British Columbia Investment Management Corporation
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Mr. Roger Brake
The Executive Member
Foreign Investment Review Board
c/- The Treasury
Langton Crescent
Parkes ACT 2600

August 7, 2020
By email

Copy to: Mr. Andrew Deitz
Principal Adviser, Policy

By email:
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andrew.deitz@treasury.gov.au

Dear Mr. Brake,

British Columbia Investment Management Corporation – Submissions regarding proposed reforms to Australia's foreign investment review framework

We make reference to the Foreign Investment Reforms paper published on 5 June 2020 (**Proposed Reforms**) and implementation roadmap published on 31 July 2020 (**Implementation Roadmap**). We understand from the Implementation Roadmap that the draft amendments to the *Foreign Acquisitions and Takeovers Act 1975* and the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**FATR**) will be released in two tranches, the first of which was released on 31 July 2020 (with a consultation period to 31 August 2020), and the second of which is to be released in September 2020 (with a consultation period to follow).

We write in advance of the publication of the second tranche of the proposed amendments, as our submission relates to issues to be addressed in the second tranche of draft legislation, including streamlining measures and investor exemption certificates (please refer to detailed submissions below). We greatly appreciate the opportunity to provide feedback on the Proposed Reforms and thank you in advance for your consideration.

British Columbia Investment Management Corporation (**BCI**) is a leading provider of investment management services for British Columbia's public sector and one of the largest asset managers in Canada, with approximately C$171.3 billion of assets under management as of March 31, 2020. BCI was established pursuant to the *Public Sector Pension Plans Act* with a mandate to invest around the world and across a range of asset classes, including infrastructure, renewable resources, private equity and real estate, on behalf of its public sector clients. Although it is an agent of the government of British Columbia, BCI operates at arm's length from government and BCI's investment decisions are required by law to be made in the best financial interests of BCI's clients by the Chief Investment Officer of BCI or his

delegates (as opposed to BCI's board of directors and the government which are prohibited from being involved in investment decisions).

BCI is a long-term investor with a proven track record of conducting its operations to the highest governance standards and in compliance with law, and currently holds interests (typically alongside other co-investors) in a number of significant Australian investments, including Pacific National, Linx Cargo Care, Patrick Terminal Holdings, Endeavour Energy, Dalrymple Bay Coal Terminal and Navitas. BCI continues to consider Australia an attractive jurisdiction for investment, aligning with its focus on securing stable returns for its public sector clients, however because BCI is classified as a foreign government investor (**FGI**) within the meaning of FATR it is put at a competitive disadvantage relative to other foreign investors and faces significant cost, uncertainty and delays when making investments in Australia.

Accordingly, we request consideration of the following proposals which in our view ensure fair treatment of BCI and other similarly situated investors while continuing to promote the purposes of Australia's foreign investment review framework.

1. Low Risk FGIs

As noted, BCI is an FGI under the current Australian foreign investment review framework and as such its investments in Australian entities, business and assets are subject to mandatory Foreign Investment Review Board (**FIRB**) review. As a result, certain low risk and low value transactions, below the thresholds applicable to other foreign persons, require FIRB approval.

We welcome the recognition in the Proposed Reforms that targeted relief from the effective zero-threshold regime applicable to FGIs is appropriate to streamline less sensitive investments. However, we suggest that more extensive relief should be considered as the targeted relief set out in the Proposed Reforms would not apply to investment managers like BCI which are themselves FGIs (as opposed to investment managers with FGIs as investors), and the requirement for FIRB approval (with attendant uncertainty and delay) unduly disadvantages BCI relative to other investors. Apart from the additional administrative burden and cost, in a competitive auction process the current regime can significantly disadvantage BCI relative to other bidders who do not require FIRB approval as a closing condition, which ultimately makes it more difficult for investors like BCI to invest in Australia.

We submit that a distinction should be drawn in the foreign investment legislative framework between entities which are assessed to be essentially commercial investors that operate independently of government, as compared with true government bodies and state-owned enterprises which may have regard to political or strategic objectives. A system which would enable FGIs to be categorised as 'low risk' if they are able to satisfy FIRB (or other appropriate decision-maker) of their essentially commercial nature would enable practical distinctions to be drawn and in effect allow 'low risk' FGIs to be treated as non-FGIs (or otherwise relieved of some or all FGI restrictions) where appropriate.

