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Amendments to the Canadian Merger Review Process

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On March 12, 2009, concurrent with changes to Canada's foreign investment laws, the Canadian parliament passed legislation incorporating significant amendments to Canada's *Competition Act*. Notable among these amendments were considerable changes to the provisions governing merger review, which included amending the merger notification process to mirror the U.S. *Hart-Scott-Rodino Antitrust Improvements Act* process, increasing one of the merger notification thresholds and reducing the time following closing within which the Competition Bureau ("Bureau") can challenge a transaction.

Amendments to the Pre-Merger Notification Process

The amendments have introduced a new "U.S.-style" merger review regime, pursuant to which a transaction subject to notification may not be completed until the expiration (or early termination) of a 30-day waiting period following notification. The new process also provides, however, that if issues remain that the Bureau wishes to investigate, it may issue a "supplementary request" for information to the parties, in which case the proposed transaction may not be completed until 30 days after the Bureau receives the required information .

Given the prevalence of cross-border mergers involving both Canada and the United States, there is some merit in more closely correlating the Canadian merger review process with that in the U.S. However, the newly enacted system has given rise to serious concerns in Canada. Foremost among these concerns is the adoption of the "supplementary request" process. That is because the U.S. experience with its analogous "second request" process has been widely criticized for imposing excessive and expensive production burdens on merging parties.

Another drawback is that the amended Canadian merger review process eliminates any judicial oversight of the Bureau's production demands. Under the prior regime, the Bureau had to obtain a court order to compel production of information from merging parties. Although the courts tended to grant these orders without much question, parties had some ability to challenge them ex post facto. With the enactment of the new process, the Bureau can issue a wide-ranging "supplementary request" for any information that is deemed "relevant" to an assessment of the transaction without need for a court order.

The Bureau has tried to address some of these concerns in draft enforcement guidelines that it issued in late March 2009 ("Draft Guidelines"). The Draft Guidelines go to some lengths to emphasize the Bureau's view that the "supplementary request" process will not be used often and express the Bureau's commitment to minimize the burden of complying. In the absence of judicial oversight, the Bureau also will establish various internal controls to vet "supplementary requests" before they are issued and to deal with complaints from parties regarding the scope of requests or disputes about compliance. It is good see that the Bureau recognizes some of the potential pitfalls of its new "supplementary request" process. However, only time and experience will tell whether the Bureau's expressions of intent and internal controls will be sufficient to avoid the types of problems experienced in the United States.

加拿大兼并审查程序的修正

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2009年3月12日，加拿大议会在修改《加拿大海外投资法》的同时，也通过了对《竞争法案》的重要修正。在各项修正中，加拿大议会对涉及加拿大企业并购交易审批的条款作出了相当大的改动。修正后的加拿大企业兼并审查程序将更近似于美国的哈特-斯考特-罗迪诺反托拉斯改进法 所规定的企业兼并审查程序。这些修正提高了兼并的申报门槛之一，同时缩短了收购兼并活动完成后竞争管理局（以下简称"管理局"）对交易的有效质疑时间。

对兼并前期备案过程的修正

这次修正引入了一项新的"美式"兼并复审制度：受到申报过程的影响，交易有可能到申报后也不能完成，直至申报后30日的审查期结束（或提前终止）为止。在这个制度下，管理局若对某个问题仍然持有质疑态度，他们将可以"再次要求"交易方提供所需信息直到问题解决为止。在这样的情况下，拟议中的交易在管理局受理新信息后仍然有可能无法完成，直至受理后30日期限届满。

随着美加之间跨国兼并日渐普遍，与美式的企业兼并审查程序的紧密联系能给加拿大带来一定好处。但是这个新的审查程序的实施也增加了加拿大的担忧和顾虑，首当其冲的就是审查程序中的"再次要求"。因为在美国，企业早就对由于类似程序所引起的时间拖延及因此而产生的一系列生产成本的大幅增加存在诸多不满。

