



THE CANADIAN
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March 11, 2022

Via email: ic.investmentcanada-investissementcanada.ic@canada.ca

Katherine Burke
Director General
Investment Review Branch
Innovation, Science and Economic Development Canada
235 Queen Street
Ottawa, ON K1A 0H5

Dear Katherine Burke:

**Re: Regulations Amending the *National Security Review of Investments Regulations*,
Canada Gazette, Part I, Vol 156, No 7, February 12, 2022**

I am writing on behalf of the Competition Law and Foreign Investment Review Section of the Canadian Bar Association (CBA Section) in response to Innovation, Science and Economic Development Canada's (ISED) consultation on proposed amendments to the *National Security Review of Investments Regulations*:

- to establish a voluntary filing mechanism for investments to which section 25.1(c) of the Investment Canada Act (ICA) applies; and
- to extend from 45 days to five years the initial review period applicable to such investments, if they are not voluntarily notified.¹

The CBA is a national association of 36,000 lawyers, law students, notaries and academics, from every jurisdiction of Canada, with a mandate that includes seeking improvements in the law and administration of justice, and access to justice. The CBA Section is comprised of approximately 1,000 lawyers interested in promoting a greater awareness and understanding of legal and policy issues relating to competition law and foreign investment.

We appreciate the opportunity to offer our views and commend ISED's efforts to engage with stakeholders through meaningful consultations.

¹ See [Canada Gazette, Part I, Volume 156, Number 7: Index](#) (February 12, 2022).

1. General comments

The CBA Section welcomes and endorses the introduction of a voluntary filing mechanism for investments that do not currently require a mandatory application for review or a notification under the ICA, but which are nevertheless reviewable under Part IV.1 of the ICA (Investments Injurious to National Security).

Many stakeholders have considered to be problematic the absence of a mechanism for such proposed investments to gain pre-implementation regulatory certainty. The proposed amendments would benefit investors and Canadian businesses by giving legal certainty in connection with investments falling under the jurisdiction of section 25.1(c) of the ICA.

The CBA Section believes to be reasonable the extension from 45 days to five years of the initial review period for investments to which section 25.1(c) of the ICA applies but which do not require an application or a notification under the ICA and which are not voluntarily notified, for the following reasons:

- Five years appears to strike a reasonable balance between: (i) giving the government adequate time to discover and consider investments that are not brought to its attention by the investor voluntarily, and (ii) not leaving the investor with open-ended exposure in circumstances where it elects not to notify the government of its investment;
- As noted in the Regulatory Impact Analysis Statement, a five-year period would situate Canada in closer alignment with practices in comparable jurisdictions where no voluntary filing is made, such as the United Kingdom, with a five-year period, and Australia with a ten-year period; and
- Investors who do not wish to be exposed to five years of post-implementation risk can eliminate that possibility by voluntarily notifying pre-implementation.

2. Specific comments on the proposed amended text of the *National Security Review of Investments Regulations*

The CBA Section has reviewed the proposed amendments to the *National Security Review of Investments Regulations*, and considers that they would satisfactorily achieve ISED's objectives described above. We do not propose any revisions to the proposed amendments to the regulations.

3. Timely issuance of certification letters

The CBA Section agrees with ISED's prediction that the proposed amendments will likely result in an increased number of notifications submitted. Several members of the CBA Section expressed concerns about the timely issuance of letters from the Investment Review Division (IRD) certifying the completeness of notifications (Certification Letters). Certification Letters confirm, amongst other things, the date on which the Part IV.1 statutory waiting periods commence. This is important to investors because it gives timing certainty and allows for orderly commercial planning.

Several members of the CBA Section expressed the view that, at present, Certification Letters are frequently not issued in a timely manner, with a concern that an increased number of notifications may exacerbate the problem of delay.

In light of these comments, the CBA Section canvassed the largest 18 firms in Canada to determine whether this feedback represented the bar's broader experience. One third of the firms approached responded. Respondents gave anonymized information on the time taken to Certification Letters from the date the notification was deemed complete for investments notified in 2020 and 2021, and indicated whether the notification was submitted pre or post implementation.

For post-closing notifications, out of 114 examples, respondents identified: four where the Certification Letter was received more than 90 days after the date of certification; 18 where the Certification Letter was received between 60 and 90 days after the date of certification; and 43 where the Certification Letter was received between 46 and 60 days after the date of certification.² In total, approximately 57% of notifications (65/114) made post-closing received a Certification Letter after the expiry of the initial 45 day period in which action under Part IV.1 of the ICA could be taken. There was also a wide range in the length of time to receive Certification Letters, with a few examples of Certification Letters being received within less than 10 days and, a few received more than 90 days after notification.

For pre-closing notifications, in only one example was the Certification Letter received more than 45 days after the date of certification, and one example where the Certification Letter was received between 40-44 days after the date of certification. The Certification Letters for the other (few) examples of pre-closing filings were delivered well prior to expiry of the initial 45-day period.

The CBA Section understands that the IRD attempts to prioritize the issuance of Certification Letters for pre-closing filings, where the certification date is generally more important as it may determine the transaction closing date.

Based on current experience, CBA Section members are concerned that regulatory certainty offered by the new regime may be undermined if investors believe that Certification Letters are not issued in a timely fashion.

The CBA Section suggests that appropriate measures be taken, such as a staffing increase, to minimize the delay in issuing Certification Letters. We also recommend that the IRD establish and publish non-binding target dates for the issuance of Certification Letters, and we propose that date be within 14 days of notification. The CBA Section further recommends that ISED consider publishing in its annual report statistical information on the time taken to issue Certification Letters, such as the average number of days for certification.

We thank you again for the opportunity to participate in this consultation and remain available to discuss any of the items raised in this letter at your convenience.

Yours truly,

(Original letter signed by Véronique Morissette for Omar Wakil)

Omar Wakil
Chair, CBA Competition Law and Foreign Investment Review Section

Cc. Ian Macdonald, Chair, CBA Foreign Investment Review Committee

² Attached as Appendix A is a table that breaks these categories down by 2020 examples and 2021 examples (approximately 90% of total examples provided relate to 2021).

Appendix A**Survey Results: Notice of Certification of Post-Closing Notifications
in 2020 and 2021**

Notice of Certification Received after Date of Certification	Post-Closing Notifications in 2020	Post-Closing Notifications in 2021	Total (2020 and 2021)
More than 90 days	1	3	4
60 to 90 days	1	17	18
46 to 60 days	5	38	43
Less than 45 days	4	45	49
Total	11	103	114