



## COMPLIANCE REPORTING REQUIREMENTS INCLUDING INDEPENDENT AUDIT REPORTING CONDITIONS

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This guidance document incorporates content from the pre-1 January 2021 FIRB website and Guidance Notes 51 and 52, as well as new content indicated by a side bar. Please note, this is a temporary provision to assist reader's transition to these new guidance documents and may be removed in due course.

- This guidance note provides information on:
  - circumstances where foreign investors need to report on their compliance with conditions;
  - the different types of reports that might be required;
  - how a compliance report should be prepared; and
  - meeting obligations under independent audit reporting conditions (including the circumstances in which they may be applied).
- Under section 74 of the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**), the Treasurer may decide that the Commonwealth has no objection to certain foreign investments (defined in the Act as 'significant actions', 'notifiable national security actions' or 'reviewable national security actions'), subject to one or more conditions being imposed that the Treasurer is satisfied are necessary to ensure the action will not be contrary to the national interest (or national security, as the case requires).
  - Exemption certificates issued under the Act may also include conditions that a foreign investor will need to comply with.
- Generally, if conditions are imposed, these will also include conditions requiring reporting on compliance with the conditions.
- A foreign investor's specific compliance reporting obligations are set out in the relevant no objection notification or exemption certificate issued to them.
  - These reporting conditions may require an officer of the investor to certify the investor's compliance with the conditions or require that an independent audit regarding compliance with the conditions be carried out periodically. Exemption certificates issued under the Act also may include independent audit conditions.
- A template for preparing compliance reports that can be used by investors appears at [Attachment A](#) of this guidance note. The information provided in this guidance note is general advice and must be read in conjunction with the relevant no objection notification or exemption certificate.

**Note**

From 1 January 2021, all foreign investors who have been given a no objection notification or an exemption certificate after that date **must notify** the Treasurer of certain events (or situations) or when they take certain actions. These actions and situations are defined in the Act and relate to any core Part 3 action. Further information on the new reporting requirements is available on the [FIRB website](#). Investors given a no objection notification or exemption certificate prior to 1 January 2021 must continue to meet their obligations as specified in the no objection notification or exemption certificate.

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## A: WHY DO YOU NEED TO REPORT ON YOUR COMPLIANCE?

Reporting by foreign investors provides Treasury with the information it requires for monitoring investors' compliance with the conditions of their foreign investment approvals and for targeting its compliance activities as necessary. Importantly, it also provides an avenue for foreign investors to continuously engage with Treasury on compliance issues, including potential instances of non-compliance.

## B: TYPES OF COMPLIANCE REPORTS

Whilst a foreign investor should rely on the specific reporting obligations set out in the relevant no objection notification or exemption certificate, the list below captures several of the categories reports fall in to:

- Notifications about when proposed actions or transactions occur.
- Reporting on acquisitions made under an exemption certificate.<sup>1</sup>
- Periodic reporting on compliance with tax and other conditions.
- Reporting on breaches of conditions.
- Reporting on remedial actions where a compliance issue has arisen.

This is not an exhaustive list, and in some cases, conditions may require a foreign investor to provide a bespoke report. Each type of report requires a different set of information, and a foreign investor may be required to submit more than one type of report for the same investment.

## C: HOW SHOULD A COMPLIANCE REPORT BE PREPARED?

A report should be prepared in accordance with the conditions set out in the relevant no objection notification or exemption certificate (including those that have been subject to a variation).

Each type of report requires different information to be included, and there is no prescribed form or template for most reports unless otherwise provided in the condition. However, there is specific guidance available on the [website](#) for certain types of reporting, such as acquisitions made under exemption certificates issued before 1 January 2021. For exemption certificates issued on or after 1 January 2021, please see [here](#) for guidance on notification requirements under sections 98D and 98E of the Act, that are in addition to the requirements as outlined in the relevant exemption certificate. Section 98D of the Act requires that a person must notify the Treasurer of taking an action specified in an exemption certificate. Section 98E of the Act requires a person to notify the Treasurer after the action has been taken, when specified related events take place.

