Federal Government's 2017 Budget Bill Now In Force

June 29, 2017

Introduction

The Canadian federal government's budget implementation legislation of 2017 ("Bill C-44") is now in force, along with its amendments to the *Investment Canada Act* (the "ICA"). These amendments will be of interest to any non-Canadian wishing to acquire control of a Canadian business.

As discussed in our previous bulletin, the amendments to the ICA significantly increase a key financial threshold that triggers pre-closing "net benefit" review of proposed acquisitions of control of Canadian business by foreign investors.

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 discretionary review process which considers whether a foreign investment in Canada could injure Canada's *national security* (National Security Review).[1]

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 – for example, commitments on employment levels, economic activity, innovation, global competitiveness, and the participation of Canadians in management and on the board.

The New Threshold

Now that Bill C-44 is in force, a direct acquisition of control of a Canadian business by a non-Canadian investor controlled in a World Trade Organization member state (a "WTO Investor") is subject to Net Benefit Review by the Minister of Innovation, Science, and Economic Development where the *enterprise value*[2] of that Canadian business exceeds CAD $1 billion.

Under the previous legislation, the threshold was CAD $800 million.

Investors Controlled in Certain Countries Will Benefit from Further Increased Thresholds when CETA Comes into Force

In addition to the Bill C-44 amendments, the legislation ("Bill C-30") enacting the *Comprehensive Economic and Trade Agreement* with the European Union ("CETA") will further increase the Net Benefit Review threshold for all foreign investors controlled in a country that is a party to CETA or another country with a trade agreement in place with Canada (a "Trade Agreement Investor") to CAD $1.5 billion. This includes investments by entities controlled in the United States, Mexico, Chile, Peru, Colombia, Panama, Honduras, and South Korea.

Bill C-30 received Royal Assent earlier this year and is expected to be proclaimed into force shortly.

Thresholds for Other Types of Transactions are Unchanged

The Amendments to Bill C-30 and Bill C-44 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.

[1] For 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).

[2] The methodology for calculating enterprise value depends on 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.

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