

DRAFT FOR CONSULTATION

Overseas Investment Amendment Regulations (No 2) 2016

Governor-General

Order in Council

At Wellington this day of 2016

Present:
in Council

These regulations are made under section 61(1) of the Overseas Investment Act 2005 on the advice and with the consent of the Executive Council and on the recommendation of the Minister of Finance made after having regard to the purpose of that Act.

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Regulations

1 Title

These regulations are the Overseas Investment Amendment Regulations (No 2) 2016.

2 Commencement

These regulations come into force on the 28th day after the date of their notification in the *Gazette*.

3 Principal regulations

These regulations amend the Overseas Investment Regulations 2005 (the **principal regulations**).

4 Schedule 1AA amended

In Schedule 1AA, after Part 1, insert the Part 2 set out in the Schedule of these regulations.

5 New regulation 33A inserted (**Exemptions for certain transactions involving overseas custodians**)

After regulation 33, insert:

33A Exemptions for certain transactions involving overseas custodians

- (1) The requirement for consent does not apply to a transaction to the extent that giving effect to the transaction will result in the acquisition, by an overseas person in the ordinary course of business of providing custodial services (the **custodian**), of securities or rights or interests in securities or property (the **property**), if—
- (a) the custodian holds that property on trust for, or on behalf of, another person (the **beneficiary**); and
 - (b) the beneficiary becomes beneficially interested in or entitled to that property on acquisition; and
 - (c) the custodian obtains no beneficial interest in or entitlement to the property or any part of it; and

- (d) the requirement for consent would not have applied had the beneficiary, instead of the custodian, acquired the property that the custodian acquired.
- (2) For the purposes of this regulation, a person (A) provides **custodial services** if A—
- (a) acquires property on the instruction of another person (B); and
 - (b) holds that property on trust for, or on behalf of, B; and
 - (c) implements decisions made by and instructions of B in relation to that property (for example, a decision to sell); and
 - (d) makes no decisions in relation to that property.
- (3) In determining, for the purposes of subclause (1)(d), whether the requirement for consent applies or would apply, the exemption in this regulation (if it would otherwise apply) must be disregarded.

Example 1

Company X has assets that exceed \$100 million but does not own or control any interest in sensitive land or fishing quota.

Custodian A (an overseas person) buys 30% of the shares in Company X. Custodian A buys the shares in the ordinary course of Custodian A's business of providing custodial services to Company B. Company B acquires the beneficial interest in the shares. Custodian A acquires no beneficial interest in or entitlement to the shares.

Company B is not an overseas person.

No associates of Company B own or control any of the remaining 70% of the shares in Company X.

So the acquisition by Custodian A qualifies for the exemption.

Example 2

Example 1 applies, but assume instead that an associate of Company B, Trust C, owns 10% of the remaining shares in Company X (that is, Trust C owns 7% of Company X). Trust C is an overseas person.

So, after the acquisition by Custodian A, 37% of the shares in Company X will be owned or controlled by Company B together with its associate Trust C.

Had Company B acquired the property that Custodian A acquired, the requirement for consent would have applied (unless an exemption applied).

So the acquisition by Custodian A does not qualify for the exemption.

Example 3

Under another transaction, Custodian A buys 10% of the shares in Company Y. Company Y owns sensitive land and is not an overseas person.

Custodian A buys the shares in the ordinary course of Custodian A's business of providing custodial services to Trust D. Trust D acquires the beneficial interest in the shares. Custodian A acquires no beneficial interest in or entitlement to the shares.

Trust D is an overseas person.

Another overseas person, Trust E, already owns 20% of the shares in Company Y. None of Trust E's shares are acquired by Custodian A and Trust E is not an associate of Trust D.

After the acquisition by Custodian A, 30% of the shares in Company Y will be owned or controlled by overseas persons (10% by Trust D and 20% by Trust E) and, as a result of the acquisition, Company Y becomes an overseas person.

Had Trust D acquired the property that Custodian A acquired, the requirement for consent would have applied (unless an exemption applied).

So the acquisition by Custodian A does not qualify for the exemption.

