will fall within the definition of "merger" in the *Act*, but will not trigger pre-notification (because both continue to pursue their pre-existing lines of business). Such cases will be very rare indeed. In any event the Commissioner will have three years to challenge the transaction. We suggest that developing a complex administrative regime based on the difference between "productive" and "supportive" assets, is inappropriate in the above circumstances.

The Bureau's previous practice was to interpret acquisitions in the "ordinary course of business" as those made in connection with the regular business of a company, consistent with the *Blacks Law Dictionary* definition.[1] In the view of the Section this is a sensible and plain meaning definition of the term. Applying this definition, the previous advisory opinion had recognized that, for example, this description may extend to acquisitions of real properties made in the ordinary course of business of corporations that are in the business of acquiring, managing, developing and selling real properties.

An alternative approach which the Bureau may wish to consider would be to exempt from pre-notification transactions in which both parties continue in all existing lines of business, and which are within the firms' normal business activities. The

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1 *Black's Law Dictionary* (5th ed.) (St. Paul, Minn: West, 1979), at 989

Canadian Institute of Chartered Accountants recommendation 3480 defines "normal business activities" as follows:

> Factors to consider when determining whether the business activities of an entity are normal include: type and scope of operations, characteristics of the industry, operating policies, nature of products and services and the environment in which the entity operates. Transactions and events, regardless of size, resulting from normal business activities would not result in extraordinary items. (The definition goes on to provide examples that are relevant in the accounting context).[2]

Finally, we note that Rule 802 of the U.S. Federal Trade Commission, dealing with acquisition of goods in the ordinary course of business, is quite extensive in its treatment of this issue, and exempts a broader range of transactions than the Guideline would appear to exempt.

V. GUIDELINE NO. 4: SECTION 112 - EXEMPTION FOR COMBINATIONS THAT ARE JOINT VENTURES

Section 112 exempts combinations which are joint ventures from pre-notification. The Guideline notes that a requirement of section 112 is that the joint venture may not be a corporation. Under section 110, combinations are only subject to pre-notification if they carry on business otherwise than through a corporation. Consequently, combinations carrying on business through a corporation would not be subject to pre-notification (unless they fell under one of the other provisions - for example, acquisition of shares, acquisition of assets, or amalgamation) and therefore there would be no requirement for an exemption under 112.

The Section supports the logic of this position. However, the Guidelines should be re-worded to eliminate confusion, by replacing the phrase "the combination must consist of unincorporated entities" with "the combination must be of entities that do

2 Canadian Institute of Chartered Accountants, *Handbook (Accounting)*, vol. 1 (Toronto: CICA, 1999).

not use a corporation to conduct the joint venture." This would clarify that the parties to a joint venture themselves may be incorporated, provided that the joint venture itself is not.

VI. GUIDELINE NO. 5: SUBSECTION 110(3) - ACQUISITIONS OF NON-VOTING SHARES AND CONVERTIBLE SECURITIES

This Guideline makes it clear that acquisitions of non-voting shares are not notifiable, nor are acquisitions of convertible securities unless and until they are converted to voting shares. Determining whether voting shares are publicly traded is a question of whether such shares are listed and posted for trading on any stock exchange in Canada recognized by provincial securities authorities, or traded in other markets (including over-the-counter markets), when the share traded price is regularly published in a *bona fide* news, business or financial publication.

This policy statement is helpful with respect to determining when shares will be deemed to be publicly traded and confirming that acquisition of securities other than voting shares does not trigger notification. One particular issue arises in relation to the acquisition of convertible securities. Non-voting securities may be acquired at a given time, they may be subject to conversion on very short or even no notice, and the conversion may trigger a notifiable event. In such circumstances parties may unintentionally trigger the pre-notification requirement and be in breach of it. The Section agrees that the pre-notification requirement is triggered only by the acquisition of voting shares or the conversion of other securities to voting securities. Nevertheless, as a practical matter it would be useful if the Bureau were to adopt a regime to permit advance notification in respect of convertible securities likely to be converted, so that parties could guard against being caught off-side in conversion situations. Of course, the Bureau allows advance notification as a general matter, but the problem arises if conversion occurs more than one year from notification, and without advance warning. The Section recommends that the Bureau put in place a regular extension policy (under section 119) for conversion situations.

