PROVEN ▪ INNOVATIVE ▪ FOCUSED ▪ PROVEN ▪ INNOVATIVE ▪ FOCUSED ▪ PROVEN ▪ INNOVATIVE ▪ FOCUSED ▪ PROVEN ▪ INNOVATIVE ▪ FOCUSED ▪ PROVEN ▪ INNO

Canada Reviews Foreign Investment Policies for Book Industry

Mark Katz
mkatz@dwpv.com

A superior line of thought

DAVIES

North American
Free Trade & Investment Report

THOMSON REUTERS
WORLDTRADE EXECUTIVE
The International Business Information Source™

www.wtexecutive.com
The International Business Information Source™

Biweekly report on legal & financial issues affecting direct investment and cross-border trade in Mexico, the U.S., and Canada

Mexico: Data Protection

The New Mexican Federal Personal Data Protection Act

By Diego Martinez (Cervantes Sainz Abogados) and
Jim Halpert (DLA Piper)

On July 6, 2010, Mexico became the latest world economy to adopt broad-based private sector data protection legislation with the Federal Act for the Protection of Personal Data Held by Entities and Individuals of the Privacy Sector (*Ley Federal de Protección de Datos Personales de los Particulares*) (the "Act").

The Act is the Mexican government's response to fulfill international standards regarding protection of personal data. Mexico joins

See ***Mexico****, page 5*

Canada: Foreign Investment

Canada Reviews Foreign Investment Policies for Book Industry

By Mark Katz
(Davies Ward Phillips & Vineberg LLP)

In July 2010, the Canadian government announced that it will be reviewing the current restrictions on foreign investment in Canada's book publishing, distribution and retail sectors. The government has invited public input on the issue and published a "discussion paper" (the "Discussion Paper") to help inform the debate (*Investing in the Future of Canadian Books*, July 2010, available at http://www.pch.gc.ca/eng/1272486502392).

Currently, foreign investment in the Canadian book industry is governed by the *Investment Canada Act* (the "ICA"), as supplemented

See ***Canada****, page 8*

HIGHLIGHTS

Vol. 20, No. 16
September 15, 2010

Table of Contents

North American Free Trade & Investment Report is published biweekly (once in August and December) by WorldTrade Executive, a part of Thomson Reuters, P.O. Box 761, Concord, MA 01742 USA. Tel: (978) 287-0301; Fax: (978) 287-0302; E-Mail: info@wtexec.com; Website: http://wtexecutive.com. Subscription rate is $834 per year U.S./$884 per year non-U.S.
Managing Editor: Gary A. Brown. Development Editor: Mary Anne Cleary. Contributing Editors: Attorneys at the Canadian law firm of Stikeman, Elliott and the Mexican law firm of Sánchez-DeVanny Eseverri. Correspondents: Jorge Jimenez, Mexico City; Publisher: Gary A. Brown.

ISSN 1064-802X.

MEXICO

Patents

Mexican Intellectual Property Information: Opposition to the Grant of Patents?

By Cacheaux, Cavazos & Newton, L.L.P.

According with the provisions of Mexico's Industrial Property Law (LPI), inventions are patentable if: 1) they are the result of a creative activity; 2) have an industrial application; 3) and, are new. Five exceptions to such provision are set forth in Article 16 of the LPI. Additionally, Article 19 of the LPI provides cases for which inventions cannot be considered for registration. Similarly, legislation in this area provides that once a patent application is filed with the Mexican Institute of Industrial Property (*Instituto Mexicano de la Propiedad Industrial* or "IMPI") an administrative review must be carried out. Such administrative review basically consists of a formal examination of the filed application documents, which is followed by the publication of the patent application in the Official Gazette of the IMPI, usually within 18 months from the filing date (such publication can occur before such 18-month period upon request to the IMPI).

This has been the normal patent registration process for a long time. As of last June, however, a decree was published in which several articles were added to the LPI. The highlight of such decree, among others, is the new Article 52a, which states that within six months, counted from the date of publication of any patent application published in the Official Gazette, the IMPI may receive public comment concerning the application's compliance with the provisions set forth in Articles 16 and 19 of the LPI (conditions for obtaining a patent on inventions that are considered patentable). Comments that the IMPI receives pursuant to Article 52a do not mandate the IMPI to rule in a certain way. Nevertheless, this is the first time that Mexico considers the possibility of allowing an interested third party to submit some sort of "opposition" to the granting of a patent.

This may be an important step (and with time these "oppositions" may occur more often) that could spread to other areas of industrial property, including trademark registrations, as in many other countries.

