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Canadian Competition Bureau Revises Pre-Merger Notification Guidance on Acquisitions by Creditors

Authors: John Bodrug and David Feldman

The pre-merger notification requirements of the Canadian *Competition Act* (Act) contain an exemption for certain types of acquisitions by creditors. In late October, the Competition Bureau revised one of its pre-merger notification interpretation guidelines (originally issued in 2011) to confirm that the exemption may apply to a realization on a debtor's collateral by assignees of the original creditor's interest.

An acquisition of any assets in Canada of a Canadian operating business may require prior notification to the Bureau, as well as compliance with or waiver of a waiting period, when (i) the assets either have a book value in excess of $88 million or generated annual gross revenues from sales in or from Canada in excess of $88 million; and (ii) the parties together with all their affiliates have either assets in Canada with a book value in excess of $400 million or gross revenues from sales in, from or into Canada in excess of $400 million.

Paragraph 111(d) of the Act exempts from pre-notification requirements "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."

While the Bureau's previous guideline stated categorically that the "paragraph 111(d) exemption does not extend to assignees of the creditor's interest," the revised guideline instead now says that 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" (emphasis added).

The revised guideline adds that the exemption may be available if the original creditor's interest was transferred to the acquirer prior to any filing or declaration in respect of a bankruptcy, insolvency or receivership of the debtor or a debt work-out; and prior to the acquirer knowing of an impending bankruptcy, insolvency, receivership or debt work-out. However, the guideline takes the position that 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 a credit transaction in the ordinary course of business.

The Bureau's guidance does not have the force of law, and courts could take a broader view of the exemption; moreover, we are not aware of the Bureau having challenged a reliance on the creditor exemption. However, the revised guideline provides comfort to lenders and other companies that take assignments of creditors' interests that the Bureau will not assert that the assignment of an original creditor's interest in itself precludes subsequent reliance on the paragraph 111(d) exemption by the assignee if it seeks to realize on its collateral.

Key Contacts: John Bodrug and Hillel W. Rosen