

Canadian government updates approach to national security reviews

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On March 24, the government of Canada issued updated guidelines on the national security review of foreign investments.

What you need to know

- The updated guidelines identify new areas that could raise national security concerns to reflect enforcement practice and experience. These include acquisitions of Canadian businesses that have access to sensitive personal data, use sensitive technology or are involved in producing critical minerals.
- They also reinforce the government's focus on investments by foreign state-owned or state-influenced enterprises. Investors from allied countries, for example, the United States, United Kingdom, Australia, New Zealand, Western Europe and Japan, will continue to carry lower risk, even where they involve sensitive personal data, sensitive technology or critical minerals.

The details

Under the *Investment Canada Act*, the government has discretion to review virtually any foreign investment on the grounds it could be “injurious to Canada’s national security”. Numerous investments have been blocked or restructured for national security reasons. Most of these investments involved Chinese investors seeking to acquire businesses relating to critical infrastructure or sensitive technology.

National security review guidelines were initially issued in 2016 (see our bulletin on those guidelines [here](#)). Those guidelines explained that in making a national security assessment the government will consider the nature of the assets or businesses subject to an investment as well as the nature of the foreign investors.

The updated guidelines expand on those original guidelines by identifying additional issues that could present foreign investment national security concerns, including investments by state-owned or state-influenced investors and involving Canadian businesses that have access to sensitive personal data, use sensitive technology or are involved in critical minerals/critical mineral supply chains.

- The updated guidelines state that investments by state-owned or state-influenced investors will face enhanced scrutiny regardless of the value of the investment. Although the original guidelines did not specifically identify such investors as a potential concern, most national security reviews to date have involved state-owned or state-influenced investors, a trend we expect to continue. The updated guidelines also now “strongly encourage” state-owned or state-influenced investors to contact the government and make filings where applicable well in advance of closing. As a practical matter, Chinese and Russian investors will continue to be subject to the highest degree of scrutiny. State-owned or influenced investors from most other countries have historically been non-problematic.
- The updated guidelines also emphasize the risks associated with a foreign entity acquiring access to sensitive personal data that could be leveraged to harm Canadian national security. Access to personally identifiable health, geolocation or financial (e.g., debt) data, among others, by a foreign state actor could, for example, create risks of blackmail or espionage. It is widely believed that concerns about access to sensitive financial data led to the non-approval of China Oceanwide’s acquisition of the Canadian portion of mortgage insurer Genworth Financial in 2019.
- The updated guidelines also elaborate on the consideration of potential effects of an investment on the acquisition of intellectual property and transfer of sensitive technology or know-how outside of Canada (a factor identified in the original guidelines). Notably, a long but non-exhaustive list of technology areas that may be considered sensitive has been added as an annex to the guidelines, which includes: artificial intelligence; biotechnology; energy generation, storage and transmission; medical technology; next generation computing and digital infrastructure; and space technology. The Committee on Foreign Investment in the United States (CFIUS) maintains lists relating to similar concepts (critical infrastructure and sensitive personal data)—the updated guidelines appear to adopt an analogous approach.
- The potential impact of an investment on critical minerals and critical mineral supply chains has also been added to the updated guidelines. Canada maintains [a list of 31 critical minerals](#), which includes: aluminum, cobalt, copper, lithium, nickel, potash, rare earth metals, and uranium, among others. This list is mostly consistent with a similar United States government [list of 35 critical mineral resources](#). We expect that national security reviews could also occur in cases involving Canadian-listed companies with overseas mining operations, as occurred in connection with the 2020 acquisition of SEMAFO by Endeavour Mining. We also expect that acquisitions of businesses with small deposits of widely available minerals, e.g., copper or nickel, are less likely to be problematic.

Practical considerations

The expanded list of sensitive areas, particularly in the fast-growing technology sector, provide additional clarification of the government’s primary concerns. This will assist both foreign investors and Canadian businesses with greater clarity in transaction planning and upfront national security risk assessment.

The breadth of business activities covered by the updated guidelines in their totality, which effectively include most aspects of the modern economy, should serve as a reminder that it will be challenging for investors from non-allied countries (particularly China and Russia) to avoid national security scrutiny of in-bound investments. All cases will of course continue to be reviewed individually on their own merits and in some problematic cases mitigation strategies could be used to pre-empt or address government concern.

That said, the updated guidelines are iterative rather than transformational as they reflect enforcement practice and experience rather than a policy change. Accordingly, we do not expect a material difference in day-to-day enforcement activity. Moreover, as of a result of these changes, the Canadian government’s stated approach to national security reviews remains broadly consistent with that of the United States.

As always, when considering potential investments where national security issues are expected to arise, investors and Canadian businesses alike are encouraged to engage counsel and government relations advisors as early as possible in the transaction planning process given the complex and evolving nature of the national security review regime under the *Investment Canada Act*.

To discuss these issues, please contact the author(s).

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