

# Summary of Submissions from Consultation: Overseas Investment Amendment Regulations (No 2) 2016: Targeted Exemptions to the Overseas Investment Act 2005



December 2016

On 2 September 2016 the Government invited submissions on draft Regulations and a Gazette Notice to implement five targeted exemptions to the Overseas Investment Act 2005<sup>1</sup>. Feedback was sought 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?

Nineteen submissions were received on the proposed regulations. Broadly speaking, feedback was received in three areas:

- potential changes to the scope of where the exemptions would apply;
- technical amendments to the drafting of the regulations;
- ideas for further exemptions to the screening requirements of the Overseas Investment Act 2005.

In response to the submissions, changes have been made to address many of the technical amendments identified (these are not outlined specifically in the Table below). Broadly speaking, some suggested changes to the scope of the exemptions are not appropriate, as exemptions should remain targeted and not be significant policy changes to the screening regime. The Table below outlines in more detail a summary of the key submissions received and our response to the submissions.

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<sup>1</sup> Consultation documents can be found on the Treasury's website: <http://www.treasury.govt.nz/publications/reviews-consultation/overseas-investment>

Exemption	Submissions	Treasury Response
<p>Exemption from the requirement to first advertise land on the open market for acquisitions of leasehold farmland, where the cumulative duration of the lease is for a term of not more than twenty years.</p> <p><i>(Refer to the Gazette notice.)</i></p> <p>Two submissions were received regarding this exemption.</p>	<p>One submission suggested a longer duration of thirty years for eligible leases, the other a shorter duration of ten years.</p>	<p>This exemption is designed to reduce compliance costs for investors/businesses that currently rely on the regular renewal of short-term leases. We understand that due to preferences in some industries, particularly the agricultural sector, renewals may occur every three to five years.</p> <p>We consider that the duration of eligible leases should remain at twenty years. This limit strikes a balance between reducing compliance costs for investors that may use short-term leases while ensuring that the substantive requirements of the Act are maintained.</p> <p>We note that investors will continue to have the option of seeking longer-term leasing arrangements, or including rights of renewal in the original lease agreement, which bring about a similar result for investors of not having to re-advertise farmland.</p>
<p>Exemption for certain leasehold land from the requirement to gain consent where a previously consented lease is being re-granted on substantially the same terms and conditions.</p> <p><i>(Refer to proposed regulation 36AA.)</i></p> <p><i>Eight submissions were received regarding this exemption.</i></p>	<p>Five submissions were received regarding the duration of the lease. The majority want this duration extended to between 30 and 50 years. However, one submission advocated leaving the duration as is.</p>	<p>This exemption is designed to reduce compliance costs for investors/businesses that currently rely on the regular renewal of short-term leases. We understand that due to preferences in some industries, particularly the agricultural sector, renewals may occur every three to five years.</p> <p>We consider that the duration of eligible leases should remain at twenty years. This limit strikes a balance between reducing compliance costs for investors that may use short-term leases while ensuring that the substantive requirements of the Act are maintained.</p> <p>We note that investors will continue to have the option of seeking longer-term leasing arrangements, or including rights of renewal in the original lease agreement, which would bring about a similar result for investors of not having to obtain a new consent each time a lease is re-granted.</p>
	<p>Three submissions were received supporting greater flexibility to allow minor changes to the terms and conditions of a lease.</p>	<p>We agree that greater flexibility could be provided to allow for minor changes to the terms and conditions of a lease. This will ensure that that investors are not excluded from using this exemption for changes that do not affect the substantive aspects for which consent was originally granted.</p> <p>The Regulations have been amended to allow for 'permitted changes'. Permitted changes is a new defined term for the purposes of regulation 36AA.</p>

Exemption	Submissions	Treasury Response
	<p>One submission suggested amendments be made to ensure that an overseas investor will not be excluded from using the exemption if there was a change to the New Zealand (or overseas) ownership of the freehold estate in the land during the term of the lease.</p>	<p>We agree that the focus of the exemption should remain on the overseas investor who is the lessee. Changes to the lessor should not impact on an investor's ability to utilise this exemption.</p>
	<p>One submission suggested an extension of the period by which a new lease must commence from within three to six months of the expiry of the previous lease. This was to provide for negotiation of the new lease.</p>	<p>We consider that the three month negotiation period provides sufficient time to complete negotiation of a new lease. Investors will be aware that the lease is due to expire. The three month window provides flexibility for situations where negotiations may run over, and investors can plan negotiations with the three month period in mind. A longer term has greater risk of interrupting the continuity of lease.</p>
	<p>Three submissions were received regarding the drafting of 36AA(2)(f)(i), which required that there could be no new people with a 25% ownership or control interest in the lessee. Submissions recommended clarification that the requirement not apply to non-overseas persons, or that it should not matter if a new overseas persons obtain a 25% ownership or control interest in the lessee, as such changes will require consent under the Act.</p>	<p>We agree to remove 36AA(2)(f) because if a new overseas person obtains a 25% ownership or control interest in the lessee such changes will require consent under section 12 the Act.</p>