Factors for determining whether an FGI is 'low risk' could include:

(a) whether the FGI invests based on commercial and financial considerations, rather than political or strategic considerations – in this regard, separation of management of the FGI from government, appropriate internal governance arrangements, legislative framework and required assurances and undertakings from senior management could be taken into account;

(b) whether the FGI is from a foreign country with whom Australia has a mature and productive relationship – in this regard, Australia and Canada have substantial investment ties and are both member countries of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and we note that the United States recognized both Australia and Canada as excepted foreign states in the regulations under the *Foreign Investment Review Modernization Act*, effectively exempting them from certain notification and screening requirements; and

(c) whether the FGI has a track record in undertaking investment activities in Australia in a responsible and law-abiding manner.

'Low risk' status could be conferred for a specified time period, with the ability to seek renewal, and also the ability for FIRB (or other appropriate decision-maker) to withdraw the status if it ceases to be satisfied that the FGI should qualify. There could also be periodical reporting against the requirements.

Alternatively, we understand that the Proposed Reforms provide:

(a) a new national security test which will allow investors to apply for an investor-specific exemption certificate; and

(b) investors which have a single foreign government with at least 20% ownership (without influence or control) to apply for a broad investor-specific exemption certificate,

which enable those investors to make eligible acquisitions without case-by-case screening.

However, it is unclear from the summary booklet in relation to the Proposed Reforms whether the first bullet point above is applicable to BCI and it would also appear potentially not to assist in relation to situations where the more general national interest test applies. Also, as noted above, the second path will not assist entities like BCI, given that BCI is itself an FGI and, as investment manager, will have influence or control over the relevant Australian investments.

We submit that it would be useful to clarify that the investor-specific exemption certificate regime (or that regime combined with existing exemption provisions) should be available in relation to all relevant tests, and also ask that consideration be given to making it available to FGIs with a 'low risk' status determined based on the factors described above. As discussed above in relation to 'low risk' status, an FGI exemption certificate could range in length and value, and be subject to conditions, including reporting conditions where necessary.

2. Global Transactions

In addition to direct investments in Australia, BCI has invested in global businesses headquartered outside of Australia which have a connection to Australia through operations or ownership of assets in Australia, and the effective zero value threshold applicable to BCI as an FGI requires such investments to be subject to mandatory FIRB review, even where the Australian component of a transaction may be very small. As a result, as noted, when bidding for such global businesses BCI is placed at a significant competitive disadvantage relative to non-FGIs. While we recognise the availability of the exception to section 56(1)(a) for acquiring non-material interests in non-sensitive businesses under section 56(4) of FATR, this exception will only very rarely be available for BCI given the A$55 million and 5% of total asset value threshold requirements. We submit that this is not appropriate, and that the A$55 million and 5%

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of total asset value thresholds in the exception in section 56(4) of FATR should be raised to a meaningful level (for example, A$275 million and 20%).

3. Drafting of Proposed Reforms regarding Investment Funds

BCI frequently invests in investment funds which under the Proposed Reforms may no longer be treated as FGIs because their FGIs have no influence or control over the investment or operational decisions of the fund or any of its underlying assets. In drafting the implementing legislation for these exemptions, we submit that care should be taken in ensuring that customary rights which investors such as BCI enjoy as investors in such funds, such as rights to sit on fund advisory committees and voting rights on certain material fund-level decisions, should not be considered to constitute influence or control.

In addition, BCI frequently directly co-invests alongside the investment funds in which it invests and in connection with those co-investments typically obtains governance rights including board representation and decision-making rights to ensure, among other things, that the investments adhere to BCI's environmental, social and governance standards. We submit that such co-investments should be considered separately from the fund investment, such that the requirements for funds to demonstrate no influence or control are clearly related to influence or control arising via the fund investment, and do not include any rights, influence or control arising from co-investments in underlying assets of the fund (recognizing that any such co-investments will generally themselves be subject to separate FIRB oversight). If this were not the case then the managers of funds in which BCI invests may not present co-investment opportunities to BCI or other FGIs, which would make it more difficult for FGIs like BCI to make large, long-term investments in Australia.

Thank you once again for your consideration of our submissions. Please let us know if you would like any further details or if it would be helpful to discuss in order to ensure BCI's ongoing commitment to Australian investment.

Yours sincerely,

Lincoln Webb
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Infrastructure & Renewable Resources

Jim Pittman
Executive Vice President and Global Head
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