



Latest developments in foreign investment control

Canada's FDI screening amendments reinforce interventionist climate

Charles McConnell

26 March 2024



Credit: shutterstock/Iryna Tolmachova

Canada's overhaul of its investment screening regime significantly increases deal risk by giving the government more leeway to assert national security jurisdiction over transactions.

Amendments to the Investment Canada Act received royal assent on Friday, following Senate approval the same day. This marks the most significant update to foreign investment control in Canada in more than a decade, although many changes will not take effect until the government publishes implementing regulations.

The key changes, initially **introduced** in December 2022, include a new mandatory and suspensory pre-implementation filing requirement for certain investments in "prescribed sectors". Previously only direct acquisitions of control meeting thresholds triggered a national security review.

The amended law also enables the minister of innovation, science and industry to accept remedies in lieu of referring an investment to the Cabinet for a final ruling and impose interim measures, such as hold-separate orders, while a national security review is ongoing.

The Standing Committee on Industry, Science and Technology **added** several provisions in October 2023, including empowering the government to review all investments by state-owned enterprises from countries that do not have a trade agreement with Canada, while expanding the scope of the regime's parallel net benefit arm.

Joshua Krane, a partner at McMillan in Toronto and Ottawa, said that the national security rules now capture asset acquisitions, making it more difficult for investors to structure their deals to avoid filing.

"Coupled with higher penalties, we may start to see businesses seriously consider whether they want to stay in Canada if they rely on foreign investment," Krane said.

Toronto-based McCarthy Tétrault partner Michael Caldecott said national security screening has been a binary exercise in the past, with most deals either cleared unconditionally or blocked.

"This amendment has the potential to facilitate more tailored solutions to identified risks. Investors that can craft targeted and effective remedies to address specific concerns... will be in a better position under the amended regime," he said.

The inclusion of asset acquisitions could bring intellectual property transfers and offtake agreements into the scope of the regime, Caldecott added.

He noted that the government also included a provision subjecting certain transactions that result in acquiring access to "nonpublic technical information", which is a new term that may be inspired by the Committee on Foreign Investment in the United States.

State-owned enterprises from countries without a trade agreement should take note of the changes and be ready to provide undertakings related to capital expenditure, employment levels and the protection of Canadian IP and other assets, he warned.

The amended bill confirms "that the prevailing enforcement climate in Ottawa is interventionist", giving the government more leeway to assert jurisdiction over transactions and doubling down on the long-standing focus on state-owned enterprises, Caldecott said.

Adam Kalbfleisch, a Toronto-based partner at Bennett Jones, said the changes will have a "real world impact on deal-making", since smaller cross-border or global deals that are not subject to suspensory competition or foreign investment filings elsewhere will trigger a notification under the Investment Canada Act.

"That will then result in a minimum 45-day suspensory period for deals that otherwise might have closed immediately," he said. US and other global counsel will likely have a large number of inquiries, with the Canadian system seeming "like the tail wagging the dog" in some cases, Kalbfleisch added.

Blake Cassels & Graydon partner Julie Soloway in Toronto said her firm is already affecting the regulatory risk allocation in deal negotiations, with parties planning early for increased engagement by the Canadian government.

Toronto-based Davies Ward Phillips & Vineberg partner Mark Katz noted that the new rules also empower the government to start a national security review if a non-Canadian investor is convicted anywhere in the world for a corruption offence.

"It's not clear why this amendment was introduced," although it makes due diligence of potential foreign investors "even more important", he added.

While the amendment process was slow, Katz said, there may be more changes to the Investment Canada Act. He noted that the Senate committee reviewing the bill expressed concern that the scope remains "too limited" and fails to adequately balance the country's economic and national security needs.

The government must report back to parliament in three years on whether the amended law is meeting its objectives.

Charles McConnell

Senior correspondent, Global Competition Review

charles.mcconnell@lbresearch.com

[View full biography](#)

Copyright © Law Business Research Company Number: 03281866 VAT: GB 160 7529 10