THE CANADIAN BAR ASSOCIATION
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November 15, 2007

The Honourable Jim Prentice, P.C., M.P.
Minister of Industry
Industry Canada
235 Queen Street
Ottawa, ON K1A 0H5

Dear Minister:

Re**:** Guidelines on State-Owned Investors

I am writing on behalf of the National Competition Law Section of the Canadian Bar Association, to thank you for the opportunity to comment on proposed guidelines on state-owned investors. Our Foreign Investment Review Committee represents lawyers with considerable experience practising law relating to the *Investment Canada Act* (ICA). In that regard, our interest is to ensure that the Guidelines provide clarity, predictability and timeliness regarding who is a state-owned investor and how the review of acquisitions of control by such investors will be conducted

A. Introduction

The introduction of the Guidelines should set the tone for investments by state-owned enterprises (SOEs) in Canada. To that end, the Government may wish to include a statement that the Government generally regards foreign direct investment, whether state-owned or not, as beneficial to Canada. The Guidelines should also state that the Government's review of state-owned investments in Canada will take into account the factors set out in section 20 of the ICA.

B. Scope of the Guidelines – When is an Investor State-Owned?

- The Guidelines need to identify when an investor will be considered to be state-owned.
- The Guidelines need to clarify what is meant by the "state", i.e., those persons or entities that are part of the current governing structure of a foreign country. This might, for certain countries, exclude organizations that are only remotely connected with the state such as government employees' pension plans.
- Where the state owns a majority of the voting shares or interests in an investor, the relationship of the investor to the state is unambiguous.

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- However, if the Government also wishes to identify instances where a foreign state does not have control through majority voting ownership but controls the investor in fact or has a decisive influence over the investor, then the Guidelines should set out the types of factors and information the Government will consider (and by implication expect to receive as part of the application process). These could include:
    - shareholders agreements and constating documents such as articles and by-laws. These may show the state's role on the board, the number of seats held by other shareholders, the identity of other shareholders, and any veto or special rights for the state under certain circumstances.
    - information regarding family, personal, business and political relationships that may be relevant to determining if there is a sufficiently close connection between the investor and the foreign state.
- The Guidelines should recognize that, given the difficulty of identifying all circumstances in which there will be state control-in-fact or decisive influence, the investor and its counsel can contact the Government in advance for an expedited determination of whether the investor will be considered to be state-owned for these purposes.

C. Consequences of Being State-Owned

It will be important for the Guidelines to state the consequences of being state-owned should the proposed investment be subject to review. The Guidelines should outline the considerations to be taken into account in reviewing an investment by a SOE. These might include:

- Details of the SOE's rationale for making the investment.
- While all reviews of proposed investments require an outline of the investor's plans, if the Government is concerned about an SOE, the Government might request, in addition to current expressions of intent, information from the SOE such as its strategic plans, financial statements and materials relating to governance.
- The Guidelines should indicate possible Governmental responses to SOE investments from prohibition of a proposed investment to remedial action through undertakings.
- Whether the nature of the industry in which the target is engaged will be considered important. For example, if the Government is concerned about SOE investment in infrastructure or resources critical to the economy of Canada, the Government could identify such sectors (e.g., transportation), and indicate the type of concerns the Government has and how they might be addressed through undertakings or otherwise.
- The length of undertakings should be addressed. If the Government's concern relates to the SOE status of the investor, then any possibility that undertakings would last longer than the typical three to five years should be noted.
- If the Government intends to require more extensive undertakings from SOEs in certain circumstances, those circumstances should be described.
    - If there are specific concerns about an SOE's non-commercial behaviour, e.g., that Canadian customers of the SOE investor might not be supplied following the investment for non-commercial reasons, these could be addressed through undertakings.

- The Government should consider whether the Guidelines will apply to any business that is carried on in Canada whether or not such investment is foreign-controlled prior to the proposed investment.

D. Sunset Provision

The Guidelines should be subject to review after an initial period of, say, two years in order to ensure that they address the Government's concerns and offer transparency, clarity and predictability.

E. Where the Guidelines Will Not Apply

As the Guidelines do not amend the ICA, they will not apply to the following:

- non-reviewable investments, i.e., those that would fall below the review thresholds. This threshold is currently set at $281 million in book value of assets of most targets for direct acquisitions of a Canadian business ($5 million for the "sensitive sectors", namely, financial services, uranium production, cultural businesses or transportation services).
- indirect acquisitions of Canadian businesses (i.e., through the acquisition of a foreign parent company) by World Trade Organization (WTO) states or from vendors controlled in WTO states except in "sensitive sectors". We are advised by the Investment Review Branch that this applies even if a majority of the assets of a global transaction are in Canada.
- where there is no "acquisition of control" of a Canadian business pursuant to the ICA rules.

F. Other Considerations

In formulating and implementing these Guidelines, the Government needs to consider that Canadian law will apply to SOEs and may be available to address the Government's concerns about conduct of the SOE that does not accord with market or commercial principles. In particular, trade laws and competition laws may be able to address SOEs that do not behave according to market principles (*e.g.,* trade law addresses subsidies while the *Competition Act* addresses concerns such as below cost (predatory) pricing and abuse of a dominant position).

If you have any questions, please do not hesitate to contact Sandy Walker and Oliver Borgers, Chair and Vice Chair respectively, of the Foreign Investment Review Committee.

Yours very truly,

(original signed by Tamra Thomson for Barry Zalmanowitz)

Barry Zalmanowitz
Chair
National Competition Law Section

cc. Stephen Kelly, Senior Policy Advisor