

Investment Canada Act Annual Report provides new insights into the small number of transactions that have raised national security concerns

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In this Update

- On March 1, 2019, the *Investment Canada Act* Annual Report was released.
- The Annual Report is the first released after mandatory new reporting requirements on the administration of the national security provisions came into effect in 2018.
- For the first time, the federal government has released details regarding the few investments which required review on national security grounds from the 2012-13 fiscal year to 2018.
- The Annual Report includes for the first time examples of conditions that were imposed on investments, which is an important new disclosure.
- The Annual Report shows a continued trend in liberalization of the *Investment Canada Act*.

On March 1, 2019, the Director of Investments filed the [annual report](#) on the administration of the *Investment Canada Act* (the Act) for the fiscal year ending March 31, 2018 (Fiscal 2018) (the Annual Report). The Annual Report is the first released after mandatory new reporting requirements on the administration of the national security provisions came into effect in 2017. The Annual Report therefore provides important new insights and data relating to the application of Canada's national security review regime.

For the first time, the federal government has released details regarding the investments in respect of which the Governor in Council issued an order under section 25.3 of the Act (Order) for review on national security grounds from the 2012-2013 fiscal year to Fiscal 2018. Investments that were subject to review on this basis are segmented by industry, nationality of the investor and the outcome of the review.

While it continues to be clear that very few investments in Canada give rise to serious national security concerns (only 15 Orders were issued between 2012 and 2018 out of the more than 4,000 investments in that time), the newly released information provides useful insights on the types of investments that have raised concerns.

- Of the 15 investments reviewed, the country of origin of the investment as indicated in the

investment filing was China in the case of 10 Orders, and Russia in the case of two Orders. One Order was made with respect to investments from each of Egypt, the United Kingdom and Cyprus.

- The 15 investments involved a range of industries including manufacturing, transportation, pharmaceuticals and upstream oil and gas. However, it is noteworthy that two-thirds of the Orders issued were in respect of investments in information technology sectors (including telecommunications, electrical equipment, and computer and related business services).
- None of the 15 investments proceeded without conditions and the majority were either blocked (four), withdrawn (two) or subject to a divestiture order (five). Four investments were approved subject to conditions.

Notably, the Annual Report includes for the first time examples of conditions that were imposed on investments. This is important new disclosure. Examples of mitigating conditions that were considered or imposed on investments include:

- requiring government approval of proposed business locations in order to avoid proximity to strategic assets;
- requiring that all servicing and support for some or all business lines is conducted in Canada;
- creating approved corporate security protocols to safeguard information and access to a site;
- requiring the engagement of a security-cleared compliance officer to ensure and report on compliance;
- requiring third-party compliance audits on request;
- requiring access to facilities for compliance inspection;
- requiring employees with access to sensitive information to attest to compliance with approved security protocols;
- notifying existing customers of pending new ownership;
- providing notice to the Minister of new prospective employees who would have access to sensitive information or technology as a part of their job description; and
- excluding sensitive business segments or assets from a transaction.

While the additional disclosure on the administration of the national security review provisions is important and welcomed by foreign investors and Canadian businesses seeking investment, the main theme of the administration of the Act in 2017-2018 is clearly the liberalization of investment in Canada:

- The net benefit review threshold under the Act increased for all investors to \$1 billion in June 2017, and for investors from certain countries with whom Canada has a free trade agreement (such as the United States, the European Union, Mexico, etc.) the threshold increased to \$1.5 billion in September 2017. (For the 2019 thresholds, refer to our [Quick Reference Guide](#).) This led to a drastic drop in the number of transactions subject to a net benefit review, from 22 in the 2016-2017 fiscal year to nine in Fiscal 2018.
- China continues to be a significant source of foreign investment in Canada and ranks third in value of investments in Canada after the U.S. and EU. In 2017-2018, China accounted for

a total of 34 investments representing \$6.69 billion in total enterprise value (in addition to \$28.47 million in total asset value).

- As previously noted, the issuance of an Order under the national security provisions remains rare, with the review regime being implemented judiciously. Of the 751 investments reviewed or notified under the Act in Fiscal 2018, only four were issued a notice that an Order may be forthcoming, representing a fraction (just over 0.5%) of the total number of investments reviewed or notified.

While the trend in liberalization of the Act is clearly positive for potential foreign investors, the additional information disclosed in the Annual Report also provides more clarity and certainty on how the Act is likely to be administered.

Osler has extensive experience with Canada's national security regime, having advised on several transactions where an Order has been issued. We have also frequently assisted investors in identifying the risk that their investments may be reviewed on national security grounds, and how this risk can be mitigated. If you have any questions regarding Canada's national security regime, reach out directly to any of the members of our Foreign Investment team.