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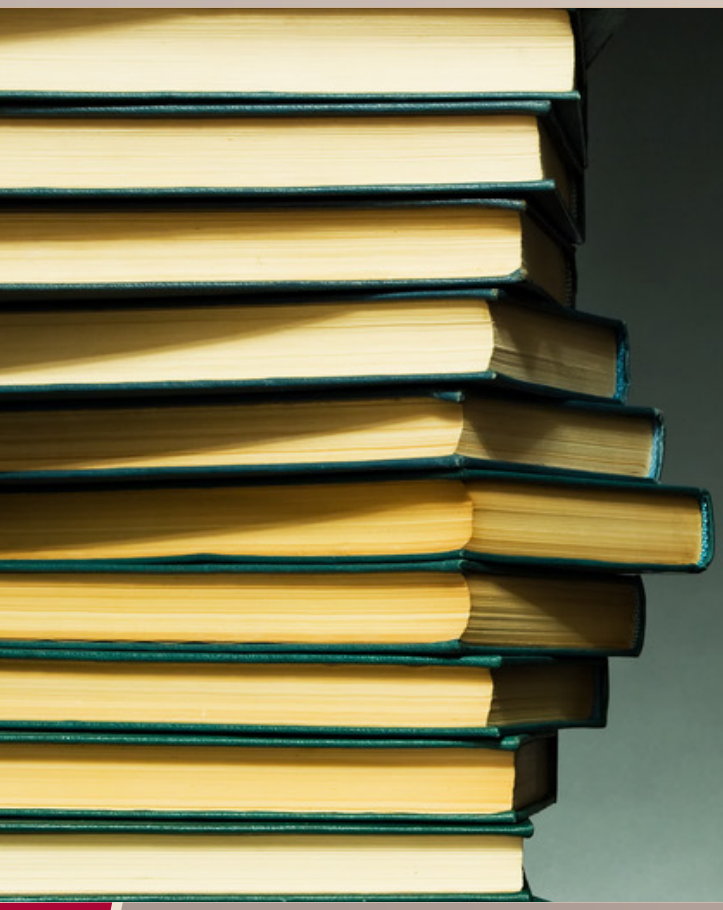
Enforcement Guidelines



Pre-Merger Notification Interpretation Guideline Number 7: Creditor Acquisitions (Paragraph 111(*d*) of the Act)

Paragraph 111(*d*) of the *Competition Act*

Canada

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

This publication replaces the following Competition Bureau publications:
Enforcement Guidelines — *Notifiable Transactions under Part IX of the* Competition Act *— Interpretation Guidelines*, April 25, 2000

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PRE-MERGER NOTIFICATION INTERPRETATION GUIDELINE NUMBER 7: CREDITOR ACQUISITIONS (PARAGRAPH 111(*d*) OF THE ACT)

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[1].

Background

Paragraph 111(*d*) of the Act provides that the following class of transaction is exempt from the application of Part IX of the Act:

> **111.** (*d*) an acquisition of collateral or receivables, or an acquisition resulting from a foreclosure or default or forming part of a debt work-out, made by a creditor in or pursuant to a credit transaction entered into in good faith in the ordinary course of business.

The acquisition by a creditor or its agents of the property of a debtor is, in certain circumstances, considered a class of transaction that is exempt from the application of Part IX of the Act. However, the subsequent disposition of the acquired collateral by the creditor or its agent is not exempt under paragraph 111(*d*) of the Act.

Policy

Trustees in bankruptcy and receivers are considered at law to operate as the agents of creditors. Hence, the vesting of a debtor's assets in the trustee or receiver and their corresponding acquisition of control and possession of the debtor's assets are exempt from the application of Part IX of the Act. However, the subsequent sale of a debtor's assets by a trustee or receiver to a third party may be notifiable, depending on the nature of the debtor's assets and whether they relate to an operating business.

1 For further information, please refer to the *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates Under the* Competition Act at p.14: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03302.html.

The paragraph 111(*d*) exemption does not extend to assignees of the creditor's interest. For example, where a creditor of an insolvent debtor assigns its interest to a "vulture fund", any acquisition of the debtor's property by the vulture fund would not be exempt under paragraph 111(*d*) of the Act because the vulture fund is not the creditor who entered into the credit transaction with the debtor.

In paragraph 111(*d*) of the Act, "debt work-out" includes plans of arrangement under the *Companies' Creditors Arrangement Act* and proposals under Part III of the *Bankruptcy and Insolvency Act*.

The vesting of a debtor's assets in a trustee or receiver is not by itself sufficient reason to consider an operating business defunct. If the trustee or receiver is carrying on the business with a view to disposing of it as a going concern, or to reorganizing its affairs, the undertaking may still be considered an "operating business". Where an operating business is incapable of being carried on or of being sold as a going concern and the trustee or receiver takes steps to liquidate the assets on a piecemeal basis, the undertaking may no longer be an "operating business" as defined in the Act.

For further information, please contact:

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Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

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