# Section 108. Definition of "operating business"

## Notifiable Transactions under Part IX the *Competition Act*

This Interpretation Guideline is issued by the Commissioner of Competition, who is responsible for the administration and enforcement of the *Competition Act* ("the 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 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 counsel to the parties, or to restate the law. Guidance regarding a specific proposed transaction may be requested from the Bureau through its program of advisory opinions.

### Definition

Subsection 108(1) of the Act states:

*"Operating business" means a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work.*

### Background

The definition of "operating business" is relevant to the determination of whether a proposed transaction is subject to notification because the transaction types in section 110 of the Act each make reference to an operating business.

### Policy

"Business undertaking" is not defined in the Act. The term "business" is defined in section 2 of the Act. "Business undertaking" is broadly interpreted to capture all arrangements through which business may be carried on, including non-profit or charitable undertakings.

Whether a business undertaking is "operating" depends on the nature of the undertaking under consideration in each case. A company that is engaged in the business of holding investments, whether passive or otherwise, may be an operating business if it satisfies the remainder of the definition of that term.

The term "in Canada" requires that there be present in Canada an office or business location of a business undertaking. A business undertaking which is partly or predominantly in another jurisdiction may be considered to satisfy the "business undertaking in Canada" requirement if it has some component or presence in Canada.

"Employees employed in connection with the undertaking" are not limited to those persons employed by the operating business itself, but may also include persons employed in connection with the operating business. Thus, employees of a third party with a contract for services in connection with a business undertaking would satisfy this requirement.

"Ordinarily report for work" does not require that an employee reporting be a full-time employee. The frequency of an employee's reporting to work in connection with a particular undertaking and whether the reporting is ordinary may depend on the nature of the undertaking. For example, if a business undertaking consists of leasing property and an employee is only required to collect the rent once per month, that would satisfy the "ordinarily report for work" requirement.

Assets of an Operating Business

Assets of an operating business include all the assets of the operating business. Accordingly, dormant assets of an operating business, such as a closed (mothballed) plant of a corporation which owns several other operating plants, are considered assets of the "operating business".

Defunct Businesses

A defunct business is not an "operating business" under section 108 of the Act. A business is considered defunct where the business has permanently closed. A business which has temporarily closed or suspended its operations is considered an "operating business". A business is not considered defunct by reason only that its assets have vested in a trustee in bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, or that its assets have been placed in receivership. If a trustee or receiver is carrying on a business undertaking with a view to disposing of the business as a going concern or to reorganizing its affairs, the business undertaking may still be considered an "operating business". Where the operating business cannot be either carried on or 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".

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# Section 114. Number of Notices - Multiple Step or Continuous Transactions

## Notifiable Transactions under Part IX the *Competition Act*

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### Background

Section 114 of the Act places an obligation on parties to a proposed transaction which exceeds the party-size and transaction-size thresholds to notify the Commissioner of Competition. Section 110 of the Act indicates the types of transaction subject to notification and their applicable thresholds.

A separate notice and the corresponding fee are required for each proposed transaction. Most transactions are fairly straightforward in their structure and raise no particular prenotification concerns. However, some proposed transactions are structured in a more complex manner and may involve numerous parties, assets or steps. A series of proposed transactions may raise an issue regarding the actual number of transactions being proposed and, therefore, the number of notices required.

### Policy

Depending on the facts of any particular case, a series of proposed transactions may be regarded as one continuous, or multiple step, transaction with several steps for which only one notice and fee is required, or it may be considered several independent transactions for which several notices and fees may be required.

Generally, every proposed transaction under section 110 of the Act constitutes a separate proposed transaction for the purposes of notice under section 114 of the Act. However, two or more proposed transactions under section 110 typically will be considered one continuous transaction if all steps in the series of proposed transactions constitute a sufficiently connected sequence of events. To demonstrate a sufficiently connected sequence of events, the legal documents providing for the events must show clearly, comprehensively and unequivocally that each event in the series may proceed only if each previous event in the series has been completed and that the entire series will be completed within one year from the day on which the

information prescribed under section 114 has been supplied. However, where the series of events cannot be completed within one year, the parties may apply to the Commissioner for an extension of time under section 119 of the Act. For information on extensions of time under section 119, see Interpretation Guideline No.8.

A continuous transaction which has been approved by a judicial or regulatory body, such as court-approved "plans of arrangement" under corporation statutes, the *Companies' Creditors Arrangement Act* or both, may be considered one continuous transaction.

