MARCH 27, 2024

Canadian Government Enacts Major Amendments to the *Investment Canada Act* to Enhance Canada's National Security Review Regime

Authors: Jim Dinning and Umang Khandelwal

Substantial amendments to the *Investment Canada Act* (ICA) were enacted on March 22, 2024, with the passing of Bill C-34, the *National Security Review of Investments Modernization Act*. These amendments, long in the works, will come into effect on a date to be fixed by Cabinet. It is possible that certain amendments will come into effect in relatively short order, while other amendments requiring implementing regulations will not come into effect until late 2024 or early 2025.

The amendments to the ICA are the most significant since its national security regime was introduced in 2009 and are in keeping with the government's increased national security scrutiny of foreign investments. They also signal to Canada's allies that it is modernizing its national security review process to align more closely with corresponding regimes in like-minded countries such as the United States and the United Kingdom.

Key Aspects of the Amendments

New pre-closing filing for investments in certain sensitive sectors

Investments in certain sensitive sectors will be subject to a new pre-closing filing and suspensory obligation under the ICA even if they fall below the thresholds for mandatory net benefit review. The new pre-closing filing regime will require foreign investors that are making sensitive sector investments, including certain investments to acquire less than control, to notify the government in advance. Currently, acquisitions of control of Canadian businesses by non-Canadians that fall below net benefit review thresholds only need to be notified up to 30 days after closing, and acquisitions of less than control are not subject to mandatory notification.

Such investments in sensitive sectors will be prohibited from closing until review time frames lapse or are terminated. Investors that fail to comply with the pre-closing filing obligation will be subject to a penalty of up to C$500,000. Regulations that will define the sensitive sectors and types of investments to which the new filing obligation will apply have yet to be published. However, during the study of the bill at a Senate committee, a government official provided a non-exhaustive list of technology areas that may be considered sensitive for the purposes of review under the national security revisions, including:

- advanced materials and manufacturing
- advanced ocean technologies
- advanced sensing and surveillance
- advanced weapons
- aerospace
- artificial intelligence
- biotechnology

- energy generation, storage and transmission
- medical technology
- neurotechnology and human-machine integration
- next-generation computing and digital infrastructure
- position, navigation and timing; quantum science; robotics and autonomous systems
- space technology

The final list of sensitive sectors may be broader and could include critical minerals, interactive digital media or pharmaceuticals, among others. Draft regulations are expected to be released for public comment prior to being finalized. Implementation of the regulations and the pre-closing filing regime is not expected until late 2024 or early 2025.

Increase in penalties for non-compliance

In addition to the penalty of up to C$500,000 for failure to comply with the new pre-closing filing obligation for sensitive sector investments, the amendments increase maximum monetary penalties for non-compliance with the ICA to C$25,000 per day, from C$10,000 per day.

Enhanced Ministerial powers

The amendments will devolve certain administrative powers from the federal Cabinet to the Minister of Innovation, Science and Industry (Minister) by allowing the Minister to launch an extended national security review under the ICA and permitting the Minister to accept binding undertakings from an investor during the review process. These amendments are intended to facilitate the more efficient administration of Canada's national security review process as the power to order a review and accept binding undertakings currently rests only with the full Cabinet. Additionally, the amendments will allow (but not require) the Minister to publicly disclose the identity of a non-Canadian investor that is the subject of an order under a national security review.

The Minister will also have the power to unilaterally impose interim conditions on an investor while a national security review is underway —for example, through issuing "hold separate" orders even after implementation of an investment—or to limit an investor's access to sensitive intellectual property and data of a Canadian business pending the outcome of a review. The new regime also clarifies that, if a non-Canadian has been convicted, within or outside Canada, of an offence involving an act of corruption, that is a sufficient basis for the Minister to commence a national security review of an investment in a Canadian business by that non-Canadian.

Expanded scope of the national security provisions

The amendments close perceived loopholes in the jurisdictional reach of the nationals security regime provisions. Previously, it was ambiguous whether the national security review provisions could apply to certain asset acquisitions, especially acquisitions of assets with a limited connection to Canada. The legislative changes expressly provide that the ICA national security review provisions can apply to acquisitions of any of the assets of a Canadian business by a non-Canadian state-owned enterprise (SOE), implicitly including assets that are not located in Canada. In addition, while the national security review provisions already apply to an investment by a non-Canadian to acquire, in whole or in part, an entity carrying on all or any part of its operations in Canada if the entity has (a) a place of operations in Canada, (b) an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations, or (c) assets in Canada used in carrying on the entity's operations, the amendments clarify that the provisions apply to an investment to acquire, in whole or in part, the assets of such an entity.

These amendments are consistent with the government's willingness to assert ICA national security review jurisdiction over investments in businesses with limited connection to Canada, most notably including in the critical minerals space.

Information-sharing about foreign investors with international counterparts

The changes will permit the sharing of information pertaining to investors that is obtained in the foreign investment review process with foreign investment review authorities in other jurisdictions to facilitate national security reviews where, for example, a common national security interest exists. However, the government says that Canada will not share such information "where there are confidentiality or other concerns," which may signal an intent to share such information only with trusted jurisdictions that would, in turn, protect the confidentiality of such information.

New rules to protect sensitive information in court proceedings

The amendments will permit the Minister to identify sensitive information, such as classified intelligence information, that would be protected from disclosure in legal proceedings arising from enforcement action under the ICA, such as judicial reviews of orders to block or attach conditions on investments for national security reasons.

Bill C-34 also includes additional amendments that have implications for the ICA's net benefit review regime. The amendments:

i. indicate the government's priorities with respect to net benefit reviews under the ICA. The Minister will be required in a net benefit review to take into account the effect of the investment on any rights relating to intellectual property whose development has been funded, in whole or in part, by the Canadian government, and the effect of the investment on the use and protection of personal information relating to Canadians.

ii. increase the scope for scrutinizing SOE investments. The amendments grant the Minister the power to order a net benefit review for any notifiable investment (i.e., an acquisition of control of a Canadian business that does not meet mandatory net benefit review thresholds) by an investor that is a SOE (including an entity controlled or influenced by a foreign state) unless the SOE is a "trade agreement investor". A trade agreement investor is an investor that is ultimately controlled by nationals of countries that have a trade agreement with Canada. Currently, the list of trade agreement investor countries includes the United States, the United Kingdom, the European Union and its member states, Australia, Japan, New Zealand, Singapore, Vietnam, Malaysia, Brunei, Chile, Colombia, Honduras, Mexico, Panama, Peru and South Korea. Notably, SOE investors from countries that have historically been more likely to result in national security enforcement under the ICA, including China and Russia, are not trade agreement investors and could therefore also be caught by this new net benefit review call-in power.

For more on the substance of these amendments, read our previous bulletin.

Implications

While the amendments provide the government with greater national security review enforcement powers, at the same time they provide some welcome additional flexibility which may be beneficial to foreign investors. For example, by granting the Minister the ability to accept undertakings without having to refer the matter to Cabinet, parties may be able to obtain greater certainty about remedies or mitigation measures earlier in the review process and have opportunities to negotiate a broader range of remedial measures.

Additionally, in the past, foreign investors in many transactions deferred engagement with the ICA process until after closing. In light of the changes brought about by the bill, including the incoming pre-closing notification regime, and the government's general increased national security scrutiny of foreign investments, it will be critical for foreign investors and their counsel to ensure more thorough and early consideration of the ICA process.

Key Contacts: John Bodrug, Mark Katz, Anita Banicevic, Elisa K. Kearney, Charles Tingley and Jim Dinning