



Australian Government
The Treasury



Ministerial Submission

MS23-000141

FOR ACTION - Enhanced Risk-Based Framework to Guide Foreign Investment Decision-Making

TO: Treasurer - The Hon Jim Chalmers MP

TIMING

By 17 February 2023. We can brief you and your office further in February as required.

ATTACHMENT D – MANAGING TAXATION RISKS

- The foreign investment framework complements and supports broader initiatives to address multinational tax issues as the impact on Australian taxation revenue and the integrity of the tax system are key considerations when assessing the national interest implications of a foreign investment proposal.

s 37, s 47E(d)

Foreign Investment Review Board (FIRB)

09 December 2021

Treasury Update: Compliance

Decision required

The Board is asked to:

- **Note** the report on compliance activities (**Attachment A**).

Attachment A — Report on Compliance Activities

s 22



Conditions Library

- The Compliance Branch recently undertook a review of board and governance conditions to assess the extent to which these conditions are practical and effective in mitigating current and emerging risks to Australia's national interests.
- The board and governance conditions are intended to strengthen the likelihood that the board and senior management of the investor/target company will operate in a manner which is not contrary to the national interest and which is consistent with Australian business practice.

s 47E(d)

- The review found:
 - Used effectively, board and governance conditions can be useful in mitigating risks to Australia's national interests arising from foreign investment, including the risk that foreign involvement in company decision-making leads to outcomes which do not reflect Australia's corporate governance standards, community expectations or are otherwise not based solely by commercial rationale.

s 47E(d)

Foreign Investment Review Board (FIRB)

24 February 2023

FID Regulatory Practice & Standards Unit (RPSU) – Quarterly Update

Decision required

The Board is asked to:

- Note progress made on the establishment of the Regulatory Practice & Standards Unit, and its mission to further develop the approach to the maturing of the foreign investment regulatory system (**Attachment A**)

Key points

s 22

We have also further developed the Foreign Investment Conditions Library (the Library) to support FID in continuing to respond to current foreign investment risks and challenges by:

- Finalising the review of the Library's board and governance conditions. This was the first substantial review of a category in the Library since its first publication, with the updated guidance published in version 10 of the Library released on 10 January 2023.
- Developing a forward plan for future updates to the Library, which includes the intention to implement the relevant outcomes of the Regulatory Posture Review.

s 22

Resourcing implications

Nil

Risks

Not applicable

Consultation

Progress on RPSU's priorities has been, and will continue to be, achieved through consultation and collaboration across FID.

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Assistant Secretary Practice & Systems Branch

Foreign Investment Division

P: s 22

M: s 22

15 February 2023

Attachment A – Report on RPSU activities

s 22



Conditions Library – Version 10 release and 2023 forward plan

The Foreign Investment Conditions Library (the Library) provides FID with a list of commonly used conditions categorised depending on the type of risk to the national interest to be addressed and the sector of investment. The Library is intended to increase consistency in the application and wording of conditions. It is a living resource and therefore needs to adapt as risks in foreign investment change or shift, new areas for foreign investment develop, or challenges in the effectiveness of the conditions are identified (whether through engagement with applicants or partner agencies, or through assuring compliance).

With the intention of ensuring the Library continues to respond to current foreign investment risks and challenges, we undertook the first major review of a conditions category since the development of the Library. For the review, we evaluated the ongoing relevance and use of board and governance conditions since the 2021 foreign investment reforms and the greater focus in FID on compliance. The review resulted in a significant update to the guidance for the board and governance conditions to ensure they are targeted in the most efficient and effective way to mitigate risks to the national interest or national security, and to balance the conditions to reasonably address challenges identified by investors in meeting their obligations.

s 47E(d)

s 47C, s 47E(d)

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Ref: EC23-001269

Foreign Investment Review Board (FIRB)

26 May 2023

Sensitive sectors and the use of FATA conditions

Decision required

The Board is asked to:

- **Note** the role of conditions (governed by FID's Conditions Framework) in managing risks to national interest and national security under the *Foreign Acquisitions and Takeovers Act 1975* (FATA).

s 47E(d)

Key points

Conditions imposed on acquisitions are the regulatory mechanism by which the Government can allow foreign investment to proceed, while managing identified risks to the national interest or national security associated with it.

However, the conditions that can be imposed are not without constraint, and are subject to endorsed conditions principles, including to ensure they are permissible under the FATA. They are also not capable of effectively managing certain risks, and would not necessarily be an appropriate regulatory mechanism in those circumstances.

