Competition Bureau Canada
Bureau de la concurrence Canada

Pre-Merger Notification Interpretation Guideline Number 7

Creditor Acquisitions (Subsection 108(1) and Paragraph 111(d) of the Act)

Canada

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Enforcement guidelines

October 26, 2017

Notice

This publication replaces the following Competition Bureau publication:

Enforcement Guidelines — *Pre-Merger Notification Interpretation Guideline Number 7: Creditor Acquisitions (Paragraph 111(d) of the Act)*, June 20, 2011

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[Footnote 1].

1. Background

Creditor acquisitions sometimes involve businesses that are either defunct, temporarily closed, or whose operations are suspended. Such transactions may require an assessment of whether there is an acquisition of an "operating business" as defined in subsection 108(1) of the Act.

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. The subsequent disposition of the acquired collateral by the creditor or its agent may also be exempt under paragraph 111(*d*) of the Act, depending on the circumstances.

2. Policy

In insolvency proceedings, trustees and receivers are officers of the court that administer the insolvency process. 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.

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[Footnote 2].

The paragraph 111(d) exemption may extend to acquisitions following the transfer of a creditor's interest (e.g. on secondary markets), provided the acquisition is pursuant to a credit transaction entered into in good faith in the ordinary course of business. For example, where a creditor transfers its interest to another creditor that subsequently makes an acquisition pursuant to a foreclosure or default or as part of a debt work-out,[Footnote 3] the subsequent acquisition is exempt under paragraph 111(d) of the Act if the transfer was made prior to:

1. any filing or declaration in respect of the bankruptcy, insolvency or receivership of the debtor, or the debt work-out; and

2. the acquirer having knowledge of the impending bankruptcy, insolvency, receivership, or debt work-out.

An acquisition following a transfer that occurs after an announcement or filing for bankruptcy would not be exempt under paragraph 111(d) of the Act because it would not be deemed a credit transaction in the ordinary course of business.

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Footnotes

Footnote 1

For further information, please refer to the *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates* Under the Competition Act.

Footnote 2

For further information, please refer to the *Pre-Merger Notification Interpretation Guideline Number 1: Definition of "Operating Business" (Section 108 of the Act)*.

Footnote 3

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*.