Prepared by Cacheaux, Cavazos & Newton, L.L.P. an international law firm with offices in Texas and throughout Mexico, www.ccn-law.com. © 2010, CCN.

Lawsuits

Class Action Lawsuits in Mexico

By Cacheaux, Cavazos & Newton, L.L.P.

The Official Journal of the Federation published on July 29, 2010 an amendment to article 17 of the Constitution of the United Mexican States to create in Mexico the legal concept of class action lawsuits, i.e. lawsuits brought by a group of people that meet a uniform set of conditions arising from the same cause that resulted in losses or claims. The constitutional reform limits class action lawsuits to proceedings regarding federal law, such as those relating to consumers, users of financial services and matters concerning the environment, and grants federal judges exclusive jurisdiction to hear such cases. It is also important to note that Mexico's Congress will have one year to issue secondary legislation on how to regulate class action lawsuits.

Rules on class actions are nothing new, since countries like the United States, Spain, Colombia, Brazil, Argentina and Chile, among others, already have rules on this type of collective actions at a constitutional and secondary level of legislation. With the constitutional amendment to Article 17, the scope of a ruling on class actions lawsuits would be valid for a group of people who are in an identical situation to that of any plaintiff

*See **Lawsuits**, page 4*

***Lawsuits**, from page 3*

who has filed a lawsuit against an institution or entity. Additionally, this amendment will compensate victims that sustain damages resulting from monopolies, unfair claims, abuse and fraud and other causes of action that give rise to a class action lawsuit.

It is estimated that the success of this legal concept will depend largely on secondary legislation approved by Mexico's Congress. Up until this constitutional reform, the only class action available at the federal level could be filed only by the Federal Office of Consumer Protection ("Procuraduria Federal de Proteccion al Consumidor" or "PROFECO") against companies that defrauded customers, but its effectiveness and scope was limited and was subject to the willingness of the authority to prosecute any given case. Last May, Mexico's Supreme Court ruled for the first time on class action lawsuits brought by PROFECO, and held that the benefits of a judgment from such lawsuits must accrue to all affected consumers, not just those who joined in the lawsuit.

Prepared by Cacheaux, Cavazos & Newton, L.L.P. an international law firm with offices in Texas and throughout Mexico, www.ccn-law.com.

Industry

Industrial Insecurity: Myth or Reality?

By Rene Cacheaux
(Cacheaux, Cavazos & Newton, L.L.P.)

Mexico's President, Felipe Calderon, met on August 10 with representatives from various political parties to discuss the federal government's policy on internal security and the so-called war against organized crime. President Calderon stressed that the federal government is winning this war; however, reality seems to have overtaken all political rhetoric. The companies and industrial conglomerates with industrial facilities in the Mexican Republic are concerned about the lack of safety that seems to have spread from coast to coast and from border to border.

The real question is the following: How dangerous is it to enter and leave the country and visit industrial facilities, especially those located in border areas and in sparsely populated areas? The United States consulates in Monterrey, Nuevo Laredo and Ciudad Juarez have issued several warnings for American citizens who live in and visit Mexico that advise them to be careful and take extra precautions when visiting and traveling within Mexico. How unsafe is it and what precautions should be taken when visiting industrial plants? In reality, unfortunate incidents that result from the lack of safety do not occur everywhere in Mexico or on a daily basis. These are isolated incidents that lead to unfortunate situations that are sometimes linked to involvement with members of the underworld.

From a practical standpoint, if proper precautions are taken, the risk of facing problems during visits to industrial facilities can be significantly reduced. Some general recommendations for these visits include the following:

(i) avoid travel or night-time travel in isolated places where there is little traffic;

(ii) refrain from wearing dress suits to not draw attention

(iii) avoid unaccompanied travel from industrial facilities to hotels or other places;

(iv) plan to travel on federal highways and toll roads as much as possible;

(v) cooperate with personnel manning checkpoints;

(vi) do not to carry large sums of money or require managers or employees at the facility to carry large sums of money;

(vii) place security guards at facility entrances and strengthen identification procedures and access to such facilities;

(viii) hire services from well known companies and verify their references;

(ix) do not carry firearms for personal safety;

(x) to the extent possible, seek the company of local people who are familiar with local practices and the location of the intended destination when traveling to a facility;

(xi) refrain from making cash transactions and receiving large sums of cash;

(xii) attempt to stay in places where there is a good number of people around; and

(xiii) in case of an unfortunate incident, report it to the nearest consulate.

If these precautions are taken, the risk of being involved in a bad incident will be reduced.

