

Competition Law

May 28, 2012

Canada Proposes Additional Amendments to the Foreign Investment Review Process

On May 25, 2012, the Canadian government announced proposed amendments to the foreign investment review process.

The proposed amendments are stated to be intended to:

- provide the Minister and a foreign investor with an alternative to litigation where the Minister believes that a foreign investor has failed to comply with a written undertaking, and
- narrow the scope of transactions subject to the net benefit review process under the *Investment Canada Act* (the “ICA”) to those that are the “most significant”.

These proposals follow the announcement in late April of proposed amendments to the ICA relating to enhanced transparency of the review process under the ICA and improved enforcement tools for contraventions of the ICA (for more information about those proposed amendments, please see the Goodmans Update dated May 8, 2012 titled “[Canada Proposes Amendments to the *Investment Canada Act* for Greater Disclosure and Enhanced Enforcement](#)” at [www.goodmans.ca](#)).

Mediation as an Alternative to Litigation

Currently, where the Minister believes that a failure by a foreign investor to comply with a written undertaking has occurred and no consensual resolution can be reached, the Minister’s only effective remedy is to initiate court proceedings.

The Canadian government has now issued a guideline providing that, where the Minister believes that the foreign investor has failed to comply with a written undertaking, the parties may commence a process with a third-party mediator to facilitate a resolution rather than engage in litigation. This guideline is presumably in response to the costly and protracted enforcement measures taken against U.S. Steel by the Canadian government for its failure to comply with its undertakings in connection with its 2007 acquisition of a Canadian steel company (for more information about those proceedings, please see the Goodmans Update dated June 23, 2010 titled “[U.S. Steel: Federal Court Upholds the Constitutionality of Section 40 of the *Investment Canada Act*](#)” at [www.goodmans.ca](#)).

Increase in Review Threshold

The announcement also contemplates issuing amending regulations under the ICA to increase the transaction review threshold substantially from the current level of \$330 million in asset value (based on the value of the assets reflected in the financial statements of the business) to \$1 billion in *enterprise value*¹ over a four-year period.²

For the first two years following the amendments, the transaction review threshold would increase to \$600 million. The transaction review threshold would then increase to \$800 million for the subsequent two years,

¹ The draft regulations first pre-published for public comment in 2009 included a proposed “enterprise value” based on the “market capitalization” of the entity, plus its total liabilities minus its cash and cash equivalents. The May 25th announcement suggests that additional proposed changes to the methodology for calculating “enterprise value” will be contained in the proposed amendments to the regulations; however, at the time of this update, the proposed amendments to the regulations have not yet been published.

² The proposed amendments give effect to prior amendments to the ICA that were passed through the *Budget Implementation Act*, 2009. For more information about the 2009 amendments, please see the Goodmans Updates dated February 11, 2009 and March 16, 2009 titled “[Significant Changes Proposed to the Competition Act and the Investment Canada Act](#)” and “[Amendments to the Competition Act and the Investment Canada Act Granted Swift Passage](#)”, respectively at [www.goodmans.ca](#).

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and \$1 billion thereafter (indexed to reflect changes in Canada's gross domestic product going forward). In its announcement of the proposed amendments, the Canadian government stated that the concept of enterprise value better reflects the value of a business as a going concern and the increasing importance of service and knowledge-based industries. The Canadian government has provided a 30-day period for comments to the draft regulations before final publication.

No Reference to "Net Benefit" Test

Following the controversial November 2010 decision by the Canadian government that the proposed takeover of Potash Corp. by BHP Billiton was not likely to be of net benefit to Canada, foreign investors and Canadians alike have been anticipating clarification from the Canadian government to the "net benefit" test (which requires a foreign investor to provide the Minister with justification as to why its investment would be of net benefit to Canada). Notably, neither the proposals announced on May 25, 2012, nor those announced in late-April, provide any clarification in this regard.

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