

## **Backgrounder**

### **An Act to amend the *Investment Canada Act***

The *Investment Canada Act* (ICA) provides for both net benefit and national security reviews of foreign investments into Canada. The ICA was established to provide investor certainty while reserving Canada's ability to block individual investments under specific circumstances. The Act is designed to encourage investment, economic growth and employment, only interceding when an investment is not of net benefit to Canada or would harm national security. As threats faced by Canada continue to evolve, the government is working to ensure that Canada's foreign investment review regime continues to strike the right balance between promoting foreign direct investment and protecting Canada's interests.

The Government of Canada has committed to promoting economic security and combatting foreign interference by modernizing the ICA to strengthen the national security review process and better mitigate economic security threats arising from foreign investment. The government is advancing a comprehensive ICA modernization package that includes a series of policy, regulatory and legislative measures that collectively represent the most significant update of the Act and its administration since 2009.

#### **Amendments to the *Investment Canada Act***

The Government of Canada is introducing An Act to amend the *Investment Canada Act*. This will bolster Canada's visibility on investments, enhance transparency, support greater investor certainty, and ensure Canada has strong authorities to take action quickly and where required.

The legislative amendments include:

1. New filing requirement prior to the implementation of investments in prescribed business sectors;
2. Authority for the Minister to extend the national security review of investments;
3. Stronger penalties for non-compliance;
4. Authority for the Minister to impose conditions during a national security review;
5. Authority for the Minister to accept undertakings to mitigate national security risk;
6. Improved information sharing with international counterparts; and
7. New rules for the protection of information during the course of judicial review.

#### **New filing requirement prior to the implementation of investments in prescribed business sectors**

The amendments introduce a pre-implementation filing requirement for certain investments in prescribed sectors in order to provide the government earlier visibility on investments where there is risk that the foreign investor would gain access to sensitive assets, information, intellectual property or trade secrets, for example, immediately upon closing. The government can therefore ensure that such irremediable harm does not occur. Investors in such sectors will now be required to file notifications in time periods set out in regulations.

#### **Authority for the Minister to extend the national security review of investments**

The amendments make the national security review process more efficient by providing the Minister of Innovation, Science and Industry, in consultation with the Minister of Public Safety, the power to extend reviews under the s. 25.3 stage of review, whereas previously a Governor in Council (GiC) order was required at this stage in the multi-step process.

Removing the additional step of getting an order by the GiC will provide more time for security and intelligence partners to complete the increasingly complex intelligence analysis.



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## **Stronger penalties for non-compliance**

The amendments update the penalties for non-compliance within the provisions of the *Investment Canada Act* and provide the authority to update these penalties in the future, as required, in regulations.

The penalties for non-compliance were established several decades ago and have not been revisited to correspond to current typical deal valuations or inflation. An update, with a new formula for ongoing updates set out in regulations, would make the penalty amounts more meaningful. In addition, a new penalty will be introduced for failing to comply with the pre-implementation filing requirements.

Penalties for non-compliance are a clear signal and incentive to comply with the ICA, and these changes are not expected to chill legitimate investment. The imposition of ICA fines will continue to be effected through court orders. The new penalty for a violation of the pre-implementation filing requirement is broadly in line with allied jurisdictions' foreign investment review regimes.

## **Authority for the Minister to impose conditions during a national security review**

The amendments introduce the authority for the Minister of Innovation, Science and Industry, after consultation with the Minister of Public Safety, to impose interim conditions on an investment during the national security review. This will reduce the risk of national security injury taking place during the course of the review itself, such as through the possible access to or transfer of assets, intellectual property or trade secrets before the review is complete. At the end of the review period, if an investment is allowed to proceed, an interim condition may be converted into a permanent undertaking or condition or, if appropriate, be removed.

## **Authority for the Minister to accept undertakings to mitigate national security risk**

The amendments allow the Minister of Innovation, Science and Industry to accept binding undertakings from investors to reduce the potential national security injury that would result from the investment.

Potential undertakings could include obtaining Government of Canada approval for proposed business locations in order to avoid proximity to Canadian assets or creating approved corporate security protocols to safeguard information and access to a site—such as details on cybersecurity, visitor logs, etc.—or to grant access to facilities for compliance inspection.

Previously, the imposition of such conditions on a transaction to mitigate national security risks could only occur through a GiC order. Allowing binding undertakings at the ministerial level also means these can be amended—or even ended—in the right circumstances or if economic or security circumstances change.

These undertakings will have to satisfy the Minister of Innovation, Science and Industry, with the concurrence of the Minister of Public Safety, that they sufficiently address the national security injury that would result from the investment. Investors will be monitored for compliance.

## **Improved information sharing with international counterparts**

The amendments facilitate international cooperation and information exchange by allowing the Minister of Innovation, Science and Industry to disclose information about an investor to allies in order to support their foreign investment review and national security assessments, on terms and conditions that the Minister deems appropriate. Prior to this amendment, information about a specific investor was considered privileged and could not be disclosed.

This change will help defend against a situation where an investor may be active in several jurisdictions seeking the same technology, for example, and where there is a common national security interest. That said, Canada would not share such information where there are confidentiality or other concerns.

## **New rules for the protection of information during the course of judicial review**

The amendments introduce new provisions on closed material proceedings that will allow for the protection of potentially injurious information in the course of judicial review of national security review decisions, that is, allowing the use of sensitive information while protecting it from disclosure.

Decisions made under the national security review processes in the ICA can rely heavily on the use of sensitive information that, if publicly disclosed, would be potentially injurious to international relations, national defence or national security or would endanger the safety of any person. To strengthen the government's ability to defend such decisions in case of judicial review, the Crown may use this process to protect sensitive information that forms part of the evidentiary record that was relied upon in making these decisions. This will ensure that judges in these proceedings can consider a more complete set of factors driving the decision making at issue, even where all the information in the record may not be disclosed to a non-government party.