

Overseas Investment Amendment Regulations (No 2) 2016: Targeted Exemptions to the Overseas Investment Act 2005

Exposure Draft for Consultation

September 2016



THE TREASURY
Kaitohutohu Kaupapa Rawa

New Zealand Government

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<http://www.treasury.govt.nz/publications/reviews-consultation/overseas-investment>

Submissions

This document sets out the Government's proposals for implementing targeted exemptions to the investment screening requirements of the Overseas Investment Act 2005. We invite interested parties to make **written submissions** on these proposals.

How to have your say

We have included questions to guide your feedback on the proposed Regulations and Gazette notice. We prefer that you make your submission via email to the following address: overseasinvestment@treasury.govt.nz. If you wish to send your submission via post it can be sent to:

Overseas Investment Regulations Consultation
The Treasury
PO Box 3724
Wellington 6140
NEW ZEALAND

The deadline for submissions is 5.00pm on Friday 7 October 2016.

Next steps

Officials will analyse all submissions after the closing date. The views expressed in the submissions will be taken into account when the final proposals are developed and considered by the Cabinet.

The Government intends to finalise the Regulations for promulgation by the end of 2016.

For further information

Further information on the Government's policy behind the proposed exemptions outlined in this document can be found on the Treasury's website:

<http://www.treasury.govt.nz/publications/informationreleases/overseasinvestment/oio-fees-exemptions>

Email: overseasinvestment@treasury.govt.nz

Official Information Act 1982

Submissions are subject to the Official Information Act 1982 (OIA). Please set out clearly with your submission if you have any objection to any information in the submission being released under the OIA, and in particular, which part(s) you consider should be withheld, together with the reason(s) for withholding the information.

Grounds for withholding information are outlined in the OIA. Reasons could include that the information is commercially sensitive or that you wish personal information, such as names or contact details, to be withheld. An automatic confidentiality disclaimer from your IT system will not be considered as grounds for withholding information.

We will take your objections into account when responding to requests under the OIA.

Any personal information you supply in the course of making a submission will be used by the Treasury only in conjunction with the matters covered by this document. Please clearly indicate in your submission if you do not wish your name to be included in any summary of submissions that we may publish.

Proposed targeted exemptions

1. In May 2016 the Minister of Finance and the Minister for Land Information announced that targeted exemptions would be made to New Zealand's overseas investment screening regime. The exemptions were developed in response to feedback from stakeholders during the Government's consultation on proposed changes to the application fees for the Overseas Investment Office.
2. The purpose of this consultation document is to seek feedback on the workability of the Government's proposed Regulations to implement the decision to provide targeted exemptions. The five proposed exemptions are outlined below.
 - Exempt from the requirement to first advertise land on the open market acquisitions of leasehold farmland, where the cumulative duration of the lease is for a term of not more than twenty years. Refer to the Gazette notice.
 - Exempt leasehold land from screening where a previously consented lease is being re-granted on substantially the same terms and conditions, and the substantive ownership of the property in question, is unchanged. Refer to proposed regulation 36AA.
 - Exempt transactions from one overseas person to another for specified land that is of a small scale and that has previously been screened. Refer to proposed regulation 36AB.
 - Exempt certain transactions where consent is required as a result of certain Public Works Act 1981 actions. Refer to proposed regulation 36AC.
 - Exempt custodians who are overseas persons but who hold investments on behalf of New Zealand investors from the requirement for consent for those investments only. Refer to proposed regulation 33A.
3. The exemptions are described in further detail below along with how the proposed Regulations and Gazette notice implement the policy.

Questions for consultation

4. Consultation on the proposed Regulations and Gazette notice is an opportunity to test their workability to ensure that investors will be able to reasonably comply with the requirements to claim the exemption. We are not seeking feedback on the underlying policy for the Regulations.
5. We seek your feedback on the following questions for the proposed Regulations:
 1. Are the proposed Regulations clear about how their scope will apply in order to claim the exemption?
 2. Where there are conditions attached to an exemption, are the obligations practicable to comply with?

