

Foreign Investment Review Board updates to Guidance Note 47 on tax structures

The Foreign Investment Review Board (FIRB) is required to consider the tax structure of an investment proposal when determining if the proposal is contrary to the Australian national interest.

30 September 2020

Tax Guidance Note GN 47 requires FIRB to consider the impact the investment proposal would have on Australian tax revenues and the integrity of the Australian tax system.

The ATO is now consulted on all foreign investment proposals and the ATO provides a risk rating to the Treasurer along with qualitative advice on the risk to tax revenues. The Treasurer takes into account the risk rating in determining whether to approve an investment. The risk rating scale is:

- **Low:** the ATO has not identified significant tax issues
- **Medium:** there may be a risk to tax revenue or the integrity of the tax system
- **High:** there is a clear risk to tax revenue or to the integrity of the tax system.

The ATO will take into account the tax compliance history of the applicant and its related parties in determining its rating. The ATO can also recommend to the Treasurer that tax conditions are applied to any FIRB approval to protect the Australian national interest. These conditions can take the form of 'standard' conditions or where a particular tax risk is identified the ATO can recommend 'additional' conditions are imposed on the applicant.

The effect of the standard conditions is generally to require compliance with Australia's tax laws, co-operation with the ATO by producing information in a timely and complete manner, payment of outstanding tax debt and reporting on compliance with the conditions.

The additional conditions will generally be imposed where a particular tax risk is identified. The additional conditions can be onerous for an applicant. Examples of additional conditions include:

- Providing regular periodic reporting on specific information to the ATO including forecasts of tax payable
- Providing information on the acquisition structure
- To enter into good faith negotiations with the ATO for an advanced pricing arrangement
- To request a private binding ruling
- To take action to resolve outstanding tax issues.

Guidance Note 47 was updated on 21 September 2020 to:

- Provide clarity regarding the ability, and the process for investors to discuss imposed conditions with the ATO/Treasury; and
- Extend the 'additional' tax conditions that can be applied to an applicant.

The imposition of additional conditions on an applicant can significantly delay and complicate FIRB approval and can impede operations post FIRB approval. GN 47 now clarifies that where FIRB is seeking to impose additional conditions, the applicant will:

- Have the opportunity to put forward questions relating to the effect and operation of the tax condition
- Be entitled to submit comments to the particular decision maker
- Have the ability and opportunity to discuss complex or novel tax conditions, technical issues and errors with proposed conditions with the ATO or jointly with the ATO and Treasury.

GN 47 also expands the types of additional conditions that FIRB may impose on a potential foreign investor. Where a particular tax risk has been identified by the ATO, the applicant may now be asked to provide, amongst other things:

- Any aspects of the proposed investment / transaction that may be covered by an ATO Taxpayer Alert. Taxpayer Alerts generally cover what the ATO believe are new or emerging higher risk arrangements
- Confirmation of entities (if any) that would be members of a 'Tax consolidated group' in the applicant's post-acquisition structure
- Confirmation of any intangible assets that are to be transferred to offshore entities following their acquisition under the proposed transaction.

Where requested, the applicant must provide the above to Treasury **within 90 days of the transactions completion.**

Who does it impact?

These changes, and the process itself, will impact foreign purchasers requiring FIRB approval. The changes may also impact Australian vendors seeking foreign purchasers.

Important dates

The GN47 update is effective from **21 September 2020.**

How ShineWing Australia can help

The ATO has a significant voice in determining whether particular foreign investments are contrary to the Australian national interest. FIRB applicants are being increasingly asked for more and more information on their proposed investment structures and intentions after a successful acquisition.

It is important that investors understand what investment structures will attract a higher risk rating from the ATO, and what structures may lead to a higher degree of scrutiny by the ATO. These structures will both increase the risk rating (and thus decrease the chance of FIRB approval) and will likely delay FIRB approval times.

It is equally important that investors consider how they will structure their Australian investments before seeking FIRB approval. The acquisition structure will be provided by FIRB to the ATO. The ATO may impose conditions that may complicate a post FIRB restructuring. In some circumstances an investor may be 'stuck' with a structure that has been approved by FIRB notwithstanding that it is not the most tax efficient structure.

Investors should have a tax investment strategy developed prior to the FIRB application and Investors should ensure that information provided to FIRB and the ATO will not prejudice future plans and proposals.

Get in touch with our experts for further assistance and advice.



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