The Conditions Framework

- The Board has previously been briefed on FID's Conditions Framework, which governs the imposition and drafting of conditions recommended for conditional no objection notifications and exemption certificates.
- The Conditions Framework consists of:
 - a set of guiding principles for developing conditions (endorsed by the Treasurer in June 2022), published in a guidance note and other material for stakeholders available on www.firb.gov.au (Attachment A)
 - a comprehensive conditions library of the most commonly imposed conditions that Treasury staff and Commonwealth partner agencies have access to.
- The endorsed guiding principles for developing conditions require that (among several other requirements) conditions must be both necessary and effective.

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- Conditions must also be allowable (that is, imposed on the investor itself (and not the target)), outcomes focused, risk based, workable, efficient, clear, observable, compliant with domestic and international obligations, and enforceable.
- Where a condition does not meet all of these requirements, it should not be recommended.

What makes a condition 'necessary' and 'effective'?

- The FATA mandates that conditions imposed on investments must be necessary to ensure the action will not be contrary to the national interest or, for decisions in relation to actions specified in section 74(1A) of the Act, contrary to national security.
 - In order to be necessary, there must be a nexus between the imposed condition and the identified risk. The condition must treat the risk.
- A condition must also be determined to likely be effective in managing the identified risk, to be able to be considered necessary.
 - A condition that is unlikely to mitigate the risk, or does not directly mitigate the risk, is unlikely to be considered effective and will therefore not be necessary to mitigate that risk.
 - Conditions that merely 'nudge' an investor to act in a certain way, but do not directly require it, are unlikely to be considered effective.
 - Similarly, conditions that require/prohibit a certain activity or action, with the intention that this will influence a flow-on activity or action (the actual targeted risk), are unlikely to be considered to meet this threshold.
- In addition to the above, an imposed condition must also represent the best available way to mitigate identified national interest or national security risks.

Limitations of conditions in risk management

- Where a risk is identified but a condition cannot be applied that satisfies the Conditions Framework, then that risk should not be managed by the imposition of conditions under the Foreign Investment Framework.
- Consideration should be given to whether the risk can/is mitigated by other means (for example, other domestic legislation), or whether the acquisition should be prohibited from proceeding entirely.

Resourcing implications

Nil

Consultation

Not applicable

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Guidance note on conditions principles



Australian Government

Foreign Investment Review Board

GUIDANCE 11

PROTECTING THE NATIONAL INTEREST: GUIDING PRINCIPLES FOR DEVELOPING CONDITIONS

Last updated: 5 July 2022.

- This Guidance Note explains the guiding principles for the development of advice to decision makers under the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**) relating to the imposition of conditions under section 74 of the Act.
 - The imposition of conditions on foreign investment proposals is guided by the need to facilitate foreign investment while protecting the national interest and balancing regulatory burden with compliance assurance outcomes.
 - Where a decision is to be made in relation to an action of a type identified in section 74(1A) of the Act, only factors relating to national security may be taken into account. References in this Guidance Note to 'national interest or national security' are intended to differentiate between decisions made in respect of significant actions or an exemption certificate, where national interest considerations including but not limited to national security may be taken into account, and decisions in relation to actions identified in section 74(1A) of the Act where only national security considerations are relevant.

Looking for more?

A: The National Interest Test	2
B: Conditions	2
C: Guiding principles	3
D: Regulatory Approach – how are conditions used?.....	4
E: Types of conditions	4
Further information	7

A: THE NATIONAL INTEREST TEST

Australia's foreign investment review framework balances the need to welcome foreign investment with the need to reassure the community that the national interest is being protected.

The national interest, and what would be contrary to it, is not defined in the Act. Instead, the Act confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest. A range of factors typically taken into account in assessing the impact of a proposal on the national interest is set out in *Australia's Foreign Investment Policy*.

Typically, the Government considers the following factors when assessing foreign investment proposals in all sectors of the economy:

- National security
- Competition
- Other Australian Government policies (including tax)
- Impact on the economy and the community
- Character of the Investor

Where a decision is to be made in relation to an action of a type identified in section 74(1A) of the Act, only factors relating to national security may be taken into account. References in this Guidance Note to 'national interest or national security' are intended to differentiate between decisions made in respect of significant actions or an exemption certificate, where national interest considerations including but not limited to national security may be taken into account, and decisions in relation to actions identified in section 74(1A) of the Act where only national security considerations are relevant.

B: CONDITIONS

Under section 74 of the Act, the Treasurer can issue a no objection notification for certain investments (defined in the Act as 'significant actions') subject to one or more conditions if the Treasurer considers that the conditions are necessary to ensure the investment is not contrary to the national interest. Under amendments to section 74 commencing from 1 January 2021, conditions may also be imposed in respect of certain actions other than significant actions, if the Treasurer is satisfied that they are necessary to ensure the action will not be contrary to national security. Exemption certificates issued under Division 5 of Part 2 of the Act may also include conditions that a foreign investor or a developer is required to comply with.