The Commonwealth is likely to consider the following factors in considering whether reports that have been prepared fulfil the relevant [conditions](#):

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<sup>1</sup> For a no objection notification or exemption certificate given on or after 1 January 2021, an investor must report on these matters as specified on the FIRB website.

- Timeliness including with reference to tax reporting dates and accounting periods.
- Who prepares and signs off on the report, and their role(s) in relation to the foreign investor (for example, CEO or other officer of the investor, or Commonwealth approved independent auditor).
- Accurate, factual and complete information.
- Quality, depth and relevance of information and evidence provided.

## **D: TIMELINESS**

Reports, including notifications of acquisitions, should be submitted by the date and via the mechanism (for example, email address) specified in the conditions. If the conditions are silent on the mechanism to submit the report, please email the compliance report to [firbcompliance@treasury.gov.au](mailto:firbcompliance@treasury.gov.au).

The reporting period set out in the conditions should be adhered to. Where it is not clear when a compliance report is due, the generally acceptable practice is that it should be submitted as soon as practicable following the end of the reporting period or triggering event (for example, the completion of an acquisition). Significant [penalties](#) (including infringement notices, civil and criminal penalties) may apply for breaches of the law.

If there is a compelling commercial reason for varying the timing of the reporting period or when a specific report is due, foreign investors should engage as early as possible with Treasury at [firbcompliance@treasury.gov.au](mailto:firbcompliance@treasury.gov.au). Treasury will seek to work with foreign investors to support them in achieving compliance, and in some instances, reporting deadlines may be able to be extended.

### **Tax reporting dates and accounting periods**

If a foreign investor does not have tax obligations in Australia, then they should submit their report to the ATO in accordance with when the Australian target entity (if relevant) submits its tax returns.

If a foreign investor has tax obligations in Australia, then they should provide their standard tax conditions compliance report at the same time that they submit their annual tax return to the ATO. In preparing their report, they should use the accounting period of the standard Australian financial year (1 July to 30 June) or a substituted accounting period as approved by the ATO. For more information on substituted accounting periods, please see the [ATO website](#).

For further information on reporting under tax conditions please see below.

## **E: WHO PREPARES AND SIGNS OFF ON THE REPORT AND THEIR ROLE(S) IN RELATION TO THE INVESTOR**

An investor's conditions will generally state what is considered an appropriate level of assurance for a report (for example, that the report is to be signed by the chief executive officer of the foreign investor or an independent audit firm). If it does not, assurance should generally be

provided by an officer<sup>2</sup> of the investor. The report should specify that the assurance was given on the basis of reasonable enquiries made by the person signing it, and should detail any elements of material non-compliance with the relevant conditions. The person signing off the report should be able to explain, if asked, the processes undertaken and evidence examined to enable them to provide their assurance. It is generally not appropriate for a legal or other adviser of the investor to sign the report.

If investors remain in doubt about who should sign off on a report, they should contact Treasury at [firbcompliance@treasury.gov.au](mailto:firbcompliance@treasury.gov.au).

## **F: ACCURATE, FACTUAL AND COMPLETE INFORMATION**

It is important to provide information that is accurate, factual and complete. The report should provide appropriate assurance of this.

The information provided should not have significant gaps, it should present facts that can be verified if needed, and it should be sufficiently complete that it can be used to make informed decisions about the foreign investor's degree of compliance.

Investors should be aware that it is an offence under Part 7.4 of the *Criminal Code* to provide false or misleading information or documents to a Commonwealth officer or entity, or in compliance or purported compliance with a law of the Commonwealth.

