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New restrictions and divestiture orders send clear warning to foreign SOE investment in Canada's critical minerals sector

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On October 28, 2022, the Honourable François-Philippe Champagne, Minister of Innovation, Science and Industry (the Minister), together with the Honourable Jonathan Wilkinson, Minister of Natural Resources, issued a new policy relating to the treatment of foreign state-owned enterprise (SOE) investment in Canada's critical minerals sector (Policy) under the *Investment Canada Act* (ICA).

The Policy is effective immediately. It identifies minerals that the government has determined are essential to Canada's prosperity in emerging low-carbon and other technology sectors or that contribute to Canada's national security as vital inputs to defence and high technology. The Policy is intended to preserve Canada's access to critical minerals and to support the government's Critical Minerals Strategy, which in turn is designed to position Canada as the global supplier of choice for critical minerals.

The Policy applies to any direct or indirect investment by a foreign SOE in a Canadian business engaged in the "critical minerals" sector value chain, regardless of the size of investment or whether such investment is reviewable under the general net benefit framework of the ICA. In summary, the Policy states that, where the Minister is required to determine whether an investment of this nature is of "net benefit to Canada" that will be the finding on *an exceptional basis only*. Further, *all* foreign SOE investment in the critical minerals sector, regardless of size or value, will be subject to enhanced scrutiny under the discretionary national security review provisions.

Less than one week after issuing the Policy, the Minister announced that the federal government has ordered the divestiture of three separate investments in Canadian critical mineral companies involved in (among other things) lithium mining activities, both within and outside of Canada. The divestiture orders are a significant change in both approach and tone relative to recent cases such as the recent acquisition by Zijn Mining (a state-owned Chinese mining company) of Neo Lithium (a Canadian-headquartered lithium mining company with assets in Argentina), which was allowed without consideration of a full national security review. While the questions raised (including before the Standing Committee on Industry and Technology) about that decision may have played a role in the formalizing of a harsher approach towards investment in the critical minerals sector, the Canadian government has viewed such investment as an area of strategic importance for some time. The Policy also builds on the enhanced scrutiny that has been applied by the government under the revised Guidelines on the National Security Review of Investments since early 2021, as discussed in our earlier Update.

The divestiture announcement is also significant in its transparency about government actions under the national security review provisions. Historically, the federal government

has not routinely disclosed the outcome of a Cabinet-level national security review. The announcement includes a statement that in order to ensure transparency, the federal government will announce the outcomes of final Cabinet orders (i.e., non-approvals or approvals subject to conditions) on a going-forward basis.

Type of foreign investment impacted by the policy

The Policy applies to any investment by a foreign SOE in a Canadian business engaged in the "critical minerals" sector value chain, regardless of the size of investment or whether such investment is reviewable under the general net benefit framework of the ICA. To understand the implications of the Policy, it is important to unpack some of the key terms.

- A foreign SOE includes not only an enterprise that is owned or controlled directly or indirectly by a foreign government, but also an entity that is "influenced directly or indirectly" by a foreign government. Moreover, the ICA provides that the Minister may determine whether an entity is controlled in fact by a SOE.
- Furthermore, the Policy also applies to investments from private foreign investors assessed as being closely tied to subject to influence from, or who could be compelled to comply with, extrajudicial direction from foreign governments, particularly non-likeminded governments.
- The direct foreign investor need not be an SOE itself. Rather, indirect ownership in the investor by a foreign SOE is also captured.
- While the focus is clearly on non-likeminded governments, the Policy is not limited in its application to only certain countries.
- Canadian businesses for purposes of the ICA and the Policy do not need to be Canadian-owned and do not need to have their operations based in Canada.
- Critical minerals refers to those minerals "critical for the sustainable economic success of Canada and its allies" as set forth on Canada's Critical Minerals List, published on March 11, 2021. It includes the following 31 minerals:

Critical Minerals List

- Aluminum
- Antimony
- Bismuth
- Cesium
- Chromium
- Cobalt
- Copper

- Fluorspar
- Gallium
- Germanium
- Graphite
- Helium
- Indium
- Lithium
- Magnesium
- Manganese
- Molybdenum
- Nickel
- Niobium
- Platinum group metals
- Potash
- Rare earth elements
- Scandium
- Tantalum
- Tellurium
- Tin
- Titanium
- Tungsten
- Uranium
- Vanadium
- Zinc

The critical minerals sector includes all stages of the value chain (e.g., exploration, development and production, resource processing and refining, etc.).

New rules for foreign SOE investment in the critical minerals sector

Net benefit regime – exceptional basis only

Where an investment by a foreign SOE (or a foreign-influenced private investor as described above) results in a direct "acquisition of control" of a Canadian business and exceeds the applicable threshold for pre-closing Ministerial review under the general net benefit framework of the ICA, approval will only be issued on "an exceptional basis". Factors to be considered to determine whether a proposed investment would be of likely net benefit to Canada include

- the extent to which a foreign state is likely to exercise direct operational and strategic control over the Canadian business as a result of the transaction
- the degree of competition that exists in the sector, and the potential for significant concentration of foreign ownership in the sector as a result of the transaction
- the corporate governance and reporting structure of the foreign SOE
- whether the Canadian business to be acquired is likely to continue to operate on a commercial basis

The reference to approval being issued on "an exceptional basis" is reminiscent of the language in the 2012 SOE Guidelines as they relate to foreign SOE investment in the oilsands, and is similarly clearly intended to discourage and restrict significant acquisitions of control in the critical mineral sector by foreign SOEs.

National security regime – heightened risk

The Policy states that *all* investments by foreign SOEs (or foreign-influenced private investors as described above) that involve a Canadian business or entity operating in a critical minerals sector in Canada will form the basis for a finding that the investment could be "injurious to national security". The use of this phrase suggests that any foreign investors with direct or indirect SOE investment making an investment of any size in the critical mineral sector in Canada should expect to receive a notice, pursuant to section 25.2 of the ICA, that a Cabinet-level national security review of the investment *may* be ordered. This is an interim step in the national security review process and in many cases no further action is taken. However, the issuance of a 25.2 notice serves as a bar to closing if that has not yet occurred until confirmation from the government that no further action will be taken.

While a pre-closing filing may result in delay, the government's recent divestiture orders highlight the risk of post-closing review and possible remedial action to address national security concerns in circumstances where an investor chooses to submit a mandatory notification on a post-closing rather than pre-closing basis (for acquisitions of control where net benefit review is not triggered) or opts not to voluntarily notify the investment (for investments that do not involve an acquisition of control, as discussed in our earlier Update).

The Policy includes a list of factors that may be considered by the government as part of its national security review:

- the size, scope and location of the Canadian business
- the nature and strategic value to Canada of the mineral assets or supply chain involved
- the degree of control or influence an SOE would likely exert on the Canadian business, the supply chain and the industry
- the effect the transaction may have on the ability of Canadian supply chains to exploit the asset or access alternative sources (including domestic supply)
- the current geopolitical circumstances and potential impact on allied relations

For further information regarding the Policy or other questions relating to Canada's foreign investment review regime, please contact the members of Osler's Competition and Foreign Investment Group.