Intelligence MEMOS

From: David Rosner

To: Navdeep Bains, Minister of Innovation, Science and Economic Development

cc: John Pecman, Commissioner of Competition

Date: March 2, 2018

Re: **It's Time to Reform Canada's Merger Notification Rules**

In 1985, Parliament passed merger notification rules as part of a new *Competition Act*. But it's been more than 30 years and Canada's economy has transformed in that time. Those rules no longer accomplish their core objective, which hurts companies and Canadians.

The rules were intended to require that the Competition Bureau be notified of those mergers most likely to give rise to potential harm. To this end, the rules require that merging companies that exceed certain financial thresholds notify the Bureau.

The rules reflect the context of the Canadian economy in 1985. However, much has changed. Canada has entered into a series of free trade agreements and joined the WTO, and the Canadian economy has shifted from being heavily weighted to manufacturing and natural resources toward services, technology and other industries.

Given the magnitude of these changes, the rules are no longer effective. Instead, it is clear that they are both overbroad, in that they result in the notification of benign mergers that pose no risk to competition (a phenomenon noted in other C.D. Howe Institute reports) and not broad enough, in that they miss mergers that pose risks to competition.

For example, 38 percent of the mergers flagged to the Bureau last year originated from the real estate and oil and gas sectors. But the Bureau has never challenged a merger in these industries in the past 30 years, which demonstrates how unlikely it is that such mergers will cause potential harm.

By further example, the rules' thresholds do not take full account of revenues earned from imports. The constant value of imports has more than quadrupled since 1985, but because of gaps in the rules, mergers between foreign companies with large sales in Canada are less likely to be caught by the merger notification rules.

These shortcomings produce negative effects for companies and Canadians. Companies must give notice (at significant cost) of benign mergers, while foreign merging companies in sensitive sectors do not benefit from the certainty of engaging with the Bureau through the formal notification process. Canadians pay taxes to support the Bureau's review of benign mergers, but are less protected from harm when the Bureau is not notified of significant foreign mergers.

All of this demonstrates why the merger notification rules are due for reform. Reform should reflect the Canadian economy as it stands today. Reform should also reflect the Bureau's experiences reviewing mergers in the past 30 years and the international best practices developed by multilateral organizations (to which Canada belongs). I provided a more in-depth diagnosis of the rules' ineffectiveness, as well as specific proposals for reform, in a recent longer paper. Companies and Canadians would benefit significantly if reform occurred without delay.

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