

Issue 07 | February 2016

The Treasurer of the Commonwealth of Australia announced on 22 February 2016 that new requirements will be imposed on foreign investment applications to ensure compliance with Australian tax laws. This follows the overhaul of the foreign investment laws implemented at the end of last year. The Treasurer has stated that the new requirements will add to the 'already strengthened' framework.

Foreign investment applications will now be subject to a set of standard conditions that must be met in order for an application to be considered as not against the 'national interest'. These include a broad condition that investors "must comply with Australia's taxation laws" in relation to the proposed investment and any transactions, operations or assets in connection with the assets or operations acquired, directly or indirectly, as a result of the investment. The obligation on the investor is not limited to its own compliance, but also extends to investors ensuring that their 'associates' comply with the condition if it is within their powers to do so, or otherwise using their best endeavours to do so. Other conditions include:

- complying with information requests from the Australian Taxation Office (ATO) in relation to proposed investments;
- advising the ATO if investors enter into any transactions with non-residents to which transfer pricing or anti avoidance measures in respect of Australian tax law may potentially apply; and
- the requirements to report to the Foreign Investment Review Board (FIRB) annually on compliance with the conditions.

Additional conditions may also be imposed on a case-by-case basis where a significant tax risk is identified. Such conditions could involve a requirement that the investor enter into advance pricing arrangements with the ATO or seek pre-transaction rulings.

A failure to meet any of the conditions may result in prosecution, fines and/or the Treasurer ultimately ordering a divestment of Australian assets.

A full list of the standard conditions that are stated to be imposed 'prospectively' are set out in Attachment A to the Treasurer's Press Release and can be found [here](#).

Given the broad nature and wording of the conditions, it is not clear at this stage how they will be interpreted and applied in practice. In many respects, they raise a number of questions that will need to be considered in greater detail and will require further guidance from the ATO and FIRB. It is understood that FIRB intends to release a guidance note on the conditions shortly.

More than ever before, it is clear that the ATO has a large role to play in the foreign investment application framework. The move to incorporate tax-related compliance as a condition of the Treasurer approving investment applications reinforces the increased importance that tax-related matters have had in the FIRB review process in recent times. Given the breadth of the conditions that may now be imposed, it is essential that foreign investors seek tax and legal advice early in the investment process – particularly in cases where it is likely that the ATO will request further information in relation to the proposal or will expect the investor to obtain pre-transaction rulings or enter into arrangements with the ATO.

We anticipate a significant reaction from taxpayers and substantial consultation before the guidance is released. As more guidance becomes available, we will provide further updates.

The KPMG FIRB team in Australia is comprised of expert tax advisors and corporate transactional lawyers with extensive experience in handling FIRB applications.

As a committed tax advisor to our clients, we welcome any opportunity to discuss the relevance of the above matters. If you need further clarification, please contact us. Our details are listed on the right.

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