## **G: QUALITY, DEPTH AND RELEVANCE OF INFORMATION AND EVIDENCE PROVIDED**

Reports should be prepared in accordance with the relevant conditions. All reports should contain necessary details so that it is clear who the investor is, what the action (that is, the relevant investment) is that has been taken, which conditions are being complied with, and who is the person responsible for providing assurance of compliance. Such details may include, but are not limited to:

- the name of the foreign investor and the file numbers relevant to the application;
- the name and authority of the person/s signing off on the report;
- the date by which the report was required to be submitted;
- the dates the action/s were approved, and the dates they were completed;
- the other parties to the action/transaction; and
- the name of the entity/entities performing the action, its ultimate owner/s, and the executive officer/s with ultimate responsibility for the action.

## **H: REPORTING UNDER TAX CONDITIONS**

The reporting template provided at [Attachment A](#) can also be used by investors that are required to report to the Treasury annually on compliance with standard tax conditions, as per condition

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<sup>2</sup> An officer is defined in section 4 of the Act.

six of these standard tax conditions mentioned in the *Tax Conditions* Guidance Note. The report may be modified to suit particular circumstances.

The report should be signed off by an officer of the investor as mentioned above and as defined in section 4 of the Act

## I: REPORTING ON INDEPENDENT AUDIT CONDITIONS

Independent audit conditions, under which investors must engage an independent audit firm to audit their compliance with conditions, provide an additional level of assurance where more visibility of compliance with conditions is required. These conditions generally require that the Commonwealth approve the identity of the audit firm or auditors, followed by the review and approval of the scope of the audit. In some cases, conditions will allow an investor to engage an independent professional advisory firm with appropriate technical skills (in addition to, or instead of, an independent audit firm (Relevant Expert)) to prepare an audit report in accordance with relevant Australian audit standards issued by the [Auditing and Assurance Standards Board](#). It is also possible for an investor to engage one firm to audit compliance with most conditions and a separate specialist firm to audit compliance with others.

The decision maker may be more likely to impose an independent audit condition in relation to investments which are of a higher value or where the assessed risk to the national interest (or national security, as the case requires) is higher, such as investments involving sensitive sectors of the economy.

The audit must be carried out at the cost of the entity to which it relates.

### **Factors the Commonwealth is likely to consider in determining whether to approve a particular audit firm and/or relevant expert undertaking audit work**

Amongst other factors, the Commonwealth is likely to consider the following in determining whether to approve an audit firm (and/or Relevant Expert, if applicable) undertaking audit work:

- 1) Depth and quality of the pool of people dedicated to the audit, including relevant experience of the firm and individual team members, as well as the level of commitment of people supporting the audit. The proposed team members' experience in undertaking similar work in Australian regulated entities is also a relevant factor.
- 2) Absence of any existing or potential conflicts of interest (including a robust process to ensure this is the case), and the approach to identifying, reporting and managing any potential conflicts of interest during the course of the audit. Investors and their proposed auditors are encouraged to consider the impact of prior engagements, and may be asked for further information relating to them (Treasury would generally expect that any prior internal or external auditing engagements with both the investors and the target entities are noted in the submitted audit proposal).
- 3) Knowledge and understanding of the relevant industry. The investor should, to the best of its ability, provide information on the work that the proposed audit firm (and/or Relevant Expert, as applicable) has undertaken in the relevant sector over the last five years.
- 4) Understanding of governance.
- 5) Understanding of the technical, commercial, policy and regulatory issues.

- 6) Where relevant, capacity and expertise to assess and advise on potential physical security and system security (including cybersecurity) issues. A summary of previous security analysis roles undertaken within Australian or global companies would be useful in this regard.
- 7) Staff with appropriate security clearances (where applicable and relevant).

It is important to note that it is a requirement that the audit must be conducted independently and, while the Commonwealth must be able to rely on the content of the audit report, it will not be party to the audit.