Defined terms used in the drafting

6. Please be aware that the following terms that are already defined in the Act have been used in the draft Regulations and Gazette Notice:

- associated land
- exempted interest
- governing body
- non-urban land
- property
- relevant land
- transaction

Exemption from screening for certain transactions involving overseas owned custodians

Purpose

7. This exemption seeks to ensure that the screening requirements of the Act are focussed on the beneficial owner and controller of an investment rather than screening a custodian (where such an arrangement exists). It exempts custodians, who are overseas persons who hold an investment on behalf of New Zealand investors, from the requirement to gain consent for those investments.

Description

8. Proposed regulation 33A implements this exemption.
9. Sub-clause 1 outlines the terms where the exemption will apply. To be eligible for the exemption, a person in the ordinary business of providing custodial services must be acquiring the property on behalf of a beneficiary that would not have required consent for that investment. Sub-clause 1 uses the term “requirement for consent”, which is already defined in the Overseas Investment Regulations 2005.
10. Sub-clause 2 provides the definition of “custodial services” the purpose of this regulation.
11. Sub-clause 3 provides an additional term for the operation of the exemption.
12. The proposed regulation uses examples. Regulation 3(3) of the Overseas Investment Regulations 2005 explains the status of examples.

Exemption from screening for the granting of certain leasehold land

Purpose

13. This exemption seeks to address a concern that some lease agreements may be structured in such a way that a new lease is granted, rather than a lease being renewed, which repeats the consent process. The exemption only applies where the new lease (or other non-freehold interest) is being granted on the same terms and conditions as the previously consented lease, with limited exceptions provided in sub-clauses (1)(b) and (1)(c) of proposed regulation 36AA.
14. The exemption does not deal with renewals as these are already included in the lease term (or other interest).

Description

15. Proposed regulation 36AA implements this exemption.
16. Sub-clause 1 outlines the terms where the exemption will apply. To be eligible for the exemption, the new interest must:
 - commence within 3 months of the previous interest ending;
 - only include sensitive land that was included in the previous interest;
 - be granted on the same terms as the previous interest, except the lease period may be shorter and the monetary terms such as rent or rent rebates may be different (but indemnities, guarantees, or terms that limit the liability of a person must be the same);
 - the term of the new interest (including any rights of renewal) must expire within 20 years from when the original or previously consented interest began – the intention is that consent is required once at least every 20 years; and
 - the activity to be conducted on or from the land must be substantially the same as the activity provided for under the original consent.
17. Sub-clause 2 provides the conditions for claiming the exemption. The conditions are:
 - the same investor must have previously received consent relating to the land in question;
 - conditions on the consent must continue to be complied with (and have not been breached);
 - the investor or certain individuals associated with the investor must continue to meet the requirements referred to in the Immigration Act 2009;
 - the investor must not have any new 25% or more owners/controllers since the time of the original consent;
 - the investor must notify the Overseas Investment Office that the exemption has been claimed and provide information to support this claim.
18. Sub-clause (2)(g) sets out the information that must be provided to the Overseas Investment Office. This information will support the Office to monitor compliance. If a person does not meet the conditions of an exemption (and not other exemption applies), that person will be in breach of the Act for having entered a transaction without consent. The Act sets out various offences and remedies that may apply in such a situation.
19. Sub-clauses 3 and 4 provide defined terms and interpretation provisions for the purposes of this regulation.

Exemption from screening for certain transactions between overseas persons

Purpose

20. The exemption seeks to target investment when screening of the land in question has already previously occurred, the land is within urban areas, and where screening is generally not required (screening is only required due to the type of adjoining land and, given that the land is 5 hectares or less, because it is urban land).
21. This exemption seeks to address a concern highlighted by cases where mergers and acquisitions can be delayed while waiting for Overseas Investment Office approval despite an overseas person already having obtained consent for the New Zealand assets subject to the transaction.

