THE CANADIAN BAR ASSOCIATION
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Via email: Carolyn.Knobel@canada.ca

Carolyn Knobel
Director General
Economic Security Task Force, National and Cyber Security Branch
Public Safety Canada
269 Laurier Avenue West
Ottawa, ON

Dear Ms. Knobel:

Re: Economic Threats to National Security

The Competition Law and Foreign Investment Review Section of the Canadian Bar Association (CBA Section) is pleased to respond to Public Safety Canada's consultation on economic-based threats to national security.

The Canadian Bar Association is a national association of 36,000 lawyers, Québec notaries, law teachers and students, with a mandate to promote improvements in the law and the administration of justice. The CBA Section promotes a greater awareness and understanding of legal and policy issues relating to competition law and foreign investment review.

We commend Public Safety Canada's efforts to engage with stakeholders through meaningful consultations and appreciate the opportunity to share our views. Our comments are limited to the questions in the *Economic Threats to National Security* consultation document relevant to the CBA Section.

1. Filing requirements

What would be the impact on Canada or your industry if the Government introduced a pre-closing notification requirement for specified categories of investments, or certain categories of investors, such as state-owned or controlled enterprises?

The CBA Section believes that a focused pre-closing notification regime could effectively alert the Government to investments of potential concern prior to implementation and give foreign investors and Canadian businesses increased predictability and regulatory certainty.

As such, we support a pre-closing notification regime provided it is:

(i) focused on higher risk investments;
(ii) based on clear thresholds; and
(iii) free of burdensome or time-consuming compliance obligations.

For reference, pre-closing notification and approval is required under other legislation, such as the *Competition Act*. However, the *Competition Act* requires notification for only a small subset of merger and acquisition transactions and has notification thresholds based on asset/revenue metrics that are easily determined by reference to financial statements. Moreover, the Competition Bureau effectively processes most non-problematic transactions in approximately two weeks based on simple letter applications. We believe that this type of effective and targeted regime should be the objective of any changes to the *Investment Canada Act* (ICA).

The recently updated Guidelines on the National Security Review of Investments note factors that are relevant to the Government's national security analysis, and notably include a list of sensitive technology areas in Annex A. What would be the impact of requiring pre-closing notifications in certain technology areas? What kind of guidance should accompany the sensitive technology areas listed in Annex A to help a potential investor to determine whether they would be subject to the pre-closing filing requirement in order to be able to comply?

The CBA Section has no view on what business activities may be viewed as sensitive by the Government and whether a pre-closing filing obligation should be based (in part) on the activities of the Canadian business. However, filing requirements must be clear and unambiguous to materially limit the number of investments subject to pre-closing filing requirements.

The list in Appendix A of the *Guidelines* offers investors helpful general guidance. However, it is not well suited as a notification threshold on its own: it is non-exhaustive and descriptions such as "software", "robotics" and "energy" are too nebulous and broad. Without more specific criteria, too many businesses and investments will be captured and be subject to a mandatory notification regime.

A clear and unambiguous threshold based on a standard that investors and Canadian businesses can easily assess is preferable. If there is a desire to base mandatory pre-closing notification on sensitive technology or other specific industry sectors, we suggest exploring triggers based on North American Industry Classification System (NAICS) codes or other clear and unambiguous metrics.

We would endorse an approach that combines consideration of the foreign investor and the specific industry sector. For example, requiring pre-closing notification for state-owned enterprises investing in sensitive technology areas and exempting investors from the U.S., U.K. and Australia (from any pre-closing filing).

Allies, such as the United States, provide certain exemptions to investors from Canada, the United Kingdom, and Australia. What impact would it have for Canada to offer (or not offer) reciprocal treatment to investors from the U.S. or others for any new investment screening measures?

Over two-thirds of foreign investment is from the U.S., U.K. and Australia.[1] We believe that investments from these countries are highly unlikely to raise national security concerns.