Counsel who intend to characterize a series of proposed transactions as a continuous transaction should (i) ensure that the transaction description in the notice is as complete and detailed as possible; (ii) set out in the cover letter the reasons for characterizing the series of proposed transactions as a continuous transaction; and (iii) in the case of a short-form filing, consider including the relevant legal documents on a voluntary basis. For both short- and long-form filings, counsel should refer in their cover letters to the specific paragraphs in the legal documents supporting the continuous transaction claim.

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# S. 112. Exemption for Combinations that are Joint Ventures

## Notifiable Transactions under Part IX the *Competition Act*

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### Policy

The exemption under section 112 of the Act does not apply to joint ventures in corporate form. For a joint venture to be exempt under section 112 of the Act, the combination is required to be an unincorporated entity.

Subsection 110(1) of the Act provides that Part IX of the Act applies only to proposed transactions described in section 110 of the Act. Accordingly, combinations for purposes of prenotification are limited to those found in subsection 110(5) of the Act. That provision refers to proposed combinations of two or more persons intended to carry on business "otherwise than through a corporation". Therefore, when interpreting section 112 of the Act, the words "otherwise than through a corporation" should be read in because "combination" in subsection 110(5) excludes corporate entities; the meaning of "combination" in reference to prenotification is restricted to its use in subsection 110(5); section 112 is an exception to subsection 110(5); and section 112 does not explicitly include corporate entities.

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# Subsection 110(3). Acquisitions of Non-Voting Shares and Convertible Securities

## Notifiable Transactions under Part IX the *Competition Act*

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### Background

Subsection 110(3) of the Act sets out the transaction-size thresholds for the acquisition of voting shares of a corporation.

### Policy

The phrase "person or persons", found in subparagraphs 110(3)(*b*)(i) and 110(3)(*b*)(ii) of the Act, should be interpreted in the same manner as the expression "person or persons together with their affiliates", found in paragraph 110(3)(*b*).

Different thresholds exist under paragraph 110(3)(*b*) of the Act according to whether the voting shares of a corporation are publicly traded. Publicly-traded voting shares include shares which have been listed and posted for trading on any stock exchange in Canada recognized as such by the appropriate provincial securities authority, or which are traded in any other market, including over-the-counter markets, if the prices at which they have been traded are regularly published in a *bona fide* news, business or financial publication of general and regular circulation.

Acquisitions of non-voting shares of a corporation are not notifiable under Part IX of the Act. Thus, where non-voting shares are being acquired from a third party holding them and reflecting them on its balance sheet as assets, the acquisition is not notifiable.

In the case of an acquisition of convertible securities, such as convertible debentures, convertible non-voting shares, options, warrants and rights, notice of the acquisition need only be given when the securities will be converted to voting shares and if the party-size and transaction-size thresholds have been exceeded.

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# Subsection 110(4). Amalgamation

## Notifiable Transactions under Part IX the *Competition Act*

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### Background

Subsection 110(4) of the Act provides that prenotification is required for a proposed amalgamation of two or more corporations where: (a) the aggregate value of the assets in Canada of the continuing corporation, other than assets which are shares of that corporation, exceed $70 million; or (b) the gross revenue from sales in or from Canada generated from the assets in (a) exceed $70 million.

### Policy

While the Act does not provide a definition of amalgamation, the process of amalgamation refers to the union of two or more corporations, whereby they become one corporation. For most federally incorporated businesses, sections 181 to 186 of the *Canada Business Corporations Act* set out the procedure for amalgamation. For provincially incorporated businesses, the applicable corporations legislation should be consulted.

An amalgamation pursuant to valid legislation is considered an amalgamation for purposes of subsection 110(4) of the Act, whether the amalgamation occurs under federal or provincial legislation or under the laws of a foreign jurisdiction. Care should be exercised not to confuse amalgamations with share acquisitions which could be captured under subsection 110(3) of the Act.

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# Paragraph 111(*d*). Creditor Acquisitions

## Notifiable Transactions under Part IX the *Competition Act*

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### 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:

*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.

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.

