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ARTICLE

Federal Government's 2017 Budget Bill Will Amend Review Thresholds And Public Reporting Obligations Under The Investment Canada Act

Introduction

The Canadian federal government's budget implementation legislation for 2017 ("Bill C-44") includes amendments to the *Investment Canada Act* (the "ICA") that will be of interest to any non-Canadian wishing to acquire control of a Canadian business.

As described in more detail below, the proposed amendments to the ICA, once enacted, will significantly increase a key financial threshold that triggers pre-closing "net benefit" review of proposed acquisitions of control of Canadian business by foreign investors. The proposed amendments are also notable for expanding the federal government's annual public reporting obligations to include a discussion of the administration of the "national security" review process under the ICA.

Background

By way of background, the ICA is Canada's legislation that governs reviews of foreign investments in Canada. It contains two separate review processes to which foreign investments may be subject:

1. A review process which considers generally whether an acquisition of control of a Canadian business by a foreign investor would be of *net benefit* to Canada (Net Benefit Review); and
2. A review process which considers whether a foreign investment in Canada could injure Canada's *national security* (National Security Review).

Whether a Net Benefit Review of an acquisition is required turns on whether the value of the target Canadian business exceeds the applicable financial threshold. If the value of the target business exceeds the applicable threshold, investors must file an application for Net Benefit Review with the Investment Review Division (IRD), and observe a waiting period of up to 75 days prior to closing the investment. In order to secure approval under this process, investors must satisfy the relevant federal Minister that the investment is likely to be of "net benefit" to Canada, having regard to certain evaluative factors set out in the legislation. To do this, investors typically give enforceable undertakings to the Minister that address these factors, including commitments on employment levels, economic activity, innovation, global competitiveness, and the participation of Canadians in management and on the board.

There are no financial (or shareholding/control) thresholds that trigger National Security Reviews. Rather, these reviews are initiated at the sole discretion of the Minister of Innovation, Science, and Economic Development (the Minister) and can extend for as long as 200 days.¹

Increased Net Benefit Review Thresholds

Under the current legislation, a direct acquisition of control of a Canadian business by a non-Canadian investor controlled in a World Trade Organization (WTO) member state is subject to Net Benefit Review by the Minister where the *enterprise value* ² of that Canadian business exceeds CAD \$600 million.

Pursuant to amendments to the ICA that came into force in 2015, this review threshold was scheduled to increase to CAD \$800 million on April 24, 2017, then to CAD \$1 billion two years later.

Then in the Fall of 2016, the federal government announced its intention to accelerate this process by increasing the threshold to CAD \$1 billion in 2017 (rather than waiting until 2019). These intentions were formalized last week in proposed amendments to the ICA that were included in the government's Budget Bill C-44.

Although Bill C-44 has not yet been enacted by Parliament and proclaimed in force, the \$1 billion threshold will probably come into effect later this Spring. In the meantime, the threshold will increase to CAD \$800 million on Monday, April 24, 2017, as currently scheduled under the ICA.

The proposed amendments do not affect the other Net Benefit Review thresholds under the ICA, which apply to different types of transactions, including:

- Acquisitions by non-Canadian investors that are state-owned or controlled ("SOEs");
- Acquisitions of target Canadian businesses that are engaged in "cultural" activities (e.g. in the film/TV, music, or publishing sectors); and
- Acquisitions by investors that are controlled in states that are not WTO members.

It also remains the case that foreign investments that do not exceed the applicable threshold for "net benefit" review must be notified to the IRD no later than 30 days after closing.

Annual Reporting to include Administration of National Security Review Process

The ICA currently requires the Director of Investments (appointed under the ICA) to issue an *Annual Report* on the administration of the Net Benefit Review process — but not the National Security Review process — of the ICA.

Nevertheless, the *Annual Report* of 2016 contained, for the first time, information about the administration of the National Security Review provisions of the ICA (though the information disclosed was very limited). ³

Bill C-44 also includes proposed amendments to the ICA that will require the Director, on a going forward basis, to include a discussion about the administration of the National Security Review process in his *Annual Reports*.

These proposed changes are intended to address criticisms about the lack of transparency surrounding the National Security Review process. However, the proposed amendments do not specify what information (if any) must be included in the *Annual Reports*. As such, the Director will retain significant discretion regarding the information to be disclosed, and IRD representatives have recently expressed reservations about the prospect of increased disclosure out of concern for the protection of confidential, privileged, and/or other sensitive information. As such, it remains to be seen how (if at all) the proposed amendments will mitigate concerns about transparency surrounding the process.

¹For more information about the national security review process, please see ["National Security Guidelines seek to provide clarity to foreign investors, but uncertainty remains"](#) (22 December 2016).

²Until recently, the applicable threshold measured the value of the Canadian business with reference to its "book value" (*i.e.*, according to its balance sheets). 2015 amendments to the ICA adopted an "enterprise value" approach to measurement, which was intended to reflect "the increasing importance to our modern economy of service and knowledge-based industries in which much of the value of an enterprise is not recorded on its balance sheet because it resides in people, know-how, intellectual property and other intangible assets not recognized in a balance sheet by current accounting methods" (Competition Policy Review Panel, *Compete to Win, Final Report — June 2008*, at 31). The methodology for calculating enterprise value depends on whether the structure of the transaction (*i.e.*, whether it is an acquisition of shares or assets) and whether the shares of the target are privately held or publicly traded.

³See *Investment Canada Act*, *Annual Report 2015-16*, where the Director reported for the first time on the number of National Security Reviews ordered (by year, since the process was first enacted in 2009) and the range of outcomes of these reviews (e.g. remedies imposed by order of the federal Cabinet, abandoned transactions, etc.).

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