2018 CANADIAN MERGER NOTIFICATION THRESHOLD INCREASES

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The 2018 increases to the merger thresholds under Canada's *Competition Act* and *Investment Canada Act* have been announced.

Competition Act

The *Competition Act* requires advance notification of certain merger transactions involving operating businesses in Canada where "size-of-target" and "size-of-parties" financial tests both are exceeded:

- The "size-of-target" test requires that the value of assets in Canada to be acquired, or owned by the corporation the shares of which are being acquired, or the annual gross revenue from sales in or from Canada generated by those Canadian assets, exceeds a specified threshold. The Competition Bureau has announced that the "**size-of-target**" t**hreshold will be increased to C$92 million for 2018**. The new threshold will take effect immediately following publication in the Canada Gazette, which is expected to occur on February 10, 2018. This represents a C$4 million increase from the C$88 million threshold for 2017.
- The "size-of-parties" test requires that the parties to a transaction, together with their affiliates, have assets in Canada, or annual gross revenues from sales in, from or into Canada, exceeding **C$400 million**. (The "size-of-parties" threshold remains unchanged from 2017.)

Investment Canada Act

The *Investment Canada Act* requires that any Non-Canadian that acquires control of a Canadian business (whether or not that business is controlled by Canadians prior to the acquisition) must file either a notification or an application for review. For the purposes of the Act, a Non-Canadian includes any entity that is not controlled or beneficially owned by Canadians.

Investors from the EU and certain other countries with most-favoured nation treatment under Canada's free trade agreements (including the United States, Chile, Colombia, Honduras, Mexico, Panama, Peru and South Korea) that are not State-Owned Enterprises are generally required to file a pre-closing application for review

and approval when directly acquiring a Canadian business where the enterprise value exceeds **C$1.5 billion**. This enterprise value threshold became effective on September 21, 2017. The threshold also applies in respect of investments to acquire control of a Canadian business that was, immediately prior to the investment, controlled by an investor from one of these countries. The C$1.5 billion threshold will be subject to inflationary indexing annually, starting in January of 2019.

WTO Investors (firms controlled in WTO countries) that are not State-Owned Enterprises and that do not enjoy the benefit of the most-favoured nation trade agreements noted above are generally required to file a pre-closing application for review and approval when directly acquiring a Canadian business where the enterprise value exceeds **C$1 billion**. This enterprise value threshold became effective on June 22, 2017. The threshold also applies for non-WTO Investors that directly acquire control of a Canadian business that was, immediately prior to the investment, controlled by a WTO Investor. The C$1 billion threshold will be subject to inflationary indexing annually, starting in January of 2019.

For direct acquisitions by WTO country State-Owned Enterprises, determination of the threshold for approval is not based on enterprise value but on asset value. The Investment Review Division has announced that the **2018 asset size threshold will be increased to C$398 million**. The new threshold will take effect immediately following publication in the Canada Gazette, which is expected to occur very shortly. This represents a C$19 million increase from the previous C$379 million threshold. This asset value threshold also applies for non-WTO country State-Owned Enterprises that acquire control of a Canadian business that was, immediately prior to the investment, controlled by a WTO Investor. This asset size threshold is adjusted annually for inflation, typically in January.

The asset size approval thresholds for investments by non-WTO Investors that are not described above, and for investments in Canadian cultural businesses, remain at C$5 million for direct acquisitions, and C$50 million for indirect acquisitions.

As mentioned earlier, any acquisition by a Non-Canadian of a Canadian business that is not subject to an application for review is required to file a notification under the *Investment Canada Act*. This notification can be filed any time pre-closing or within 30 days following closing.

The I*nvestment Canada Act* also contains a national security review regime. Any investment (even the acquisition of minority interests) by a non-Canadian in a Canadian business that "may be injurious to national security" can trigger a national security review. A national security review can be initiated within 45 days following submission of a notification or an application for review. Where a potential transaction raises potential national security concerns, consideration should be given to submitting the notification or application for review well in advance of closing.

Quick Checklists

Please go here for our Canadian *Competition Act* and *Investment Canada Act* Filing Checklist, showing the 2018 thresholds.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.