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# Section 103. "Substantially Completed" and Section 119. "Completed"

## Notifiable Transactions under Part IX the *Competition Act*

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### Background

Under Part VIII of the Act, where the Commissioner is satisfied by a party or parties to a proposed transaction that the Commissioner would not have sufficient grounds on which to apply to the Competition Tribunal under section 92 of the Act, the Commissioner may, pursuant to section 102 of the Act, issue an Advance Ruling Certificate ("ARC"). Section 103 of the Act provides that the Commissioner shall not apply to the Tribunal under section 92 if the transaction to which the ARC relates is substantially completed within one year after the certificate is issued and if the set of facts on which the certificate is issued remains substantially the same.

Section 119 of the Act provides that a notice under section 114 of the Act is valid for one year from the date on which the notice is given and the prescribed information is supplied to the Commissioner. Where a proposed transaction is not completed within one year or such longer period as the Commissioner may specify in any particular case, another notice will be required if the parties wish to complete the proposed transaction.

### Policy

For purposes of section 103 of the Act, a transaction is "substantially completed" when: (i) in an acquisition of assets, title to all of the assets has passed from the vendor(s) to the purchaser(s); (ii) in an acquisition of shares, the shares have been transferred from the vendor(s) to the purchaser(s); (iii) in an amalgamation, the amalgamation has become effective according to the statute under which the amalgamation was completed; (iv) in a combination, title to all of the assets to be contributed to the combination has passed from the contributor(s) to the combination; and (v) in an aquisition of an interest in a combination, title to that interest has passed from the vendor(s) to the purchaser(s). After closing there may remain some ancillary details of a minor or routine nature to be completed, such as filings for registrations. Once they have been attended to, the transaction will be finally completed.

Under section 119 of the Act, the Commissioner may choose to extend the one-year period for completing a transaction. Any extensions granted will be for a limited range of circumstances and for a limited period of time. For example, an extension of up to several months may be granted where unforeseen reasons cause a delay, or where the proposed transaction requires the regulatory approval of either administrative tribunals or other agencies and it is not reasonably possible to obtain the approvals within the one-year period. Requests for extension of the one-year period should be made as soon as the parties become aware that there may be some difficulty in closing the transaction within the statutory period.

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# Shareholder Agreements

## Notifiable Transactions under Part IX the *Competition Act*

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### Background

Paragraph 2(4)(a) of the Act provides that a corporation is controlled by a person if that person holds more than 50 per cent of the votes that may be cast to elect directors of the corporation. Shareholders of a corporation may enter into agreements, among themselves or with other parties, whereby voting interests may be acquired, transferred or suspended, either on a temporary or permanent basis. These voting interests found in shareholder agreements may include rights to elect directors. The question of the potential impact of shareholder agreements may arise in the context of threshold calculations for purposes of section 109 or subsection 110(3) of the Act.

### Policy

Arrangements between parties to a shareholder agreement regarding the number of votes to be cast for the election of directors will not alter the basis for determining whether a person controls a corporation for purposes of paragraph 2(4)(a) of the Act and, hence, whether two corporations are affiliated under subsection 2(2) of the Act. Accordingly, when interpreting "control" in paragraph 2(4)(a) in the context of a shareholder agreement, it is the number of voting shares owned by each shareholder which is relevant, not the number of votes for the election of directors which each shareholder will exercise pursuant to the shareholder agreement.

### Example #1 - Affiliation Determination

A corporation (Acorp) is owned by two corporate shareholders. Forty per cent of the voting shares are owned by corporate shareholder B (Bcorp) and 60 per cent by corporate shareholder C (Ccorp). Bcorp and Ccorp enter into a shareholder agreement whereby Bcorp and Ccorp agree to share on a 50/50 basis the votes for electing corporate directors. For purposes of paragraph 2(4)(a) of the Act, Ccorp controls Acorp. Accordingly, under subsection 2(3) and paragraph 2(2)(a) of the Act, Acorp is a subsidiary of, and is therefore affiliated with, Ccorp. Although Ccorp has entered into a shareholder agreement which grants another shareholder the right to cast

additional votes for the election of directors, Ccorp owns more than 50 per cent of the voting shares. If Ccorp sells to another corporation (Dcorp) its 60 per cent holding in Acorp, and if Dcorp replaces Ccorp in the shareholder agreement between Bcorp and Ccorp, Dcorp will be considered as acquiring 60 per cent of the voting shares of Acorp for purposes of subsection 110(3) of the Act. In this case, for purposes of calculating party-size thresholds in section 109 of the Act, Acorp will be considered an affiliate of Ccorp.

