

COVID-19 crisis inspires global tightening of Foreign Investment Screening

Canada

On April 18, 2020, the Canadian government published a [policy statement](#) on foreign investment review and COVID-19 (the **Policy**). Foreign direct investment is regulated by the federal government under the [Investment Canada Act](#) (ICA, or the **Act**), which empowers the Minister of Innovation, Science and Economic Development (the **Minister**) (and in certain cases the Minister of Canadian Heritage) to screen, impose conditions, or possibly forbid, such investments.

Overview of foreign investment screening in Canada

The *ICA* contains three main components: notification, “net benefit” reviews and national security reviews. Where a non-Canadian investor seeks to acquire control of a Canadian business with an enterprise value exceeding [prescribed financial thresholds](#), which vary depending on the type and origin of foreign investor and the business carried on by the Canadian business, the transaction is subject to a “net benefit” review and must be approved by the Minister prior to closing. Under this review, the Minister must determine whether the transaction is likely to result in a net benefit to Canada based on a number of factors set out in the *ICA*.

Where a transaction does not meet the financial thresholds, the foreign investor is simply required to file a notification of the transaction within 30 days of closing. Reviewable and notifiable transactions are both also subject to review to assess whether the transaction could be injurious to Canada’s national security. Although “national security” is not defined in the Act, the Canadian government has [published guidelines](#) (the **Guidelines**) which set out a number of categories of transactions where such issues could arise. The Guidelines also inform investors of the procedures applicable to such a review. Namely, if a notification or application for economic review is filed, the Minister has 45 days from certification of a complete filing to notify the investor that an order for national security review may be issued. In addition, where a transaction is not subject to notification or economic review (because it is an investment of a minority interest), it is still subject to a national security review for up to 45 days from closing.

COVID-19 related changes in approach

The Canadian government has not introduced any new review procedures or powers in its implementation of the Policy. Instead, the Canadian government will rely on existing powers, such as the ability to request additional information or extend timelines, to ensure that certain types of investments are adequately reviewed during the COVID-19 pandemic.

The Canadian government has recognized that the current state of the financial markets and global economy as a result of the COVID-19 pandemic is a “unique” environment that could lead to “opportunistic investment behavior.” While typically foreign investment is a welcome and integral element to the success of Canadian businesses in the global economy, the current “extraordinary circumstances” and market conditions attributable to the COVID-19 pandemic require, in the government’s view, appropriate regulatory and policy changes. Therefore, the Policy advises that the Canadian government will increase oversight of certain foreign direct investments to protect the Canadian economy and national security, including the health and safety of Canadians.

In particular, the following foreign investments will be subject to “enhanced scrutiny” under the *ICA* “until the economy recovers” from the effects of the pandemic:

- “Foreign direct investments of any value, controlling or non-controlling, in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or to the Government.”
- “All foreign investments by state-owned investors, regardless of their value, or private investors assessed as being closely tied to or subject to direction from foreign governments.”

The complete scope of the Policy remains unclear. It does not define what businesses constitute “public health” or “critical goods and services”, and the Policy will remain in effect for an indeterminate period, i.e. until the economy recovers from the impact of the pandemic. Further, the Policy will likely be applied broadly. The Guidelines refer to the Canadian government’s [National Strategy for Critical Infrastructure](#) (the **Strategy**) for the meaning of “critical infrastructure,” which includes the following ten sectors: energy and utilities, finance, food, transportation, government, information and communication technology, health, water, safety, and manufacturing. The Strategy is also cited in Canada’s [Guidance on Essential Services and Functions in Canada During the COVID-19 Pandemic](#).

Conclusion

It is considered to be a best practice in Canada to submit a notification at least 45 days before closing where a transaction falls within the areas identified in the national security Guidelines. This continues to be the case under the Policy. Parties should therefore build in this time in their transaction timelines as well as additional time in the event the transactions involve public health or critical goods and services. This will provide an opportunity to obtain some guidance from investment officials on their views of whether the transaction may raise concerns under the national security provisions of the Act.

By **Kevin Ackhurst, Kenza Bensaid** and **Neil Rosen**