As such, we strongly favour exempting investors from the U.S., U.K. and Australia from any mandatory pre-closing notification regime. (New Zealand could also be included for equal treatment of Five Eyes jurisdictions.) Exempting investors from key allies would be a helpful and effective way of reducing pre-closing notification burdens on foreign investors without materially impairing the Government's ability to effectively enforce the national security provisions of the ICA.

Rules exempting investors from these three key allied countries must be clear and unambiguous. Complex scenarios should be addressed in legislation or guidance (e.g., how would U.S. or U.K. based private equity funds with minority limited partners be treated? How would dual nationals be treated?)

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[1] See Annual Report on the administration of the Investment Canada Act for fiscal year 2018–19.

The CBA Section recognizes that treating some foreign investors differently from others may raise "level playing field" questions. For example, investors from the U.S., U.K. or Australia may be perceived as having a competitive advantage in acquisition transactions with less burdensome regulatory requirements compared to investors from other countries. We do not believe this a concern. Investors are already treated differently for a variety of reasons.[2] Achieving a regulatory regime narrowly focused on investments of potential concern that has certainty, predictability and clear and consistently applied rules are more important factors.

More generally, the CBA Section also supports an approach to pre-closing notification consistent with other countries such as the U.S., U.K. or Australia. Alignment of national security regimes across the Five Eyes jurisdictions would make counselling more straightforward. It would allow Canadian lawyers and other advisors to benefit from experience and jurisprudence in other jurisdictions. Alignment may also help ensure Canadian businesses benefit from any reciprocal exemptions or other preferred investor status.

2. Mitigation

What is your view on the use of mitigation measures to protect national security while allowing investments to be implemented, where this is assessed by the Government as sufficient to protect Canada's national security interests? What is your view on the efficacy of existing mitigation measures in preventing security issues? Please use examples, if available, to illustrate your point of view.

Nearly every investment that comes to the attention of the Government contains a mixture of risk and reward for the Canadian economy. Mitigation is, and should be viewed, as a possible remedy to elements of an investment that present a concern of injury to Canada's security interests. Where that injury can be avoided by behavioural or structural mitigation, we believe such mitigation should be fully and transparently explored between the Government and the parties. Canada has a robust and internationally recognized security and intelligence community capable of verifying that undertakings or conditions imposed are respected.

The Investment Review Division (IRD) should have the resources to increase its ability to monitor and enforce mitigation measures (and to monitor non-reported investments and compliance with the ICA generally).

What challenges might mitigation measures present to potential investors and the ongoing operations of the Canadian business? How could the process for developing these measures be improved?

Good faith investors with commercially oriented objectives will likely accept reasonable mitigation measures if they facilitate a timely clearance and are necessary to protect Canada's security interests. Challenges for investors may include mitigation measures with burdensome compliance obligations or that change the overall economic rationale for the investment. While the processes by which mitigation measures are developed may be specific to each investment, certain commonalities will emerge.

In that vein, advance awareness of likely mitigation measures is desirable because unexpected risks, (which includes unexpected mitigation measures) can make it challenging for parties to enter into commercial agreements. Regulatory uncertainty can have a spillover chilling effect and deter non-problematic investors. Cataloguing accepted mitigation measures in the ICA Annual Report is helpful as an informal guide to investors and counsel on what the Government might expect or accept by way of mitigation. The CBA Section encourages this transparency.

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[2] For example, Canadian investors are completely exempt from the *Investment Canada Act*.

Do you have concerns about certain mitigation measures, which might, in your view, make foreign investments untenable?

Structural mitigation such as non-approval or divestiture of lines of business should not be ordered unless absolutely necessary. Rather, behavioural mitigating options within or in respect of existing business lines should be fully canvassed between the Government and proponents before non-approval or divestiture is considered.

Do you have any suggestions for standard mitigation measures that could be imposed as warranted?

