

## Canada-U.S. Merger Working Group

### BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS

The United States federal antitrust agencies (the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”), jointly referred to as the “U.S. agencies”) and the Competition Bureau Canada (“CCB”) have successfully cooperated for many years on merger investigations that affect both the United States and Canada, pursuant to the longstanding bilateral agreement between the two countries.<sup>1</sup>

This document seeks to:

- x articulate the current day-to-day cooperation practices of the CCB and the U.S. agencies;
- x promote cooperation and coordination between the U.S. agencies and the CCB and enhance the likelihood of consistent outcomes between the CCB and the U.S. agencies in the application of their competition laws;
- x make transparent the practices that the U.S. agencies and the CCB seek to apply, to the extent consistent with their respective laws and enforcement responsibilities, when they review the same merger;<sup>2</sup> and
- x acknowledge the substantial contribution that merging parties can make in facilitating cooperation among reviewing agencies in the merger review process.

The CCB and the U.S. agencies reserve their full discretion in the implementation of these best practices and nothing in this document is intended to create or modify any enforceable rights. As the identification of best practices is an ongoing process, the U.S. agencies and the CCB will jointly continue to explore ways to further improve on these practices.

#### I. Objectives

1. Many mergers involving North American and/or international businesses are likely to be subject to review in both Canada and the U.S., as well as in other jurisdictions. When the U.S. agencies<sup>3</sup> and the CCB are reviewing the same merger, both have an interest in reaching, insofar as possible, consistent analyses and outcomes.<sup>4</sup>

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## **II. Communication between Reviewing Agencies**

5. The reviewing U.S. agency (FTC or DOJ) and CCB ordinarily will contact one another promptly upon learning of a merger that appears to be subject to review in both the U.S. and Canada and where cooperation between the U.S. agencies and the CCB may be beneficial. The nature and frequency of communication between the U.S. agencies and the CCB will be determined on a case-by-case basis.

#### **IV. Collection and Evaluation of Evidence**

9. In matters under review that raise issues of concern in both jurisdictions, the reviewing agencies seek to coordinate with one another throughout the course of their investigations and to keep one another informed of their progress. This coordination may include sharing publicly available information and, consistent with the agencies' confidentiality obligations, discussing their respective analyses at various stages of an investigation, including market definitions, assessments of competitive effects and efficiencies, theories of competitive harm, economic theories and analyses, and empirical evidence needed to test those theories. They also may discuss views on necessary remedial measures and relevant past investigations and cases. In addition, the reviewing agencies may discuss and coordinate information or discovery requests to the merging parties and third parties, including exchanging draft questionnaires to the extent permitted by the respective jurisdiction's laws and regulations. Efficient investigatory coordination will benefit the merging parties, third parties, and the reviewing agencies. For example, in appropriate cases, the reviewing agencies might encourage and provide opportunities for parties to organize presentations or interviews jointly with both agencies, and to allow for the concurrent submission of documents.

10. With respect to mergers involving a supplementary information request in Canada and a second request in the U.S., the agencies may, where possible, seek to coordinate those requests, whether before or after issuance, by aligning language, relevant search periods, custodians, data formats, and other aspects of the requests. The ability of the agencies to do this will depend on the nature of the issues being examined in each jurisdiction and the cooperation of the parties in aligning the timing of the agencies' investigations. In this context, however, neither agency will accept less information than it requires to conduct its review.

11. Waivers of confidentiality executed by merging parties enable more complete communication between the reviewing agencies and with the merging parties regarding evidence relevant to the investigation. While such waivers are not required by the CCB to share information with the U.S. agencies pursuant to Section 29 of the Competition Act and the CCB's position on information ar016 Tw -17.e, in appropriate

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remedy proposals, and may participate in joint discussions with the merging parties, prospective buyers, and trustees.