It appears that Mexico's state of the insecurity will continue for the foreseeable future, thus, it will be important to stay vigilant at all times. This does not mean that investments by industrial groups are in danger or that there is a justifiable rush for such groups to leave the country due to the Mexico's insecurity. Mexico has been and will continue to be a country of peace and harmony. These are times of transition and cleansing beyond prediction. In the future, companies and industrial conglomerates will have to factor in safety conditions in selecting the location of their industrial facility.

Rene Cacheaux (rcacheaux@ccn-law.com), founding partner in Cacheaux, Cavazos & Newton, L.L.P. an international law firm with offices in Texas and throughout Mexico, www.ccn-law.com.

***Mexico**, from page 1*

Argentina and Uruguay as one of a few Latin American countries with broad data protection regulation. The Act is a major shift in privacy regulation in Mexico. Its requirements will not take effect until July of 2011, following the issuing of regulations which will clarify the scope of the Act's broad pronouncements. It is already clear, however, that the Act will demand several significant changes in business practices for commercial entities doing business in Mexico.

The Act largely tracks the OECD Guidelines, and is most similar to Canada's national privacy law, PIPEDA. In contrast to broad-based privacy laws enacted in Argentina and Uruguay, it does not follow the E.U. data protection regulation model. Instead, it adopts a middle ground position that is far more compatible with U.S. privacy law. The Act's principal requirements are to:

(1) provide detailed notice to data subjects;

(2) offer data subjects the right to opt-out of uses and disclosures of personal information and to an opt-in right for sensitive personal information;

(3) engage in fair processing of personal data;

(4) provide access, correction and rectification rights for data subjects to personal data about them;

(5) secure personal data;

(6) not keep personal data for longer than necessary; and

(7) provide notification of security breaches involving personal data.

While the law contains significant potential sanctions, preliminary indications from the Federal Institute for Access to Information and Data Protection are that there will be a significant role for self-regulation and a significant emphasis on public education to adopt a culture of data protection in Mexico, rather than extensive enforcement for the next several years.

The Act implements the 2009 amendments to Articles 16 and 73 of the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*) (the "Constitution") that explicitly recognize the right to protection of Personal Data (as defined in the Act). Paragraph 2 of Article 16 now provides that "*Any person is entitled to the protection of his/her personal data, to the access, rectification, and cancelation of same...in accordance with the provisions set forth in the Law, which shall provide for exceptions and the principles ruling the treatment of data…*". Article 73 of the Constitution was amended to provide that the Congress may issue any kind of legislation in connection with the protection of Personal Data.

Salient Features

Scope: As drafted, the Act appears to apply to all data that is processed in Mexico without regard to the nationality of data subjects in question. It also appears to apply to websites that target Mexican Internet users. Furthermore, personal data is defined quite broadly as any information regarding an identified or identifiable individual.

On the other hand, the Act provides for uniform federal regulation so as to prevent a multiplicity of local laws governing Personal Data. It applies to private parties, both individuals and entities, in possession of or managing Personal Data[1] (referred to as "Responsible Parties") other than: (i) credit reporting corporations (*Sociedades de Información Crediticia*), who are regulated separately; and (ii) entities that maintain and/or manage Personal Data for their own use and not for commercial purposes or for purposes of disclosing the information.

Most of the Act's requirements are aimed at the processing ("*Tratamiento*") of personal data. "*Tratamiento*" is defined as "the procurement, use, disclosure, or storage of personal data by any means". Art. 3, XVIII. "*Use*" is in turn defined broadly to cover "*any act of access, management, exploitation, transfer or disposition of person data.*" *Id.* This combination of definitions approximates the broad definition of processing under the E.U. Data Protection Directive.

The Act's requirements are imposed on "*those responsible for*" processing personal data ("responsible parties"), who are defined as private individuals or entities "deciding over the *Tratamiento* of personal data." (Art. 3, XIV) This definition closely resembles the definition of a data controller under the E.U. Data Protection Directive.

Notice and Consent: The Act adopts a notice and opt-out / opt-in consent regime for processing ("*Tratamiento*") of Personal Data.

Responsible parties must notify the data subjects in a privacy notice of the personal data of the data subject that is in the possession of and under the management of the Responsible Party and the purposes for which it was obtained. The Privacy Notice must describe (1) the identity and address of the responsible party; (2) the purposes of the processing; (3) the choices and means available to the data subject to limit the use and disclosure of the personal data; (4) how to exercise access and correction rights; (5) data transfers that have been effected; and (6) how the responsible party will notify the data subject of changes to its privacy notice. The Act provides for *opt-out* consent for all processing covered by the privacy notice except in the case of sensitive data and financial data, for which *opt-in* consent is required. Consent may be revoked at any time per the method(s) set forth in the privacy notice. Processing that is beyond the scope of disclosures in the privacy notice and is not compatible or analogous to them requires a separate, new consent.