The CBA Section believes mitigation could include some or a combination of the following measures, depending on the transaction and perceived risk:

1) Technological and informational mitigation
   - network segregation, hardening, and protocols
   - limitations on investor informational rights to sensitive information or technology

2) Physical mitigation
   - secure access (key cards, video surveillance, security auditing, hardening)
   - reasonable geographic restrictions

3) Personnel mitigation
   - replacement of or restrictions on key or sensitive personnel (including contractors)

4) Audit and inspection
   - technology-driven and verified

5) Marketplace or structural mitigation
   - non-approval
   - sale of a business line

3. Enforcement

What is your view on the increased focus on non-compliance and enforcement of newly implemented or proposed investment rules in the United States, the United Kingdom, and Australia, including (as relevant) on Canadian investors making investments in those jurisdictions?

The CBA Section believes enforcement is an important part of an effective national security regime. The IRD budget should be adequate to ensure it can monitor and enforce compliance with notification requirements and mitigation measures.

What is your view on what the impact would be if Canada adopted a similar approach [to enforcement as the U.S., U.K. and Australia] (e.g., increased statutory fines for non-compliance, or administrative monetary penalties)?

As noted above, the CBA Section generally endorses a similar approach to enforcement as in other Fives Eyes jurisdictions.

Specifically, we support increased statutory fines for failure to make a required application or notification under the ICA, provided:

(i) the quantum of a fine is discretionary;
(ii) there are clear statutory provisions or guidelines on when and what fines investors could expect; and

(iii) courts continue to be responsible for imposing fines.

The CBA Section only supports fining investors for contraventions of filing or other process requirements. We do not believe investors ought to be fined for national security "contraventions."

The CBA Section also endorses the current requirement that fines are applicable only if an investor fails to comply with Ministerial demands to submit a required notification or application. While it may be desirable to dispense with this requirement in the case of any mandatory pre-closing notification obligation, the vast majority of investments raise no national security or net benefit concerns. We do not believe these investors should risk punishment for an inadvertent failure to notify.

In summary, we would support a reasonable increase in the quantum of fines currently envisioned by the ICA. If there is a requirement to notify pre-closing for certain specified types of higher risk investments, the CBA Section would also support a penalty for a failure to file without first requiring a Ministerial demand, to encourage compliance and bolster Canada's national security. That said, any increased fines should continue be discretionary and, where appropriate, permit alternative resolutions in certain scenarios.[3]

4. Other

What are key irritants that foreign investors and Canadian businesses have with the existing ICA notification and national security review process and what suggestions would you have for how these might be addressed?

Notification form requirements

We understand that some foreign investors consider certain information disclosure requirements more burdensome and intrusive than necessary to protect national security. The CBA Section believes this is particularly the case for categories of investors that would appear to be presumptively very low risk.

For example, if considered as a collective category, U.S., U.K. and Australian based private equity funds make a significant number of investments in Canada each year. These funds frequently have minority investors that technically fall within the definition of "state-owned enterprise", such as public sector pension funds. Often, these investors own a very small percentage in the fund, and are almost always required to be purely passive financial investors to preserve their limited liability status in the fund. Obtaining information about all the investors in private equity funds (and even confirming if they are state-owned enterprises) is often burdensome.

This burden could be eased if there were limited exceptions to the information requirements in the notification form. This could be accomplished by, for example, permitting investors to respond "no" to question 12 of the form and include an explanation to the effect of "public sector pension funds from the U.S., U.K. or Australia that hold an interest in the investor, which is a private equity fund, have been excluded from the analysis" or "parties who hold an interest of less than 5% in the investor, which is a private equity fund, have been excluded from the analysis." This could be done on the understanding that the IRD would have the right to demand complete information during the screening process.

Initial 45-day period

It can be difficult to meaningfully engage with the IRD during the initial 45-day period (beyond an initial cover letter accompanying the notification form). There can be silence until the 45th day, when a notice

[3] The CBA Section believes mandatory pre-closing notification requirements should be clear and unambiguous. The CBA Section would oppose amendments permitting fines without Ministerial demand where filing requirements were unclear or ambiguous and good faith investors erroneously decided not to file.

of extended initial review is issued and questions follow, rather than questions posed and answered in the initial 45 days.

