

2023 OSLER LEGAL OUTLOOK

## Strengthening Canada's national security review regime

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Authors: [Shuli Rodal](#), [Kaeleigh Kuzma](#), [Michelle Lally](#)

Foreign investment review in Canada, like in many other jurisdictions, is increasingly emphasizing national security considerations, including economic security. This trajectory will be amplified as a result of the [amendments](#) to the *Investment Canada Act* anticipated to be implemented in 2024. These changes will expand the scope of investments subject to mandatory pre-closing national security clearance.

When introducing the amendments in December 2022, the Minister of Innovation, Science and Industry emphasized the importance of foreign investment to Canada's economy and the government's desire to strike an appropriate balance between continuing to welcome investment and protecting Canada's national security. Accordingly, while closing conditions related to national security clearance may become more commonplace, prohibition of foreign investment on national security grounds is likely to remain exceptional.

The federal government's focus on national security is evident in the recent rebranding of the Investment Review Division of Innovation, Science and Economic Development Canada to the Foreign Investment Review and Economic Security Branch. In addition, civil servants with significant national security experience have been appointed to senior positions within the Branch. These changes further reinforce the trend towards a greater focus on national security considerations in assessing foreign investment in Canada.

### What is changing?

In late 2022, the federal government [introduced](#) the *National Security Review of Investments Modernization Act* which proposes a broad set of amendments to the *Investment Canada Act* aimed at enhancing national security review. The most significant of these is a proposal to establish a mandatory pre-closing filing regime for investments (including less than control investments) by non-Canadians in business sectors viewed as especially sensitive from a national security perspective. It is anticipated that the regime will subject a range of sensitive sectors – including critical minerals, vaccines, semiconductors, quantum computing, cybersecurity, artificial intelligence, information technologies and personal data collection – to comprehensive scrutiny. We discuss these changes in detail in our [Osler Update](#). As of the time of publication, the proposed legislation has passed third reading in the House of Commons and is now before the Senate.

The House of Commons Standing Committee on Industry and Technology proposed several amendments to the legislation, most notably the establishment of a discretionary net benefit review regime for *all* investments by state-owned enterprises (SOE) that are not from a trade agreement state. Currently, trade agreement states consist of the member states of the European Union, the United States, the United Kingdom, Mexico, Australia, Brunei, Chile, Colombia, Honduras, Japan, Malaysia, New Zealand, Panama, Peru, Singapore, South Korea and Vietnam. While it remains to be seen how this most recent proposal will be implemented, including its impact on transaction timelines, it is reasonable to believe that it could have a material effect on SOE foreign investment in Canada.

More generally, the existing national security review process in Canada has undoubtedly become more rigorous. Since the introduction of Canada's foreign investment national security review regime approximately 15 years ago, we have seen a year-over-year increase in the number of extended national security reviews. For the federal government's fiscal year ended March 31, 2023, a record 32 investments resulted in an extended review period. This trend continued for the balance of 2023. This is a significant increase from prior years: we saw 24 extended reviews in the fiscal year ended March 31, 2022, 23 extended reviews in 2021, 10 in 2020, nine in 2019 and four in each of 2018 and 2017.

However, unlike in the early years of the regime, an extended national security review is not necessarily the death knell for an investment. While there has been a clear increase in the number of extended reviews, there has also been a corresponding increase in the number of clearances. For example, of the 32 extended reviews in the fiscal year ended March 31, 2023, a total of 20 investments were permitted to proceed with no further action required by the investor. Ten of such reviews were concluded without the issuance of a Cabinet order for a review. In contrast, in the early years of the national security review regime, eight Cabinet orders for extended review were issued between 2009 and 2016, resulting in seven Cabinet remedial orders imposing a range of measures including divestiture, prohibition and undertakings (the remaining investment was withdrawn by the investor).

While the recent amendments constitute a significant change to the regulation of foreign investment in Canada – and the most extensive amendments proposed to the *Investment Canada Act* in over a decade – the new regime brings Canada in line with other countries such as the U.S. and the U.K. Both of these jurisdictions have taken steps in recent years to require pre-closing notification of sensitive investments. In light of Canada's increased legislative activity surrounding foreign investment, combined with enhanced regulatory oversight, we can expect national security implications to become an increasingly important factor in 2024 and beyond for non-Canadians seeking to invest in Canada.