VII. GUIDELINE NO. 6: SUBSECTION 110(4) - AMALGAMATION

This Guideline deals with the question of when an amalgamation occurs, for the purpose of the *Competition Act* notification regime. The *Act* does not define the word "amalgamation", but the Bureau regards the process of amalgamation as occurring when there is a union of two or more corporations under a federal or provincial statutory procedure (or similar process in a foreign jurisdiction) whereby they become one corporation. Sections 181 to 186 of the *Canada Business Corporations Act* set out the procedure for amalgamations under that legislation. An amalgamation under valid corporate legislation will be considered an amalgamation for the purposes of the *Act*.

The Section agrees with the Bureau's interpretation. It notes, however, that the reference to "similar" foreign process is not entirely clear. Instead, the Section suggests the following: "or corporate procedures in a foreign jurisdiction which is described there as an amalgamation under the law of that jurisdiction, or is in essence an amalgamation, being the merging of two or more corporate entities into a continuing single entity." As well, for greater certainty, the Guideline should state that a merger under Delaware law (a so-called "Delaware Merger") constitutes an amalgamation between the surviving entity and the entity that merges with and into it.

VIII. GUIDELINE NO. 7: PARAGRAPH 111(D) - CREDITOR ACQUISITIONS

Paragraph 111(d) of the *Act* provides that certain acquisitions are not subject to pre-notification: acquisitions of collateral or receivables, those resulting from foreclosures or defaults and those which are part of debt work-outs flowing out of a good faith credit transaction in the ordinary course. In addition, acquisitions of assets in such circumstances by trustees or receivers are exempt under this section, because trustees and receivers operate as agents of creditors. The sale by the creditor

(or a trustee or receiver) to a third party may be a notifiable transaction. Further the assignment by a creditor of its interest is not exempted under paragraph 111(d). The vesting of a debtor's assets in a trustee or receiver is not sufficient by itself to consider an operating business defunct if the business being carried on is a going concern. Finally, the phrase "debt work-out" found in paragraph 111(d) includes plans of arrangement under the *Companies' Creditors Arrangements Act* and proposals under the *Bankruptcy and Insolvency Act*.

While the Section agrees within the Bureau's interpretation of the provision, the use of the phrase "ordinary course of business" in this section highlights the difficulty of applying the productive/supportive distinction.

IX. GUIDELINE NO. 8: SECTION 103 - "SUBSTANTIALLY COMPLETED"/SECTION 119 - "COMPLETED"

Section 103 provides, in part, that the Commissioner may not challenge a transaction under section 92 if an Advance Ruling Certificate (ARC) has been granted under section 102 and the transaction is substantially completed within one year. Section 119 provides that a notification under section 114 is valid for one year from the date on which it is given. Where the transactions are not completed within such one year period, or longer period as the Commissioner may specify, another notification will be required.

The Guideline notes that under section 103 a transaction will be regarded as substantially completed when there has been a closing and title to the assets passes, even if there are ancillary details (such as registration) to be worked out after closing. Under section 119 the Commissioner may choose to extend the one year period for completing a transaction for a limited range of circumstances and for a limited time: for instance, for up to several months if unforeseen delays arise in the transaction, or where regulatory approval of some sort is required and takes more than one year. The request for an extension of the one year period should be made as soon as the

parties become aware there may be difficulties in closing a transaction within the statutory period.

The Section suggests that the word “reasonably” be inserted before the word “possible” in the second last sentence.

The first paragraph in the Guideline’s “Policy” should be amended to recognize that not all transactions are transactions involving the transfer of assets. Accordingly, the first sentence in the section “Policy” should be amended to provide:

> For purposes of section 103 of the *Act*, a transaction is “substantially completed” when there has been a closing and: (i) the title to the assets has passed from the vendor(s) to the purchaser(s); (ii) the shares have been transferred from the vendor(s) to the purchaser(s); (iii) the amalgamation has been effectively completed in that only one corporation continues to exist; or (iv) all of the assets to be contributed to the combination have been contributed.

An issue which the Guideline does not address is the efficacy of an ARC in avoiding the need for pre-notification when the transaction closes more than one year after the ARC is granted. Section 103 provides that, subject to the exceptions, a transaction cannot be challenged by the Commissioner if the transaction closes within one year of the issuance of the ARC. Section 103, however, does not speak to the need to pre-notify with respect to the granting of an ARC. Paragraph 113(b) exempts from the application of the pre-notification provisions a transaction in respect of which the Commissioner has issued an ARC. Therefore, there is no one year limitation contained in paragraph 113(b). Pursuant to the statutory scheme, a transaction closing more than one year after the granting of an ARC should be exempt from pre-notification, notwithstanding that the Commissioner may nonetheless be able to challenge such transaction under section 92 because of the expiry of the ARC.

