



EXEMPTION CERTIFICATES (BUSINESS)

INTRODUCTION

On 1 July 2017, the *Foreign Acquisitions and Takeovers Regulation* (**Regulation**) were amended to introduce a new exemption certificate for programs of acquisitions of interests in the assets of an Australian business and/or securities in an entity, including interests acquired through the business of underwriting (Business EC).

The Business EC is additional to the existing exemption certificates available for acquisitions of land and land entities, and mining and exploration tenements that were introduced on 1 December 2015. A separate exemption certificate was also available for underwriters since December 2015, however, interests obtained through underwriting will now be captured under the broader Business EC.

This guidance note explains how these exemption certificates operate, the eligibility for a Business EC, information required as part of an application, factors typically considered when assessing an application and guidance on the scope and operation of these exemption certificates. Guidance to support applications for Land Exemption Certificates can be found at Guidance Note 21. The process and types of factors considered in granting an exemption certificate are fairly standard across both certificates.

Each application will be considered on a case-by-case basis, and the particular combination of investor type, the nature and scale of the proposed investment (including target business or industry) and duration of the certificate sought will determine whether the proposed investment activity is appropriate for a Business EC and the scope and conditions attached to any approval. Consequently, whether or not a proposed program of investment is suitable for pre-approval through a Business EC is highly dependent on the facts of each case, therefore applicants are encouraged to contact the Foreign Investment Review Board (FIRB) Secretariat early in the process of developing an application for a Business EC. The Secretariat will be able to assist applicants target the information required to support their application.

OVERVIEW OF EXEMPTION CERTIFICATES

Under the *Foreign Acquisitions and Takeovers Act 1975* (**the Act**), with specific relevance to the types of acquisitions intended to be captured under the Business EC, foreign persons are required to notify the Treasurer for each notifiable action related to:

- interests in securities, for example an acquisition of at least 20 per cent in an Australian entity with total assets exceeding \$266 million, and/or
- foreign government investors acquiring a direct interest in an Australian entity or business.

Section 42 (businesses and entities) of the Regulation provides the Treasurer with the power to grant a foreign person an exemption certificate to acquire one or more interests in assets of an

Australian business and/or securities in an entity. The exemption certificate framework is intended to reduce regulatory burden for foreign persons, particularly investors who are subject to lower screening thresholds, by removing the need to make multiple notifications for a program of low risk investments.

In other words, rather than having to notify before each separate acquisition, a Business EC allows a foreign person to apply once prior to making any acquisitions and seek pre-approval for multiple acquisitions. This is suited to large investment funds, particularly those with low risk foreign government investors, for example government pension funds that typically have to notify of each acquisition regardless of the value, potentially significantly reducing the cost and regulatory burden of separate applications. It also suits those types of investors who may not have exact target acquisitions in mind when they seek approval but intend to make a series of passive investments in sectors or industries that are typically not considered sensitive from a national interest perspective.

The Treasurer can also grant Business ECs that exempt one or more acquisitions covered by the certificate from being significant actions. However, this exemption is only likely to be granted in circumstances where the proposed acquisitions are:

- capable of being assessed against the national interest test (see below) at the time of application (i.e. this will likely necessitate a higher level of certainty about the nature of the acquisition/s); and/or
- the investor is assessed to be very low risk; and/or
- the proposed target company, business, industry, sub-sector or sector typically does not raise national interest issues.

Consequently, the Treasurer will typically grant a Business EC exempting entities covered by the certificate from further notification (subject to any conditions that require post-acquisition reporting) but may retain the power to issue divestments (albeit very rare) or impose conditions. This is an important safeguard to protect Australia's national interest and strikes a balance between facilitating foreign business investment and retaining an ultimate safeguard if future concerns arise. As with any application given conditional approval, the circumstances in which the Treasurer might ultimately exercise these reserve powers are very rare. Applicants should seek further advice at the time of applying for a Business EC on the implications of acquisitions made under the exemption certificate still being assessed as significant actions.

National interest test

Applications for Business ECs will be considered on a case-by-case basis to ensure they are not contrary to the national interest. This will take into account factors such as the character of the investor and the nature of its Australian business, the purpose and scope of proposed acquisitions, acquisitions history, and compliance standing (for example, meeting reporting requirements and any existing conditions) as well as any national security risks. For more information on the assessment of the national interest, see Australia's Foreign Investment Policy.

The following are examples of situations which may mean that the grant of the exemption certificate is considered contrary to the national interest by the Treasurer.

- The program of proposed acquisitions is not well defined by an applicant and the scope is very broad.
- National interest factors cannot be adequately assessed at the time of the application.
- The program of investment is not considered to be ‘low risk’ or ‘low sensitivity’ as described below.
- The potential tax risks cannot be adequately assessed at the time of the application.

WHO CAN APPLY?