6 New regulations 36AA to 36AC and cross-heading inserted

After regulation 36, insert:

Exemptions from requirement for consent in respect of overseas investments in sensitive land

36AA Exemption for certain transactions involving land acquired on same terms as immediately previous interest within certain period

- (1) The requirement to obtain consent under section 10(1)(a) of the Act (which relates to overseas investments in sensitive land) does not apply to a transaction to the extent that giving effect to the transaction will result in the acquisition by an overseas person (**A**) of a lease or any other interest other than a freehold estate in sensitive land (the **new interest**), if—
- (a) the new interest commences within 3 months of the expiry of an interest of the same type that is owned or possessed by A (and no other person) (the **immediately previous interest**); and
 - (b) the sensitive land that is the subject of the new interest (**land B**) is the same as or is a portion of the sensitive land that was the subject of the immediately previous interest (**land C**), but land B is no greater than land C; and
 - (c) the terms and conditions of the new interest are the same as the terms and conditions of the immediately previous interest in land B, except that—
 - (i) the term of the new interest may be the same as or shorter than the term of the immediately previous interest in land B (in each case including rights of renewal, whether of the grantor or A); and
 - (ii) the monetary terms of the new interest may be the same as or different from the monetary terms of the immediately previous interest; and
 - (d) the term of the new interest (including rights of renewal, whether of the grantor or A) expires within 20 years of—

- (i) the commencement date of the immediately previous interest, if that interest resulted from A's last consented transaction; or
 - (ii) in any other case, the commencement date of the previous interest acquired by A in the whole of land B that resulted from A's last consented transaction; and
 - (e) the activity to be conducted by A on or from land B is the same or substantially the same as the activity conducted on or from land B under the previous interest that resulted from A's last consented transaction.
- (2) The exemption is subject to the conditions that—
- (a) A obtained consent under section 10(1)(a) of the Act to—
 - (i) the transaction that resulted in A (and no other person) acquiring the immediately previous interest; or
 - (ii) if subparagraph (i) does not apply, at least 1 transaction that resulted in A (and no other person) acquiring an interest in the whole of land B that A treated as an immediately previous interest for the purpose of previous reliance by A on this exemption; and
 - (b) A has not breached any condition of the consent granted to A for A's last consented transaction, nor has A breached any condition of any other consent granted to A and related to land B (if any); and
 - (c) A complies, on a continuing basis, with the continuing conditions of the consent for A's last consented transaction that are related to land B; and
 - (d) A continues to conduct the same or substantially the same activity on or from land B as A conducted under the previous interest that resulted from A's last consented transaction; and
 - (e) if A is an individual, A is not, at the date that A acquires the new interest, an individual of a kind referred to in section 15 or 16 of the Immigration Act 2009 (or A is an individual for whom a special direction referred to in section 17(1)(a) of that Act has been made permitting a visa or entry permission to be granted to that individual); and
 - (f) if A is not an individual,—
 - (i) each person who, at the date that A acquires the new interest, has a 25% or more ownership or control interest in A also had, at the date of consent for A's last consented transaction, a 25% or more ownership or control interest in A; and
 - (ii) at the date that A acquires the new interest, each of the following is not an individual of a kind referred to in section 15 or 16 of the Immigration Act 2009 (or is an individual for whom a special direction referred to in section 17(1)(a) of that Act has been made permitting a visa or entry permission to be granted to that individual):

- (A) each individual who has a 25% or more ownership or control interest in A; and
 - (B) each member of the governing body of A who is an individual; and
- (g) by the date that is 1 month after the date that A acquires the new interest, A provides the regulator with the following information and documents, in writing:
- (i) a general description of the transaction that resulted in A acquiring the new interest, including a copy of the document or documents setting out the terms and conditions of the new interest; and
 - (ii) notification to the effect that the new interest has been acquired in reliance on the exemption in this regulation and that each of the conditions of the exemption are met; and
 - (iii) a copy of the document or documents setting out the terms and conditions of the immediately previous interest; and
 - (iv) information that identifies or allows the regulator to identify A's last consented transaction (if it is not clear from the document or documents provided under subparagraph (iii)); and
 - (v) a list of the continuing conditions of the consent for A's last consented transaction that are related to land B; and
 - (vi) notification of the activity to be conducted by A on or from land B; and
 - (vii) if A is an individual, A's full name; and
 - (viii) if A is not an individual, the full name of—
 - (A) each individual who has a 25% or more ownership or control interest in A; and
 - (B) each member of the governing body of A.
- (3) In this regulation,—
- A's last consented transaction** means the most recent transaction described in subclause (2)(a) for which A obtained consent under section 10(1)(a) of the Act (or, if only 1, means that transaction)
- continuing**, in relation to the conditions of the consent for A's last consented transaction, means those conditions that—
- (a) have not been met (or have not been met fully) at the date that A acquires the new interest; or
 - (b) are ongoing, even if they are met at that date
- monetary terms**, in relation to an interest,—
- (a) means terms of that interest that set out the amount and timing of payments; but

