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Canadian Government's Proposed Extension of Time Limits Has Implications for ICA's National Security Review Process

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The federal government has published a [draft legislative proposal](#) that would allow for the extension of certain legislative time limits and other periods due to COVID-19. The draft proposal (referenced as the *Time Limits and Other Periods Act [COVID-19]*) released on May 20, 2020, would, among other things, allow federal ministers to extend or suspend specified existing legislative time limits for up to six additional months, with the possibility that the extensions or suspensions can apply retroactively to as early as March 13, 2020.

Included in the proposed schedule of legislative and regulatory time periods that may be extended by a federal minister are two key provisions and time limits stipulated under the national security review process for foreign investments under the *Investment Canada Act* (ICA). As discussed in more detail below, the potential for the Minister of Innovation, Science and Economic Development to suspend or extend the applicable time periods for some stages of the national security review process for up to six months threatens to create significant uncertainty and a chilling effect on foreign investment in Canada.

Background

Under the ICA, a non-Canadian's acquisition of control of a Canadian business 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). 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 the establishment of a new business in Canada when such transaction or 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 when assessing whether a national security review is likely to be triggered (such as whether the investment is likely to enable espionage or affect national defence capabilities, critical infrastructure or delivery of critical goods and services to Canadians).

Currently, 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. Under current timelines, if a national security review is triggered, the entire process can take more than 200 days.

As we [previously reported](#), the federal government recently issued a policy statement regarding the additional scrutiny to be applied to certain investments in Canadian businesses during the COVID-19 pandemic and until the economy recovers from the effects of the pandemic. It is now apparent that the Minister may be applying a significantly broader concept of potential national security concerns than was the case before the COVID-19 pandemic.

Draft Legislative Proposal

The draft proposal lists two provisions under the ICA (sections 25.2 and 25.3), as well as the *National Security Review of Investments Regulations*, that could be subject to extension or suspension. Therefore, it appears that the Minister would have the ability to extend or suspend several time periods that arise at various stages of the national security review process.

For instance, if this draft legislation is passed in its current form, the Minister would be able to extend the existing 45-day statutory time period during which he can issue an initial notice of a potential review under section 25.2 for up to a maximum of six months. As a result, under the proposed legislation, the Minister could have up to six months and 45 days to decide whether to issue an initial notice of a

possible national security review of an investment in a Canadian business. When such an initial notice has been issued, under the existing statutory timelines, the Minister would have a further 45 days to decide whether to proceed with a national security review (under section 25.3). Under the draft legislative proposal, it appears that the Minister could elect to extend this period as well. What is not clear, however, is whether the proposed limit on extensions (of six months) would apply individually to each extension under each provision or collectively across the entire review process. The extension of these periods could affect the parties' ability to close a transaction (when notice of a potential national security review has been issued prior to closing, the parties are prohibited from completing the transaction until the national security review process is terminated or an approval is obtained).

Any order by the Minister to extend or suspend any applicable time period, together with the reasons for making it, must be published on a government website as soon as feasible but no later than five days after the order is made. Any order for an extension can be made to apply retroactively (to as far back as March 13, 2020), and the draft proposal provides that the Minister can make such an order up to September 30, 2020. The draft legislative proposal is open for [public comments](#) until May 30, 2020.

Implications

- Given that the national security review process can already be a lengthy one that may be extended (at certain stages), it is difficult to understand the need for lengthy extensions (including possibly at multiple stages of the review process). Indeed, if the draft legislative proposal is passed in its current form, it would create significant uncertainty for foreign investors considering whether to invest in Canadian businesses.
- The prospect of additional extensions to the already opaque process of national security review is likely to lead to a significant chill on inbound investment. This uncertainty is exacerbated by the Minister's ability to issue an extension or a suspension order at any time until September 30, 2020, with such order potentially applying retroactively to March 13, 2020, and applicable to all investments by non-Canadians. That is, passing the legislation as currently proposed would in and of itself create significant uncertainty as to whether and how the Minister will use these powers of extension (e.g., whether multiple time periods will be extended for the full six months allowed under the draft legislation). This significant uncertainty could, however, be mitigated by clear and timely guidance from the Minister as to how (or whether) he intends to use the potential extension powers.
- In light of the multiple stages to the national security review process, to the extent that any extension could be required, a limited extension to the initial 45-day period (upon which a notice of a possible review can be issued) should be sufficient and would strike a balance between the need to take additional time and providing investors with a clear and certain timeline.

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