THE CANADIAN BAR ASSOCIATION
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Via email: lionel.kinkartz@cb-bc.gc.ca

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Dear Lionel Kinkartz

Re: Draft Information Bulletin on Transparency

The Competition Law and Foreign Investment Review Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to comment on the Competition Bureau's draft *Information Bulletin on Transparency* (Draft Bulletin). We appreciate the Bureau's guidance and note its intention to "enhance communications efforts to be more transparent about our work, communicate more often about the actions we are taking" as articulated in its Strategic Vision for 2020-2024.

General comments

As a preliminary matter, the CBA Section believes the Bureau should explain how it intends the Draft Bulletin to interact with the existing *Conformity Continuum Information Bulletin.* It would be helpful for the Bureau to clarify if the Draft Bulletin is intended to supplement or replace the *Conformity Continuum Information Bulletin's* guidance on the Bureau's general enforcement approach.

Also, in many ways, the Draft Bulletin offers less guidance than currently offered and gives the Bureau significantly more flexibility on the transparency offered to parties during the investigation. While we appreciate that the Draft Bulletin aims to reflect the Bureau's current approach to transparency and understand the need for flexibility, we are concerned that the balance has been tilted and constructive guidance to businesses, consumers and the legal community is unnecessarily reduced.

This appears to represent a trend in recent Bureau guidance documents. Reduced transparency and increased Bureau discretion to follow its stated processes in the Draft Bulletin (and other recent guidance documents) give less procedural predictability and diminishes the overall utility of these documents. Again, while we appreciate the Bureau's need for flexibility, it should be balanced against the value of giving meaningful guidance that can be relied on by stakeholders and promotes consistency in Bureau enforcement activities.

In our view, the Draft Bulletin's tone suggests a more adversarial approach and could suggest that private parties may expect less transparency than before. We believe, in most cases (mergers and civil matters in particular), that increased transparency is likely to promote efficient case resolution. We are concerned that the approach to transparency in the Draft Bulletin will result in more lengthy, costly and adversarial enforcement processes – leading to adverse resource impacts for the Bureau and private parties.

Comments on specific provisions

2.1 Communication with those subject to a merger review or civil investigation

The Draft Bulletin notes that, in a merger review or civil investigation, the Bureau "often" lets parties know about the nature if its concerns, but that discussions and conclusions shared are "not final." The Draft Bulletin also states that "views may change and evolve as the investigation progresses" and "those who are subject to investigation should not expect a detailed explanation of the case or our internal work products." This language is not found in the 2014 *Information Bulletin on Communication during Inquiries* (2014 Bulletin).

While the CBA Section understands that the Draft Bulletin reflects the Bureau's current approach, we question if this approach promotes efficient resolutions of merger or other civil cases. Given that the Bureau ultimately bears the onus of proving its case, it is unclear why it would be reluctant to share its analysis with the parties once it has been sufficiently advanced. In our experience, when sharing its analysis, the Bureau includes caveats that the analysis is evolving and may change over time. As such, we urge the Bureau to consider deleting the phrase "those who are subject to investigation should not expect a detailed explanation of the case or our internal work products," because it is unnecessary to preserve the Bureau's flexibility.

We encourage the Bureau to continue to share its analyses with the parties (with appropriate caveats) in as much detail as possible to facilitate earlier and more efficient resolution of investigations. In our view, the Draft Bulletin sends a counterproductive signal to parties that the Bureau is not willing to engage in a detailed discussion of the facts and analysis of a particular case. This could lead to less engagement from the parties and more adversarial stances – resulting in unnecessary expenditures of resources by the Bureau and parties.

The Draft Bulletin states that, in the context of a civil investigation, the Bureau will "typically" let the subject of the investigation know when it closes an investigation. In contrast, the 2014 Bulletin stated that the Bureau would typically communicate with the subjects of the inquiry every six months to confirm if the inquiry was ongoing and commit to advising the subjects of investigation's closure.

