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# Global Tax Alert

News from EY Law

## Australia to require Foreign Investment Review Board approval for most foreign investment transactions, including internal reorganizations

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On 29 March 2020, the Australian Government announced with immediate effect that:

- ▶ All proposed foreign investments into Australia will require approval from the Foreign Investment Review Board (FIRB), regardless of value (i.e., the monetary threshold is temporarily \$0 for foreign investment), including **internal reorganizations**.
- ▶ The above applies to investments where the specific investor will acquire a 20% ownership interest or increase a pre-existing ownership interest of 20% or more, except for the media sector where the acquisition threshold is 5% ownership or more, and importantly includes internal reorganizations (e.g., where an ownership interest of 20% or more is transferred within a group).
- ▶ However, the above does not apply to existing agreements entered into before 10:30 pm AEDT 29 March 2020 where the investment has not been completed and that investment either had or did not require FIRB approval.
- ▶ The permitted time period for FIRB to consider any application for approval is now 6 months and not 30 days.

The above changes are expected to be temporary due to the current COVID-19 pandemic and Australia is still open for foreign investment however it is not known how long these new procedures will remain.

In the absence of advance approval, FIRB has the power to unwind transactions and impose penalties.

## Implications

These changes introduced by FIRB may impact foreign investments into Australia under the following conditions:

- ▶ A foreign investor will acquire a 20% or more ownership interest (direct or indirect).
- ▶ A foreign investor will acquire at least an ownership of 5% or more in a business in media sector.
- ▶ A foreign investor will increase a pre-existing ownership interest of 20% or more.

All monetary thresholds that previously applied have been temporarily reduced to \$0.

Such transactions, including **internal reorganizations** (e.g., where an ownership interest of 20% or more is transferred within a group), may now require prior FIRB approval, regardless of value or the nature of the foreign investment.

By way of example, prior to this change, acquisitions in non-sensitive businesses only required FIRB approval where the acquisition threshold was more than AU\$275 million/ AU\$1,192 million (depending on the investor's country). This represents a significant change that may impact deals currently underway.

The FIRB has since confirmed that the new \$0 threshold does not apply to transactions where an agreement was entered into before 10:30 pm AEDT 29 March 2020 but the acquisition itself has not yet occurred (e.g., due to unmet conditions in the agreement). In other words, if the transaction documents have been signed before 10:30 pm AEDT 29 March 2020 and that transaction either had or did not require FIRB approval, the transaction may proceed.

By temporarily reducing the foreign investment thresholds, the Australian Government seeks to gain appropriate oversight over all proposed foreign investments during this time.

The Australian Government has indicated this is not an investment freeze, Australia is still open for business and investments will continue to be approved where these align to the Australian national interest.

In the absence of advance approval, FIRB has the power to unwind transactions and impose penalties.

Depending on the stage of the agreement, this **may immediately impact deals involving both external acquisitions and internal reorganizations** where the 20% (or 5% for media sector) ownership (direct or indirect) threshold is met in relation to an Australian company/ Australian subsidiary.

Accordingly, businesses should evaluate the impact of this change on any existing and proposed transactions, including **internal reorganizations** to ensure this approval is applied for in advance.

The FIRB will continue to work with the Australian Taxation Office (ATO) to review the potential tax impact of nonresidential foreign investment proposals. As part of its review, the ATO will generally impose standard taxation conditions and where appropriate additional or specific taxation conditions. The standard tax conditions are aimed at encouraging overall adherence to Australian taxation law through tax compliance and transparency with the ATO.

EY Law can assist in preparing and submitting these applications.

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