



Government Releases Much-Awaited National Security Review Guidelines

December 19, 2016

[Michael Kilby](#)

On December 19, 2016, the Minister of Innovation, Science and Economic Development issued [Guidelines on the National Security Review of Investments](#) under the [Investment Canada Act \(ICA\)](#).

Overview of the Guidelines

Most significantly, the Guidelines list factors that will be taken into account by the government in determining whether foreign investments into Canada could be injurious to national security. These factors are:

1. The potential effects of the investment on Canada's defence capabilities and interests;
2. The potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada;
3. Involvement in the research, manufacture or sale of goods/technology relating to certain **controlled goods** noted in the **Defence Production Act**, including firearms, military training equipment, certain types of aircraft, weaponry and defence systems, *etc.*;
4. The potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government;
5. The potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the Government of Canada;
6. The potential of the investment to enable foreign surveillance or espionage;
7. The potential of the investment to hinder current or future intelligence or law enforcement operations;
8. The potential impact of the investment on Canada's international interests, including foreign relationships; and,
9. The potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime.

The Guidelines represent the first time any such disclosure has been made since the ICA was amended in 2009 to provide for a national security review process. It also represents the second time in 2016 that the government has provided eagerly sought-after details regarding the national security review process, signaling significantly enhanced transparency in relation to the administration of the national security review process. (Earlier in 2016, the government for the first time published certain statistics on the frequency and outcomes of national security reviews.)

Insights from the Guidelines

The Guidelines are notable in at least three respects.

First, they set out nine factors that will be considered in assessing the national security implications of a foreign investment. While these factors are not intended to be exhaustive, and while some of them are capable of broad interpretation, others are more precise and provide meaningful information to investors contemplating investment into Canada. It is certainly true that some of these factors may already have been, broadly-speaking, self-evident to foreign investors and their counsel; nevertheless, the specifics identified in the guidelines are useful, particularly as this type of disclosure was previously non-existent. Most notably, the factors reveal a core focus on defence, technology and intelligence-related concerns.

Second, the Guidelines recommend that foreign investors file their ICA notifications “early” and prior to the deadlines set out by statute. By way of context, the ICA sets out that the **only** filing requirement in respect of the vast majority of foreign “control” investments into Canada (*i.e.*, 95%+) is to file a form known as a notification, which may be filed up to 30 days after closing. However, where an investor desires certainty regarding the application of the national security provisions to its investment, it may voluntarily file this notification early, prior to closing, and, if 45 days elapse following the filing of such notification, with no action being taken, the investor can proceed with closing knowing that the period within which a national security review could be ordered has expired.

The Guidelines encourage investors to file their notifications early – even though this is not required by law – particularly in cases where the assessment factors described above may be present. In the past, we believe it would have been accurate to characterize the government as largely indifferent as to when a foreign investor filed its notification – certainly the statute itself is formally indifferent. We believe that recent, complicated situations in which the government has sought post-closing divestitures of Canadian businesses on national security grounds have led the government to conclude that it is far easier to manage national security concerns on a pre-closing basis, before ownership has transferred, and hence to formalize the recommendation to file early.

Third, the Guidelines set out that Investment Review Division officials are ready to meet with and engage in consultations with foreign investors in relation to their transactions with a view to facilitating national security assessments and clarifying information requirements, “at the earliest stages of the development of their investment projects”. While it has always been open to foreign investors to engage with the Investment Review Division, the Guidelines go further in actively encouraging early engagement. Foreign investors and the Canadian businesses in which they propose to invest may previously have been reluctant in some cases to engage in this manner with governmental authorities; the Guidelines may on balance lead to earlier and more involved engagement.

DISCLAIMER: This publication is intended to convey general information about legal issues and developments as of the indicated date. It does not constitute legal advice and must not be treated or relied on as such. Please read our full disclaimer at www.stikeman.com/legal-notice.