Goodmans LLP Update

Canada Tightens Scrutiny Over Foreign Investment in Response to COVID-19

Key points:

- In response to the COVID-19 pandemic, the Government of Canada announced in a policy statement issued on April 18 that it will subject certain foreign investments into Canada to enhanced scrutiny under the Investment Canada Act (Act).
- The two specific types of investments the government will scrutinize with particular attention until the economy recovers from the effects of COVID-19, regardless of their value:
    - controlling or non-controlling investments in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or to the government; and
    - all investments by state-owned investors, or private investors assessed as being closely tied to or subject to direction from foreign governments.
- Enhanced scrutiny may take several forms:
    - The government announced this may involve requests for additional information or extensions of timelines to permit fuller assessments.
    - The announcement also points to a broader range of transactions that will be subject to national security and state-owned enterprise provisions of the Act, as well as enhanced scrutiny – including potentially more intrusive undertakings – of those transactions reviewed.
- To ensure regulatory certainty, the government reaffirmed the wisdom of submitting notifications (for transactions that are not subject to a mandatory review) at least 45 days ahead of closing and engaging with the Investment Review Division at an early stage.

Background

Certain acquisitions of control of and investments in Canadian businesses are subject to the Act. As reported here, Canada has not raised the high monetary thresholds applicable to foreign investment in response to COVID-19.

In recent years, there has been a shift in attention from reviewing foreign direct investment generally, to focusing on investments that could be injurious to the Canadian economy (because they are made by state-owned enterprises that may be following non-commercial imperatives and/or because they are made in industries that could have implications for Canada's national security). In each of these areas, the government relied on provisions of the Act that involve greater discretion by the Minister responsible (in the case of non-cultural industries – the Minister of Innovation, Science and Economic Development) as well as guidelines articulating broad policy objectives.

State-owned enterprises are defined broadly under the Act as including those "influenced" by foreign governments. State-owned enterprises are subject to a lower monetary threshold of C$428 million in book value (as compared to higher thresholds for certain private sector investors of up to C$1.613 billion in enterprise value). The government has also applied greater scrutiny over acquisition by these investors under guidelines articulating specific considerations aimed at ensuring appropriate governance over, and commercial orientation of their investments.

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Investments that the government perceives could be injurious to Canada's national security are reviewable under the Act's national security provisions. All investments, whether controlling or not, are reviewable on national security grounds. The Act does not contain any definition of national security. Under specific national security guidelines, the factors listed as potentially relating to national security include, among others:

- the potential impact of the investment on the security of Canada's critical infrastructure (i.e., 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); and
- the potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the Government of Canada.

New Developments

In response to the economic impact of the pandemic, as well as international competition for critical supplies, the Government of Canada announced its temporary policy on foreign investment.

The government cited the fact that "[m]any Canadian businesses have recently seen their valuations decline as a result of the pandemic" and the government acknowledged that these sudden declines could lead to "opportunistic investment behaviour".

The government also indicated its intention to "scrutinize with particular attention under the Act foreign direct investments of any value, controlling or non-controlling, in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or to the Government."

Analysis

The government signalled it will use its existing discretion under the Act to enhance scrutiny over transactions raising concerns of opportunistic investment, as well as over specific investments proposed by entities under the influence of foreign governments and acquisitions of businesses critical to Canada's pandemic response.

As we previously advised, reviews are likely to take longer than established timelines, even in transactions that may not involve critical businesses. Additional information may also be required to permit a fuller assessment of whether a proposed investment meets the statutory test of being of "net benefit to Canada."

For entities influenced by foreign governments, increased scrutiny could cause the Minister to require a net benefit review based on the application of the lower threshold applicable to state-owned enterprises.

Proposed investments in Canadian businesses involved in Canada's "critical infrastructure" or the supply of "critical goods and services" to Canadians and the government will likely receive the most enhanced scrutiny. Based on existing guidelines, these businesses include 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. Such enhanced scrutiny may well extend to requiring undertakings ensuring the secure supply of these goods and services to Canadians before serving the needs of others.

The imposition of these interim measures reinforces the benefit of early advice from counsel to frame the structure and objectives of transactions that may receive enhanced scrutiny under these exceptional circumstances, and to engage with the Investment Review Division.

If you have any questions about Canadian foreign investment law during the COVID-19 pandemic, please contact any member of our Competition, Antitrust and Foreign Investment Group.