



Broadcasting Notice of Consultation CRTC 2011-791-1

PDF version

Additional reference: 2011-791

Ottawa, 10 August 2012

Call for comments on proposed standard clauses for non-disclosure agreements and provisions for the conduct of audits

The purpose of this call for comments is to establish provisions that will help frame certain of the business dealings involving broadcasting distribution undertakings (BDUs) and the services of programming undertakings. Specifically, it seeks to establish standard clauses that will aid in safeguarding commercially sensitive information that may be obtained over the course of negotiations or other interactions between programming undertakings and BDUs. It also seeks to establish provisions for the conduct of audits of subscriber information held by BDUs so as to allow programming undertakings to obtain reasonable access to this information as it relates to their services.

To this end and in light of the interventions received in response to Broadcasting Notice of Consultation 2011-791, the Commission considers it appropriate to call for comments on the specific wording and content of the proposed standard clauses for non-disclosure agreements and provisions governing the timeframes and modalities for the conduct of audits set out in the appendices to the present notice. Specifically, the Commission seeks comments on the following matters:

- whether the proposed non-disclosure and audit provisions are worded with sufficient clarity;*
- whether the proposed non-disclosure and audit provisions are worded in such a way as to be operationally workable; and*
- where wording is not sufficiently clear or operationally workable, what specific alternate wording is required to provide the necessary clarity or render the provisions operationally workable.*

The Commission also invites comments on its preliminary views set out in paragraphs 15 and 18 of this notice, namely:

- that the non-disclosure clauses adopted as a result of the present proceeding should apply in circumstances where at least one party is vertically integrated and should cover all aspects of the relationship between a programming undertaking and a BDU; and*

- *that the audit provisions adopted as a result of the present proceeding should apply in all relationships involving a BDU that is vertically integrated.*

*The Commission will accept comments that it receives with respect to the above-noted matters on or before **10 September 2012**. The Commission will also accept reply comments filed by **20 September 2012**.*

Following the conclusion of this proceeding, which is a continuation of the proceeding initiated by Broadcasting Notice of Consultation 2011-791, the Commission intends to determine the appropriate content of non-disclosure and audit-related provisions, as well as the scope of their applicability and the method by which they should be implemented.

Introduction

1. In Broadcasting Regulatory Policy 2011-601 (the Vertical Integration Framework), the Commission determined that notwithstanding the introduction of an audit provision in the *Broadcasting Distribution Regulations* (the Regulations), additional details on the conduct of audits and further amendments to the Regulations might be required. The Commission also determined that a properly framed non-disclosure agreement, which minimizes the level of intrusion in the business functions of vertically integrated (VI) entities,¹ was the appropriate method to protect against the misuse of commercially sensitive information.
2. Accordingly, the Commission announced, among other things, that it would initiate a follow-up proceeding to:
 - develop timeframes and other modalities with respect to the conduct of audits; and
 - develop wording for a standard form non-disclosure agreement, as well as determine to whom such agreements should apply.
3. In Broadcasting Notice of Consultation 2011-791, the Commission sought comments on the following:
 - modalities for the conduct of audits, including:
 - standard information to be provided by broadcasting distribution undertakings (BDUs) to programming services annually and on receipt of an audit request;

¹ Vertical integration (VI) refers to the ownership or control by one entity of both audiovisual programming services, such as conventional television stations or pay and specialty services, as well as distribution services, such as cable systems or direct-to-home satellite services. VI also includes ownership or control by one entity of both audiovisual programming undertakings and production companies.