Given the uncertainty created on subjects of an inquiry, we believe the Bureau should commit to notifying them once an investigation is formally closed. There is clearly no public interest achieved by not disclosing the conclusion of an investigation and there is a negligible impact on resources to communicate with the subjects of the investigation. In our view, this policy change undermines the Bureau's credibility and is contrary to its stated goal of enhancing transparency.

2.2 Communication with those subject to criminal investigations

The Draft Bulletin states that the Bureau will generally "enforce the law without notifying those subject to a criminal investigation." Moreover, the Bureau indicates that it will communicate with a person subject to a criminal investigation only on a case-by-case basis. In contrast, the 2014 Bulletin indicated that the Bureau would inform a person subject to a criminal investigation "where reasonably possible."

While the CBA Section understands the Bureau's need for flexibility in criminal investigations, we believe the term "case by case" gives no meaningful guidance on when potential subjects of a criminal

case can expect to be informed that they are potentially exposed to criminal liability. The rationale for the change is unclear. Clearly, removing "where reasonably possible" is not intended to signal that the Bureau reserves the right to act unreasonably.

2.3 Communication with those subject to a dual track investigation

The 2014 Bulletin stated that, where reasonably possible, the Bureau would notify a party if the Bureau was pursuing a criminal or civil track. This policy was the result of significant stakeholder concerns about threats of criminal proceedings used to exert leverage in cases appropriately dealt with as civil investigations and other due process issues. This statement is absent from the Draft Bulletin.

The CBA Section believes the Bureau should commit to notifying a party to a dual track investigation on which track applies as soon as reasonably possible – and maintain the 2014 Bulletin approach. We question why the Draft Bulletin deviates from the prior approach, particularly given the importance of procedural fairness and the absence of any sound public interest rationale for the change.

3.1 Statements on active investigations

The 2014 Bulletin stated that "[t]he Bureau's ability to inform the general public about ongoing inquiries is restricted by subsection of 10(3) and section 29 of the Act."

Subsection 10(3) of the Act states that all inquiries must be conducted in private. Section 29 prohibits the disclosure of information given to or obtained by the Bureau under the Act, subject to the following exceptions: (a) disclosure to a Canadian law enforcement agency; (b) disclosure for the purposes of the administration or enforcement of the Act; or (c) disclosure of information that has already been made public or with the consent of the person who gave the information.

In *Canadian Pacific Ltd.* v. *Canada (Director of Investigation & Research),*[1] the court commented on subsection 10(3) and section 29 and the privacy of information obtained during an inquiry:

> […] we think it significant that s.10(3) of the Act requires that s.10 inquiries be conducted in private and that s.29(1) of the Act directs that any information obtained at the investigatory stage is to remain confidential subject to certain limited exceptions. These provisions provide protection to the affected parties by precluding public scrutiny of their conduct at the investigatory stage while at the same time, permitting the Director to fulfil his or her obligations under the Act. In the event that the proceedings go no further than the investigatory stage, the affected parties need not fear public disclosure.

Consistent with subsection 10(3) and section 29 of the Act (and relevant jurisprudence), the 2014 Bulletin explained:

- Typically, the Bureau does not make inquiries known by way of announcement to the 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 public, the Bureau may confirm that it has an ongoing inquiry.

The Draft Bulletin, however, contains only a generic statement that "[t]here are limits in our law that affect our ability to share information about ongoing cases with the general public" and that "[the

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1 (1997] O.J. No. 3762 (Ont. C.A.)

Bureau] may publish statements about active cases on a case-by-case basis. We do this when it will help, and not harm, our ongoing work, and to administer and enforce our law."

In contrast to the 2014 Bulletin, the Draft Bulletin explains that the Bureau can (and will), on a case-by-case basis, publish statements on active cases that are not otherwise public (including identifying subjects of these investigations).