We recognize there may be many cases where it is not possible to rule out potential concerns in the initial 45 days. However, increased opportunity to engage meaningfully with the IRD during this stage may reduce the number of notices of extended initial review issued in borderline cases. This could potentially be accomplished by establishing a mechanism, such as a request accompanying the notification, that would trigger the appointment of a "case officer" who would be the primary point of contact within the IRD.

Some foreign investors are frustrated by the lack of a recognized informal process for the IRD to give an oral and non-binding indication to investors who notify pre-closing but wish to close before the initial 45 days have expired. Increased opportunity for meaningful engagement during the initial 45 days could potentially address this concern.

Full national security review process

Members of the CBA Section who have experienced a full national security review process have expressed concerns with the lack of transparency. More specifically, an investor's ability to address the Government's concerns is or may be impaired because they have not been given sufficient information about the Government's concerns.

We recognize the tension between disclosing information to the investor and the need to protect national security. We acknowledge that the degree of disclosure has generally improved since the early years of the national security review powers. However, and while recognizing that each case is different, we believe there is usually room for additional disclosure without jeopardizing national security.

To the extent it is not already in place, the CBA Section recommends that the Government consider adopting a rigorous internal process where those who seek to withhold information that would reasonably be considered relevant to an investor's response to the Government's concerns need to justify to their appropriate colleagues why disclosing this information could be a threat to national security.

Special advocate / fairness monitor

The CBA Section also believes that an appropriately security-cleared Special Advocate (or similarly-styled individual) – acting as a fairness monitor in national security reviews – could improve the review process to benefit both investors and the Government.

This individual would remind all parties of the proper considerations of a security review, namely those related to genuine threats to the security of Canada and its allies. This individual would observe official deliberations on a transaction and certify that the process was objective, fair and based on genuine security considerations.

There are several limitations of this model. For example, to whom would the Special Advocate's legal duties run? Could the individual attend Cabinet meetings where decisions are made under the ICA? What limitations would be placed if this individual felt that a decision had been made on an improper or insufficient basis? Despite these challenges, the CBA Section sees merit in exploring the possibility of using a Special Advocate for national security issues under the ICA.

Are there are any other issues, including those touched upon by the Standing Committee on Industry, Science and Technology in its recent study of the Investment Canada Act, that you would like to see addressed?

Obtaining pre-closing certainty in non-control level acquisitions

The CBA Section recommends giving investors in non-acquisition of control transactions means to obtain formal and definitive pre-closing certainty with respect to national security review risks. Presently, this is only available to investors in control level transactions, which is a source of frustration.

This could be remedied by establishing a voluntary notification scheme triggering the review process that currently applies to acquisition of control investments. We believe that this type of voluntary regime would benefit the Government (by encouraging reporting of potentially problematic investments) and investors and Canadian businesses (by giving legal certainty with minority investments).

Gap Analysis

The CBA Section believes there may be a potential "gap" between (i) investments to acquire all or part of a business, and (ii) transactions involving contractual transfers of technology, intellectual property or data (that do not involve the acquisition of assets or businesses and that may not be caught by export control legislation).

We encourage the Government to consider whether there is a jurisdictional gap that needs to be addressed and, if so, ensure that appropriate authorities can review these agreements and that a voluntary notification scheme covers these agreements as well. We recognize that the ICA may not be the natural home for the review of these agreements because they are not "investment" transactions.

Thank you for the opportunity to participate in the consultation. We trust our comments are helpful and we look forward to being of further assistance.

Yours truly,

(original letter signed by Marc-André O'Rourke for Navin Joneja)

Navin Joneja
Chair, Competition Law and Foreign Investment Review Section

cc. Shawn Barber, Deputy Head, ESTF, (shawn.barber@canada.ca)

Mike Kilby, Chair, Foreign Investment Review Committee (mkilby@stikeman.com)