(b) does not include any indemnities, guarantees, or terms that limit the liability of a person

related to land B, in relation to the conditions of a consent, means conditions that relate to the use of land B (whether or not they also relate to the use of other land), including any conditions that—

- (a) require, permit, or prohibit activities on land B; or
- (b) require improvements or changes to land B

sensitive land means land that is sensitive under Part 1 of Schedule 1 of the Act.

- (4) In this regulation, a reference, in relation to an interest, to the **whole of land B** is a reference to an interest in land that includes or comprises the whole of land B.

36AB Exemption for certain transactions where relevant land of certain type and area is already in overseas ownership or control

- (1) The requirement to obtain consent under section 10(1)(a) of the Act (which relates to overseas investments in sensitive land) does not apply to a transaction to the extent that giving effect to the transaction will result in the acquisition by an overseas person (**A**) of an interest in land or of rights or interests in securities of a person who owns or controls (directly or indirectly) an interest in land (**A's acquisition**), if,—
- (a) no part of the relevant land is land that is sensitive under paragraph (a) of Part 1 of Schedule 1 of the Act (which relates to land of a type listed in table 1 of that schedule, where the area of that type of land together with any associated land of that type exceeds a corresponding area threshold, if any); and
 - (b) no part of the relevant land and no part of any associated land is—
 - (i) land that is or includes foreshore, seabed, or a bed of a river or lake; or
 - (ii) non-urban land; and
 - (c) the area of the relevant land together with any associated land does not exceed 5 hectares; and
 - (d) the activity to be conducted on or from the relevant land is the same or substantially the same as the activity conducted on or from the relevant land under the previous land consent; and
 - (e) the transaction will not result in an overseas investment in significant business assets; and
 - (f) the total value of the consideration for the overseas investment in sensitive land (and in fishing quota, if any) that will result from the transaction does not exceed \$100 million.

- (2) The exemption is subject to the condition in subclause (3) or (4) (as applicable) and the further conditions in subclause (5).
- (3) If A's acquisition is of an interest in land (**land interest**) (*see* section 12(a) of the Act), the condition is that the following statements apply:
 - (a) a previous acquisition of the land interest (or previous acquisitions of part of the land interest that, together, comprise that land interest) has (or have) been consented to under section 10(1)(a) of the Act (**previous land consent**); and
 - (b) the land interest has remained in the ownership or possession of an overseas person at all times since the date of that previous land consent; and
 - (c) if, since the date of that previous land consent, the land interest has been acquired by another overseas person, that acquisition was in accordance with the exemption in this regulation (but no other exemption).
- (4) If A's acquisition is of rights or interests in securities of a person (**P**) who owns or controls (directly or indirectly) an interest in land (*see* section 12(b) of the Act), the condition is that—
 - (a) the statements in subclauses (3)(a) to (c) apply to the acquisition of the interest in land owned or controlled by P (**land interest**); or
 - (b) if those statements do not apply,—
 - (i) P owned or controlled the land interest before becoming an overseas person as a result of an acquisition of rights or interests in P's securities; and
 - (ii) consent was obtained under section 10(1)(a) of the Act to the acquisition of rights or interests in P's securities referred to in subparagraph (i) (**previous land consent**); and
 - (iii) at all times since the date of the previous land consent P has remained an overseas person and the land interest has remained in the ownership or control of P; or
 - (c) paragraphs (a) and (b) apply to parts of the land interest owned or controlled by P and those parts, together, comprise that land interest.
- (5) The further conditions are that,—
 - (a) if A is an individual, A is not, at the date of A's acquisition, an individual of a kind referred to in section 15 or 16 of the Immigration Act 2009 (or A is an individual for whom a special direction referred to in section 17(1)(a) of that Act has been made permitting a visa or entry permission to be granted that individual); and
 - (b) if A is not an individual, at the date of A's acquisition each of the following is not an individual of a kind referred to in section 15 or 16 of the Immigration Act 2009 (or is an individual for whom a special direction

referred to in section 17(1)(a) of that Act has been made permitting a visa or entry permission to be granted to that individual):

