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Increased Filing Fees for Merger Reviews Under the Canadian *Competition Act*

Authors: [John Bodrug](#) and David Feldman

The Canadian Competition Bureau has announced that the filing fee for merger reviews under the *Competition Act* (Act) will increase to \$72,000, from \$50,000, effective May 1, 2018. The fee will be adjusted for inflation annually thereafter. This 44% increase represents the first change to the merger filing fee since 2003.

Notification Thresholds Unchanged

Other than the filing fee, no other changes have been made to Canada's merger review process or the applicable thresholds for mandatory pre-merger notification.

The Act requires that mergers, acquisitions and certain other types of business combinations that meet prescribed thresholds be notified to the Commissioner of Competition (Commissioner), the head of the Bureau, before they can be completed.

The Commissioner reviews notifiable transactions to determine whether they are likely to prevent or lessen competition substantially. The Commissioner may seek to challenge a transaction that is likely to have such anticompetitive effects. Alternatively, if the Commissioner concludes that anticompetitive effects are unlikely, he may issue a form of clearance letter indicating that he does not intend to challenge the proposed transaction. The merger filing fee is payable whenever a pre-merger notification is filed or another form of clearance under the merger provisions of the Act is requested.

As a general rule, an acquisition of an operating business in Canada is subject to notification when each of the following is exceeded: (i) a "size of parties" threshold; (ii) a "size of transaction" threshold; and (iii) if control is not being acquired, a minimum ownership threshold. (The relevant asset and gross revenue figures in the thresholds are usually to be obtained from the most recent audited financial statements of the relevant party.)

i. Size of Parties Threshold

A notification is not required for any type of transaction unless the parties to the transaction, together with all their affiliates, have

- assets in Canada that exceed \$400 million in aggregate value, or
- annual gross revenues from sales in, from or into Canada that exceed \$400 million.

ii. Size of Transaction Threshold

The size of transaction threshold varies by type of transaction, but generally this threshold will be exceeded for transactions completed in 2018 (this threshold is adjusted annually) when the target has

- assets in Canada whose aggregate value exceeds \$92 million, or
- annual gross revenues from sales in or from Canada that exceed \$92 million.

iii. Ownership Threshold

In the case of share acquisitions, the purchaser's voting interest in the target following the transaction (including interests owned by the purchaser's affiliates) must exceed 20% (where the target's shares are publicly traded) or 35% (where the target has no publicly traded shares), or 50% if the relevant threshold is already exceeded prior to the transaction.

Similarly, when the transaction involves the acquisition of an interest in a non-corporate entity, the purchaser, together with its affiliates, must hold an aggregate interest in the entity that entitles the person to receive more than 35% of the profits of the entity, or more than 35% of its assets on dissolution, or, if the purchaser is already so entitled, to receive more than 50% of such profits or assets.

Similar thresholds apply for certain other types of transactions.

Implications for Purchase Agreements

Purchase and sale agreements in respect of notifiable transactions often provide either that the purchaser will pay the filing fee under the Act or that the parties will split the fee. The increased fee may result in more focus on the negotiation of this point, particularly for relatively small acquisitions of businesses with large sales volumes but low margins that exceed the notification thresholds because of the gross sales of the target business.

Key Contact: [John Bodrug](#)