Despite this, we understand the Commissioner’s position to be that an ARC will not displace the need for pre-notification for transactions closing more than one year from the date the ARC was granted. The Section believes that while this interpretation may be consistent with the approach of sections 103 and 119, it is

contrary to the clear wording of paragraph 113(b). It may be that paragraph 113(b) should be amended to provide for a one-year limitation but, failing that, the Section encourages the Commissioner to verify that pre-notification will not be required in respect of a transaction for which an ARC has been granted, whether or not the transaction closes within the one year period.

X. GUIDELINE NO. 9: CONTROL AND SHAREHOLDER AGREEMENTS

This Guideline deals with two issues:

(a) the issue of control for the purpose of determining whether the parties are affiliated within the meaning of paragraph 113(a) and subsection 2(2); and

(b) the impact of shareholder agreements on sections 109 and 110(3).

The Guideline notes that shareholder agreements may effectively transfer or alter voting interests. Nonetheless, the Bureau states that for the purpose of pre-notification such agreements will not alter the determination of whether control has been transferred, whether a person controls a corporation, or whether corporations are affiliated. This decision will be governed by the ownership of voting shares, not the alteration of votes pursuant to shareholder agreements.

The Section generally agrees with the approach in the Guideline, for the purposes of pre-notification. The Section notes, however, that such analyses may not be appropriate for other purposes under the *Act*. For instance, in determining affiliation for the criminal provisions of the *Act*, this approach may not always be appropriate. Further, the Section notes the definition of "voting share" in section 108, which requires that such shares be voting in all circumstances. This may pose difficulties for the Bureau's determination of "control" when shareholder agreements provide that certain shares will not be voting in certain circumstances. The Section believes that the Bureau should consider the question of section 108 in this regard.

XI. GUIDELINE NO. 10: NOTIFIABLE TRANSACTIONS REGULATIONS - TRANSACTIONS AND EVENTS IN SECTION 14

This Guideline permits adjustment in aggregate value of assets or the gross revenues from sales, when a transaction or event has occurred after the relevant fiscal period, but before closing, where the subsequent transaction or event is likely to affect the determination as to whether a transaction will be notifiable.

The Guideline notes that in some cases shell companies are created for the purpose of acquiring a corporation or assets. Immediately prior to such acquisition, such shell companies are funded for the purposes of making the acquisition. An issue then arises as to whether the transaction would be notifiable, based on the assets injected into the shell company for the purpose of undertaking the transaction.

The Guideline further notes that the transaction or event referred in section 14 of the regulations must be a separate transaction from the notifiable transaction. The mere funding of a company for the purpose of effecting the transaction itself is not to be a subsequent event for the purpose of section 14 of the regulations. Therefore funding a shell company to make the purchase will not trigger pre-notification.

The Guideline also addresses "intervening transactions". These arise when, in the period prior to a transaction closing, a subsequent transaction occurs which makes the first transaction notifiable because the size of one or both of the parties or their affiliates has changed. The Guideline states that where a party to a proposed transaction enters into a second proposed transaction which is completed before the first transaction closes, the second transaction will be considered an event or transaction for the purposes of section 14 of the Regulations, and therefore may make the first transaction notifiable.

The Section agrees with the Bureau's conclusion that funding a shell company to make a purchase will not trigger an obligation to pre-notify. This is a change from some previous practice of the Bureau. The Section therefore suggests that the Guideline identify this change in approach more clearly.

The interpretation provided in the Guideline with respect to intervening transactions is reasonable, although in rare circumstances it may give rise to unintentional breach of the pre-notification provisions. It would therefore be useful to understand the Bureau's intended approach in such circumstances.

The Guideline unfortunately does not address a related circumstance. One of a party's affiliates (as opposed to the party itself) may enter into a subsequent transaction, with or without that party's knowledge. This may affect the pre-notification threshold. It would be useful to know whether the Bureau believes the pre-notification thresholds will be triggered by such subsequent transaction.

The Guideline should clarify what type of "transaction" is intended to be caught in section 14. A company's business may grow rapidly, such that its assets may exceed the threshold before closing. However, this may not have appeared on the last audited financial statements, as there may have been no transactions out of the "ordinary course of business". The Guideline should clarify that such growth will not be caught by section 14.