- (i) each individual who has a 25% or more ownership or control interest in A; and
 - (ii) each member of the governing body of A who is an individual; and
- (c) A complies, on a continuing basis, with the continuing conditions of the previous land consent that are related to the relevant land; and
- (d) the same or substantially the same activity continues to be conducted on or from the relevant land as the activity conducted on that land under the previous land consent; and
- (e) by the date that is 1 month after the date of A's acquisition, A provides the regulator with the following information and documents, in writing:
- (i) a general description of the transaction that resulted in A's acquisition, including a copy of the document or documents setting out the terms and conditions of the interest or rights acquired; and
 - (ii) notification to the effect that the interest or rights have been acquired in reliance on the exemption in this regulation and that each of the conditions of the exemption are met; and
 - (iii) information that identifies or allows the regulator to identify the previous land consent; and
 - (iv) a list of the continuing conditions of the previous land consent that are related to the relevant land; and
 - (v) notification of the activity to be conducted on or from the relevant land; and
 - (vi) if A is an individual, A's full name; and
 - (vii) if A is not an individual, the full name of—
 - (A) each individual who has a 25% or more ownership or control interest in A; and
 - (B) each member of the governing body of A.
- (6) In this regulation,—
- continuing**, in relation to the conditions of a previous land consent, means those conditions that—
- (a) have not been met (or have not been met fully) at the date of A's acquisition; or
 - (b) are ongoing, even if they are met at that date
- previous land consent** has the meaning set out in subclause (3) or (4), whichever applies

related to the relevant land, in relation to the conditions of a previous land consent, means conditions that relate to the use of the land that is the relevant land (whether or not they also relate to the use of other land), including any conditions that—

- (a) require, permit, or prohibit activities on that land; or
- (b) require improvements or changes to that land.

36AC Exemption for transactions consequential on certain actions under Public Works Act 1981

The requirement to obtain consent under section 10(1)(a) of the Act does not apply to a transaction to the extent that giving effect to the transaction results in the acquisition, by an overseas person (**A**), of an interest in land (**land B**), if—

- (a) the acquisition is by way of grant, vesting, or other disposal to A in accordance with section 105, 106, 107A, 117, or 119 of the Public Works Act 1981; and
- (b) in the case that land B is or includes land of a type listed in table 1 of Schedule 1 of the Act, the area of land B that is that type of land does not exceed the corresponding area threshold in that table, if any; and
- (c) land B adjoins land in which A already owns or possesses an interest (other than an exempted interest) or land B is separated from that land only by a public road (including a motorway or a State highway, and including whether or not that road is formed); and
- (d) the total area of land B does not exceed 5 hectares.

Schedule

New Part 2 inserted into Schedule 1AA

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Part 2

Provisions relating to Overseas Investment Amendment Regulations (No 2) 2016

2 Transitional provision relating to application of exemptions

The amendments made by regulations 5 and 6 of the Overseas Investment Amendment Regulations (No 2) 2016 apply only to the acquisition of securities or rights or interests in securities or property after the commencement of those amendment regulations.

Clerk of the Executive Council.

Explanatory note

This note is not part of the regulations, but is intended to indicate their general effect.

These regulations, which come into force on the 28th day after the date of their notification in the *Gazette*, amend the Overseas Investment Regulations 2005 (the **principal regulations**).

These regulations provide for—

- 1 new class exemption from the requirement for consent under section 10(1)(a) and (b) of the Overseas Investment Act 2005 (the **Act**) and section 57B of the Fisheries Act 1996, which relate, respectively, to overseas investment in sensitive land, overseas investment in significant business assets, and overseas investment in fishing quota (*see new regulation 33A*); and
- 3 new class exemptions from the requirement for consent under section 10(1)(a) of the Act, which relates to overseas investments in sensitive land (*see new regulations 36AA to 36AC*).

