COMMENTS OF THE AMERICAN BAR ASSOCIATION
ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION
IN RESPONSE TO THE CANADIAN COMPETITION BUREAU
REQUEST FOR PUBLIC COMMENTS REGARDING ITS
DRAFT MODEL TIMING AGREEMENT FOR MERGER REVIEWS
WHERE MERGING PARTIES RAISE EFFICIENCIES CLAIMS

September 30, 2019

The views stated in this submission are presented on behalf of the
Antitrust Law Section and International Law Section. They have not been
approved by the House of Delegates or the Board of Governors of
the American Bar Association and therefore should not be construed
as representing the policy of the American Bar Association.

The American Bar Association Antitrust Law Section and International Law Section (the
Sections) welcome the opportunity to participate in the Canadian Competition Bureau’s (the
“Bureau”) public consultation process on the Draft Model Timing Agreement for merger reviews
in which merging parties raise efficiencies claims (the “Draft Timing Agreement”). The Sections
offer these comments to assist the Bureau in further refining the Draft Timing Agreement. The
Sections are available to provide additional comments or to participate in further consultations
with the Bureau as it may deem appropriate. These comments reflect the expertise and experience
of the Sections’ members with competition law, intellectual property law, and economics.

INTRODUCTION

The Sections commend the Bureau for its continuing commitment to transparency and
consultation with stakeholders on key guidance and process documents, such as the Draft Timing
Agreement. This commitment results in improved policies from the perspective of both the Bureau
and its stakeholders.

The Sections appreciate that timing agreements may be required in certain cases. If done
properly, timing agreements can be mutually beneficial. However, it is not clear to the Sections
what problem the Draft Timing Agreement seeks to address, particularly given that most mergers
do not raise issues under competition law and that cases that involve efficiency claims are
relatively rare. As such, the Sections see no obvious need for a model timing agreement that applies
only to merger reviews where merging parties raise efficiencies claims.

The Sections have a number of conceptual and specific comments on the Draft Timing
Agreement. These comments, discussed in more detail below, relate to: (a) the need for and
breadth of the application of the Draft Timing Agreement; (b) the timeframes in the Draft Timing
Agreement; (c) the move to a sequential (rather than a concurrent) merger review process; (d) the
cost of delay to the merging parties; and (f) the interpretation of section 96 of the Act that seems
to be the basis for the above.
CONCEPTUAL COMMENTS

1. **The Need for and Overly Broad Application of Timing Agreements**

   In the absence of the parties’ entering into a timing agreement that the Bureau deems acceptable, it appears to the Sections that the Commissioner of Competition (the “Commissioner”) will not be willing to consider an efficiencies defense prior to closing. If this is the case, efficiencies, and, in particular, whether the efficiencies likely to arise from a merger are greater than and offset its anticompetitive effects, will likely be analyzed much later in the process, in the context of litigation or a decision whether or not to litigate.

   The Sections are concerned that the Bureau’s proposed “blanket” approach of requiring a timing agreement in all cases that involve efficiencies claims is overly broad. Depending on the context, a timing agreement may be neither appropriate nor necessary. The Sections believe that the need for a timing agreement should instead be determined on a case-by-case basis, having regard to all of the facts and circumstances in question. The Sections note that section 100 of the *Competition Act* (the “Act”) permits the Competition Tribunal (on application by the Commissioner) to enjoin the completion of a merger for up to 60 days. The Sections consider that the Act already provides a mechanism to provide the Commissioner with additional time to complete the Bureau’s review where required and are concerned that the timing agreement proposal cedes to the Commissioner an extended period of review that does appear to be provided for in the Act.

   The Sections are also concerned that the Commissioner will in effect fetter his discretion to consider the facts relevant to an efficiencies defense in the absence of a timing agreement. More broadly, section 96 appears (somewhat uniquely) to recognize the desirability to the Canadian economy of efficiency-enhancing mergers. As such, the Sections consider that the Bureau’s approach to the application of section 96 should encourage parties to bring forward legitimate efficiency rationales for proposed transactions. The Sections believe that an overly broad application of the timing agreement requirement could actually have the opposite effect, thereby discouraging parties from developing and bringing forward such evidence.

2. **Lengthy Timeframes**

   The Sections believe the Competition Bureau should take steps to ensure that efficiency-enhancing mergers are not unduly delayed and to expedite reviews of complex matters. However, while the stated intent of the Draft Timing Agreement is to “establish a schedule for the expeditious resolution of [proposed transactions],” it will likely lengthen the Bureau’s review, at least in certain cases. This is because the Draft Timing Agreement contemplates a sequential review, in which the Bureau assesses and reaches a conclusion on the competitive impact of the proposed transaction before even considering the merging parties’ efficiencies claims. In fact, the Draft Timing Agreement contemplates that efficiencies submissions will now be provided within 30 to

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40 days after full compliance with Supplemental Information Requests (SIRs). This is in contrast to the position taken in the Bureau’s draft Practical Guide to Efficiencies Analysis in Merger Reviews (the Draft Efficiencies Guide), which encourages merging parties to provide their initial efficiencies submissions and available supporting information at an early stage in order to “allow the Bureau sufficient opportunity to analyze potential effects and efficiencies concurrently.”

The Sections also believe that the proposed sequential approach to merger review will unnecessarily delay the merger review process, particularly given the lengthy timelines in the Draft Timing Agreement. In fact, such delay is expressly recognized in the Draft Efficiencies Guide, which provides:

In other instances, merging parties have waited for a definitive conclusion as to whether or not the merger is likely to result in an SPLC before providing detailed information about efficiencies. This approach typically lengthens the Bureau’s review process since the assessment of efficiencies claims is iterative, and the provision of a submission is only the first step in this assessment. While merging parties might seek to hold back a submission until the Bureau has made determinations regarding the scope of the potential remedy or narrowed the scope of a merger that is under review, this will come at the cost of time that could have otherwise been spent engaging on the efficiencies claims.