Simply put, conditions are the regulatory mechanism by which the Government can allow foreign investment to occur while at the same time managing the risks to the national interest or national security associated with it.

Conditional no objection decisions under the Act are made at a point in time, based on an assessment at that time of the risks to the national interest (or to national security only if the decision were made under section 74(2)(a)(iii) or (iv)). Under section 74 of the Act, conditions attached to a "no objection" decision may only be varied if the Treasurer is satisfied that the

Protecting the National Interest: Guiding Principles for Developing Conditions

variation is not contrary to the national interest or to national security as relevant, and that either the applicant has consented to the variation or that the variation does not disadvantage them.

Repeat investors may find that modified terms of conditions are imposed in relation to later investments. This reflects the assessment of risk to the national interest or national security at the time of the later investment. In order to reduce regulatory burden, it is open to the investor to apply for a variation of earlier conditions to align with the later ones. It is likely that such requests would be considered favourably by the decision-maker.

C: GUIDING PRINCIPLES

While each foreign investment proposal subject to the Act is considered on its merits on a case by case basis, the Treasurer has endorsed a set of guiding principles against which the Treasury will frame any recommendation for conditions on a proposed foreign investment. These principles are drawn from a combination of requirements set out in the Act, matters addressed in the [Australian Government Regulator Performance Framework \(the RPF\)](#) and sound regulatory practice. They provide a framework for Treasury, consult partners and the Foreign Investment Review Board (FIRB) to work within when developing advice for decision-makers.

Threshold considerations

Mandated in legislation

- **Necessary** – Are the conditions necessary to ensure the action will not be contrary to the national interest or, for decisions in relation to actions specified in section 74(1A) of the Act, contrary to national security?
- **Allowable** - Are the conditions being imposed on the person (or persons) taking a significant action, a notifiable national security action, an action in respect of which the Treasurer has given a notice under section 66A(4) or a reviewable national security action, or to whom an exemption certificate is issued?

Non-legislated

- **Effective** - Do the conditions represent the best available way to mitigate identified national interest or national security risks and, so far as it is possible to assess, will they continue to do so in an enduring manner?
- **Outcomes Focused** – Do the conditions achieve the best foreign investment outcome in light of Australia's foreign investment policy?

Regulatory approach

- **Risk Based** - Are the conditions proportionate to the identified risk?
- **Workable** – Are the conditions able to be implemented by the investor?
- **Efficient** - Do the conditions impose the minimum burden necessary to mitigate identified risks to the national interest or to national security?

Compliance and integrity

- **Clear** - Are the conditions clear as to what is being required of the investor?

Protecting the National Interest: Guiding Principles for Developing Conditions

- **Observable** – Is compliance with the conditions able to be monitored?
- **Compliant** - Do the conditions comply with domestic and international obligations?
- **Enforceable** - Are the conditions legally enforceable?

While the principles will be taken into account in recommending conditions, they are not binding on the decision-maker. The decision-maker has a legal obligation to take into account the merits of a particular case when making a decision.

D: REGULATORY APPROACH – HOW ARE CONDITIONS USED?

The Treasurer is the decision-maker responsible for Australia's foreign investment policy and administration of the Act. The FIRB is a non-statutory body established to advise the Treasurer and the Government on Australia's Foreign Investment Policy and its administration.

As the regulator, the Treasury formulates proposed conditions to address national interest risks identified in consultation with partner agencies for consideration by the FIRB and the Treasurer.

As the agency responsible for administering the Act, the Treasury has three objectives when considering the viability and appropriateness of conditions:

- To ensure that conditions meet legal requirements, including that they are required to mitigate risks to the national interest or national security;
- To ensure that conditions are consistent with our regulatory approach under the Regulator Performance Framework and limit the impact of regulatory activity on investors, where possible; and
- To ensure that conditions uphold the integrity and credibility of the foreign investment regime, including through enabling appropriate compliance monitoring, and enforcement when needed.

In preparing its advice on what conditions, if any, are necessary to ensure that the proposal would not be contrary to the national interest or to national security, or whether they should be imposed on an exemption certificate, the Treasury consults with a range of Commonwealth, state and territory partner agencies to ensure a whole of government perspective is applied.

Recommendations from the Treasury and its partner agencies must be in accordance with the legal requirements of the Act and consistent with Australia's international agreements.

In addition, Commonwealth regulators that administer, monitor or enforce regulation are required to implement the RPF. The RPF was established in 2015 and forms an important part of the Government's commitment to reduce unnecessary and inefficient regulation. It encourages regulators to minimise the regulatory burden created through their administration of regulation.