The exemptions apply only to acquisitions of securities or rights or interests in securities or property after these regulations commence.

Exemption from requirement for consent for overseas investments in sensitive land, sensitive business assets, and fishing quota

The exemption in *new regulation 33A(1)* is for overseas custodians acquiring shares or other property on behalf of other persons (the **beneficiaries**) in the ordinary course of their business of providing custodial services. *New regulation 33A(2)* sets out what is meant by the term custodian services. The overseas custodian must act on the instruction of a beneficiary in acquiring the property, must not make any decisions in relation to that property, and must act on the beneficiary's decisions. For the exemption to apply, the beneficiary must obtain the beneficial entitlement to, or interest in, the property, and the custodian must obtain no such beneficial entitlement or interest. The exemption then “looks through” to the beneficiary who is the person with the ultimate ownership and control of the property. The exemption will not apply to the custodian to the extent that, had the beneficiary instead acquired the property, that acquisition by the beneficiary would have required consent.

Exemptions from requirement for consent for overseas investments in sensitive land

The exemption in *new regulation 36AA* is for certain acquisitions of leases or other interests in sensitive land (*see section 12(a)* of the Act), but does not extend to freehold estates. It applies where a lease or other interest held in the land is expiring or has recently expired. If certain terms and conditions are met, the person who held that interest will be able to acquire a new interest of the same type in that land without obtaining consent.

This exemption is intended for situations where a lease or other interest is effectively being regranted to the same person. The terms and conditions of the new interest must be the same as the previous interest, with some exceptions, none of which permits the new interest to be greater than the previous interest in terms of the sensitive land involved or the term of the interest. The activity to be conducted on the land must also remain the same or substantially the same. The exemption could apply to allow any number of regrants to a person; however, for the exemption to apply, that person must have obtained consent to a previous lease or another interest in that land (on the same or not greater terms and conditions) and the term of the new interest must expire within 20 years of the commencement date of that previous lease or other interest. Other conditions of the exemption include that the person must continue to comply with any ongoing or unfulfilled land-use conditions of the previous consent that relate to that land, and provide the regulator with certain information and documents within 1 month of relying on the exemption.

The exemption in *new regulation 36AB* is for certain transactions between overseas persons where the sensitive land in question (the **relevant land**) has, in the past, been the subject of overseas investment that was consented to under section 10(1)(a) of the Act, has since remained in overseas ownership or control, and will continue to be used for the same or substantially the same activity. It applies both to certain acquisitions of an interest in sensitive land and to certain acquisitions of rights or interests in securities of a person who owns or controls an interest in sensitive land (*see*, respectively, section 12(a) and (b) of the Act).

This exemption does not apply to all types of sensitive land, and it will not apply if the relevant land together with any associated land (*see* section 8(4) of the Act) exceeds 5 hectares. It will not apply if any of the sensitive land or any associated land is non-urban land, foreshore, seabed, or a bed of a river or lake, regardless of size. Other terms and conditions apply, including that the transaction cannot result in an overseas investment in significant business assets, that the total value of the consideration for the overseas investment in sensitive land (and in fishing quota, if any) that will result from the transaction does not exceed \$100 million, that the investor must continue to comply with any ongoing or unfulfilled land-use conditions of the previous consent that relate to that land, and that the investor must provide the regulator with certain information and documents within 1 month of relying on the exemption.

The exemption in *new regulation 36AC* applies where an overseas person acquires land in accordance with certain provisions of the Public Works Act 1981. Terms of that exemption restrict the size of the sensitive land covered (including by type) and require that the land adjoin or be separated only by a public road from land in which the overseas person already has an interest (other than an exempted interest).

Some exemption terms and conditions are ongoing, while other terms and conditions are measured at points in time (such as the date of the relevant acquisition). If a person breaches a term or condition of an exemption, then the exemption does not apply and, if the overseas investment has been given effect to (and no other exemption from

the requirement for consent applies), the investor will be in breach of the Act for not having obtained consent to the transaction.

Regulatory impact statement

The Treasury produced a regulatory impact statement on 24 March 2016 to help inform the decisions taken by the Government relating to the contents of this instrument.

A copy of this regulatory impact statement can be found at <http://www.treasury.govt.nz/publications/informationreleases/ris>

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*:

These regulations are administered by the Treasury.