

APRIL 20, 2020

Canadian Federal Government Announces Enhanced Scrutiny of Certain Foreign Investments During COVID-19

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The federal government has released a policy statement announcing its approach to foreign investment review during COVID-19, noting that it “will subject certain foreign investments into Canada to enhanced scrutiny” under the *Investment Canada Act* (ICA).

The statement of April 18 puts foreign investors on notice that:

- The government will **“scrutinize with particular attention under the [ICA] 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 the Government.”**
- The government will “also **subject all foreign investments by state-owned investors, regardless of their value, or private investors assessed as being closely tied to or subject to direction from foreign governments to enhanced scrutiny** under the [ICA]. This may involve the Minister requesting additional information or extensions of timelines for review as authorized by the ICA, in order to ensure that the Government can fully assess these investments.”
- Foreign investors are **strongly encouraged “to consider the [ICA’s] review process in the early stages of their investment planning,”** including engaging with Innovation Science and Economic Development Canada (ISED) before implementing an investment.

The policy statement explains that such enhanced scrutiny is required “to ensure that in-bound investment does not introduce new risks to Canada’s economy or national security, including the health and safety of Canadians” and provides that this enhanced scrutiny will be applied until the economy has recovered from the impact of COVID-19. Below we provide an overview of the foreign investment review process under the ICA and discuss the implications of this statement for foreign investors.

Background

Under the ICA, an acquisition of control of a Canadian business by a non-Canadian is subject to either a pre-closing “net benefit” review (if certain financial thresholds are exceeded) or a notification (which may be filed either before closing or up to 30 days after closing). The financial thresholds for triggering a net benefit review are lower for investors that are considered to be state-owned enterprises (SOEs). For ICA purposes, an SOE is broadly defined to include a foreign government or agency, or an entity that is controlled or influenced, directly or indirectly, by a foreign government or agency.

In addition to the net benefit review process, the ICA provides for a separate review process that may apply to any investment (even a minority investment) or to the establishment of a new business in Canada when such transaction/new business may be “injurious to national security.” While the concept of “national security” is not defined in the ICA, previously issued guidelines list nine factors that may be taken into account in assessing whether a national security review is likely to be triggered (such as whether the investment is likely to impact national defence capabilities, enable espionage, impact critical infrastructure or delivery of critical goods and services to Canadians).

The national security review process may be initiated up to 45 days after the date upon which a notification or application for review (for transactions that exceed the financial thresholds) is received. An investment that is not subject to notification or review may be voluntarily disclosed to the Minister and the Minister may notify the investor up to 45 days after closing that a national security review may be required. If a national security review is triggered, the entire process can take up to 200 days (or longer if the investor and Minister agree to extend the timelines). For a more detailed discussion of recent experiences with the national security review process, please see our bulletin [Canadian Foreign Investment Review Annual Report Confirms Shift in Emphasis Toward National Security Concerns](#).

Implications for Foreign Investors

1. The federal government **appears to be prepared to apply the national security review provisions to a broader set of transactions than has traditionally been the case**. It remains to be seen how broadly the government will interpret the concept of “critical goods and services” in the current environment, but it is likely intended to extend beyond the public health sector.
2. **The announcement does not change the applicable thresholds for net benefit reviews under the ICA, but it suggests that net benefit reviews of proposed acquisitions of Canadian businesses in the health or critical goods and services sectors or net benefit reviews involving acquisitions by SOEs will be subjected to more detailed and lengthier reviews than those prior to the COVID-19 pandemic.**
3. While it is not surprising that the federal government would seek to scrutinize any investment that may affect health and safety or critical goods/infrastructure during the COVID-19 crisis, **the purpose behind increased scrutiny of all investments by any SOE is less clear**. However, the impetus for increased scrutiny of investments by SOEs appears to be the view that “some investments into Canada by state-owned enterprises may be motivated by non-commercial imperatives that could harm Canada’s economic or national security interests.” **As a result, it appears unlikely that a commercially motivated ordinary course investment by, for example, a foreign pension fund (which may be considered to be an SOE for the purposes of the ICA) would be significantly affected by such scrutiny.**
4. The policy statement not only encourages early engagement with ISED but it also provides that foreign investors who wish to “obtain regulatory certainty must file a notification under the [ICA] at least 45 days before closing.” However, under the ICA, the notification process is not applicable for minority investments that do not result in an acquisition of control, and indeed a national security review may be initiated up to 45 days post-closing for any such investment that is voluntarily brought to attention of the Minister. It is not yet clear whether this statement can be interpreted to suggest that ISED will accept such notifications absent an acquisition of control during the COVID-19 crisis. **However, it is our experience that guidance with respect to the possibility of a national security review may be obtained via informal consultations with ISED even in the absence of such a notification.**
5. **As the federal government recognizes the need to remain “open to investment that benefits Canadians,” it is unlikely that ordinary course commercial transactions by non-SOEs that do not raise national security concerns will be significantly affected.**
6. **However, foreign investors considering any investment into Canada during the COVID-19 pandemic (and until the economy has recovered) should consult with counsel at an early stage to assess whether this increased scrutiny is likely to have an effect on their proposed investment and, if appropriate, engage with the Investment Review Division of ISED.**

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