

Federal government issues updated guidelines on national security review of foreign investments

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On March 24, 2021, the Minister of Innovation, Science and Industry released a [statement](#) accompanying an updated version of the [Guidelines on the National Security Review of Investments](#) (the Updated Guidelines) under the *Investment Canada Act* (the Act). The Updated Guidelines broadly reflect the government's approach in recent years in administering the national security review provisions of the Act rather than a policy shift. However, given the very limited information publicly disclosed regarding the administration of the national security review regime, the increased transparency into the government's priorities and experience is welcome. In addition, the issuance of the Updated Guidelines communicates to the business community that even though few investments have ultimately been blocked or required divestiture or mitigation to address national security concerns, the national security review provisions are actively enforced and increased scrutiny is being applied by the government to screen for investments in Canada that may give rise to national security concerns. The Updated Guidelines follow from the April 2020 [Policy Statement on Foreign Investment Review and COVID-19](#), where it was made clear that investments by state-owned enterprises (SOEs) and investments in broadly-defined critical goods and services sectors, particularly in the health sector, would face increased scrutiny. The Updated Guidelines continue the focus on SOE investment and provide greater detail on the national security considerations that are taken into account. It is noteworthy that additional specificity has now been provided regarding investments that involve certain sensitive technology areas, critical minerals and sensitive personal data.

National security review – background

Under the Act's national security review regime, the government has the right to review and prohibit, or impose conditions on, a very broad range of investments by non-Canadians where it determines that an investment would be injurious to Canada's national security. The national security review regime is distinct from the "net benefit" review regime, under which acquisitions of control of Canadian businesses by non-Canadians are subject to either mandatory review and approval or notification, depending on their value and structure.

The national security review regime does not provide for a "safe harbour" for investors. Even establishments of new businesses as well as investments of any size falling well below an acquisition of control may be subject to national security review. A national security review can take place either before or after the transaction is completed. The federal cabinet can take any measures it considers advisable to protect national security, including directing the investor not to implement the investment, authorizing the investment on the condition that the investor provide undertakings or implement the investment on specified conditions, or requiring divestiture of the investment (if previously completed). A national security review

occurs in stages and while few foreign investments in Canada have ultimately been subject to a cabinet-level national security review and blocked or required divestiture or mitigation to address national security concerns, many additional investments have been assessed in some degree of detail to rule out potential national security issues.

The phrase “injurious to national security” is not defined in the Act. More than five years after the national security review provisions came into force, the government released guidelines on the *National Security Review of Investments under the Investment Canada Act* (the 2016 Guidelines) to provide guidance on its enforcement of the national security review provisions. The 2016 Guidelines were welcomed as providing insight – for the first time – into the factors the government considers when assessing whether an investment poses a national security risk.

The 2016 Guidelines set out a list of nine broad, non-exhaustive factors considered in the assessment, including the effects of the investment on Canada’s defence capabilities and interests and intelligence activities, the transfer of sensitive technology or know-how outside of Canada, the effects on the security of Canada’s critical infrastructure and the supply of critical goods and services, and the potential of the investment to enable foreign surveillance or espionage. While the guidance provided in the 2016 Guidelines was welcome, it was very broad.

Updated Guidelines

Relative to the 2016 Guidelines, the Updated Guidelines provide greater transparency on the types of investments that are likely to be subject to heightened scrutiny on national security grounds, with particular focus on investments by SOEs, and in certain critical sectors.

Investments by state-owned enterprises

While Canada’s national security review regime continues to apply broadly to all investors, the Updated Guidelines confirm the government’s previously stated focus on scrutiny of SOE investment in Canada. The Updated Guidelines emphasize that the government will subject all investments by SOEs (including private investors closely tied to foreign states) to enhanced national security scrutiny, regardless of the value or size of the investment. Under the Act, an SOE is broadly defined as

- the government of a foreign state, whether federal, state or local, or an agency of such a government
- an entity that is controlled or influenced, directly or indirectly, by a foreign government or agency, or
- an individual who is acting under the direction of a foreign government or agency or who is acting under the influence, directly or indirectly, of such a government or agency

Outside of the national security context, long-standing guidelines applicable to SOE investments that are subject to the net benefit review provisions of the Act indicate that, in the context of a net benefit review, SOE investors must demonstrate a strong commitment to transparency and commercial operations. The Updated Guidelines make clear that SOE investments are also routinely subject to review on national security grounds. While the government has not published statistics on the percentage of national security reviews that involved SOE investors, the updated guidance reflects foreign investment advisors’ experiences with the national security review regime.

Sensitive sectors and factors

While the Updated Guidelines continue to make clear that a broad range of investments may give rise to national security concerns, a more detailed and expansive overview of the factors considered in assessing whether an investment is more likely to raise national security concerns is now provided. Examples include

- the potential effects of the investment on Canada's defence, capabilities and interests (including foreign interests)
- the potential of the investment to enable foreign surveillance or espionage
- the potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations, organized crime or corrupt foreign officials
- the potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada, including consideration of whether the investment provides access to information not in the public domain related to the research, design or manufacture of sensitive technologies. Sensitive technology areas include those that have military, intelligence or dual military/civilian applications, such as advanced manufacturing, advanced ocean technologies, advanced sensing and surveillance, aerospace and space technology, artificial intelligence, biotechnology, energy generation, storage and transmission, medical technology, next generation computing, quantum science and robotics
- the potential impact of the investment on the supply of critical goods and services to Canadians or the potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government
- the potential impact of the investment on critical minerals and critical mineral supply chains. Critical minerals are identified with reference to the minerals found on the [Critical Minerals List](#). The list identifies 31 minerals that are considered essential to Canada's economic security, required for Canada's transition to a low-carbon economy and a sustainable source of critical minerals for Canada's trading partners
- the potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation. Personal data includes personally identifiable health or genetic (e.g., health conditions or genetic test results), biometric (e.g., fingerprints), financial (e.g., confidential account information, including expenditures and debt), communications (e.g., private communications), geolocation or personal data concerning government officials, including members of the military or intelligence community

The national security review factors set out in the Updated Guidelines are noteworthy for their focus not just on control over businesses in critical sectors, but also on potential concerns that may arise in cases where less than a controlling interest is acquired, including the ability to access sensitive information (including personal data) or know-how.

Consultation

The Updated Guidelines encourage investors to engage with the Investment Review Division early on in their investment planning, particularly in circumstances where the investment either involves an SOE or touches upon the factors set out in the Updated Guidelines.

The publication of the Updated Guidelines provides a further reminder of the increased government focus on the potential national security implications of investments in Canada and the importance of considering those possible implications early in transaction planning.

For further information regarding the Updated Guidelines or other questions relating to Canada's foreign investment review regime, please contact the members of Osler's [Competition and Foreign Investment Group](#).