The Guideline does not deal with circumstances in which there has been a disposition of assets after the most recent audited financial statements. It would be helpful to have the Bureau's guidance on how section 14 of the regulation applies to such dispositions.

Finally, the Section recommends that the third sentence under the heading "Example" be revised to read: "the aggregate asset values or revenues of Acorp and

Bcorp, together with their affiliates, do not exceed the threshold under section 109 of the *Act*".

XII. GUIDELINE NO. 11: CORPORATE SPIN-OFFS

Paragraph 113(a) of the *Act* provides an exemption from pre-notification if the parties to the transaction are affiliates of one another. In this Guideline the Bureau notes that in some cases corporate re-organizations occur by way of spin-off of shares in affiliated or subsidiary corporations to shareholders. The Guideline states that depending on how such transactions are structured, they may trigger pre-notification. For instance, once shares are transferred by a parent company to its shareholders, the two corporations will likely no longer be affiliates (unless there is a majority voting shareholder). As well, a spin-off of shares to shareholders holding more than 20% but less than 50% of the voting shares (for publicly traded companies) may be subject to notification, because such shareholders are not affiliated with the original corporation.

The Section agrees with the Bureau's analysis of the affiliate exemption in relation to corporate spin-offs and transfers of assets between original parent corporations and the spun-off former affiliate. Nevertheless, such transactions, given that they do not change ultimate control of assets, will not result in increased concentration in any substantive way. They should be exempt from pre-notification. To the extent that the current statutory regime does not exempt them, guidelines should be established which would provide for *pro forma* issuance of ARCs in such cases, together with a waiver of fees. This occurred with respect to asset securitizations prior to the current amendments.

XIII. OTHER MATTERS

The Section encourages the Bureau to issue guidelines to address other pre-notification matters, such as:

1. Locus of Assets
   - If securities of foreign firms are held in Canada, are those assets in Canada?

2. Trust Units
   - Are trust units voting shares or assets?

3. Joint Venture Agreements
   - What does the Bureau view as the necessary requirements for agreements to qualify for exemption under paragraph 112(c)?

XIV. PROCEDURES GUIDE

The Section notes that it is very helpful to have such a Procedures Guide for counsel and their clients. The Section's few substantive comments on the Guide are as follows:

1. The section of the Guide *When would the Commissioner request a long form* states: "it is expected that instead of requesting a detailed list of information on a voluntary basis, the Bureau may ask the parties to provide the long form information." This suggests that use of the long form notification will become much more common than it has been in the past.

   The information required in a long-form filing will be much more expensive and time consuming to gather than has been the case in the past. Parties are

often prepared to provide whatever information may be relevant to an assessment of the transaction to the Commissioner, under oath, if requested. The Section believes this is preferable to requiring parties to complete a long-form filing. The substantive advantage, for enforcement purposes, in a long-form filing, is the provision of additional information and the creation of a longer waiting period. However, if the parties are prepared to provide whatever information is requested, and are prepared not to close the transaction, at least for the period of a long-form waiting period, there would be no advantage to the Bureau in requiring a long-form filing. Nor would it assist a substantive view of the transaction. It would, however, add to the cost, and would create uncertainty for parties attempting to determine which form to file. Therefore, wherever parties are genuinely co-operative, the Bureau should continue the previous practice of accepting short form filing together with appropriate requested information.

2. Section III would benefit from a statement as to when the Commissioner is likely to grant an ARC. Counsel experienced in merger work will have a sense of this, but this Guide is designed to help others with less regular interaction with the Bureau. A paragraph as to typical ARC availability would be helpful in that regard.

3. The Procedures Guide would benefit from a statement as to the likely availability of advisory opinions in respect of mergers which do not trigger pre-notification and the Bureau's preferred approach in such circumstances.

4. Finally, the paragraph dealing with subsection 110(3) - *Voting Share Acquisition* - should be revised slightly to indicate the test is not merely whether the acquiring party will obtain in excess of twenty (or thirty-five or fifty) per cent of the voting shares, but whether the acquirer, together with its affiliates, would own voting shares of the corporation which, in the

aggregate, carry more than twenty (or thirty-five or fifty) per cent of the votes attached to all outstanding voting shares.

XV. CONCLUSION

As the Section has outlined, there are several issues which should be addressed to improve the Guidelines and Procedural Guide and to ensure their consistency with the *Act*. We recognize the Bureau's work in developing these guidelines and hope our comments will be of assistance.