- the audit process, including step-by-step timeframes for the conduct and completion of audits; and
 - the method and timeframe by which auditors will be selected by parties and possible disputes resolved.
 - wording for a proposed standard non-disclosure agreement and to whom it needs to apply.
4. The Commission received a number of comments in response to Broadcasting Notice of Consultation 2011-791. The public record for this proceeding can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Positions of parties

Audits of subscriber information

5. A number of interveners, including Allarco Entertainment 2008 Inc., Astral Media Inc., the Canadian Broadcasting Corporation, the Canadian Independent Distributors Group (CIDG), GlassBOX Television Inc., the Independent Broadcast Group (IBG) and Pelmorex Communications Inc. (Pelmorex), proposed the adoption of detailed audit provisions, including provisions setting out the standard information to be provided to auditors, the format of the information provided, the modalities of the audit process and the method and timeframe by which auditors will be selected. However, other parties, such as Bell Canada, Quebecor Media Inc. (QMI), on its behalf and on behalf of TVA Group Inc. and Videotron G.P, Saskatchewan Telecommunications (SaskTel) and Shaw Communications Inc., argued that there was no need for additional regulatory measures relating to audits given the recent amendments to the Regulations, which provide for audit rights and incorporate by reference the provisions of Broadcasting Public Notice 2005-34.
6. A majority of the interveners suggested that any additional audit-related requirements should apply uniformly to both VI and non-VI BDUs to avoid dual regulatory regimes.

Non-disclosure agreements

7. Most VI entities, as well as SaskTel, argued that there was no need to impose standard non-disclosure provisions. These interveners argued that non-disclosure agreements were already standard practice in the industry and suggested that there was no evidence that they were not working. Most independent distributors and programming undertakings, however, argued for the need for a detailed non-disclosure agreement that would nonetheless permit parties to depart from standard provisions if they both agreed to do so.
8. Most independent broadcasters submitted that such provisions should cover all interactions between distributors and programming undertakings from initial negotiations through final affiliation agreements, as well as during the full term of

any such agreement. These interveners also argued for an expansive definition of “confidential information” that would include all manner of information not publically available that relates to a party to the agreement, as well as certain internally developed information. These interveners submitted that disclosure of such information should be limited to those with a “need to know” and exclude personnel dealing with both distribution and programming operations.

9. Several VI entities argued that mandated adoption of complete agreements would be overly burdensome and create significant operational problems due to differences in corporate structures. They argued that if the Commission adopted measures for the non-disclosure of commercially sensitive information, parties should be allowed to depart from those provisions upon agreement. They also submitted that personnel at the highest executive level should not be precluded from receiving information from both the programming and distribution arms of a VI entity.
10. Rogers Communications Inc. (Rogers) argued that the definition of confidential information proposed by the independent broadcasters was overly broad, such that it would provide little guidance in ascertaining what qualifies as confidential. Rogers also submitted that the proposal to include within that definition information developed by a VI entity and which specifically relates to the other contracting party – with carve-out provided for such information that is independently developed by the VI entity other than in its capacity as a broadcasting undertaking – would impose significant costs on an entity as it tries to determine whether a given piece of information qualified as “confidential.”
11. Most VI entities argued that any non-disclosure provisions adopted by the Commission should apply equally to all broadcasting undertakings regardless of corporate structure. Many independent distributors and programming undertakings, however, argued that Commission involvement in devising a standard agreement was only required in relation to VI entities. The detailed provisions provided by these parties would extend to both video-on-demand and digital media broadcasting undertakings. Rogers, however, argued that such provisions should not be extended to either of these types of undertakings as doing so would be out of the scope of this process.
12. Most VI entities, as well as SaskTel, argued that any non-disclosure provisions adopted by the Commission should serve as guidelines only. Most independent distributors and programming undertakings argued that the Commission should have the means to require the adoption of standard contractual clauses on the use and safekeeping of commercially sensitive information. Some suggested that this could be accomplished by amending the code of conduct set out in Appendix 1 to the Vertical Integration Framework to refer to the adopted non-disclosure provisions. Failure to execute such provisions or materially similar provisions would either constitute *prima facie* evidence of undue preference/disadvantage or could give rise to recourse to the Commission’s dispute resolution procedures. Pelmorex suggested that such provisions be incorporated into the Regulations.

