Government announces “enhanced scrutiny” of foreign investments as a result of COVID-19

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The *Investment Canada Act* (ICA) governs foreign investment in Canada, and allows the federal government to review and potentially block or impose conditions on foreign investments into Canada. Citing the “unique” and “extraordinary circumstances” of the global COVID-19 pandemic and “sudden declines in valuations [that] could lead to opportunistic investment behaviour”, the government announced on April 18, 2020 that it is going to use the ICA to “subject certain foreign investments into Canada to enhanced scrutiny.”

What you need to know

- Foreign investments in companies involved in public health or the supply of critical goods and services, and/or investments by parties that tied to foreign states will be closely reviewed under the ICA at least until the economy recovers from the effects of the COVID-19 pandemic.
- This may result in significant delays and the potential imposition of conditions by the government before certain investments can be made, if they are allowed at all.
- Parties considering investments into Canada that may fall under the enhanced scrutiny signalled by the government during this time should be taking steps to ensure that any potential government concerns are resolved prior to closing.
- Canada’s action is consistent with similar announcements relating to heightened scrutiny of in-bound foreign investment made by other countries, including the European Union and certain of its member states and Australia.

Targets of the enhanced scrutiny

The primary targets of this enhanced scrutiny will be investments in Canadian businesses:

a. That are related to public health or involved in the supply of critical goods and services; and/or

b. By investors that are owned, subject to influence by or even closely tied to foreign states.

Under the national security review (NSR) provisions of the ICA, the government can review virtually any investment of any value into Canada by a non-Canadian – including non-controlling investments – to determine whether they "would be injurious to national security". Although for certain investments the "enhanced scrutiny" announced may be under the separate "net benefit" review provisions of the ICA, it is likely that the bulk of this heightened scrutiny will be under the NSR provisions, as there are no financial thresholds and NSR can be applied to even small minority investments, unlike the net benefit review.

Criteria under which investments will be considered

The "would be injurious to national security" criteria for blocking or imposing conditions on an investment under the NSR provisions is very broad, affording the government significant scope within which to prevent investments it believes would be problematic. The concept of "national security" is not defined in the ICA and the government has generally offered very little transparency into the true nature of its concerns with various investments. Prior to the current COVID-19 situation, the only official guidance from the government on the factors taken into account when assessing the potential national security implications of a deal includes the following factors:

- Effects on Canada's defence capabilities and interests (including R&D or the supply of military weapons and technologies);
- The transfer of sensitive technology or know-how outside of Canada;
- Impacts on the supply of critical goods and services to Canadians (including energy, utilities, food, health, and water);
- Impacts on the supply of goods and services to the Government;
- Enablement of foreign surveillance or espionage, or the hindrance of intelligence operations and law enforcement;
- Impacts on Canada's international interests, including foreign relationships; and
- Involvement or the facilitation of activities of illicit actors (*e.g.* terrorists/terrorist organizations, organized crime).

A number of these factors are clearly likely to be of heightened concern given the current circumstances, both in terms of immediate health and safety and the desire to protect the fragile economy.

In recent years, there has been a clear trend toward applying heightened scrutiny under the NSR provisions to investments into Canada by foreign state-owned enterprises and foreign investors deemed to have close ties to foreign states, even if there is no formal state ownership or control, and the government's new statement makes it clear that this will be a primary concern in the present climate. However, there is little clarity on the basis by which the government determines which investors it considers to be subject to influence by or have close ties to a foreign state, other than that it has made clear that actual or de facto control by a foreign state is not required for a concerning level of state-influence to arise.

Timing implications for investments

The formal deadlines applicable to the commencement of the NSR process are unchanged by the government's statement. The deadline depends on whether the investment is subject to review, notification or neither under the net benefit review provisions of the ICA , and if neither, if a voluntary filing is made. The result is that in many cases, if parties do not take affirmative steps to ensure that the deadline passes prior to closing, the NSR process can start after closing. The applicable deadlines are:

- For any investment not subject to notification under the net benefit review provisions of the ICA (such as non-controlling investments), in a significant change implemented in 2022, the deadline depends on whether a voluntary notification is filed:
    - If a voluntary notification is filed, the NSR process can be initiated at any time up to **45 days after filing**.
    - If a voluntary notification is not filed, the NSR process can be initiated at any time up to **five years after closing**. This is a significant change from the prior 45 day period that applied even without a voluntary notification.
- If an investment is subject to post-closing notification under the net benefit review provisions, but not a full net benefit review (such as acquisitions of control of Canadian businesses that are below the applicable net benefit review thresholds), the NSR process can be initiated at any time up to **45 days after** the complete requisite notification (due within 30 days after closing) is filed.
- If an investment is subject to a full net benefit review because it exceeds the applicable thresholds under those provisions, the NSR process can be initiated at any time up to 45 days after the complete application for net benefit review is filed.

An investment not completed before the initiation of the NSR process cannot legally proceed until the review is final.

For investments not subject to net benefit review, if the parties (in most cases, particularly the investor) want to ensure that the investment cannot be subject to the NSR process post-closing, they need to submit net benefit review notifications prior to closing, and ensure that the terms of the agreement require that either the deadline for initiating the NSR process expires or that the deal is allowed following the NSR process.

Prior to the COVID-19 situation, although the timing for the completion of the NSR process varied, parties assumed that the process could take at least 200 days to be completed. It is unclear whether this estimate may change in the current situation, but if significantly more reviews are being conducted due to growing concerns identified in the recent statement, it is reasonable to assume that the process may take longer.

By

Subrata Bhattacharjee, Denes A. Rothschild

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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