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Canadian Government Announces Changes to Foreign Investment Review Regime

Authors: John Bodrug, Jim Dinning, Hillel W. Rosen, George N. Addy and Adam F. Fanaki

On March 25, 2015, the Canadian government announced that it would implement long-awaited changes to Canada's foreign investment review regime under the *Investment Canada Act* (ICA). These changes will significantly alter the threshold used in most transactions to determine whether foreign investments will be subject to review under the ICA. The changes will also implement more detailed information requirements for notifications and applications for review. In addition, the government announced that it has increased the maximum possible review period under the ICA's national security review provisions.

New Review Threshold

As described in previous communications in July 2009 and May 2012, the federal government previously announced its plans to amend the general ICA "net benefit" review threshold for most acquisitions of Canadian businesses by non-Canadians from a threshold based on the book value of the Canadian business's assets to one based on the enterprise value of the Canadian business. These changes will be made effective as of April 24, 2015.

Specifically, under the current thresholds, direct acquisitions of control of Canadian businesses (either share acquisitions or asset acquisitions) by non-Canadians are generally subject to net benefit review if the book value of the Canadian business's assets exceeds C$369 million. (Lower thresholds currently apply to acquisitions of Canadian "cultural businesses".) Following implementation of the ICA amendments, a net benefit review will generally be required only if the "enterprise value" of the business to be acquired exceeds C$600 million, rising progressively to C$1 billion over the next four years.

The current C$369-million book value threshold will continue to apply to acquisitions by state-owned enterprises, and the current lower book value threshold will continue to apply to acquisitions of cultural businesses. Most indirect acquisitions of Canadian businesses (*i.e.*, acquisitions of foreign companies with Canadian subsidiaries) will still not be subject to net benefit review.

The amendments include a number of provisions relating to the calculation of enterprise value. In the case of an acquisition of control of a Canadian business that is publicly traded, the enterprise value of the Canadian business will be the market capitalization of the entity plus its liabilities (excluding operating liabilities) and minus its cash and cash equivalents. Market capitalization will be determined on the basis of the average daily closing price of each class of security outstanding multiplied by the average number of that security outstanding, calculated over a prescribed time period.

In the case of an acquisition of control of a Canadian business that is not publicly traded or in the case of an asset acquisition, the enterprise value of the Canadian business will be the acquisition value plus liabilities assumed (excluding operating liabilities) and minus cash and cash equivalents.

The new enterprise value threshold reflects the Canadian government's stated objective of focusing the ICA's net benefit review process on only the most significant transactions involving foreign investments in Canada. The new thresholds are likely to significantly reduce the number of transactions subject to net benefit review by Industry Canada. However, some transactions subject to review under the new enterprise value threshold may not have met the book value review threshold.

Information Requirements

The ICA amendments will implement significant additions to the information that must be provided by foreign investors as part of their applications for review (or, if no net benefit review is required, their post-closing notifications). Specifically, starting on April 24, 2015, foreign investors will be required to disclose the names, addresses, contact information and dates of birth of their directors, officers and significant (>10%) shareholders as part of their ICA filings. In addition, foreign investors will also need to provide information concerning any ownership interests held by foreign states, directly or indirectly, in the investor. There is no express materiality threshold for reporting on state ownership.

National Security Review Timelines

In addition to the general net benefit review regime under the ICA, the Act contains provisions allowing the government to review a wide range of investments in Canada by a non-Canadian on national security grounds. Previously, if a national security review was implemented, the government had up to 130 days to complete its review (with further extensions possible only with the consent of the investor). As a result of amendments that will come into force immediately, the government now has up to 200 days to complete its review (subject to further possible extensions on consent).

Key Contacts: John Bodrug, Jim Dinning and Hillel W. Rosen