Commission's preliminary views

13. The Commission notes that there was considerable divergence in the submissions regarding proposed audit modalities and non-disclosure provisions.
14. With respect to non-disclosure agreements, some parties proposed few, if any, provisions. Others set out detailed and exhaustive provisions, such as those that would require undertakings to implement intrusive internal information barriers and procedures relating to personnel training. The Commission considers that neither approach is consistent with its stated intent to develop non-disclosure provisions that would protect against the misuse of commercially sensitive information while minimizing interference with the operation of business functions.
15. Having considered the proposals put forth by the interveners and taking into account the above-stated intent, the Commission has developed its own standard clauses for non-disclosure provisions in Appendix 1 to this notice. It is the Commission's preliminary view that these standard clauses should cover all aspects of the relationship between a programming undertaking and a BDU.² It is also the Commission's preliminary view that these standard clauses should apply in circumstances where at least one party is vertically integrated, as that term is understood in the Vertical Integration Framework.
16. These standard clauses attempt to strike a balance between ensuring adequate protection against misuse of commercially sensitive information and respecting existing corporate structures. In this regard, the proposed clauses represent a compromise in that they fall short of the level of intervention proposed by the CIDG, the IBG and Pelmorex, yet are more detailed than the provisions put forth by the VI entities. In essence, they permit parties to retain existing agreements that meet these minimum requirements and to negotiate specific additional areas of non-disclosure if they wish. The proposed clauses also ensure that all parties have basic protections against inappropriate use of commercially sensitive information.
17. Further, in Appendix 2 to this notice, the Commission has set out proposed provisions governing the timeframes and modalities for the conduct of audits. For the most part, these proposed provisions represent clarifications of the existing provisions currently set out in Broadcasting Public Notice 2005-34. They also reflect those proposals that garnered the most agreement by those parties that intervened in response to Broadcasting Notice of Consultation 2011-791. Changes were made to the language proposed in various interventions in an effort to streamline both the language and the applicability of the audit provisions.

² These provisions would thus apply to information exchanged during the course of negotiations engaged in prior to entering into an affiliation agreement, as well as to information resulting from the provision of programming services to a distributor for the purposes of distribution.

18. It is the Commission's preliminary view that the audit provisions set out in Appendix 2 should apply in all relationships involving a BDU that is vertically integrated.

Call for comments

19. The Commission considers it appropriate to invite comments on the specific wording and content of Appendices 1 and 2. In this regard, the Commission seeks comment on the following matters:

- whether the proposed non-disclosure and audit provisions are worded with sufficient clarity;
- whether the proposed non-disclosure and audit provisions are worded in such a way as to be operationally workable; and
- where wording is not sufficiently clear or operationally workable, what specific alternate wording is required to provide the necessary clarity or render the provision operationally workable.

20. Where alternate wording is suggested, supporting rationale as to why the change is required should be provided.

21. The Commission also invites comments on its preliminary views set out in paragraphs 15 and 18 of this notice, namely:

- that the non-disclosure clauses adopted as a result of the present proceeding should apply in circumstances where at least one party is vertically integrated and should cover all aspects of the relationship between a programming undertaking and a BDU; and
- that the audit provisions adopted as a result of the present proceeding should apply in all relationships involving a BDU that is vertically integrated.

22. The Commission will accept comments that it receives with respect to the above-noted matters on or before **10 September 2012**. The Commission will also accept reply comments filed by **20 September 2012**.

23. Following the conclusion of this proceeding, which is a continuation of the proceeding initiated by Broadcasting Notice of Consultation 2011-791, the Commission intends to determine the appropriate content of non-disclosure and audit provisions, as well as the scope of their applicability and the method by which they should be implemented.

