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Proposed amendments to national security review regime: voluntary filings and substantially expanded review timeline

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On February 12, 2022, a series of proposed amendments [PDF] were published in the *Canada Gazette*, including two amendments to the national security review process as set out in the *National Security Review of Investments Regulations* (the proposed amendments) of the *Investment Canada Act* (the ICA). These proposed amendments will have important implications for foreign investors seeking to implement minority investments in Canadian businesses, or other investments that do not constitute an acquisition of control or the establishment of a Canadian business as defined under the ICA. For such investments, the amendments would, for the first time, provide non-Canadian investors with an ability on a voluntary basis to formally notify and clear the national security review process prior to closing. However, investors who do not choose to formally notify the government of such investments will face an extended period of five years during which a national security review could be undertaken.

The introduction of a voluntary filing regime aligns Canada with the approach to national security review in other jurisdictions including the United States, the United Kingdom and Australia.

Context

Under the ICA, an acquisition of control of a Canadian business by a non-Canadian, depending on its value and structure, is subject to either an application and approval on a "net benefit" basis by the applicable federal Minister (which is a pre-closing filing except for indirect acquisitions of cultural businesses), or notification to the applicable federal Minister within 30 days of closing. In addition, the establishment of a new Canadian business by a non-Canadian is subject to notification within 30 days of the establishment. The ICA does not require a pre-closing application or a notification for an investment or activities by a non-Canadian which do not amount to an "acquisition of control" or the establishment of a new "Canadian business" as such phrases are defined in the ICA.

Under the ICA'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, well beyond those subject to an application or notification requirement, where it determines that an investment would be "injurious to Canada's national security". A national security review can take place either before or after the investment is completed (subject to the limitation periods set out in the ICA, described in further detail below). Where a Notice or Cabinet Review Order (defined below) is issued prior to completing an investment, closing may not occur until the national security review is complete.

There are three stages of review under the ICA's national security regime. The review may be concluded upon the completion of any of the stages if it is determined that the investment does not raise national security concerns. The vast majority of investments are only subject to the first stage of review.

First stage: Within 45 days of this stage being triggered, the government determines whether it has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security, and, therefore, whether to send the investor a notice that a Cabinet-level national security review of the investment *may* be ordered (a Notice). The government subjects all foreign investment to the first stage review.

Second stage: Once a Notice is sent, the federal Cabinet has another period of time to determine whether to issue an order for a Cabinet national security review (a Cabinet Review Order). Instead of first issuing a Notice, the federal Cabinet may elect to issue a Cabinet Review Order within the first 45 days, effectively truncating the first stage review period referenced above.

Third stage: Once a Cabinet Review Order is made, an in-depth and lengthy national security review is initiated. A full national security review can be expected to take at least the 200-day maximum provided in the ICA. In practice, it typically takes materially longer as the investor really has no choice but to consent to extensions or abandon the investment. (For example, the average length of review for the 11 investments subject to a Cabinet Review Order during fiscal 2020-21 was 225 days.)

Importantly, the first stage of the national security review is only triggered by filing a complete application or notification or, where no filing is required by the ICA, by closing. Currently, the first stage cannot be triggered on a pre-closing basis by an investor in circumstances where an investment does not constitute an acquisition of control of a Canadian business or the establishment of a new Canadian business. Even in circumstances where an investor voluntarily engages with the federal government on a pre-closing basis, no certainty on the application of the national security review regime can be obtained. The proposed amendments seek to resolve this situation, while also creating an incentive for foreign investors to voluntarily notify the government of investments not otherwise subject to a mandatory application or notification.

Voluntary filing option

The proposed amendments would enable an investor who wants pre-closing certainty on the application of the national security review regime to trigger the first stage 45-day review period by filing information (prescribed by the proposed amendments) which closely tracks that which is required to be filed for notifications of control-level investments. The investor would be required to provide details regarding the nature of its investment and indicate whether the investor has the power to appoint board members or senior management of the Canadian business, or whether the investor has the authority to direct the strategic or operational decision-making of the Canadian business.

As there is no prescribed timeline within which a voluntary filing would have to be made, submitting the filing would not trigger a requirement to wait 45 days before closing. However, the purpose of the amendments is to give non-Canadian investors the ability to obtain comfort that action under the national security review provisions will not be taken before implementing an investment. Therefore, one would expect that investors choosing to make a voluntary filing would do so before closing, and would wait to complete the investment until expiry of the first stage 45-day review period without issuance of a Notice or Cabinet Review Order.

The comfort obtained from the voluntarily filing would apply solely to the investment in respect of which the filing is made. Subsequent ownership increases would, as a technical matter, reopen the national security review right. Further investment that resulted in an acquisition of control would also be subject to notification or review under the net benefit provisions of the ICA.

Extending timeline for national security review

Where a voluntary filing is an option for the investor but the investor does not choose to make such a filing, the proposed amendments provide the government with five years (as compared to the current 45 days) after the date of the implementation of an investment to commence a national security review. The proposed amendment provides the federal government with a significantly longer time period to undertake national security reviews on a post-closing basis in circumstances where investments are not voluntarily notified and may not come to the attention of the government until well after closing.

For comparison, the regulatory authority in the United States has an unlimited time after the implementation of an investment to commence a national security review where parties choose not to file. The United Kingdom allows initiation of a national security review up to five years after implementation, similar to that being proposed for Canada, and Australia has a ten-year window for post-closing review.

Next steps

The government has committed to consult with key stakeholders, and a 30-day consultation process is underway.

For further information regarding the proposed amendments or other questions relating to Canada's foreign investment regime, please contact the members of Osler's Competition and Foreign Investment Group.