

Competition Law

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Canada Proposes Amendments to the *Investment Canada Act* for Greater Disclosure and Enhanced Enforcement

by Joel Schachter

On April 26, 2012, the Canadian government announced plans to amend the *Investment Canada Act* (the “ICA”). The amendments in Bill C-38 (the *Jobs, Growth and Long-Term Prosperity Act*) are intended to (i) enhance the transparency of the review process under the ICA; and (ii) improve enforcement tools for contraventions of the ICA.

The ICA currently authorizes the Minister to disclose publicly only a final decision allowing or disallowing a proposed investment and the reasons for the decision. Before making any final net benefit decision, the Minister must notify the investor if he or she is not satisfied with the proposed investment and provide the investor with an opportunity to make further representations and undertakings. The ICA currently does not permit the Minister to disclose this preliminary notice or the reasons for the negative determination. The proposed amendments will authorize the Minister to disclose this preliminary notice and, unless the relevant party satisfies the Minister that its interests may be prej-

udiced, the reasons for the preliminary determination. The Minister has rarely notified an investor of a preliminary unfavourable determination. However, a preliminary notice was issued to BHP Billiton in connection with its proposed acquisition of Potash Corp in 2010. Following receipt of this notice, BHP did not proceed with the transaction and the government was criticized for, among other things, not explaining the reasons for its preliminary decision. The amendments address this shortcoming.

The proposed amendments will also authorize the Minister to accept security from an investor for a contravention of the ICA. As a practical matter, any contravention would likely be limited to an investor breaching its undertakings. This presumably addresses the criticism by some that the government’s remedies for non-compliance are insufficient, especially in light of the protracted enforcement measures taken against U.S. Steel for its failure to comply with its undertakings in connection with its 2007 acquisition of a Canadian steel company.

In its announcement of the proposed amendments, the government stated that the Minister will be authorized to accept such security “when offered by an investor”. It remains to be seen how important it will be for an investor to “offer” to give such security on the Minister’s determination as to whether the investment will be of net benefit to Canada. The proposed amendments also permit the Minister to publicly disclose that the Minister has accepted security posted by an investor.

Please contact any member of the Goodmans Competition Group to discuss the implications of the proposed amendments.