Procedure

24. The *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277 (the Rules of Procedure), set out, among other things, the rules for content, format, filing and service of interventions, as well as the procedure for filing confidential information and requesting its disclosure. Accordingly, the procedure set out below must be read in conjunction with the Rules of Procedure and its accompanying documents, which can be found on the Commission's website under "CRTC Rules of Practice and Procedure."
25. In accordance with the Rules of Procedure, a document must be filed with, not merely sent to, the Commission by 5 p.m. Vancouver time (8 p.m. Ottawa time) on the date it is due. The Commission takes no responsibility for postal delays and will not notify a party whose submission is received after the deadline date. Late submissions will not be considered by the Commission and will not be made part of the public file.
26. The Commission will not formally acknowledge interventions. It will, however, fully consider all interventions, and they will form part of the public record of the proceeding, provided that the procedures for filing set out in the Rules of Procedure and this notice have been followed.
27. Submissions must be filed by sending them to the Secretary General of the Commission by **only one** of the following means:

by using the
[[Intervention/comment/answer form](#)]

or

by mail to
CRTC, Ottawa, Ontario K1A 0N2

or

by fax at
819-994-0218

28. Submissions longer than five pages should include a summary.
29. Each paragraph of the submission should be numbered. In addition, where the intervention is filed by electronic means, the line ***End of document*** should be entered following the last paragraph of the document, as an indication that the document has not been altered during electronic transmission.

Important notice

30. All information that parties provide as part of this public process, except information designated confidential, whether sent by postal mail, facsimile, e-mail or through the

Commission's website at www.crtc.gc.ca, becomes part of a publicly accessible file and will be posted on the Commission's website. This information includes personal information, such as full names, e-mail addresses, postal/street addresses, telephone and facsimile numbers, and any other personal information parties provide.

31. The personal information that parties provide will be used and may be disclosed for the purpose for which the information was obtained or compiled by the Commission, or for a use consistent with that purpose.
32. Documents received electronically or otherwise will be put on the Commission's website in their entirety exactly as received, including any personal information contained therein, in the official language and format in which they are received. Documents not received electronically will be available in PDF format.
33. The information that parties provide to the Commission as part of this public process is entered into an unsearchable database dedicated to this specific public process. This database is accessible only from the web page of this particular public process. As a result, a general search of the Commission's website with the help of either its own search engine or a third-party search engine will not provide access to the information that was provided as part of this public process.
34. The Commission encourages parties and interested persons to monitor the record of the proceeding, available on the Commission's website, for additional information that they may find useful when preparing their submissions.

Examination of documents

35. A list of all interventions will also be available on the Commission's website. The list is accessible by selecting "View all proceedings open for comment" from the "Public Proceedings" section of the Commission's website and clicking on the "Interventions/Answers" link associated with this notice.
36. The public may examine public interventions and related documents at the following Commission offices during normal business hours.

Location of Commission offices

Toll-free telephone: 1-877-249-2782

Toll-free TDD: 1-877-909-2782

Les Terrasses de la Chaudière
Central Building
1 Promenade du Portage, Room 206
Gatineau, Quebec
J8X 4B1
Tel.: 819-997-2429
Fax: 819-994-0218

Regional offices

Metropolitan Place
99 Wyse Road
Suite 1410
Dartmouth, Nova Scotia
B3A 4S5
Tel.: 902-426-7997
Fax: 902-426-2721

205 Viger Avenue West
Suite 504
Montréal, Quebec
H2Z 1G2
Tel.: 514-283-6607

55 St. Clair Avenue East
Suite 624
Toronto, Ontario
M4T 1M2
Tel.: 416-952-9096

360 Main Street
Suite 970
Winnipeg, Manitoba
R3C 3Z3
Tel.: 204-983-6306
Fax: 204-983-6317

2220 – 12th Avenue
Suite 620
Regina, Saskatchewan
S4P 0M8
Tel.: 306-780-3422

100 – 4th Avenue South-West
Suite 403
Calgary, Alberta
T2P 3N2
Tel.: 403-292-6660
Fax: 403-292-6686

858 Beatty Street
Suite 290
Vancouver, British Columbia
V6B 1C1
Tel.: 604-666-2111
Fax: 604-666-8322

Secretary General

Related documents

- *Call for comments on audit provisions for broadcasting distribution undertakings and on a standard form non-disclosure agreement*, Broadcasting Notice of Consultation CRTC 2011-791, 19 December 2011
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011
- *Auditing of distributor subscriber information by programming services*, Broadcasting Public Notice CRTC 2005-34, 18 April 2005