The Act largely tracks the OECD Guidelines, and is most similar to Canada's national privacy law, PIPEDA.

Exceptions to opt-out and opt-in consent apply in the case of: (1) data contained in publicly available databases; (2) data that has been de-identified; (3) processing for the purposes of performing obligations derived from a legal relationship with the data subject; (4) an emergency threat to an individual or his or her assets; (5) medical necessity; or (6) authorization by statute or a competent legal authority.

Data Security: Responsible Parties must establish and maintain administrative, technical and physical security measures necessary to protect the Personal Data from damage, loss, alteration, destruction, and from any resulting unauthorized use, access or processing. These should take account of existing risks, possible consequences for data subjects, the sensitivity of the data, and technology developments. The security measures may not be of less quality as those applied to protect the responsible party's own information. Responsible parties and third parties who participate in processing of personal data are required to maintain its confidentiality both during and after the responsible party's relationship with the data subject.

Access and Correction Rights/DROs: The Act provides that any data subject shall have the rights of access, rectification, cancelation or opposition for his or her personal data. The Act sets out detailed procedural requirements relating to the exercise of these rights. Data subjects also have a right to obtain the responsible party's privacy notice. These rights may be exercised starting 18 months after the Act's effective date – January, 2012.

By July, 2011, all responsible parties must appoint a private data responsible officer ("DRO"), who is responsible for answering data subject's requests. The DRO is also responsible for the protection of personal data within all the employees of the Responsible Party.

Data Transfer: International data transfers of personal data are permitted if three conditions are met. First, the responsible party must inform the data subjects through the Privacy Notice that the personal data may be transferred and the purpose for the transfer. Second, the responsible party must bind the recipient of the transferred personal data in a data transfer agreement to comply with all of the responsible party's obligations under the Act. Third, the responsible party must inform the foreign data recipient of the privacy notice and the purposes for which the data subject authorized processing of the personal information.

There are some circumstances provided for in the Act where the Personal Data may be transferred, without these requirements. These include transfers: (i) authorized under international treaties to which Mexico is party, (ii) between affiliates; (iii) necessary to protect the "public interest"; (iv) necessary to protect a right to be exercised in court (which appears to permit transfers for Discovery purposes); (v) necessary for medical purposes; and (vi) necessary by virtue of an agreement executed by the

responsible party "in the interest of the data subject".

Security Breach Notification: Responsible parties are required immediately to notify the data subject of any breach of security occurring at any stage of processing that "*significantly affects the economic or moral rights of the data subject*." This requirement, like many others in the Act, is stated very briefly and will be fleshed out in regulations.

Data Deletion/Fair Processing: When personal data is no longer necessary for the purposes set forth in the privacy policy or applicable law, it should be deleted. For sensitive personal information, responsible parties are required to make reasonable efforts to process the information for the shortest period possible. Information on bankruptcies and other failures to live up to contractual obligations must be deleted from databases within six years of the default.

More generally, personal data maintained in databases are to be relevant, accurate and up-to-date, and personal data may not be obtained through deceitful or fraudulent means.

Furthermore, responsible parties are required to take necessary actions to ensure that vendors and other third parties who touch personal data abide by all the terms of the privacy notice.

Enforcement and Education: The Federal Institute for the Access of Information and Protection of Personal Data (*Instituto de Acceso a la Información y Protección de Datos Personales*) (the "Institute") is charged with diffusing the right to the protection of Personal Data in Mexican society, promoting observance of these data protection rights, and conduct oversight of the observance of the Act's requirements.

The Institute has the following powers: (i) supervising and verifying compliance with the provisions of the Act; (ii) interpreting the Act for administrative purposes; (iii) providing technical support to Responsible Parties for their compliance of their obligations; (iv) issuing guidelines and recommendations as required by the due application of the Act; (v) disclosing standards and international practices regarding the security information, in relation to the nature of the data; the purposes for which it is processed, and the technical and economic capacities of the responsible party; and (vi) investigating and potential violations and imposing sanctions.

The Institute may: (i) grant a stay or discard the data protection request, or (ii) confirm, revoke or modify the response of the Responsible Party.

Both monetary and criminal penalties may be imposed for violations. The Institute is entitled to impose financial penalties. Imprisonment for felonies as a consequence of violation of provisions of the law is possible under criminal law derived from claims filed by the public prosecutor (*Ministerio Público*) per request either of the Relevant Protected Person or the Institute. Criminal penalties are imposed when Personal Data is unduly used and as a result security of the Relevant Protected Person is or could be triggered.