It is open to an investor to propose different firms to undertake different aspects of the required audit, so long as compliance with all relevant conditions is assessed. Such proposals would not be automatically agreed to by the Commonwealth, but agreement will not be unreasonably withheld. We encourage investors to engage with us early in this process and, to facilitate approvals in a timely manner, generally recommend if possible and unless otherwise mandated by the conditions:

- that audit firm/auditor proposals are submitted for our review at least 120 days before the end of the relevant reporting period; and
- subsequent scope proposals are submitted 90 days before the end of the relevant reporting period.

The Commonwealth is unable to provide a list of preferred auditors, however, investors may wish to contact auditing or other relevant professional associations if they require any assistance in this regard.

The guidance provided above is general guidance and not all criteria will be applicable in all circumstances. It should be read in conjunction with the relevant no objection notification or exemption certificate issued to a particular investor.

### **Factors the Commonwealth is likely to consider in determining whether to approve the scope of works for an audit**

Amongst other factors, the Commonwealth would expect that the scope of works for an audit should:

- 1) Outline the level of assurance to be provided, with reference to the *Framework for Assurance Engagements* issued by the Auditing and Assurance Standards Board. The Commonwealth recommends adopting the ASAE3100 for independent Audits required under the Act. While the general expectation is for a reasonable assurance review, a limited assurance engagement may be appropriate in certain circumstances.
- 2) Outline the scope of the audit, including clearly outlining which conditions will be subject to the audit and any proposed exclusions.
- 3) Provide the audit methodology used to assess compliance by the applicant, having regard to any requirements specified in the conditions.
- 4) Detail the audit procedures used to assess compliance with conditions. The Commonwealth expects auditors to review the design and implementation of compliance controls and to obtain sufficient appropriate evidence to form audit conclusions. This includes for example,

reviewing not only the policies and procedures, but also reviewing evidence that policies and procedures have been implemented and complied with.

- 5) Specify an appropriate timeframe for completion of the audit and delivery of the audit report.
- 6) Outline the proposed outcome of the audit, including an assertion about the applicant's compliance or non-compliance with the conditions and where appropriate, recommendations to remediate any deficiencies or risks identified.
- 7) Indicate whether the audit will be conducted remotely (that is, that auditors would not be required to enter premises) or whether site visits will be required.

### Contact between the Commonwealth and the audit firm

In some circumstances, conditions may specify that the Commonwealth can speak directly to the auditors prior to the commencement of any works. A direct line of communication allows Commonwealth representatives to provide appropriate context to the auditors on the intent of the conditions and requirements to be compliant.

Instructions provided directly to the auditors will not seek to change the agreed audit scope.

## FURTHER INFORMATION

If you would like further information on your compliance obligations as a foreign investor, we encourage you to engage with us by emailing us at [firbcompliance@treasury.gov.au](mailto:firbcompliance@treasury.gov.au).

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.

## ATTACHMENT A: COMPLIANCE REPORT ON FOREIGN INVESTMENT CONDITIONS

This template is not a prescribed form for preparing a compliance report. However, it may be used as guidance for the structure and content of such a report under tax and other reporting conditions. The italicised text is to provide further explanation and examples, and should not be left in the compliance report that is submitted.

Where a foreign investor has multiple no objection notifications in relation to one transaction or related transactions, the investor may seek Treasury's consent to prepare one report for the no objection notifications that have the same conditions. For example, if Investor A is acquiring multiple Australian entities in a corporate group, they may receive a no objection notification for each acquisition. If all of these no objection notifications are subject to the same conditions and have the same reporting obligations, then, subject to Treasury's consent, the investor may be able to prepare the one report in relation to all of these no objection notifications.