另一个负面影响是修正后的企业兼并审查程序削弱了对管理局信息收集的司法监管。在此之前，竞争管理局必须要得到法院许可才能要求并购方提供相关信息。尽管法院不会对竞争管理局过多质疑便授予许可，但参与并购的企业却对法院有一定的追溯权。而新规定则让竞争管理局可以无需法院许可，而直接"再次要求"并购方提供所有与交易"相关"的信息。

管理局在2009年三月下旬颁布的实施细则草案（以下简称"草案"）中尝试解释提出了法案修正后出现的这些问题。草案在一定程度上强调了管理局不会滥用这个"再次要求"的权力，并承诺一定会言出必行。在没有司法监管的情况下，管理局将通过建立多种内部监督程序来检查对"再次要求"程序的使用，规范调查尺度和解决执行时出现的纠纷。尽管管理局能够意识到"再次要求"这一新程序带来的问题让人欣慰，但唯有时间和经验才能证明管理局的决心和所谓的内部监督程序是否足以让加拿大避免那些美国在执行类似程序时所出现的问题。

INCREASED MERGER NOTIFICATION THRESHOLDS

On the positive side, the amendments increase one of the pre-merger notification thresholds. Previously, the *Competition Act* generally required the aggregate value of the target's assets in Canada, or the annual gross revenues from sales in or from Canada, to exceed CDN$50 million in order for the notification requirements to be triggered. This "size of the transaction" threshold is now increased to CDN$70 million initially, with future increases tied to changes in inflation (or as prescribed by regulation).

The threshold increase for pre-merger notifications will mean that some mergers that had to be notified previously will no longer be subject to notification. It is not clear, though, if the reduction in the number of notifiable transactions will be that significant, given the relatively modest increase to the threshold.

EX POST REVIEW

The other notable change ushered in by the amendments is that the period within which the Bureau can challenge transactions post-closing has been reduced from three years to one year following closing. This amendment is of theoretical benefit to merging parties, especially those that do not cross the notification thresholds, as it purports to reduce post-closing deal risk. However, since the Bureau rarely if ever challenged acquisitions post-closing, the practical benefits to merging parties are more limited .

CONCLUSION

Even within the limits described above, the reduced likelihood of pre-merger notification brought about by the increased merger review thresholds, and the greater deal certainty afforded by the reduction in the Bureau's ability to challenge a merger post-closing, are both positive steps for investors looking to acquire companies operating in Canada. The introduction of a "supplementary request" process is more worrisome, given the prospect for increased costs and lengthened timelines. However, this will only be an issue for transactions involving significant competitive overlap in Canada between the acquiror and acquiree, and thus less likely to be of concern for Chinese investors, at least at this stage of Chinese investment in Canada.

提高兼并申报门槛

乐观说来，修正案提高了兼并申报的门槛。在此之前，《竞争法案》规定，一般情况下，如果被兼并的公司在加拿大的资产总值或其在加拿大销售或从加拿大销售所得的年度总销售收入超过5000万加币情况下，交易就需要申报 。现在，申报门槛被提高到7000万加元，在以后也将根据通货膨胀率的变化（或根据相关规定）而调整增加。

提高兼并申报门槛意味着一些原先必须预先呈报备案的兼并交易不再需要进行审批。然而由于提升的幅度并不大，目前尚不清楚需要进行预先申报的兼并交易数量是否会有显著减少。

兼并后期的复审

新法案的另一个重大修正是把管理局对结算后交易的质疑期从之前的3年缩减到1年。从理论上来说，因为限期的缩短降低了企业结算后风险，所以将有利于兼并企业特别是那些尚未达到申报门槛的企业。但由于管理局几乎不对兼并企业在结算后提出异议，因此此项修正对兼并企业的实际帮助并不大。

总结

虽然这次的修正有一定的局限性，但对于有意收购加拿大公司的投资者来说，这些都对他们起到积极的作用。首先是兼并申报门槛的提高降低了兼并前期申报的可能性。再有管理局对交易结算后质疑权力的降低提高了交易的成功率。引入"再次要求"的复审过程确实令人担忧，因为它将拖延加拿大的企业兼并审查的程序并加大成本费用。但是它很大程度上仅影响了那些所在行业高度相似的企业间并购。在目前这个阶段，对于中国投资者来说，投资加拿大的影响并不大。