Penalties and sanctions for violations of the Act include among others, fines for amounts ranging between approximately $500 and $1.5 million. In case of repetitive violation, fines may be imposed for an amount equal to 2 times the applicable fine. Moreover, criminal penalties of 3 months to 10 years of imprisonment may be imposed.

Additionally, the Ministry of Economy (*Secretaría de Economía*) (the "Ministry") is charged with spreading awareness of the obligations regarding protection of Personal Data between the private national and international sectors with commercial activity in Mexican territory. The Ministry is to promote commercial best practices relating to protection of personal data for the development of the digital economy and of the national economy. The Ministry is given authority to: (i) spread knowledge in respect of the protection of Personal Data in the field of commerce; (ii) foster healthy commercial practices regarding the protection of personal data; (iii) with the cooperation of the Institute, issue the corresponding regulations relating to content and scope of the privacy notices referred to in the Act; and (iv) carry out the registries of consumers in respect of personal data and verify their functionality.

The Act provides for uniform federal regulation so as to prevent a multiplicity of local laws governing Personal Data.

1 Personal information in possession of governmental entities is already protected by the Federal Act on Transparency and Access to Government Public Information enacted in 2007.

Diego Martinez (dmartinez@cervantessainz.com) is Partner of Cervantes Sainz Abogados, in Mexico. Mr. Martinez focuses his legal practice on general corporate and financial activities matters, especially on banking and securities. Tel. +52 (55) 9178-5064. Jim Halpert (jim.halpert@dlapiper.com) is a Partner in the Communications, E-Commerce and Privacy practice of DLA Piper, in Washington DC. Mr. Halpert co-heads DLA Piper's global data protection practice and works extensively on global data protection matters.

CANADA

***Exports**, from page 1*

by a specific policy adopted by the Ministry of Canadian Heritage with respect to the industry (the "Book Policy").

The ICA contains general rules for non-Canadian investors who establish new businesses or acquire control of existing businesses in Canada's cultural industries, including books. Broadly speaking, acquisitions of control that exceed certain asset value thresholds are subject to review and approval by the Minister of Canadian Heritage (the "Minister"). All other investments, including the establishment of new businesses, are subject to post-closing notification only unless the Minister orders the investment to be reviewed.

The Book Policy applies over and above the ICA review/notification framework. It was initially issued in 1985 and prohibited foreign investors from controlling any Canadian business in the book industry. The original version of the Book Policy was replaced in 1992 because the absolute prohibition on foreign control proved too difficult to apply.

The current version of the Book Policy (available at http://www.pch.gc.ca/pc-ch/org/sectr/ac-ca/eiic-csir/bkp-eng.cfm) sets the following rules for foreign investment in the Canadian book publishing, distribution and retail sectors:

- foreign investment in new business enterprises is limited to Canadian-controlled joint ventures;
- the direct acquisition of an existing Canadian-controlled business by a non-Canadian is not permitted, although the government may consider granting an exception if the business is in clear financial distress and if Canadians have had a full and fair opportunity to purchase;
- indirect acquisitions are reviewed to determine whether they are likely to be of "net benefit to Canada" (the standard ICA test for approval);
- if a non-Canadian vendor wishes to sell an existing Canadian book business independent of any other transaction, it will be expected to ensure that potential Canadian investors have had a full and fair opportunity to purchase, and any successful non-Canadian bidder's investment will be subject to "net benefit" review and approval under the ICA.

Although the rules set out in the Book Policy seem quite restrictive on their face, the Policy has been administered in a more flexible manner in practice. Most recently, for example, the Minister approved Amazon's application to establish a physical presence in Canada in the form of a fulfillment centre, notwithstanding the Book Policy's ostensible requirement that foreign investment in new book-related enterprises in Canada be limited to Canadian-controlled joint ventures. The Minister instead applied a standard "net benefit" review analysis and agreed to Amazon's proposed investment, subject to undertakings. (See the March 31, 2010 issue of *NAFTIR* for more details.)

The current Canadian government has shown a willingness to tackle some of the "sacred cows" of foreign investment.

This is confirmed by the Discussion Paper, which acknowledges that the "practice of the Minister has been to approve foreign investments in Canada when book-related activities represent only a small portion of the overall business". The Discussion Paper adds, however, that even when the sale of books is ancillary to the overall business, foreign investors may (and usually will) be required to provide binding undertakings to the government regarding the future operation of the business.

