

2019 CANADIAN MERGER NOTIFICATION THRESHOLD INCREASES

Posted on February 1, 2019

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The 2019 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-parties" and "size-of-target" 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" threshold will be increased to C\$96 million for 2019**. The new threshold will take effect immediately following publication in the Canada Gazette, which is expected to occur on February 2, 2019. This represents a \$4 million increase from the C\$92 million threshold for 2018.
- 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 2018.)

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, Australia, Chile, Colombia, Honduras, Japan, Mexico, New Zealand, Panama, Peru, Singapore, South Korea and Vietnam) [\[1\]](#) 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 will exceed C\$1.568 billion in 2019. This represents a \$68 million increase from the C\$1.5 billion threshold that had originally become 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\$1.568 billion** threshold is subject to inflationary indexing annually, with the next adjustment to come in January of 2020.

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 will exceed **C\$1.045 billion in 2019**. This represents a \$45 million increase from the C\$1 billion threshold that had originally become 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\$1.045 billion threshold is subject to inflationary indexing annually, with the next adjustment to come in January of 2020.

For direct acquisitions by WTO country State-Owned Enterprises, determination of the threshold for approval is based on asset value (book value) rather than enterprise value. The Investment Review Division has announced that the **2019 asset size threshold will be increased to \$416 million**. The new threshold will take effect immediately following publication in the Canada Gazette, which is expected to occur shortly. This represents an \$18 million increase from the previous \$398 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 \$5 million for direct acquisitions, and \$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. As well, any Non-Canadian that establishes a new business in Canada is required to file a notification.

The *Investment 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, or in respect of an investment for which no

notification or application for review is required (e.g., a minority non-controlling investment), until 45 days after the investment was implemented. Where a transaction raises potential national security concerns, purchasers may wish to consider submitting the notification or application for review well in advance of closing.

Quick Checklists

Please see our *Canadian Competition Act and Investment Canada Act* [Filing Checklist](#), showing the 2019 thresholds.

by James B. Musgrove, Neil Campbell, John Clifford and Joshua Chad

[1] This list includes the six countries that have ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as of the date of this bulletin. Brunei, Chile, Malaysia and Peru have not yet ratified the CPTPP. However, Chile and Peru already benefit from existing free trade agreements with Canada. Brunei and Malaysia will obtain the benefit of the higher threshold once they ratify the CPTPP.[ps2id id='1' target=""]

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.

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