Appendix 1 to Broadcasting Notice of Consultation CRTC 2011-791-1

Proposed standard clauses for non-disclosure agreements

1. DEFINITIONS

1.1 Confidential Information

“Confidential Information” means all of the following verbal or written information or other data that is not in the public domain or specifically excluded by written agreement between the parties:

- a) the terms and conditions of any contract between the parties;
- b) the number of subscribers to or penetration achieved by any programming service, package or tier of services;
- c) viewership or subscriber data, including such data obtained through a set-top box or by similar means;
- d) technological information and planned technological developments regarding a programming service, distribution undertaking or digital media broadcasting undertaking;
- e) marketing and programming information;
- f) proposed new programming services or changes to existing programming services; and
- g) any other data or verbal or written information that is provided by a party and designated as confidential by that party.

1.2 Public Domain

“Public Domain” means all information that is generally known to the public.

2. USE, DISCLOSURE AND PROTECTION OF CONFIDENTIAL INFORMATION

2.1 Permitted Uses

To enable the parties to enter into contractual or other arrangements regarding the provision and distribution of programming services and as a result of such contractual or other arrangements, Confidential Information will be disclosed and/or developed by one or both parties. In order to protect the parties against disclosure or misuse of Confidential Information it is understood and agreed that the party in possession of Confidential Information pertaining to the other party shall exclusively make use of that Confidential

Information subject to the following:

2.1.1 – If the party is contracting in the capacity of a Canadian programming undertaking or network, solely for the purpose of facilitating the provision of its programming to the distributing party, whether as a broadcasting distribution undertaking, video-on-demand undertaking or digital media broadcasting undertaking; and

2.1.2 – If the party is contracting as a Canadian broadcasting distribution undertaking, video-on-demand undertaking or digital media broadcasting undertaking, solely for the purpose of facilitating its distribution of programming provided to it for distribution on its undertaking.

2.2 Restrictions on Disclosure

2.2.1 Subject to 2.2.3 and 2.2.5, the parties will not disclose Confidential Information to any persons outside those necessarily involved for the permitted uses set out in 2.1.

2.2.2 A party that discloses Confidential Information relating to another party to any person who is not bound by the terms of this agreement – such as outside advisors – shall ensure that such person does not disclose or use the Confidential Information otherwise than in furtherance of the permitted purposes set out in 2.1, as appropriate.

2.2.3 A party that discloses Confidential Information to persons outside those necessarily involved for the permitted purposes set out in 2.1 shall do so strictly for the purposes of normal reporting and review purposes to its parent company, directors, officers, auditors and legal advisors.

2.2.4 Any person to whom Confidential Information will be provided for the purposes contemplated in 2.2.3, other than an outside advisor, and who is not otherwise bound by the terms of this agreement, must also sign this agreement in order to receive Confidential Information for those limited purposes.

2.2.5 A party shall not be liable for disclosure or use of Confidential Information where:

- a) Such disclosure or use is required by law.
- b) It has obtained express written approval for the disclosure from the other contracting party or parties.
- c) The Confidential Information is lawfully obtained from a third party or parties without a breach of this agreement.

2.3 Protection of Confidential Information

2.3.1 Subject to 2.2, the parties shall hold all Confidential Information in strict confidence and protect this Confidential Information with the same degree of care as that with which they protect their own confidential information, which must not be less than a reasonable degree of care.

2.3.2 A party that discloses Confidential Information in accordance with 2.2.1 or 2.2.3 to any persons who are not bound by the terms of this agreement shall be responsible for any unauthorized disclosure or use of the Confidential Information by such persons.

3. REPORTING AND DISPOSAL OF CONFIDENTIAL INFORMATION

3.1 A party shall promptly report to the other party any unauthorized disclosure or other occurrence which would reasonably be understood to compromise the continued confidential treatment of Confidential Information pertaining to the other party.

3.2 After a two-year period following any requirement to use Confidential Information for the permitted uses set out in 2.1 or immediately prior to expiry of an agreement, whichever comes first, unless otherwise agreed to in writing, a party shall take all reasonable steps to return or destroy the Confidential Information.