The Discussion Paper also contains some interesting statistics on Canadian Heritage's review of foreign investments in the book industry. Canadian Heritage has reviewed 46 such foreign investments since 1999, when it assumed responsibility for these reviews. Of the 46 applications received, 31 involved "ancillary" book publishing and distribution activities and the rest had

"significant" activities in the book industry. Thirty-seven out of the 46 applications involved retail book sales; 12 involved book distributors; and seven involved publishing (eight of the applications touched on more than one sector). Significantly, only two of the 46 applications were denied, while 39 were approved on the basis of undertakings (apparently five were approved without undertakings at all). The most commonly negotiated undertakings in this context required the use of Canadian suppliers for the Canadian business as well as preserving the specialized and ancillary nature of the book sales and/or distribution.

According to the Discussion Paper, the combination of the ICA and the Book Policy has generally succeeded in achieving the government's goal of encouraging Canadian ownership and control of the Canadian book industry. For example, Canadian-owned publishers represent 96% of publishers operating in the Canadian domestic market (although the four largest book distributors in English Canada are all foreign-owned). To the extent that foreign investments have been approved, the undertakings required to receive approval have obliged foreign investors to contribute to the Canadian book industry in other ways, e.g., through the promotion of Canadian authors and content internationally; sponsorship of Canadian literary events; investment in new technologies; and sharing "best practices".

So why initiate a review of the Book Policy at this stage? In large part, this flows from the current government's overall policy objective of reviewing – and where appropriate loosening or eliminating – restrictions on foreign investment in Canada. For example, as noted in the June 30, 2010 issue of *NAFTIR*, the Canadian government has initiated a similar review process to examine the rules governing foreign investment in the Canadian telecommunications industry (*see http://www.ic.gc.ca/eic/site/ic1.nsf/eng/05650.html/www.ic.gc.ca/telecominvestment*). Also, on July 12, 2010, federal legislation came into force to eliminate foreign ownership restrictions on Canadian businesses that operate certain satellite transmission facilities (*see http://www2.parl.gc.ca/content/hoc/Bills/403/Government/C-9/C-9_4/C-9_4.PDF*).

The Discussion Paper also points to the June 2008 report of a panel appointed to review Canada's foreign investment review policies (the "Review Panel"). The Review Panel recommended that Canada's cultural investment policies be re-assessed with a view to liberalizing them in a variety of ways. With respect to the book industry in particular, the Review Panel questioned the need to maintain (at least a formal) policy of prohibiting direct acquisitions of control by non-Canadian investors. The Review Panel expressed the concern that the policy drives "investment, opportunity and talent outside of Canada".

To assist in the consultation process, the Discussion Paper sets out a series of "non-mutually exclusive options" that will be considered in reviewing the Book Policy:

1. Maintain the Book Policy in its current form.
2. Remove restrictions in one, two or all three book sectors, i.e. publishing, distribution and retail.
3. Maintain restrictions concerning acquisitions of book industry businesses, but remove restrictions concerning new entry.
4. Maintain restrictions concerning new entry, but remove restrictions concerning acquistions of book sector businesses.
5. Revise the Policy for one, two or all three book sectors to allow foreign ownership and control of book businesses subject to specific circumstances/net benefit undertakings.
6. Amend the Policy to clarify its lack of application to specific types of businesses, i.e. ancillary book retail businesses and non-Canadian-based online retailers.
7. Modernize the proposed undertakings while maintaining current restrictions linked to foreign control.

Conclusion

The current Canadian government has shown a willingness to tackle some of the "sacred cows" of foreign investment, including the heretofore untouchable restrictions on foreign investment in Canadian telecom. The review process for the Book Policy is consistent with that overall objective. It is also a welcome initiative. According to the Discussion Paper, the Book Policy has been applied in a much more flexible way than it reads on paper. Foreign investors and the industry will thus be better served by a revised Policy that accurately reflects government practice and that takes into account developments in the 18 years since the Book Policy was last revisited.

Mark Katz (mkatz@dwpv.com) is a Partner in the Competition and Foreign Investment Review Group of Davies Ward Phillips & Vineberg LLP, Canada, in Toronto (tel: 416.863.0900). Mark advises domestic and international clients on a wide variety of competition and foreign investment law matters such as mergers and acquisitions, criminal cartel investigations, joint ventures, abuse of dominance, distribution and pricing practices, misleading advertising and compliance.

UNITED STATES

Acquisitions

CFIUS Reviews of In-Bound Acquisition Transactions

By Keith Martin.
(Chadbourne & Parke LLP)

In-bound acquisitions of U.S. businesses with potential national security implications by foreign investors have run into trouble on average 14% of the time since 2006.

