

MEMO# 33715

August 4, 2021

Australian Government Issues Consultation Paper Evaluating the 2021 Foreign Investment Reforms: Comments due August 31

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TO: Foreign Direct Investment Working Group RE: Australian Government Issues
Consultation Paper Evaluating the 2021 Foreign Investment Reforms: Comments due
August 31

The Treasury Department of the Australian Government (Treasury) is evaluating the operation of its recently adopted foreign investment reforms that went into effect on January 1, 2021. As part of the evaluation, which is required to be completed by December 10, 2021, the Treasury is seeking feedback from stakeholders by August 31, 2021.^[1] A summary of the consultation paper is below, with consultation questions listed after the summary of the section to which they relate.

As part of the consultation process, the Treasury Department is also holding a virtual stakeholder roundtable on August 12 to discuss the reforms, including how they are operating, their impact on foreign investment into Australia, and potential areas for improvement, to which ICI Global has been invited.

We will hold a member call on Wednesday, August 11 at 11:00 a.m. US Eastern time to discuss the consultation and members' experience with the Australian regime in order to prepare us for the roundtable and determine whether we will respond to the consultation (and begin discussing the content of such response).

Please RSVP to Jean Zadeh at jean.zadeh@ici.org if you intend to participate in the call. If you are unable to participate, but have information that you would like to share, please contact me at emykolenko@ici.org to set up a time to talk.

WebEx Details for Member Call on Wednesday, August 11 at 11 a.m. US Eastern Time

Join from the meeting link:

<https://ici.webex.com/ici/j.php?MTID=m301ae8c3f2d28e1dad1dea7682ecadbdb>

Join by meeting number: Meeting number (access code: 1808 25 3599

Meeting password: 8EdRjBjp9X3 Join by phone: +1-415-655-0003 US Toll

Global dial-in numbers:

<https://ici.webex.com/ici/globalcallin.php?MTID=m506eb7b37b89add2fc4be643d543734f>

1. Introduction

On January 1, 2021, reforms to Australia's foreign investment review framework took effect.^[2] The reforms sought to address national security risks, while improving the operation of the foreign investment review framework. The reforms updated the framework in three broad ways: addressed national security risks; strengthened the existing system; and streamlined investment in non-sensitive businesses. This evaluation is to consider the impact of the reforms on foreign investment in Australia to see if an appropriate balance between welcoming foreign investment and protecting Australia's interest was struck.

2. Implementation

The Treasury has worked to complete the reforms, which began during the COVID-19 pandemic, and has supported investors during the transition period after the Reforms Acts were passed in December 2020.^[3] Due to the economic disruption caused by the pandemic, the Australian Government temporarily lowered the foreign investment monetary screening thresholds to zero dollars. This resulted in an extra caseload that transitioned into the new system, where the zero-dollar thresholds were removed.

Consultation Questions

2.1 Have the updated FIRB website and Guidance Notes aided investors' understanding of the new foreign investment framework and investors' obligations under the framework?

2.2 Have the Treasury's stakeholder engagement efforts aided investors' understanding of the new foreign investment framework and investors' obligations under the framework?

2.3 Have the Transitional Guidance Note, and the Treasury's implementation efforts during this period, assisted in navigating the adjustments on January 1, 2021?

3. Macroeconomic Analysis

The reforms to the foreign investment framework were intended to ensure Australia remained open to foreign investment. At the same time, the reforms also strengthened Australia's ability to ensure foreign investment is not against national interest (and therefore national security). Despite updating the foreign investment screening regime in recent years, the Treasury believes stakeholder feedback will provide insight into how the investment community feels about the impact of the reforms.

Consultation Questions

3.1 What are investors' key considerations when choosing to invest in Australia, and where does foreign investment screening fit among these considerations?

3.2 What impact has COVID-19 and the international investment environment had, or is having, on foreign investment inflows into Australia?

3.3 Have the reforms affected Australia's attractiveness as a destination for foreign investment and, if so, how?

4. Reform Analysis - National Security

The reforms introduced various new national security powers.[\[4\]](#) Two types of actions were also introduced: notifiable national security actions (NNSA) and reviewable national security actions (RNSA).

Consultation Questions

4.1 Are the national security screening requirements, and the concepts of NNSA, RNSA, and national security business and national security land, well understood?

4.2 Is the framework for defining these concepts (i.e., across the legislation, regulations, and official guidance notes) appropriate and sufficient?

4.3 What factors do investors consider when deciding whether to voluntarily notify, including the effectiveness of the guidance on voluntary notification of RNSA in the National Security Guidance Note?

5. Reform Analysis - Compliance

The reforms introduced new compliance and enforcement powers that strengthened the Australian Government's ability to prevent, identify, and respond to instances of non-compliance with Australia's foreign investment laws.

Consultation Questions

5. Have the new powers and increased enforcement penalties resulted in a change in investors' attitudes and behaviors towards compliance?

5.2 Are the new compliance obligations of investors clear and adequately explained in the available guidance material?

6. Reform Analysis - Streamlining

The reforms "reduce[d] red tape" to help streamline less sensitive investments.

Consultation Questions

6.1 Have the streamlining measures reduced the regulatory burden on investment funds making investments into Australia?

6.2 What is the expected utility and impact of the new passive foreign government investor Exemption Certificate?

6.3 What are other opportunities for streamlining the screening process to reduce regulatory burden while enabling appropriate scrutiny of risk?

7. Reform Analysis - Fees

The reforms maintained the policy that foreign investors should bear the costs of administering the foreign direct investment regime.

Consultation Questions

7.1 Is the new fees framework affecting investor decisions on investing in Australia?

7.2 Is the new fees framework affecting when and how investors apply for foreign investment approval?

7.3 Is there a need for further guidance on the fees framework and, if so, what should that guidance address and in what format?

8. Other Matters

The reforms also changed several technical aspects of the framework, such as the change of control test and the money lending exception. Despite the reforms, many aspects of the framework remain unchanged.

Consultation Questions

8.1 Have any other elements of the reforms, which are not already discussed in a consultation question above, had a significant impact on stakeholders and, if so, what are those impacts?

8.2 Are any other elements of the foreign investment framework, which are not already discussed in a consultation question above, having a significant impact on stakeholders and, if so, what are those impacts and how can they be addressed?

Eva M. Mykolenko
Associate Chief Counsel - Securities Regulation

endnotes

[1] The consultation is available at <https://treasury.gov.au/consultation/c2021-193739>.

[2] See ICI Memorandum No. 32807, dated October 5, 2020, for a general overview of the reforms, available at <https://www.ici.org/memo32807>.

[3] For a list of reforms the Treasury undertook, see page 3 of the consultation paper.

[4] A list of examples of the new powers can be found on page 4 of the consultation paper.

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