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Investment Canada Act Net Benefit Review Threshold Increases Again for Many Foreign Investors

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Just a few months after an increase in the net benefit review threshold for most direct acquisitions of control of Canadian businesses involving private sector investors, the review threshold has increased yet again. The increase is 50%, to C$1.5 billion in enterprise value of the Canadian business being acquired, and applies to investors from European Union (EU) member states and certain other trade agreement partner countries, including the United States.

The new higher threshold applies to most direct foreign investments that are subject to the *Investment Canada Act* (ICA). Investments by U.S. and EU investors alone accounted for approximately 80% of all review and notification filings made under the ICA in 2016-2017.

Consequently, significantly fewer foreign investments in Canadian businesses will be caught by the net benefit review process under the ICA, which routinely involves binding commitments from investors to increase or maintain certain levels of Canadian business activity, including in relation to employment, capital investment, and research and development in Canada, in order to demonstrate that the proposed investment is likely to be of net benefit to Canada. Transactions subject to a net benefit review must receive approval under the ICA before they can be completed.

Key Points

- The new C$1.5-billion enterprise value threshold came into force on September 21, 2017, under implementing legislation for the Canada-European Union Comprehensive Economic and Trade Agreement (CETA).
- This preferential threshold now applies to most acquisitions of Canadian businesses involving private sector investors from the European Union, the United States, Mexico, Chile, Colombia, Honduras, Panama, Peru and South Korea. (The countries to which this threshold applies are subject to change as Canada enters or exits trade agreements in the future.)
- Investments involving private sector World Trade Organization (WTO) investors not listed above will continue to be subject to the C$1-billion enterprise value review threshold implemented on June 22, 2017 under a federal government initiative to accelerate the increase in net benefit review thresholds under the ICA.
- Both the $1.5-billion and the $1-billion thresholds will, starting in 2019, be subject to annual adjustments to take GDP changes into account.
- Direct investments in Canadian businesses by state-owned or influenced enterprises are subject to a much lower net benefit review threshold, currently set at C$379 million in book value of the assets of the acquired Canadian business.
- Similarly, acquisitions of Canadian cultural sector businesses will continue to be subject to a C$5-million book value review threshold for direct investments and a C$50-million book value threshold for indirect acquisitions – that is, acquisitions of Canadian businesses made through acquisitions of non-Canadian entities. (Apart from the cultural sector, such indirect acquisitions by WTO investors are generally not subject to a net benefit review under the ICA.)

- The thresholds noted above do not apply to national security reviews under the ICA, which are distinct from the net benefit review process and are becoming more common. No financial threshold applies for such reviews, and the ICA provides broad discretion to review a wide scope of foreign investments on national security grounds.

For more information on the ICA and how it is applied, please see our publication *Investment Canada Act: Guide for Foreign Investors in Canada*.

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