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The Competition Act and the Investment Canada Act

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In Canada, legislation has been enacted to encourage competition, foreign investment and economic growth. The *Investment Canada Act* and the *Competition Act*, both federal pieces of legislation, maintain strict reporting requirements for transactions that meet certain prescribed thresholds. This article briefly summarizes the thresholds which trigger reporting requirements under these Acts. Industry Canada and the Competition Bureau annually release new thresholds and so it is important to review current information when making a determination about you or your client's reporting requirements.

Competition Act

The *Competition Act* is aimed at preventing anti-competitive practices in the marketplace. The Act requires entities to give advance notice to the Competition Bureau of proposed transactions where both of the following thresholds are met:

1. the "Size of the Target" threshold; and

2. the "Transaction Type" threshold.

In certain circumstances, failure to notify the Competition Bureau is a criminal offence.

The Size of the Target Threshold

The first step of the two-pronged test requires that the parties to the transaction and their respective affiliates have aggregate assets in Canada, or gross revenues from sales in, from or into Canada, in excess of $400 million.

The Transaction Type Thresholds

The second step of the two-pronged test requires that the prescribed thresholds relating to the type of transaction are met. For an asset acquisition, with respect to the acquired business, the value of the assets in Canada, or the revenues of the target firm generated in or from Canada, must exceed the prescribed 2014 threshold of $82 million. For a share acquisition, the same $82 million threshold applies, and one of two other criteria must also be met:

1. where the shares of the corporation are publicly traded, the transaction will not be notifiable unless, following the acquisition, the purchaser will own more than 20% of the outstanding voting shares, or more than 50% if, prior to the acquisition, the purchaser already owned more than 20%; or

2.where the shares are not publicly traded, the transaction will not be notifiable unless, following the acquisition, the purchaser will own more than 35% of the outstanding voting shares, or more than 50% if, prior to the acquisition, the purchaser already owned more than 35%.

The Act provides that notification is required for a proposed amalgamation of two or more corporations where the aggregate value of the assets in Canada of the continuing corporation, or the gross revenues from sales in or from Canada generated from those assets, exceeds $82 million. In addition, at least two of the amalgamating corporations must each have assets in Canada, or gross revenues from sales in or from Canada, in excess of $82 million. This second requirement provides that each of at least two of the amalgamating corporations must be large enough to meet the required financial threshold on its own. Accordingly, a corporation with less than $82 million in assets and revenues will not trigger a notification requirement simply by merging with a larger corporation.

Finally, for an acquisition of an interest in an unincorporated combination, the value of the assets in Canada, or the gross revenues from sales in or from Canada generated from those assets, must exceed $82 million and the purchaser and its affiliates must be entitled to more than 35% of the profits or assets on dissolution, or if more than 35% are already held, then they must be entitled to more than 50% of the profits or assets on dissolution.

Investment Canada Act

The purpose of the *Investment Canada Act* is to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities. The Act applies to parties who are not Canadian citizens or permanent residents. The term “non-Canadian” is defined in the Act as an individual, a government or an agency thereof or an entity that is not a Canadian. For the purposes of the Act, a non-Canadian includes any entity that is not controlled or beneficially owned by Canadians.

Generally, if the level of assets of the Canadian business being acquired is above the 2014 threshold of $354 million, and if a foreign entity is acquiring control of the Canadian business, then there is a requirement to file an Application for Review under the Act and receive the approval of the Minister to allow the transaction to proceed. If the level of assets of the Canadian business being acquired is below the threshold, then the requirement is only to file a notification of the investment (the “Notification”), which does not require the approval of the Minister and serves as notification of the investment only. The Notification can be filed online at any time prior to the implementation of the investment, or within 30 days thereafter.

For all investors, the thresholds for review for cultural businesses are $5 million for direct acquisitions and $50 million for indirect acquisitions. A cultural business includes a business that carries on any of the following activities: (1) publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, (2) production, distribution, sale or exhibition of film or video products; (3) production, distribution, sale or exhibition of audio or video music recordings; (4) publication, distribution or sale of music in print or machine readable form; or (5) any radio communication in which the transmissions are intended for direct reception by the general public and any radio, television and cable television broadcasting.

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