

# Enhanced scrutiny for foreign investment in Canada during COVID-19

A couple of weeks ago, we wrote an article on how [governments in some other developed economies, such as Spain and Australia, are tightening foreign investment rules in light of COVID-19](#). On Saturday, April 18, the Canadian Minister of Innovation, Science and Industry (the “Minister”) issued a new policy statement relating to foreign investment screening in the circumstances of a COVID-19.<sup>1</sup>

While no major changes to Canada’s foreign investment rules were announced, the Minister provided new guidance on the review processes during the COVID-19 pandemic, indicating heightened scrutiny for transactions involving companies related to “public health” or the supply of critical goods and services or investors with ties to foreign governments and advising of potentially longer review times.

Unlike the Australian approach, which essentially subjects all new foreign investments into Australian entities over specified percentages of equity interest to governmental approval by temporarily decreasing the financial thresholds for review to \$0, the Canadian policy statement does not change the financial thresholds for review under the “net benefit” test. Rather, the government will apply enhanced scrutiny while reviewing certain transactions under the “national security” test, which does not have any financial threshold.

## The net benefit review

The net benefit review applies to any “acquisition of control” by a non-Canadian of a Canadian business with specified financial thresholds. The financial thresholds differ depending on such factors as whether the investor is from a country who has a trade agreement with Canada, whether the investor is from a country that is a WTO member, whether the investor is a state-owned enterprise, and whether the investor is investing in a cultural business. These financial thresholds are set by the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.) (the “Act”) and are indexed to GDP.

Under the Act, if an investment is subject to the net benefit review, the investor must show the Minister that the acquisition is likely to be of net benefit to Canada. Relevant factors include:

1. What will be the effect of the investment on the economic activity in Canada? How many jobs will be created or lost? How much capital expenditure will the investor make in Canada?
2. Will there be continued Canadian participation in the business? How many Canadians act as directors and managers? Will Canadian employees have access to the equity of the business?
3. Will the investment contribute to productivity, industrial efficiency, technological development, product innovation and product variety in Canada? What will be the effect on competition?
4. Is the investment compatible with Canadian industrial, economical and cultural policies? Does the investment contribute to Canada’s ability to compete in world markets?

## The national security review

The national security review, on the other hand, does not have a financial threshold. Any acquisition “in whole or in part” of an entity carrying on all or any part of its operations in Canada can be reviewed on the basis of

national security, if the entity has (i) a place of operations in Canada, (ii) an individual in Canada who is employed or self-employed in connection with the entity's operations, or (iii) assets in Canada used in carrying on the entity's operations.

The expression national security is not defined in the Act. The lack of definition was intentional to give the government flexibility in determining what threatens national security at any given time. Nevertheless, the government did in 2016 publish Guidelines on the National Security Review of Investments, which sets out a non-exhaustive list of nine factors for assessing potential impact:

1. Are there potential effects on Canada's defence capacities and interests?
2. Are there potential effects on the transfers of sensitive technology or know-hows outside of Canada?
3. Is there involvement in the research, manufacture or sale of controlled goods as defined in the *Defence Production Act*, R.S.C. 1985, c. D-1.
4. Is there potential impact on the security of Canada's critical infrastructure?
5. Is there potential impact on the supply of critical goods and services to the government or to the Canadians?
6. Is there potential for enabling foreign surveillance or espionage?
7. Is there potential for hindering intelligence or law enforcement operations?
8. Is there potential impact on Canada's international interests, including foreign relations?
9. Is there potential for involving or facilitating the activities of illicit actors, such as terrorists and organized crime?

#### The new policy statement

The new policy statement does not change the existing statutory framework of the Canadian foreign investment review regime. Rather, by issuing this policy statement, the government provides guidance on how the Minister will administer the Act during COVID-19 and, in particular, the Minister will:

1. "Scrutinize with particular attention under the Act 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"; and
2. "Subject 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, to enhanced scrutiny under the Act".

Neither critical goods and services, nor investors tied to foreign states is new to the list of concerns for the Canadian foreign investment review process. What is of note here is the singling out of "public health" in light of the government's COVID-19 experience. Going forward, we expect to see more governmental awareness on what goods and services may be essential to public health, along with enhanced scrutiny when dealing with the suppliers of these goods and services.

From a procedural and timing standpoint, the policy statement advises that this enhanced scrutiny may involve the Minister requesting additional information or extensions of timelines for review as authorized by the Act and will apply until the economy recovers from the effects of the COVID-19 pandemic. In the meantime, the government "will take action where necessary to protect national security and to ensure the integrity of all investments into Canada, while remaining open to investment that benefits Canadians".

Given the enhanced scrutiny during COVID-19, investors into Canada are encouraged to give due considerations to the foreign investment review process early on while planning the investment. To gain certainty as to whether a potentially sensitive investment will be cleared by the government, the investor may submit a notification at least 45 days before closing to account for the government's window period for ordering a national security review.

If you have any questions about these new developments or the Canadian foreign investment review process generally, please contact a member of our team.

<sup>1</sup> <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81224.html>

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