Canada unveils significant changes to the Investment Canada Act

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On Dec. 7, 2022, the Canadian Minister of Innovation, Science and Industry (Minister) unveiled a bill that he states will "modernize" the *Investment Canada Act* (ICA), marking the most significant changes to Canada's foreign direct investment law since 2009 (the Amendments). The changes impose significant new pre-closing filing requirements on certain proposed foreign investments, including non-controlling investments, and follows the GoC's recent announcement that it would increase scrutiny of investments into the Canadian critical minerals sector by foreign state-owned or state-influenced (SOE) investors. With the Amendments, the Government of Canada (GoC) states that it aims to increase its visibility into investments that could harm Canada's national security, enhance transparency, support greater investor certainty, and ensure that it has the appropriate enforcement tools.

What you need to know

The important proposed changes to the ICA include:

- New mandatory pre-closing filing requirements for foreign investments of any value, including non-controlling investments, into businesses operating in Canada (even if their primary assets/operations are outside Canada) in certain sensitive sectors (to be defined), if the foreign investor could gain access to or direct the use of material non-public technical information or material assets and will have rights to appoint directors or senior management, or certain other rights;
- The ability for the Minister, after consultation with the Minister of Public Safety, to impose interim conditions on an investment during a national security review;
- The ability for the Minister, in consultation with the Minister of Public Safety, to extend national security reviews without obtaining a Cabinet order;
- Enhanced penalties for non-compliance (up to C$25,000 per day of contraventions of the ICA and C$500,000 for failure to notify);
- Improved international cooperation and information exchange abilities by the Minister; and
- New rules for the protection of potentially injurious information in the course of judicial review of national security review decisions.

What does this mean for non-Canadian investors?

The ICA governs foreign investment in Canada and includes two screens. First, investments to acquire control of Canadian businesses that exceed certain monetary thresholds are required to undergo a pre-closing net benefit review (NBR). This process considers whether the investment is likely to be of "net benefit" to Canada, and primarily involves an economic analysis. Second, the ICA provides for a national security review (NSR) process, which enables the government to review virtually any investment of any value (including, minority or non-controlling investments) into Canada by a non-Canadian to determine whether it "would be injurious to national security".

The Amendments touch on both aspects of the ICA regime, but they primarily focus on filing requirements and NSRs. Prior to the Amendments, the only mandatory pre-investment filings under the ICA are if NBR applies (which is rare, outside of investment into cultural sectors), and only where control of a Canadian business is acquired. One of the key stated priorities of the Amendments is to increase scrutiny over investments into sensitive sectors given the increasing impact of global geopolitical issues in the last few years. To achieve this objective, the GoC will require all foreign investors investing in entities in prescribed sectors with operations, employees or assets in Canada, irrespective of value or whether they confer control, to submit a mandatory pre-investment notification, if the investor:

1. could gain access to or direct the use of material non-public technical information or material assets as a result of the investment; and
2. the investment will provide the investor with the right to appoint directors or senior management, or certain other rights that will be prescribed.

If the GoC commences the NSR process before the waiting period (to be prescribed) expires, closing of the investment will not be permitted until the NSR process is complete.

What sectors are affected?

Although the sectors to which the new filing requirements apply have not yet been identified, recent GoC actions and statements provide a good indicator of the sectors likely to be impacted. Most recently, the GoC announced that it was significantly increasing scrutiny of investments into the Canadian critical minerals (i.e., lithium, graphite, nickel, cobalt, among others) sector by SOE investors, and ordered three Chinese companies to divest minority investments they had made in Canadian mining companies. Other GoC statements and publicly revealed NSRs have identified critical infrastructure, sensitive personal information or data, artificial intelligence and the transfer of significant intellectual property as areas of interest.

Other important changes relevant to foreign investors

Another significant change to the ICA that will be implemented with the Amendments is that if an NSR is initiated, the Minister will now be able to unilaterally impose conditions on a transaction while an NSR is underway if he, in consultation with the Minister of Public Safety, determines that they are necessary to prevent injury to national security

that could take place during the review. Importantly, this power applies to all NSRs, not just those in the sensitive sectors to which mandatory pre-investment notification will be required.

There is no limit to the conditions that can be imposed under this new power, but they may include obtaining approvals for proposed business locations, creating approved corporate security protocols to safeguard information and access—such as details on cybersecurity, visitor logs, etc.—or granting access to facilities for compliance inspections.

Additionally, the Amendments increase penalties for non-compliance. A penalty of up to C$500,000 for failing to notify a transaction has been introduced. Additionally, the current C$10,000 per day potential fine for failing to comply with other provisions of ICA (or regulations enacted under it) will be subject to a fine of C$25,000 per day.

Important information to still to come

In addition to identifying the sensitive sectors to which the new pre-investment filing requirements apply, the Amendments leave some other significant information to be prescribed by regulation after they are enacted.

Foremost amongst these issues is that the time period prior to closing of an investment by which the new mandatory pre-investment notification must be filed has not been determined. Currently, the GoC has 45 days after the filing of a notification of an investment to commence the NSR process. It is unclear whether this 45-day period will be applied to investments subject to the new filing requirement, but if it is, this will effectively impose a 45-day suspensory waiting period on all such investments.

Additionally, the types of “special rights” that are sufficient to cause an investment to require pre-closing notification—even where the investor will not have the right to appoint directors or senior management—has not been determined.

Conclusion

The Amendments represent further action by the GoC to demonstrate that it is protecting Canada’s national security in what it has repeatedly said is a climate of increasing geopolitical uncertainty, particularly with respect to SOE investments. It is clear that foreign investors seeking to invest in the sensitive sectors that will be covered by the Amendments will be subjected to scrutiny, and should prepare for more than a cursory review in most cases. It remains the case that SOE investors will be subject to heightened scrutiny, but the Amendments ensure that the desirability of all foreign investors in these sectors will at least be considered

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