E: TYPES OF CONDITIONS

To support the guidance principles, in consultation with partner agencies, the Treasury seeks to apply consistent conditions to foreign investment proposals while still recognising the need to be flexible in addressing the risks posed by individual cases.

Protecting the National Interest: Guiding Principles for Developing Conditions

Commonly used conditions are grouped according to the type of risk to the national interest they seek to mitigate, or the mechanism by which they do so. Over time, it is expected that this will support better regulatory practice and improve investor experience by streamlining the process of developing and settling conditions.

The national interest

The Act confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest.

The Government recognises community concerns about foreign ownership of certain Australian assets. The framework allows the government to consider these concerns when addressing Australia's national interest.

The Treasury considers a range of factors and the relative importance of these can vary depending upon the nature of the foreign investment proposal. These are further discussed in *Australia's Foreign Investment Policy*.

Types of condition commonly used to address aspects of the national interest

Note that the examples provided below represent a non-exhaustive description of the characteristics of some conditions used to mitigate risks arising from different types of foreign investment.

- **General Considerations**

Reporting conditions are applied to all conditional no objection notifications and exemption certificates recommended by Treasury.

If only standard tax conditions are imposed, the reporting obligations are contained within those. See the *Tax Conditions* Guidance Note.

For other conditional no objection notifications there will be a requirement for independent compliance audit or, in low risk, low consideration cases, for reporting in a specified form by an officer of the investor. See the *Conditions Reporting* Guidance Note for further details.

Investors receiving an exemption certificate are typically required to provide periodic reporting detailing all acquisitions made under the certificate and to report on any material change in their ownership structure. If the exemption certificate is subject to geographic or other sub-limits or other constraints, there may be independent audit reporting required in relation to compliance with those elements.

National security

Several types of condition are employed to address national security risks, whether as a subset of broader national interest considerations or specifically under the national security powers of the Act, depending on the nature of the investment and the assessed risk.

Board and governance conditions are designed to support national security by more closely connecting the company with Australian values, regulatory environment and community perspectives. They signal the importance of Australia's interest to incoming investors. Typically they may specify:

- a certain number or proportion of directors who are Australian citizens ordinarily resident in Australia;

Protecting the National Interest: Guiding Principles for Developing Conditions

- characteristics of the Chair; and/or
- requirements for a quorum.

Conditions relating to the treatment of sensitive data seek to mitigate risks of unauthorised access, corruption, denial or exfiltration. They may specify:

- requirements for development and implementation of data security policies and procedures that extend beyond the requirements of general Australian law;
- restrictions on access to specified data by directors, representatives and staff of the investor;
- restrictions on the location of data storage and access;
- cybersecurity arrangements; and/or
- reporting requirements in the event of a data breach.

Conditions relating to sensitive infrastructure seek to mitigate risks relating to espionage and sabotage and may include ensuring that operational control or maintenance of sensitive assets generally occurs from within Australia.

Conditions relating to commercial property seek to mitigate risks relating to client security, and may include:

- notification to tenants of changes in ownership and/or property management; and/or
- restrictions on investor access to the property.

Conditions may also be imposed to restrict the types of activity permitted on land in close proximity to sensitive land or facilities.

Other Australian Government policies (including tax)

Standard tax conditions are set out in the *Tax Conditions* Guidance Note.

Conditions to support competition policy may restrict the aggregate ownership by associated investors in a specific industry or sub-market.

Impact on the economy and the community

Conditions designed to mitigate risks to the community or to the national or regional economy may seek to ensure that there is no abrupt dislocation of a regional economy, that iconic Australian brands remain in production, that there are limits to the extent of foreign control and/or management in a particular investment or sector; or that domestic supply of certain goods is preserved. Examples may include:

- requirements to maintain company headquarters in Australia;
- requirements to limit aggregate overseas control of an investment and/or to ensure Australian management in key positions;
- requirements to maintain production facilities in specified regional areas without loss of employment for a specific period;

Protecting the National Interest: Guiding Principles for Developing Conditions

- requirements that there should have been an open opportunity for Australian investors to acquire a parcel of agricultural land before its purchase by a foreign investor; and/or
- limitations on aggregate holdings by an investor and its associates in a business, an industry sector or a geographic region.

Conditions in relation to undeveloped land seek to mitigate risks associated with land banking and speculation. They may include:

- requirements to commence continuous construction on the land within a specified period and to not sell the land until construction is complete; and/or
- specification of the type of activity which may be carried out on the land.

FURTHER INFORMATION

Further information is available on the [FIRB website](#) or by contacting 1800 050 377 from Australia or +61 2 6216 1111 from overseas.

Important notice: This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.