Consistent with the approach in the Draft Efficiencies Guide, the Sections believe that the Bureau should conduct its efficiencies assessment in parallel with its competitive effects assessment, where possible.

Furthermore, the lengthy timeframes set out in the Draft Timing Agreement (which extend to a maximum of 110 days after full compliance with SIRs) are not conducive to encouraging constructive dialogue and cooperation. Rather, they may have the opposite result, as merging parties may choose to close their transactions immediately following the expiry of the second 30-day statutory waiting period so they can begin realizing efficiencies as soon as possible.

3. Cost of Delay to Merging Parties

Delay in merger reviews significantly wastes public and private resources, including increased costs to the merging parties, such as loss of customers and talent during the extended review process due to extended uncertainty. The Bureau has committed to conducting reviews as expeditiously as possible knowing the importance to a well-functioning economy of not unnecessarily delaying or stopping efficiency-enhancing mergers. For example, the Merger Review Process Guidelines state that, “[i]n discharging its merger review obligations under the Act, the Bureau’s priority is to identify in a timely manner those proposed mergers that pose a potential threat to competitive markets in Canada, and to allow the balance to proceed as

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3 Id. (emphasis added).
expeditiously as possible.\textsuperscript{4} The Bureau also realizes that it spends a very significant amount of resources reviewing complex mergers.

In order to minimize the delay arising from the Draft Timing Agreement, the Sections recommend that the Bureau closely examine all timeframes and shorten them wherever possible.

In addition to the costs imposed on the parties, the Draft Timing Agreement may affect how the merging parties approach the United States Antitrust agencies. Specifically, unlike the current approach in most cross-border matters, the parties may need to postpone their submissions that could help dissuade the agencies from issuing a second request until the Canadian process is well underway. These cross-border considerations generally argue for shorter deadlines than those proposed in the Draft Timing Agreement.

4. \textit{Interpretation of Section 96}

In addition, it appears that the Draft Timing Agreement, the associated timeframes, and the shift to a sequential review are premised on an interpretation that section 96 of the Act involves a market-by-market trade-off analysis. However, it appears to the Sections that this reading is inconsistent with the statutory language and governing jurisprudence. For example, Canada’s Competition Tribunal has indicated that “[t]here is no requirement that gains in efficiency in one market or area exceed and offset the effects in that market or area.”\textsuperscript{5}

The Sections encourage the Bureau to reconsider both its approach to the section 96 trade-off analysis and whether the Draft Timing Agreement (in its current form or otherwise) is required, considering existing jurisprudence and that matters in which the parties assert efficiency claims are relatively rare.

\textbf{SPECIFIC COMMENTS AND PROPOSED CHANGES}

1. \textit{“One Size Fits All” Approach Not Appropriate}

The Sections believe that the “one size fits all” approach contemplated by the Draft Timing Agreement will not be appropriate for all transactions. For example, the timeframes set out in the Draft Timing Agreement are too rigid and will not be appropriate in all cases. Instead, the Sections suggest that the Draft Timing Agreement include a range for each timeframe. For example, rather than referring to 30 days, section 3 of the Draft Timing Agreement could be revised to state that “Merging Parties shall fully respond to the data specifications of the Supplemental Information Requests … as soon as possible, and in any event no later than [5-30 days] before full compliance with the SIR.” Building in such ranges will allow the merging parties an opportunity to negotiate appropriate timeframes with the Bureau on a case-by-case basis.


\textsuperscript{5} \textit{Canada (Commissioner of Competition) v. Superior Propane Inc.}, 2002 Comp. Trib. 16 at para. 140.
2. Lack of Balance

The Sections further believe that the Draft Timing Agreement lacks balance. Specifically, the benefits of the Draft Timing Agreement appear to be one-sided and disproportionately burdensome on merging parties. To address this issue, the Sections recommend that the Draft Timing Agreement include the steps that the Bureau will take to more quickly narrow the issues through a revised transparency process, including the issuance of status and preliminary assessment reports to the merging parties at early stages of the review. In this regard, it is worth noting that the Merger Review Process Guidelines provide:

The Bureau is committed to working with merging parties to narrow issues and/or the requirements for records, including data, wherever reasonably possible, while first and foremost ensuring that the Bureau accesses the information it requires to properly review a proposed transaction.6

3. Tightening Timeframes

Sections 4, 5, 6, 8, and 9 of the Draft Timing Agreement provide that certain events will or must occur “no later than” a specified number of days after another event. To help shorten the lengthy timeframes in the Draft Timing Agreement, it would be helpful to revise these sections to read “as soon as possible, and in any event no later than,” as in section 3 of the Draft Timing Agreement.

4. Failure to Meet Timelines

The Sections recommend that the Draft Timing Agreement indicate what happens if the Commissioner and/or the merging parties cannot meet one of the specified timeframes. One option would be to include a provision similar to the following provision in the FTC Model Timing Agreement: “Except as specifically provided herein, the failure of a Party to comply with any deadline in this Agreement shall cause any subsequent deadlines specified herein to be extended, day-for-day, for each calendar day the deadline is not met.”7 The Sections believe that the addition of such a provision would add certainty to the process and minimize the need for unnecessary negotiations between the parties after the timing agreement has been executed.

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The Sections appreciate this opportunity to comment and would be glad to discuss this further with the Bureau if so desired.

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