On its face, this runs counter to subsection 10(3) of the Act, which requires that inquiries be conducted in private. The statement that this is "to administer and enforce our law" suggests that the Bureau is relying on an exception to section 29. However, there is no similar exception in subsection 10(3).

The Draft Bulletin does not properly recognize the limitations imposed by subsection 10(3). Making public statements and identifying entities under investigation - not otherwise a matter of public record and before any judicial proceedings - exposes these entities to significant prejudice. For instance, identifying the subjects of a cartel investigation will likely invite civil class actions. The subjects may incur significant costs and suffer reputational damage that cannot be recovered if the Bureau's investigation is ultimately discontinued.

In our view, in contrast to 2014 Bulletin, the Draft Bulletin is a step backwards in terms of transparency. The position that the Bureau may publish statements about active cases on a case-by-case basis when it will help the Bureau's ongoing work and to administer and enforce the law, is vague and on its face would apply to every Bureau investigation. There is no indication of the factors that the Bureau would consider in deciding to make public its active investigations – in particular, consideration of the potential harm to the subject of an investigation that could result from public disclosure of this type of information.

We urge the Bureau to reconsider the Draft Bulletin's position on making public statements on active investigations that are not already a matter of public record to ensure that it accords with the Act.

3.2 Statements on completed investigations

The 2014 Bulletin states "[t]o 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 contrast, the Draft Bulletin appears to limit the potential issuance of position statements on completed investigations to (i) investigations resulting in court proceedings, (ii) warning letters to individuals and companies outlining Bureau concerns, and (iii) completion of the terms of an Alternative Case Resolution.

Rather than further restricting the scope of public Bureau statements about the conclusion of its investigations and inquiries, we encourage the Bureau to more frequently issue public statements describing completed investigations. This could take the form of position statements (or potentially less detailed descriptions of the conduct investigated) and the Bureau's reasons for completing the investigation. In some cases, it may not be necessary to identify the target of the investigation to convey the essence of the Bureau's investigation and conclusions.

Where the Bureau has conducted an "investigation", or more than just a "review" (as defined in the Draft Bulletin), it would assist businesses and advisors to better understand the types of conduct that lead to scrutiny and the conduct that the Bureau has concluded does not merit further enforcement action. Better insight on how the Bureau exercises its enforcement discretion would assist compliance efforts by businesses (thereby reducing the likelihood of businesses engaging in anti-competitive behaviour) and help potential complainants decided if they should devote considerable time and resources to submit complaints to the Bureau. Both these results would enhance the Bureau's ability to effectively monitor and investigate anti-competitive behaviour in the marketplace.

Greater transparency on how the Commissioner's discretion is exercised and on the allocation of Bureau resources (particularly for reviewable matters), would also promote the Bureau's accountability and credibility.

We endorse the principle articulated in the Draft Bulletin's introduction that "providing information to Canadians about how [the Bureau] administer[s] and enforce[s] the law is in the public interest. Communication with the public promotes transparency and accountability in [the Bureau's] work."

Frequent public statements on completed investigations are important ways of sharing information to the public. They also help ensure that broad discretionary enforcement powers are exercised in a consistent and non-discriminatory manner. With limited exceptions, issuing statements on completed investigations should be routine and not require meeting exceptional criteria like triggering an elevated level of public interest.

The Bureau has historically cited resource constraints when resisting requests for greater disclosure on cases. However, the Bureau's internal decision-making processes for file closures and cases involving resolutions should contain the relevant information enabling brief but meaningful disclosures without undue effort. The Government of Canada has recently increased the Bureau's budget and it should have the necessary resources to give important case-specific guidance along with its other communications to stakeholders.

We appreciate the opportunity to comment on the Draft Bulletin and would be pleased to elaborate on any of the foregoing or offer further input.

Yours truly,

(original letter signed by Marc Andre O'Rourke for Omar Wakil)

Omar Wakil
Chair, Competition Law and Foreign Investment Review Section