Description

22. Proposed regulation 36AB implements this exemption.
23. Sub-clause 1 outlines the terms where the exemption will apply. To be eligible for the exemption:
 - no part of the relevant land may be sensitive land under paragraph (a) of Part 1 of Schedule 1 of the Act;
 - no part of the relevant land and its associated land may be foreshore, seabed, or a bed of a river or lake;
 - the land and its associated land must be urban land;
 - the total area of the relevant land (including any associated land) must be 5 hectares or less;
 - the activity to be conducted on or from the land must be substantially the same as the activity provided for under the original consent; and
 - the transaction must not result in an overseas investment in significant business assets (see section 13 of the Act); and
 - the value of consideration provided for the overseas investment in sensitive land (or in fishing quota, if any) must not exceed \$100 million.
24. Sub-clauses 2, 3, 4 and 5 provide conditions for claiming the exemption. The conditions are:
 - the investment needs to be acquired from another overseas person, who must have obtained consent or relied on this exemption when it acquired the interest in land;
 - the interest in land needs to have remained in overseas ownership since the last consent – the intention is that if the interest in land reverts back to New Zealand ownership, then the next overseas person to make an investment must obtain a new consent;

- the new investor or certain individuals associated with the new investor must continue to meet the requirements referred to in the Immigration Act 2009; and
 - the new investor must continue to comply with any continuing conditions of the original consent relating to the relevant land, and conduct substantially the same activity on the land as provided for under the original consent.
25. Sub-clause 5(e) provides that the investor claiming the exemption must provide certain information to the Overseas Investment Office. [See paragraph 18 above.]
26. Sub-clause 6 provides defined terms for the purposes of this regulation.

Exemption from screening for certain transaction arising from actions under the Public Works Act 1981

Purpose

27. This exemption seeks to address a concern that consent may be required as a result of certain actions by authorities under the Public Works Act 1981 where the overseas person has limited or no ability to stop that action.

Description

28. Proposed regulation 36AC implements this exemption. It outlines the sections of the Public Works Act 1981 under which land may be acquired where the exemption will apply (being sections 105, 106, 107A,¹ 117, and 119 of the Public Works Act 1981).
29. It also provides limitations for the types of land to which the exemption will apply. The land must not be sensitive land under the definitions in Table 1 of Schedule 1 of the Act, and must also be less than 5 hectares, to qualify for the exemption.

¹ The EGI paper referred to section 107. The change to section 107A is deliberate.

Exemption from farmland advertising for the acquisition of certain leasehold land

Purpose

30. This exemption seeks to address a concern that requiring farmland advertising for the acquisition of leasehold land imposes excessive compliance costs for these investments where the substantive control of the land remains in New Zealand hands or has previously received consent. It is limited to leases of duration of up to twenty years.

Description

31. The draft Notice of Exemptions from Farm Land Offer Criterion (Pursuant to Section 20 of the Overseas Investment Act 2005) 2016 implements this exemption, as well as re-stating and updating the existing Notice. The proposed updates reflect changes in securities legislation (clauses 4 (a) and (b)) and immigration legislation (clause 4 (i)) since the Notice was originally issued, as well as technical drafting improvements (e.g. clause 4 (d), definition of “farm land securities”, and changing “if” to “where”).
32. Clause 4 (j) of the proposed new Notice implements this exemption for the acquisition of lease interest in farmland. Clause 4 (k) of the proposed new Notice implements this exemption for the acquisition of a lease interest in farmland where that interest is held via securities. In both instances:
 - the exemption is limited to leases of duration of up to 20 years; and
 - in the twenty years prior, consent had been obtained and that previous transaction was not exempt from the farmland advertising requirement (and that requirement was complied with) – the intention is that advertising is required once at least every 40 years.

Specific questions

1. Clause 4 (a): Do you agree with the change from “New Zealand Exchange Limited” to “licensed market” under the Financial Markets Conducts Act 2013 (FMC Act)?
2. Clause 4 (b): The FMC Act does not have a test equivalent to the previous test of “offer to the public” under the Securities Act 1978. Do you agree with the FMC Act references used in the drafting? Similar drafting has been used elsewhere, such as in section 86IB(1)(b)(i) of the Stamp and Cheque Duties Act 1971.

Further exemption proposals

In June 2016 the Minister for Land Information hosted workshops relating to the Overseas Investment Office's development programme. At these workshops an invitation for further ideas for exemptions was expressed.

We would welcome any further ideas for exemptions as part of any feedback that you may have on these exemptions. We note that while the Act contains a broad exemption making power (refer section 61(1) of the Act), any proposals for an exemption must be consistent with the purpose of the Act.

We will provide advice to the Minister of Finance on the feasibility of any further ideas we receive in early 2017.