Two investments by Chinese companies were effectively blocked in the last 10 months — including one in the solar sector — after questions were raised by CFIUS, a federal panel that reviews such acquisitions. The parties cancelled the transactions.

In one case, Emcore, a U.S. manufacturer of components for fiber optics and solar panels, proposed to sell 60% of certain of its businesses to a Chinese company, Tangshan Caofeidian Investment Corporation, for $27.8 million. The Chinese company planned to invest another $27 million in the business after the initial purchase. Emcore planned, as part of the deal, to establish a photovoltaic manufacturing facility in China. The company announced in late June that it was withdrawing the transaction after CFIUS expressed "certain regulatory concerns."

Last December, CFIUS forced another Chinese investor, the Northwest Nonferrous International Investment Company, to drop plans to acquire a 51% interest in FirstGold, a mining company based in Nevada. FirstGold holds leases to use more than 8,000 acres of federal land. The government felt the deal would bring the Chinese too close to a sensitive Naval air base and other military facilities whose locations are classified.

The withdrawals are a reminder to submit proposed in-bound acquisitions of interests in U.S. businesses that might raise security concerns for approval. CFIUS was formed by President Gerald Ford in 1975. It is an interagency committee, headed by the Treasury Department, on which 16 agencies sit. Submission of proposed deals is voluntary. However, the committee has authority to set aside transactions after the fact that were not submitted for review.

The committee makes recommendations. The U.S. president has ultimate authority to block a transaction. Only one transaction has been formally rejected by the president. The first President Bush rejected a proposed acquisition of MEMCO Manufacturing Inc., a supplier to Boeing, by the China National Aero-Technology Import and Export Corporation in 1990. Transactions that run into trouble are usually withdrawn before they reach the need for a presidential decision.

Before 2006, at most one or two transactions a year were withdrawn. During the period 2006 through 2009, 64 transactions were withdrawn, or roughly 14% of the 469 transactions submitted to CFIUS for review during that period. CFIUS still approves most requests, including a purchase by EdF, which is owned partly by the French government, of a minority stake in nuclear plants owned by Constellation Energy.

In July, 50 members of the House steel caucus sent Treasury Secretary Timothy Geithner a letter urging him to "thoroughly investigate" a proposed investment by the Anshan Iron & Steel Group of China in the Steel Development Company in Mississippi. Terms of the investment have not been announced but are believed to involve investments in as many of five steel mills owned by the U.S. company. The congressmen charge that the investment could distort the U.S. market because of the Chinese company's access to "massive Chinese government subsidies" and cost American steelworkers their jobs.

Virgin Galactic, a company formed by Richard Branson to engage in commercial space travel, sold 32% of the company to Aabar Investments in Abu Dhabi for $280 million in July 2009, subject to regulatory approvals. Late in 2009, the company agreed to withdraw and resubmit its application to give CFIUS more time to review it. The government is reportedly concerned about possible spread of missile-based weapons delivery systems. The company plans to build a spaceport in New Mexico. More than 340 people have paid deposits of $20,000 a piece toward tickets costing $200,000 each. A company spaceship is expected to make its maiden voyage in two to three years.

Keith Martin is with Chadbourne & Parke LLP in Washington.

Exports

President Obama Announces Sweeping Changes in Export Control Regulation

By Barry J. Hurewitz and Ronald I. Meltzer
(Wilmer Cutler Pickering Hale and Dorr LLP)

On August 31, 2010, the White House previewed a set of sweeping changes in U.S. export control policies, following a year-long interagency review that found the current system to be overly complicated and inefficient. The revised approach will set new standards for determining which items and technologies should be controlled, streamline export licensing requirements, and consolidate export control agencies' enforcement operations.

Interagency Review Highlighted Long-Standing Problems with U.S. Export Controls

In announcing the regulatory reform initiative, the White House noted:[1]

- The current export control system implements two different control lists with fundamentally different approaches to defining whether items are controlled, administered by unrelated agencies. This has caused significant ambiguity, confusion and jurisdictional disputes, and delayed clear license determinations for months and, in some cases, years;
- The different licensing agencies apply different licensing policies and operate under unique procedures and definitions, leading to gaps in the system and disparate licensing requirements for nearly identical products;
- A multitude of agencies with overlapping and duplicative authorities currently enforce export controls, creating redundancies and jeopardizing one another's investigations; and
- The agencies operate on separate information systems, none of which is accessible to other licensing or enforcement agencies or compatible with the other systems, resulting in a lack of comprehensive information about items approved for export and, more significantly, items for which export authorization is denied.

