

CHANGES TO INVESTMENT CANADA ACT THRESHOLDS, FILING REQUIREMENTS, AND NATIONAL SECURITY REVIEW THRESHOLDS

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On March 25, 2015, long-awaited amendments to the *Investment Canada Regulations* and the *National Security Review of Investments Regulations* were published in the Canada Gazette. These amendments will raise the key foreign investment review threshold and change the valuation methodology from asset value to "enterprise value" for most transactions. They also expand the information required to facilitate assessment of national security and state-owned enterprise issues and extend the theoretical maximum length of national security reviews under the *Investment Canada Act (ICA)*.

Changes to the Foreign Investment Review Thresholds

Currently, direct acquisitions of Canadian businesses involving foreign investors (acquirors or vendors) from World Trade Organization member nations (WTO Investors) are subject to review by Industry Canada where the asset value (balance sheet book value) of the acquired entity exceeds C\$369 million.^[1] Acquisitions under this threshold size need to be notified to Industry Canada but do not require review and approval.

In 2009, the Government of Canada announced plans to increase this review threshold to C\$1 billion in enterprise value for WTO Investors over a four-year period. This intention was reiterated in the Government's *2013 Economic Action Plan* ^[2] but required amendments to the *Investment Canada Regulations* and definition of enterprise value before implementation. The increases do not apply to acquisitions by state-owned enterprises (SOEs). The amended regulations were issued on March 25, 2015 and will be effective as of April 24, 2015.

The enterprise value review threshold will be C\$600 million for a two-year period, C\$800 million for a further two-year period, and then C\$1 billion for a further year and the remainder of that calendar year. It will then be subject to inflationary indexing in subsequent years. The situations where enterprise value will apply, and the manner in which it is to be calculated, are summarized in the table below: ^[3]

Transaction

Non-SOE WTO Investor

SOE WTO Investor

	Enterprise value	
	= market capitalization (on a	
Acquisition of publicly-traded shares	published exchange)	
	+ liabilities*	
	- cash and cash equivalents*	
	Enterprise value	
Acquisition of privately-held shares	= acquisition value	Asset value of the Canadian entities
	+ liabilities*	
	- cash and cash equivalents*	
	Enterprise value	
Acquisition of assets	= acquisition value	
	+ liabilities assumed	
	- cash and cash equivalents	

* Based on most recent quarterly balance sheet.

Additional Information Required in Filings

The amendments to the *Investment Canada Regulations* expand the prescribed information required in both applications for review and notifications of foreign investments.

The additional required information includes details regarding the investor's board of directors, five highest paid officers, and any person or entity owning 10% or more of the investor's equity or voting interest. It also includes information regarding ownership or influence by a foreign state, such as:

- an indication of whether a foreign state has a direct or indirect ownership interest in the investor, and, if so, the name of the state and the nature and extent of its interest in the investor;
- an indication of whether a foreign state owns a third or more of the investor's voting interests and no other party has a controlling interest; and
- an indication of any special rights or powers of the foreign state, such as the power to appoint members to the investor's board of directors (and, if so, the number of members the state has appointed and the total number it may appoint), the power to appoint the Chief Executive Officer or other senior management officers, or a special veto or other decision-making rights attached to its interest.

The purpose of these changes is to facilitate the ability of Industry Canada to identify and assess whether the acquiror is an SOE (which was defined in the 2013 amendments to the *ICA*) and/or potential national security concerns. New application and notification forms are expected to be released relatively soon reflecting these amendments.

National Security Review Timelines

National security reviews were introduced to the *ICA* in 2009 and allow Industry Canada to review virtually any transaction involving a foreign investor (even one not involving acquisition of control) to determine whether it may be injurious to national security. Plans to lengthen the timelines for national security reviews were announced in the *2013 Economic Action Plan*, and the necessary amendments to the *National Security Review of Investments Regulations* came into force on March 25, 2015. These amendments extend the maximum potential national security review timelines from the current 130 days to 200 days (assuming no further extensions are agreed upon between the Minister and the non-Canadian investor).

The amendments increase the maximum time period for several steps in the review process:

Stage of Review Process	Old Timeline	New Timeline
Minister may send an initial notice to the non-Canadian that a national security review may be ordered (optional)	45 days from receipt of notification or application for review (or implementation of the investment if it is not notifiable or reviewable)	No change
On the Minister's recommendation Cabinet makes an order for a national security review	Further 25 days if initial notice was given 45 days from receipt of notification or application for review if no initial notice was given	Further 45 days if initial notice was given No change if no initial notice was given
Minister refers the investment to the Cabinet with his/her findings and recommendations or notifies the non-Canadian that no further action will be taken	45 days after the order for review was made, or any further period agreed upon by the Minister and the non-Canadian	45 days after the order for review was made
If the Minister is unable to complete the review within prescribed 45-days, Minister may extend the review by a further period	n/a	Further 45 days "or any further period that the Minister and the non-Canadian agree on"

Cabinet may take any measures with respect to the investment to protect national security (such as prohibiting the investment or requiring undertakings)

15 days following a recommendation by the Minister

20 days following a recommendation by the Minister

Concluding Observations

The amendments to the *Investment Canada Regulations* and national security review timelines have been anticipated for some time and are generally consistent with the Government's prior announcements. The new definition of enterprise value and the higher review threshold underscore Canada's general openness to foreign investments of a commercial orientation. In addition to these changes, the *Canada – European Union: Comprehensive Economic and Trade Agreement (CETA)*, concluded in August 2014, will further increase the ICA review threshold to C\$1.5 billion (enterprise value) for non-SOE investors from the European Union (as well as certain other countries entitled to most-favoured nation treatment under Canada's current free trade agreements). We expect that a substantial number of potential investors will benefit from the increased threshold when *CETA* is ratified.

The new threshold and information requirements also reflect the Government's policy statement in December 2012, accompanying revisions to the *Guidelines on Investments by State-Owned Enterprises*, and 2013 amendments to the *ICA*. While this certainly does not mean that Canada is hostile to investments by SOEs, it does signal the continued importance of demonstrating an SOE investor's "commitment to transparent and commercial operations". To date, many investments by SOEs have been approved subject to undertakings by the SOE investor with respect to commercial orientation of the business, employment of Canadians in senior management positions, adherence to Canadian standards of corporate governance, and other commitments that confirm a transaction will be of net benefit to Canada.^[4]

Finally, the new national security review timelines give the Government more time to consider whether investments could be injurious to national security and also greater flexibility to extend the review period if required. We expect that most transactions which may be subject to national security consideration will not require the theoretical maximum length of time where investors engage proactively on potential concerns. However, in transactions where there are significant issues, these extended timelines may help to facilitate negotiated resolutions instead of prohibition decisions or abandoned transactions.

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¹ Lower review thresholds apply where the investor is not from a WTO-member nation or where the transaction involves a "cultural business".

² *Economic Action Plan 2013 Act, No. 1.*

³ Direct investments by non-WTO Investors or in "cultural businesses" are subject to a lower threshold of C\$5 million. The review threshold for indirect investments by such investors is C\$50 million.

⁴ Also applies where a non-Canadian that is not a WTO Investor nor an SOE acquires control of a Canadian business that is controlled by an SOE Investor immediately prior to the acquisition.

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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