Section 42 of the Regulation does not limit which foreign persons can apply for a Business EC. However, the Business ECs are intended to facilitate low risk business transactions meaning:

- Typically applications should be made by or on behalf of a corporate entity and not an individual.
- Foreign government investors are eligible to apply for a Business EC but the track record of the investor and the nature of their proposed investment (including the level of control or influence they might achieve over a business, industry or sector) will be carefully considered.
- It is unlikely that an exemption certificate will be granted to first time investors to Australia (e.g. an investor with no prior investment activity in Australia). The character of the investor is a key criterion in applying the national interest test, and this includes assessing the investor’s track record in complying with Australian laws (e.g. tax and company laws as well as the foreign investment framework).

An application can be made on behalf of an entity/ies that already exist or entity/ies that have not been established at the time of applying (e.g. investment consortium/s, subsidiaries or trusts)—note that sufficient detail of who this entity/ies is/are must be provided in the application. Further, an applicant can seek to include both direct and indirect acquisitions; for example, future acquisitions by an acquired entity (e.g. bolt-on acquisitions). This will likely only be appropriate where the bolt-on acquisitions fall within the target industry or business the applicant proposes to acquire interests in, and where they do not exceed the maximum level of interest and/or consideration cap specified in the Business EC.

WHAT ARE THE TYPES OF ACQUISITIONS THAT CAN BE COVERED?

The types of acquisitions likely to be eligible for a Business EC will be those that are unlikely to raise significant national interest issues—loosely referred to as ‘low risk’ or ‘low sensitivity’ transactions. This is not defined, but can generally be interpreted to exclude acquisitions involving ‘sensitive’ entities and businesses within the meaning of the Act and Regulation or any other relevant government policy or legislation. Whether a business is ‘sensitive’ or a proposed acquisition is low risk would be determined on a case-by-case basis and informed by Treasury and other government agencies responsible for assessing national interest factors. For example:

- Businesses designated as sensitive businesses in Section 22 of the Regulation (Media, telecommunications, transport, etc.) would be unlikely to be covered by any exemption certificate.
- Acquisition of interests in critical infrastructure assets and sectors is likely to raise sensitivities and therefore might not be suitable for an exemption certificate. Through the establishment of the Critical Infrastructure Centre the Government has signalled that critical infrastructure raises particular sensitivities including national security risks. Likewise, assets or business that fall within the meaning of ‘public infrastructure’ and ‘public utility’ as defined with the Regulation are also unlikely to be suitable for a Business EC.
- Acquisition of interests in agribusinesses would be unlikely to be covered by any business exemption certificate.
- Business or assets in sectors likely to raise competition issues, or where the applicant already has significant interests identified.

WHAT INFORMATION NEEDS TO BE SUPPLIED?

The proposed acquisitions must be of a kind that the Treasurer can be satisfied they are not contrary to the national interest at the time of granting the certificate. As such, when granting an exemption certificate, the Treasurer must be satisfied that the proposed investments to be covered by the certificate are not individually or collectively contrary to the national interest.

As such, applications for exemption certificates need to contain sufficient detail about proposed acquisitions to allow the national interest test to be applied. While in some cases an applicant may not know the target entity for the investment, applications will need to contain sufficient detail about potential target entities or assets by identifying target industries, and the nature of the business and assets that the foreign person wishes to invest in. For example, if the certificate is to capture bolt-on acquisitions the application will need to specify this and the nature of the likely bolt-on acquisitions.

The FIRB will closely work with applicants to assist them to meet information and eligibility requirements during an assessment. However, it is recommended that applicants contact the FIRB before lodging an application to ensure they are providing the most relevant information—the information sought on the online application form provides a good guide as to the type of information required. Additional information that is not well targeted will not assist in the efficient processing of applications.

Applicants should refer to the [standard business checklist](#) which will assist them to provide the required information. Additional information beyond the below factors may also be requested during the assessment stage.

1. **Applicant information:** All applications should provide information on the entities to be covered by the exemption certificate, including:
 - Ultimate ownership of each foreign person (including if a foreign government investor) and, if there will be more than one entity, information on each entity;
 - Details of the applicant’s business activities in Australia, including activities of their group (if part of a broader group operating in Australia);
 - If there will be more than one entity to be covered by the exemption certificate, information on each entity’s role in the business should be provided;