Example #2 - Voting Trusts

Occasionally, shareholders of a corporation (Acorp) may create a voting trust whereby some or all the shareholders collectively confer their voting rights to a voting trustee. In some circumstances, the voting trustee may have the right to exercise voting rights that, in aggregate, constitute more than 50 per cent of the outstanding voting rights attached to the shares of the corporation. Further, the voting trust agreement may require that the shares subject to the agreement be registered in the name of the voting trustee. However, corporate control and, as a consequence, corporate affiliation are primarily dependent on the beneficial ownership of voting shares, not their registered ownership. Accordingly, where a shareholder who is the beneficial owner of shares with more than 50 per cent of the outstanding voting rights enters into a voting trust agreement that grants a voting trustee the right to exercise such voting rights, the shareholder still controls the corporation. If the shareholder is a corporation, it is affiliated with Acorp for purposes of subsection 2(2) of the Act. The voting trust could not be affiliated with Acorp in any event because the affiliation provisions in subsection 2(2) do not extend to trusts.

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# *Notifiable Transactions Regulations* – Transactions and Events in Section 14

## Notifiable Transactions under Part IX the *Competition Act*

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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.

### 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.

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.

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# Corporate Spin-Offs

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### Background

Paragraph 113(a) of the Act provides an exemption from prenotification under Part IX of the Act in cases where all parties to a transaction are affiliates of each other. The definition of affiliates for purposes of the Act is found in subsection 2(2) of the Act.

A spin-off is a form of corporate reorganization that results in a subsidiary or division of a corporation becoming an independent company. In a spin-off, the parent corporation transfers part of its assets to the new independent, while the shares of the independent are distributed to the shareholders of the parent without surrender by them of any stock in the parent.

### Policy

Corporate spin-offs may be treated as acquisitions of assets by the new corporate entity or acquisitions of shares of the new corporate entity and may be subject to prenotification if the party-size and transaction-size thresholds are exceeded, unless the affiliates exemption under paragraph 113(a) of the Act applies.

### Example #1

A corporation (Acorp) is a publicly traded corporation. Bcorp is the major controlling shareholder, holding 51 per cent of the shares of Acorp. Ccorp is a minority shareholder with 25 per cent. Acorp decides to spin off one of its divisions. For that purpose, Acorp incorporates a new, wholly-owned subsidiary, Dcorp, and transfers all of the assets of the division, valued at $40 million in the audited financial statements of Acorp, to Dcorp in exchange for shares of Dcorp. Acorp intends to distribute the shares of Dcorp to Acorp's shareholders in equal proportions to the shares they hold in Acorp and to list the shares of Dcorp on a recognized stock exchange in Canada. After the reorganization, Bcorp will hold 51 per cent of the shares of both Acorp and Dcorp. Accordingly, Bcorp's acquisition of shares in Dcorp will be exempt under

paragraph 113(a) of the Act because Bcorp and Dcorp are affiliates. Similarly, Dcorp's acquisition of Acorp's assets will be exempt. However, Ccorp is not affiliated with Dcorp. If Ccorp and Dcorp (together with its affiliates, Acorp and Bcorp) meet the party-size threshold under section 109 of the Act and given that Dcorp meets the transaction-size threshold under subparagraph 110(3)(a)(i) of the Act, Ccorp will be required to give notice of its acquisition of a 25 per cent interest in the shares of Dcorp.

Example #2

A corporation (Acorp) is a widely-held corporation traded on a stock exchange, with no one shareholder holding more than 10 per cent of the outstanding shares. Acorp decides to spin off one of its divisions. For that purpose, a new corporation, Bcorp, is established. A person that is unrelated to Acorp or its shareholders initially owns Bcorp. Acorp transfers all of the assets of the division to Bcorp in exchange for substantially all of the outstanding shares of Bcorp. Acorp intends to distribute the shares of Bcorp to its shareholders in equal proportions to the shares they hold in Acorp and to list the shares of Bcorp on a recognized stock exchange in Canada. At the outset, because Acorp does not control Bcorp and they are not under common control, the exemption for affiliates under paragraph 113(*a*) of the Act does not apply. Accordingly, the transfer of assets from Acorp to Bcorp may be notifiable under subsection 110(2) of the Act. However, the acquisition of shares of Bcorp by the shareholders of Acorp would not be notifiable because none of the shareholders will exceed the 20 per cent threshold for publicly traded voting shares under subparagraph 110(3)(*b*)(i) of the Act.

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