4. NON-WAIVER

Any failure by either party to enforce the other's strict performance of any provision of this Agreement will not constitute a waiver of its right to subsequently enforce such provision or any other provision of this Agreement. Similarly, no failure or delay in the performance of any obligation hereunder shall absolve the parties from the continued requirement to abide by all obligations resulting from this Agreement.

Appendix 2 to Broadcasting Notice of Consultation CRTC 2011-791-1

Proposed provisions governing the timeframes and modalities for the conduct of audits

A. Application

These audit provisions shall apply in all relationships involving a broadcasting distribution undertaking (BDU) that is vertically integrated, as that term is defined *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011.

B. Selection of the Auditor

The programming undertaking shall select the auditor.

The auditor shall be a professional accountant, such as a CA, CGA or CMA, and hold a valid public accounting licence, where applicable, in the jurisdiction where the physical audit will take place. Should the BDU object to the selection of the auditor, the BDU shall provide, in writing, within 15 days of receipt of the written audit request, the grounds for its objection to the programming service, copying the proposed auditor. The programming undertaking shall have 15 days from the receipt of the notice of the BDU's objection to the selected auditor to reply to the BDU in writing, either selecting another auditor or, if keeping the original selection, setting out its response to the objection. If the matter is not resolved, then the issue may be submitted to the Commission for dispute resolution (with the Commission reserving the right to suspend the application of audit timeframes as described in section D).

C. Access to Information

The BDU shall make available all such books, records, accounts and other information as is reasonably required, so as to permit a programming undertaking's auditor to verify and confirm that the BDU's payments and distribution of the programming undertaking's service(s) comply with the terms of the affiliation agreements. More specifically, the information provided to the auditor shall include the following:

1. Channel listing of each system applicable to period audited.
2. Retail rates of all packages and/or services offered to customers during audit period.
3. Monthly System Subscriber Reports.
4. Monthly remittance calculations.
5. List of all bulk accounts by system:

- a. Number of units/rooms for each account.
 - b. Number of basic subscribers for each account.
 - c. Number of extended tier subscribers for each account.
 - d. Activation date of each account.
 - e. Rate per unit/room for each account.
 - f. Name of each account.
- 6. List of all complimentary subscriptions by system.
 - 7. Details of all promotions offered by BDU.
 - 8. Any other information deemed necessary by the auditor.

Audit information shall be made available in electronic format where possible or otherwise be made available in a format that facilitates the most efficient and effective audit.

D. Timeframes, Period Covered by the Audit and Audit Report

A written audit request shall be served by the programming undertaking on the BDU. The audit shall commence on a date to be mutually agreed upon by the auditor and the BDU, such date to be no later than 90 days from the date of delivery of the written request to the BDU.

A request for an audit may be made at any time after the period being proposed to be audited has ended but no later than 12 months after the end of the period proposed to be audited.

The period covered by the audit shall be for 12 months or a longer period if agreed to by parties and a given time period should be subject to only one audit.

The auditors should conduct their audits and present or validate their findings within the general standards adopted by their governing body.

E. Scope and Conduct of the Audit

The scope of the audit is to confirm compliance with the affiliation agreement(s) between the BDU and the programming undertaking, which could include the monthly reports, subscriber counts, payments and other information supplied by the BDU.

The audit shall take place on the premises where the BDU maintains the records applicable to the compliance audit.

The parties shall make commercially reasonable efforts to ensure the audit is completed

and the audit report is submitted to both parties within 210 days from the notice of intention to audit.

F. Retention of Records

The auditor may retain sufficient information to validate his findings. The auditor and the BDU can agree on which information can be retained and photocopied and which information should be discarded once the compliance audit is complete. Confidentiality agreements and non-disclosure agreements are to be signed to protect both the BDU and the programming undertaking against the disclosure of confidential information.

G. Group audits

The conduct of audits as set out above shall apply equally to audits conducted by individual programming undertakings, as well as audits conducted at the same time by the same auditor for more than one related or unrelated programming undertakings.