- If the investor is a fund it is important to specify key fund information (i.e. information about the fund manager, fund governance rights and details and percentage interests of any foreign government investors), and state whether the fund has been structured as a managed fund with passive investors (i.e. on commercial terms), the name, jurisdiction and percentage ownership of each person that holds 5% or more of the fund and each person that is an investor in the fund that is an FGI;
2. **Preferred duration of certificate:** Applications should specify the preferred duration of the certificate.
- Noting that standard singular application approvals usually cover a 12 month period it is anticipated that applicants will seek a certificate for a period longer than 12 months.
 - There is no standard cap for the duration of Business EC's. However, applicants should note that the longer the period the more challenging it may be to adequately assess whether the proposed program of acquisitions is in the national interest. For example, applications for certificates for a five year or longer period will only be granted in special circumstances where it is possible to adequately apply the national interest test to assess potential national interest issues into the future.
 - The longer the period sought the more likely the proposed acquisitions will need to be restricted to very low risk transactions and very low risk investors, and in circumstances where the applicant is able to describe the type of investment, maximum value and interest.
3. **Statements about the character of the applicants/investors:** including compliance standing with the Act and any foreign investment conditions currently imposed (that is, the applicant's and any other entity's compliance); and
- If an applicant, or any related person or entity, has held an exemption certificate previously and has not complied with its conditions, or has not met conditions attached to individual acquisitions, this compliance history will be taken into account when assessing the applicant's suitability to hold an exemption certificate.
4. **Scope and value of proposed investment:** recognising that it may not be possible to identify specific companies or businesses, as much information should be provided as possible to enable an assessment of the proposed acquisitions.
- As a minimum, where the specific entity or assets are unknown, a list of proposed sectors or industries that the applicant proposes to acquire interests in must be provided.
 - The applicant should where possible provide sufficient information about the sector/market they wish to acquire interests in, the size of the proposed acquisitions relative to their existing market share and/or the purpose of the investment.
 - Applicants should specify both the maximum amount in monetary terms to be covered by the certificate and the breakdown for individual acquisitions:
 - the maximum level of individual investment in monetary terms (i.e. maximum consideration to be paid for each proposed acquisition to be made under the certificate);
 - a specified maximum percentage interest for each entity or asset acquired; and
 - total maximum investment amount sought to be approved.

- While the Regulation do not provide upper limits or caps on the value of investment activity that can be covered by a Business EC, typically, certificates will usually set a maximum monetary limit both for each transaction and a total limit for the certificate.
- Business exemption certificates will generally have total acquisition caps of less than \$1 billion.
 - The Treasurer retains the discretion to approve applications that seek pre-approval of investment that exceeds this cap and also to impose a lower cap. Applicants should provide information in their application explaining the reasoning behind the maximum investment amount sought for pre-approval.

TIMEFRAME AND PROCESS FOR ASSESSING BUSINESS ECs

The usual timeframes and rules under the Act and Regulation for processing applications and notifications apply. However, given these applications will typically be more complex than applications for individual transactions they may take longer to process than standard applications.

The applicant can assist the FIRB Secretariat to efficiently assess the application by completing all fields in the online application with specific attention to detail that will assist government agencies to identify the likely targets for investment. The more specific the application is about likely targets and the scale and nature of the proposed acquisitions, the more straightforward the assessment process will be.

EXEMPTION CERTIFICATE CONDITIONS AND COMPLIANCE

An exemption certificate will generally be given subject to conditions.

Each exemption certificate will set clear parameters for proposed acquisitions that can be made under the exemption certificate. As noted above, this will generally involve a limit on total consideration and the kinds of interests that can be acquired (for example, one or more of assets or securities). Acquisitions relating to a particular kind of interest or specific targets may be subject to specific limits. This may mean a certificate is granted on a narrower basis than initially applied for.

A foreign person whose application for a Business EC is declined or narrowed can seek approval for the specific acquisition via the standard individual notification process.

Acquisitions made that do not fall within the scope of an exemption certificate are not covered by the exemption certificate and if a notifiable action, must be separately notified and assessed. Failure to do so may constitute an offence or breach of the Act and result in penalties. Non-compliance with the Act or the conditions of an exemption certificate may lead to revocation of an existing exemption certificate.

Conditions contained in a Business EC will apply in the same way as if the target was being acquired individually, that is, the usual standard conditions will be applied.

REPORTING AND COMPLIANCE

As with other types of exemption certificates, foreign persons granted a Business EC must report periodically (for example, quarterly) on the acquisitions made during the period under their exemption certificate, as per their specific reporting condition. The frequency of reporting will depend on factors such as the period the certificate is in force and the nature of the acquisitions covered by the certificate. As part of this reporting, an exemption certificate holder will also need to confirm that all foreign persons covered by the exemption certificate are meeting all ongoing conditions attached to the certificate and earlier individual approvals and certificates. For more information please see [Reporting to the Foreign Investment Review Board](#).

FEES

An application to acquire an exemption certificate will not be considered until the relevant application fee has been paid in full.

Information regarding the fee which would apply can be found in Guidance Note 30—Fees—Business. Note that the 1 July 2017 amendments also introduced a specific fee rule to address circumstances where a foreign person applies for a Business EC or a land exemption certificate separately but within 14 days of making the first application. The rule operates to waive the fee for the second certificate. This rule has been included in specific recognition that a foreign person may apply for an exemption certificate to cover a specific type of interest, (for example, land) but then subsequently identify that the program of acquisitions will also involve acquiring interests in a business or assets of a business.

PENALTIES

Strict penalties (including civil and criminal penalties) may apply for breaches of Australia's foreign investment rules.

VARIATIONS AND REVOCATIONS

The Treasurer may vary or revoke an exemption certificate given to a person if the Treasurer is satisfied that the variation or revocation is not contrary to the national interest.

A variation may be made on application in writing or by the Treasurer's own initiative.

FURTHER INFORMATION

Further information is available on the FIRB website at www.firb.gov.au or by contacting +61 2 6263 3795.

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.