### COMPLIANCE REPORT TEMPLATE

**Investor:** Foreign Investor Plc

**Ref:** FI20XX/XXXXX *[include any other relevant approvals]*

**Reporting Year/period:** DD/MM/YYYY – DD/MM/YYYY

**Date report due:** DD/MM/YYYY

**Actions in this report:** *[This information is usually required for notifications about when relevant actions or transactions occurred. Please delete if not required]*

<b>Action</b> <i>[a description of the action/s taken under the no objection notification /s/ exemption certificate]</i>	<b>Approval</b> <i>[the reference of the no objection notification/exemption certificate for the action]</i>	<b>Approved</b> <i>[the date the no objection notification for the action/exemption certificate was issued]</i>	<b>Completed, and by whom</b> <i>[the date the action was completed, and the name of the person/entity that completed the action]</i>	<b>Ultimate owners of assets acquired</b> <i>[if the action relates to acquiring an asset (including a company) the name of the person/entity that is the ultimate owner of the asset]</i>  <i>[Please also list ultimate ownership in relation to joint venture participants here,</i>	<b>Other Parties</b> <i>[the names of any other parties involved in the action and the country they are based in]</i>	<b>Value</b> <i>[the monetary amount in Australian dollars the investor paid/gained as part of completing the action, for example, the amount paid to acquire a business]</i>

**Compliance reporting requirements including independent audit reporting conditions**

				<i>in the case of an acquisition made through a joint venture agreement].</i>		
Acquisition of Target Company 123 Pty Ltd	F120XX/XXXX X	Approved DD/MM/YY YY	Acquired DD/MM/YYYY Acquired by Subsidiary Company of Foreign Investor Plc	Holding company of Foreign Investor Plc		AUD\$XX
Merger with Multinational Corporation XYZ Ltd	F120XY/YYYY Y	Approved DD/MM/YY YY	Acquired DD/MM/YYYY		Overseas Equity Financier LLP	AUD\$YY
Lease of Office Property, Name Street, City, State, Postcode	F120XZ/ZZZZ Z	Approved DD/MM/YY YY	Acquired DD/MM/YYYY			AUD\$ZZ

**Compliance with conditions:**

*[This table should address all of the conditions under a no objection notification or relevant conditions in an exemption certificate that a foreign investor is required to comply with. This information is required when reporting on breaches of, and/or compliance with, a no objection notification or exemption certificate.]*

*If the conditions for multiple related no objection notifications are the same, then the same table can be used, but it should be clear to which no objection notification any instances of non-compliance relate to.]*

<b>Condition</b>	<b>Compliant?</b>	<b>Details (if non-compliance)</b>
1: text of condition	Y/N	<i>For example: Not compliant – report was submitted 14 days after the due date. The date was marked incorrectly in our own records. Treasury was informed of non-compliance as soon as practicable and they agreed that no action should be taken at this stage.</i>

		<i>Information about remedial action should also be included here.</i>
2: text of condition	Y/N	
3: text of condition	Y/N	
4: text of condition	Y/N	

**Additional considerations for Treasury**

*[Please include any additional information that you would like to provide to Treasury in relation to your conditions, or any questions about your conditions.]*

**Assurance**

I, [insert name] am an officer<sup>3</sup> of [insert name of Applicant] and have the authority to make this report on behalf of [insert list of names of each relevant entity for which the person makes the attestation] (“the investor(s)”).

I have (made reasonable enquiries/caused reasonable enquiries to be made) with respect to compliance by the investors with (each condition/ conditions [insert numbers of relevant conditions e.g. 1 to 5]) specified in the no objection notification dated [date] for the actions described in the table above. On the basis of those enquiries I am satisfied that [,except to the extent specified above,] each investor has fully complied with those conditions.

I hereby consent to each investor providing to the Department of the Treasury, on request, details of the enquiries I have (made/caused to be made) in order to make this Report, and the data produced as a result of those enquiries.

I acknowledge that giving false or misleading information to the Commonwealth is a serious offence.

**[Insert Signature]**

**Name and Position**

**Date DD/MM/YYYY**

**Reports should be emailed to: [firbcompliance@treasury.gov.au](mailto:firbcompliance@treasury.gov.au)**

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3 An officer is defined in section 4 of the Act.