Cassels

Canadian Government Announces Increased Scrutiny of Foreign Investments During Current Crisis and Recovery Period

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Certain foreign investments will be subject to enhanced scrutiny under the *Investment Canada Act* (ICA) until the economy recovers from the effects of the COVID-19 pandemic, the Canadian government announced on April 18, 2020.

The New Policy

Foreign investments that are subject to enhanced scrutiny include investments in businesses that are related to public health and the supply of critical goods and services. Investments by state-owned enterprises (SOEs) or investors with ties to foreign governments will also be subjected to enhanced scrutiny. The policy will remain in force until the Canadian economy recovers from the effects of the COVID-19 pandemic.

The purpose of the policy is to ensure that foreign investments do not introduce new risks to Canada's economy or national security, including the health and safety of Canadians. A driver for the policy is that Canadian businesses have seen significant declines in their valuations, which may lead to opportunistic investments in critical sectors.

This new policy does not change the provisions of the ICA. This means that the government must apply this policy within the existing legislative framework.

Investments that exceed the relevant financial threshold are "reviewable" and cannot proceed without approval. To obtain approval, investors must show that the investment will provide a net benefit to Canada. There is no statutory definition of "net benefit," which means that the government has significant discretion in reviewing these transactions.

Investments in critical sectors that are below the thresholds required to trigger a net benefit analysis can only be reviewed by invoking the national security review provisions of the ICA. These provisions do not define what national security is, giving the government extremely wide latitude to decide what investments are injurious to national security. The Investment Review Division has published guidelines on national security reviews. These guidelines identify a wide range of factors that the government will consider in determining whether a transaction raises potential national security concerns. These include obvious factors such as defence, espionage, and law enforcement, as well as less obvious ones, such as critical infrastructure, and the supply of critical goods and services to Canadians. The government has identified ten critical infrastructure sectors, including energy and utilities, information and communication technologies, finance, health, food, water, transportation, safety, government, and manufacturing.

The policy signals that the government may be willing to make increased use of the national security review provisions. The government has suggested that investors can mitigate potential transaction timing issues by filing notifications at least 45 days before closing. Normally, notifications, which are required for investments that are not subject to pre-merger net benefit review, do not need to be filed until after closing.

Implications for Investors

The new policy involves several implications for investors:

- **Increased information requirements**: Investors involved in net benefit reviews will likely be asked to provide more information than usual.
- **Increased commitments**: Investors may be asked for increased commitments (for example, in terms of Canadian investment, maintenance of Canadian employment or duration).
- **Increased likelihood of national security review**: Investors should assume that what constitutes a "critical sector" will be construed very broadly by the government, and investments in those sectors are more likely to face a national security review.

In light of this policy, foreign investors will have to consider at the planning stage how their investments may be impacted. This is especially the case for investments in critical sectors or investments by SOEs, even if those investments are not subject to pre-merger review under the ICA.

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