Alert

January 23, 2023

COZEN O'CONNOR

Canada Proposes Sweeping National Security Updates to Investment Canada Act

Foreign investors in Canadian businesses are set to face tougher national security review provisions under the Investment Canada Act (the ICA). Canada's Minister of Innovation, Science, and Industry proposed sweeping amendments to the ICA through the introduction of Bill C-34 on December 7, 2022.

The amendments target the ICA's national security regime. Their introduction caps a year that saw a fundamental shift in Canada's foreign investment policy toward blocking investments from "non-like-minded countries" in critical sectors. See *Canada Gets Tough on Chinese Investors.*

Although the amendments are still before parliament, investors should begin planning for their arrival. Bill C-34 is likely to have an important impact on due diligence strategies and transaction processes for those looking to buy, sell, or invest in Canadian businesses.

The key proposed amendments are:

- a new pre-closing filing requirement
- new ministerial powers
- increased penalties for non-compliance
- improved information sharing with international counterparts
- closed court proceedings

New Pre-Closing Filing Requirement

The ICA currently requires that foreign investors notify the Canadian government when acquiring control of a Canadian business. Notification can be made after closing, although the government has been encouraging parties to notify in advance if a transaction may raise national security issues. Notification triggers a 45-day period during which the Industry Minister may commence a national security review of an investment. The ICA does not currently require notification for minority investments.

The proposed amendments will require foreign investors to file a pre-closing notification when acquiring a controlling or minority stake in a corporation or other Canadian entity that "carries on a prescribed business activity," where the foreign investor could have access to material assets or material non-public technical information and also would have certain rights, including the ability to appoint persons who direct operations of the business.

Where pre-closing notification is required, investors may not close the investment until the statutory timeline has expired or the investment passes a national security review.

The requirement will "provide the government with increased visibility of investments in sensitive sectors to prevent national security," the Minister stated in introducing the bill. "Prescribed business activities" (to be set by regulation) will likely include businesses engaged in sectors such as military and defense, critical infrastructure, quantum computing, artificial intelligence, critical minerals, and critical mineral supply chains, and sensitive technology areas (likely those listed in Annex A of the Guidelines on the National Security Review of Investments).

The government says that by requiring parties to file before closing, the proposed amendment will prevent national security harm from occurring before a review is complete and will avoid undesirable post-closing divesture orders.

New Ministerial Powers

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Bill C-34 gives the Industry Minister new administrative powers.

Interim Conditions: The bill empowers the Industry Minister to impose interim conditions on an investment during a national security review. Interim conditions would expire at the completion of the review, at which point they may be converted to permanent undertakings or conditions or removed. The Minister will only be able to impose conditions after consulting with the Public Safety Minister, however.

Undertakings: The Minister will be entitled to accept undertakings from an investor to reduce the national security risk posed by an investment. Undertakings will be enforceable. The government says that it will only accept undertakings that sufficiently address the national security concerns posed by an investment, and it will monitor all undertakings for compliance. It suggests, as an example, that potential undertakings could include obtaining the government's approval for proposed business locations in order to avoid proximity to Canadian assets.

This change fills an important gap in the ICA. Binding undertakings currently require cabinet approval. There is a developing practice of the Industry Minister accepting "commitments," but these commitments are not enforceable.

Industry Minister may extend national security review: The Minister will also be entitled to extend the timeline for a national security review under the ICA upon consultation with the Minister of Public Safety without obtaining an order from the Governor in Council (essentially the federal cabinet). This change will improve the efficiency and flexibility of the national security review process by providing more time for security and intelligence analysts to complete the review, the government says.

Increased Penalties for Non-Compliance

The proposed amendments will increase the maximum penalties for non-compliance with the ICA.

The government will be entitled to impose monetary penalties of up to $25,000 per day for each infraction, which is more than double the current maximum of $10,000 per day.

The bill also adds a new penalty for non-compliance with the new pre-closing filing requirement. Offending parties will be subject to a fine of the greater of $500,000 or a prescribed amount.

The proposed amendments allow the Governor in Council to make future updates to these penalties by regulation.

Improved information sharing with international counterparts

Bill C-34 proposes to "improve" Canada's ability to share information with its international counterparts.

The Minister will have the power to share information collected about an investor with Canada's allies to aid in national security reviews in other jurisdictions. Currently, the Minister can only share such information with other government departments and enforcement agencies (those listed in s. 7 of the *National Security Review of Investments Regulations)*.

The government says this amendment will facilitate international cooperation and information exchange to address national security threats. And that it will enhance the ability to protect against national security risk posed by investors active in multiple jurisdictions.

Closed Court Proceedings

Bill C-34 also introduces new provisions to protect information during judicial review proceedings. The Industry Minister may make submissions on evidence in the absence of the public, and even of the investor and its counsel, provided that the judge agrees that disclosure of the evidence poses a risk of injury to national security or international safety. The judge must keep applicants "reasonably informed" of the government's case by providing summaries of the secret evidence.

This change would strengthen the government's ability to defend national security decisions. It would allow the government to introduce sensitive information during court proceedings without being concerned that the information would be disclosed to the investor. However, it would also

undoubtedly reduce the fairness of the proceeding, since it empowers the government to rely on evidence that the investor cannot see.

The government has recently proposed similar information protection amendments to the Telecommunications Act, in Bill C-26.

Striking the "Right Balance" Between Canada's Economic and National Security Interests?

Bill-34 represents the most important update to the ICA since 2009, and the latest event in the ongoing evolution of Canada's foreign investment strategy.

It remains to be seen, however, whether the proposed changes will effect a "balance" between facilitating foreign development that contributes to Canada's economic prosperity and safeguarding Canada's national security interests, as the government intends.

The government's clear intent is to block investments in critical sectors (such as critical minerals and technology) by investors from what are now termed "non-like-minded countries" (China being the most prominent of these countries).

Getting ready for the new rules

Bill C-34 is unlikely to become law before summer 2023. That does not mean that investors from non-like-minded countries will get a free pass in the meantime. The ICA currently allows the government to review completed investments, including minority investments, and order divestitures. Indeed, the government issued three divestiture orders in November 2022. As a result, anyone considering an investment in a critical sector should consider using the government's voluntary pre-notification process, which enables the investor to know for certain whether an investment will be allowed.

If you have any questions about the proposed amendments or foreign investment in North America generally, please reach out to any member of our Antitrust & Competition group.