This review led the Administration to recommend new export control criteria for exported items and universal guidelines for determining the need for an export license. The new regulatory initiative follows a broad outline issued earlier this year and a push for new export control legislation that has progressed slowly in Congress. This new announcement reflects the Administration's intent to move forward with regulatory changes that can be made without Congressional action. It will likely take months to roll out the new regulations.[2]

New Export Control Criteria

Under the revised regulations, agencies will apply new criteria, based on more objective and transparent rules, to determine which items and technologies should be controlled. These criteria will be used to revise both the State Department's U.S. Munitions List (USML) and the Commerce Department's Commerce Control List (CCL), so that they will both feature "tiers" that distinguish sensitive items requiring stricter controls from items raising less significant national security concerns. Further, the often blurred jurisdictional boundary between the State Department and the Commerce Department will be clarified to reduce uncertainty about which agency has jurisdiction over a particular item. Finally, both the USML and CCL will be structurally aligned using objective criteria to facilitate a future consolidation into a single list of controlled items.

Each list will be divided into three "tiers," delineated as follows:

- Highest-Tier – items that provide a critical military or intelligence advantage to the U.S. and are available almost exclusively from the U.S., or items for weapons of mass destruction;
- Middle-Tier – items that provide a substantial military or intelligence advantage to the U.S. and are available almost exclusively from the U.S. or multilateral partners and allies; and
- Lowest-Tier – items that provide a significant military or intelligence advantage but are available more broadly outside of the U.S.

Universal Guidelines for Imposing Export Licensing Requirements

Once an item is placed into a tier, licensing requirements will be based upon a standardized policy and will be followed by all of the agencies with export control authority. This standardization is intended to provide more clarity to both industry and government personnel regarding the proper application of the export control specifications. These guidelines will be as follows:

- For highest-tier items, a license will generally be required for all destinations;
- For middle-tier items, many will be authorized for export to multilateral partners and allies under license exemptions or general authorizations;
- For lowest-tier items, a license will generally not be required;

- For items authorized to be exported without licenses, new measures will be imposed to prevent unauthorized re-exports to unauthorized destinations; and
- The U.S. government will continue its sanctions programs directed toward specific countries, such as the heightened export restrictions in place against Cuba, Iran, North Korea, Sudan, and Syria.

Improved Enforcement and Interagency Coordination

To protect against unauthorized exports of sensitive items, the revised system will include additional end-use assurances against diversion by foreign consignees and will increase outreach and on-site visits both domestically and abroad. Additionally, an Export Enforcement Coordination Center will coordinate these enforcement efforts across all export agencies.

The export control agencies will transition to a single export control information system for reviewing applications, issuing licensing decisions, and ensuring improved interagency information sharing. The consolidation of enforcement operations and information systems is a preliminary step toward a possible future merger of the Treasury, State, and Commerce Departments' export functions into a new agency.

Businesses and Institutions Face an Extended Period of Regulatory Change

The current export control framework is complex and highly technical, and the upcoming regulatory changes are intended to improve predictability for businesses and institutions by more clearly identifying sensitive items. This transition will require substantial changes in the regulations and practices of the export control agencies, and corresponding changes to the internal policies and procedures of every affected business and institution. Moreover, these changes will come amidst significantly increased enforcement activity, enhanced penalties, and continued movement by the European Union and other countries toward a multilateral regulatory structure, based on the system of controls that the U.S. is now changing.

These changes to the U.S. export control system will alter long-standing practices and expectations among businesses and institutions concerning agency jurisdiction, product and technology classifications, licensing requirements, processing of license applications, assurances sought from foreign customers, and assessments of enforcement risk. Thus, the price of a rationalized export control system will include a period of uncertainty for businesses and institutions, as unfamiliar new standards and policies are implemented.

1 *See* White House Press Release, *President Obama Lays the Foundation for a New Export Control System To Strengthen National Security and the Competitiveness of Key U.S. Manufacturing and Technology Sectors* (August 30, 2010), *available at* www.whitehouse.gov/the-press-office/2010/08/30/president-obama-lays-foundation-a-new-export-control-system-strengthen-n.

2 For further information about the Administration's efforts to reform the U.S. export control system, see previous WilmerHale alerts: www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9413 and www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9502.

Barry J. Hurewitz (barry.hurewitz@wilmerhale.com) and Ronald I. Meltzer (ronald.meltzer@wilmerhale.com) are Partners in the Regulatory and Government Affairs Department of Wilmer Cutler Pickering Hale and Dorr LLP, in the Washington, D.C. office.

