



# Pre-Merger Notification Interpretation Guideline Number 10

Notifiable Transactions Regulations—Transactions and  
Events (Section 14 of the Regulations)

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## Enforcement guidelines

June 20, 2011

Notice

### **This publication replaces the following Competition Bureau publication:**

Enforcement Guidelines — Notifiable Transactions under Part IX of the *Competition Act* — Interpretation Guidelines, April 25, 2000

This Interpretation Guideline is issued by the Commissioner of Competition ("Commissioner"), who is responsible for the administration and enforcement of the [Competition Act](#) ("Act"). The purpose of this Guideline is to assist parties and their counsel in interpreting and applying the provisions of the Act relating to notifiable transactions. This Guideline sets out the general approach taken by the Competition Bureau ("Bureau") and supersedes all previous statements made by the Commissioner or other Bureau officials. This Guideline is not intended to be a binding statement of how discretion will be exercised in a particular situation and should not be taken as such, nor is it intended to substitute for the advice of legal counsel to the parties, or to restate the law. Guidance regarding a specific proposed transaction may be requested from the Merger Notification Unit<sup>[Footnote 1](#)</sup>.

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## Background

Section 14 of the Notifiable Transactions Regulations ("the Regulations") provides for the adjustment of the aggregate value of assets or the gross revenues from sales when a transaction or event has occurred after the close of the fiscal period for which audited financial statements are available. Adjustments may be made to reflect the transaction or event, the consequence of which, if taken into account, would affect the determination of whether notice is required under section 114 of the Act. Paragraph 14(2)(c) of the Regulations provides that a transaction or event referred to in subsection 14(1) of the Regulations includes any agreement, arrangement, understanding or other transaction or event that is likely to have a material effect on the aggregate value of the assets or gross revenues from sales of the parties to the proposed transaction or of their affiliates. A material effect is one which would affect the determination of whether notice is required under section 114 of the Act.

The issue of whether a transaction or event under paragraph 14(2)(c) of the Regulations has a material effect on a proposed transaction may arise in cases where a shell company is incorporated for use as an acquiring corporation, or where one or more parties to a transaction enters into, and completes, a second transaction prior to completion of the first.

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## Shell companies

Acquisitions are frequently structured in such a way that a shell company is incorporated for the sole purpose of acting as the acquiring corporation in a proposed transaction. From the time of incorporation up until a short time prior to closing the transaction, the assets and revenues of the shell company may be nonexistent, while those of its affiliates, if any, may be below the party-size threshold under section 109 of the Act. However, just prior to closing, a significant sum of money may be transferred to the shell company for purposes of carrying out the transaction. These injected funds, if taken into account, could result in the party-size threshold being exceeded, potentially making the transaction notifiable.

For example, this situation may arise when a foreign company with no assets in Canada incorporates a Canadian shell company for purposes of completing an acquisition of an operating business in Canada and, immediately prior to closing, injects into the shell company the funds required to complete the purchase.

## Policy

A transaction or event referred to in section 14 of the Regulations should be separate from the transaction which gives rise to the question of prenotification. Thus, where a significant sum of money is injected into a shell company prior to closing a proposed transaction for purposes of carrying out that transaction, such a temporary change to the asset base of the shell company is not considered separate from the proposed transaction and is therefore not a transaction or event which would necessitate an adjustment to the shell company's financial statements under section 14 of the Regulations.

## Section 109 parties

Section 109 of the Act provides that Part IX of the Act does not apply to a proposed transaction unless the "parties thereto, together with their affiliates", exceed the thresholds set out in paragraphs 109(1)(a) or 109(1)(b) of the Act. Where a proposed transaction is subject to prenotification, the parties may not close the transaction prior to expiry of the relevant waiting period set out in section 123 of the Act. Between the date on which an agreement between two parties is executed and the date on which the transaction closes, one or more parties to the proposed transaction, or their affiliates, may become involved in other transactions which may affect the size of the party(ies). In these circumstances, it is possible that a party or parties falling below the section 109 threshold could now exceed it, thereby making the first transaction notifiable where, prior to involvement in the second transaction, it was not.

## Policy

Where a party to a proposed transaction, or its affiliates, enters into a second proposed transaction which will be completed before the first transaction closes, the second transaction is considered a transaction or event for purposes of section 14 of the Regulations. In such circumstances, the party to the second transaction should determine whether that transaction is likely to have a material effect on the party-size threshold under section 109 of the Act for purposes of the first transaction.

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## Example

A corporation (Acorp) enters into an agreement to purchase assets from another corporation (Bcorp). The purchase agreement is dated February 1; the closing is scheduled for September 1. The aggregate values of the assets or the gross revenues from sales of Acorp and Bcorp, together with their affiliates, do not exceed the threshold under section 109 of the Act. Accordingly, the parties are not required to prenotify. Before the transaction with Bcorp closes, Acorp enters into an agreement on March 1 to purchase assets from a third corporation (Ccorp). The transaction with Ccorp closes on August 1. Whether or not the transaction with Ccorp is notifiable, the effect of this transaction is to increase Acorp's party size. If this increase is sufficient to render Acorp's transaction with Bcorp notifiable, then Acorp's transaction with Ccorp has a material effect on the transaction between Acorp and Bcorp. Accordingly, Acorp's financial statements should be adjusted pursuant to section 14 of the Regulations to reflect the transaction with Ccorp in order to determine whether the adjusted aggregate value for Acorp's assets will cause the combined party-size of Acorp and Bcorp, together with their affiliates, to exceed the section 109 threshold.

**For further information, please contact:**

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## Footnote

### Footnote 1

For further information, please refer to the [\*Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act\*](#) at p.14.