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News Flash

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Recent Changes to the *Investment Canada Act* Will Affect Investments by Non-Canadians

By Stephen Zolf

The Canadian federal government has recently announced material changes to the *Investment Canada Act* (the "**Act**") in three areas, namely:

1. higher thresholds and changed valuation methodologies for reviews of investments;
2. time frames for national security review (the Canadian equivalent to the U.S. CFIUS rules) extended; and
3. information filing requirements for non-reviewable investments have become significantly more onerous

1. Higher Thresholds and Changed Valuation Methodologies for Reviews of Investments under the *Investment Canada Act*

Commencing April 24, 2015, the review threshold for WTO investments (by investors other than State-Owned Enterprises ("**SOE**")) is raised to C$600 million in enterprise value (an increase from the current test for transactions closing in 2015, which sets the threshold at C$369 million based on the book value of the assets of the acquired business). The C$600 million threshold will apply for a two-year period ending in 2017, increasing to C$800 million for the next two years ending in 2019, followed by an increase to C$1 billion. For subsequent calendar years, the review threshold will be indexed annually to changes in Canada's nominal GDP, in accordance with the formula in the Act.

Among the changes is a detailed methodology for calculating the enterprise value of a Canadian business, in the following scenarios:

i. for publicly traded entities, the enterprise value is calculated as the entity's market equity capitalization, plus its total liabilities excluding its operating liabilities, minus its cash and cash equivalents;

ii. for non-publicly traded entities, the enterprise value is calculated as the entity's total acquisition value, plus its total liabilities excluding its operating liabilities, minus its cash and cash equivalents, all without duplication;

iii. for investors acquiring 100% of the voting interests in the Canadian business, the total acquisition value is the total consideration payable for the acquisition as determined in accordance with the transaction documents that are used to implement the investment; and

iv. for a Canadian business that is acquired by the acquisition of assets, the enterprise value is calculated as its total acquisition value (i.e. total consideration payable for the acquisition) plus the liabilities that are assumed by the investor minus the cash and cash equivalents that are transferred to the investor, all as determined in accordance with the transaction documents that are used to implement the investment.

Under the new rules, where any portion of the total consideration to be paid by the investor is not known at the time the investment is implemented, the value of this unknown portion is deemed to be the amount that the investor represents and determines in good faith to be the fair market value. This provision will be applicable to contingent payment scenarios, including transactions with potential earn-outs, the value of which may not be known at the time of the closing of the investment transaction. The provision also ascribes value in scenarios in which there is inadequate market price information, such as non-publicly traded shares.

Notwithstanding this new mandated methodology to calculate enterprise value in specified circumstances, the existing book value method for determining the value of an acquired Canadian business will continue to apply to the following types of investments:

i. *acquisitions of control of a Canadian business by a non-WTO (SOE or private) investor (and from a non-WTO seller)*: direct acquisitions are reviewable where the book value of assets exceeds C$5 million, while indirect acquisitions of control are subject to review where the book value of the assets exceeds C$50 million;

ii. *direct acquisitions of control of a "cultural business"*: these acquisitions are subject to review where the book value of acquired assets exceeds C$5 million, while indirect acquisitions of control are subject to review where the book value of the acquired assets exceeds C$50 million (the federal cabinet retains discretionary authority to review an investment in a cultural business falling below these thresholds); and

iii. *WTO investments by an SOE:* these types of direct acquisitions of control (of non-cultural businesses) are subject to review where the book value of the assets of the acquired business exceeds C$369 million (for transactions closing in 2015); indirect acquisitions of control by WTO SOE investors remain exempt from review.

2. Time Frames for National Security Review (the Canadian equivalent to the U.S. CFIUS rules) Extended

Effective March 13, 2015, the Government of Canada has lengthened certain timelines for national security reviews under the Act and amendments made to the *National Security Review of Investments Regulations* (the "**National Security Regulations**").

These extended timelines are in addition to the initial 45-day period following receipt of a notification in a non-reviewable transaction in which the Minister of Industry may notify an investor that a review of the investment on national security grounds may be made.

Under the amendments to the National Security Regulations, the following timelines have been extended:

i. the Governor in Council ("GIC") now has 45 days (extended from 25 days) after the initial 45-day period to order a national security review of the investment once the Minister of Industry has alerted the GIC that the investment could be injurious to national security;

ii. in the context of a national security review ordered by the GIC and the related consultation between various government departments and investigative agencies, the time period for the Minister of Industry to submit a report and recommendation to the GIC is now set at 45 days from the date on which the GIC issued the order for a review of the investment;

iii. under provisions of the Act that are now in force, if the Minister of Industry is unable to complete the consideration of an investment within the above prescribed period of 45 days, upon notifying the non-Canadian investor, the Minister of Industry can extend this 45-day period by an additional 45-day period (with a further possible extension with the agreement of the non-Canadian investor); and

iv. once the GIC receives the Minister of Industry's report and recommendations pursuant to the national security provisions of the Act, the time period within which the GIC must order any measure it considers advisable to protect national security has been extended from 15 days to 20 days.

3. Information Filing Requirements for Non-Reviewable Investments Have Become Significantly More Onerous

The newly-announced rules require significantly more detailed information from investors in connection with filing notifications for non-reviewable investments. In particular, the new notification form will require disclosure of the following information:

i. the legal names of the investor's board of directors;

ii. the five highest paid officers of the investor;

iii. any individual or entity that owns 10% or more of the equity or voting interest of the investor;

iv. for each such person listed above, a local mailing address, telephone and fax numbers, email address, nationality (*i.e.* WTO or NAFTA), date of birth, and whether such person owns any interest in the acquired Canadian business;

v. whether the investor is owned, controlled or influenced, directly or indirectly, by a foreign government;

vi. the sources of funding for the investment;

vii. a copy of the purchase and sale agreement or, if not available, a description of the principal terms and conditions, including the estimated total purchase price of the investment (i.e. the transaction documents used to implement the investment); and

viii. information requirements to permit enterprise value information to be collected.

If you have questions regarding any aspect of the Aird & Berlis LLP *News Flash* please contact:

Stephen Zolf
T 416.865.3062
E szolf@airdberlis.com

AIRD & BERLIS LLP
Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9
T 416.863.1500 F 416.863.1515
www.airdberlis.com