Exemption	Submissions	Treasury Response
	<p>Two submissions suggested that 36AA(1)(d) should refer to a consent being acquired within 20 years of the commencement of the later of: the previous consent, or the commencement of the lease (or other interest) that was previously consented.</p>	<p>We agree that the 20 years should start from the date of the previous consent, and not the commencement of the lease. A lease may commence without needing consent and the leasehold interest is then sold to an overseas person, who obtains consent at that point in the duration of the lease. The 20 year period should start from that point.</p> <p>However, we do not consider that the 20 year period should start after the consent date, if the lease commences at a later date, as this risks a longer period going by without a new consent being obtained.</p>
<p>Exemption for certain transactions from one overseas person to another for specified land that is of a small scale and that has previously been screened.</p> <p><i>(Refer to proposed regulation 36AB.)</i></p> <p><i>Six submissions were received regarding this exemption.</i></p>	<p>One submission suggested expanding the submission to cover non-urban land where public access is not a problem.</p>	<p>We propose no change. The exemption is narrowly focussed to exempt urban land that would generally not require screening, other than being adjacent to a park or a reserve (for example). Expanding the scope of the exemption in this way would more significantly alter the screening regime.</p>
	<p>One submission suggested that 36AB(3)(c) should be expanded to recognise that other exemptions may be used to transfer the relevant interest other than this regulation. In particular, the corporate restructuring exemption in Regulation 33(1)(a); and the change in trustees of a trust exemption in Regulation 33(1)(e).</p>	<p>We agree that certain existing exemptions may be relevant to this exemption and should be able to still be utilised if this exemption is claimed. We will amend the Regulations so that existing exemptions 33(1)(a) and 33(1)(e) will be able to be used in conjunction with this exemption.</p>
	<p>One submission suggested removing 36AB(1)(e) and (f) suggesting the current form will be largely ineffective and there are sufficient safeguards in the regulations already.</p>	<p>We propose no change. A key feature of this exemption is that it applies to sensitive land transactions that are only screened because of the nature of the adjoining land (i.e. Table 2 land) and do not trigger other screening requirements, such as being an overseas investment in significant business assets.</p>

Exemption	Submissions	Treasury Response
	<p>One submission suggested removing 36AB(3) and (4) so that the exemption also applied to the original acquisition of the land covered by the exemption by an overseas person. This would allow some types of sensitive land to be acquired without consent.</p>	<p>We propose no change. A key feature of this exemption is that it applies to land that has already been consented for overseas ownership. Expanding the scope of the exemption as proposed would significantly alter the screening regime.</p>
<p>Exemption for certain transactions where consent is required as a result of certain Public Works Act 1981 actions. <i>(Refer to proposed regulation 36AC.)</i> <i>Three submissions were received regarding this exemption.</i></p>	<p>Two submissions suggested increasing or removing the five hectare threshold of the exemption. The current threshold was considered to be too low to be useful in many instances (for instance relating to road realignments). The action is also already subject to the oversight of the Public Works Act 1981.</p>	<p>We agree that the five hectare threshold may reduce the effectiveness of this exemption. We also note that transactions covered by this exemption will only occur where an overseas person is receiving land as compensation for land taken from them under the Public Works Act 1981. Given these circumstances, we consider it appropriate to remove the five hectare safeguard, including for simple non-urban land. We will amend the Regulations to remove this threshold.</p>
<p>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. <i>(Refer to proposed regulation 33AC.)</i> <i>Seven submissions were received regarding this exemption.</i></p>	<p>Six submissions suggested that the scope of the proposed exemption was too narrow in focusing only on transactions where a custodian acquired an investment on behalf of a customer. Submitters considered that the exemption should also apply so that in assessing overseas ownership of a body corporate, an overseas custodian that holds securities should not be counted but instead only the status of the beneficial owner of the shares (as an overseas person or not) should be counted.</p>	<p>We agree. The original drafting of the exemption was too narrow and did not deliver the desired policy result. The drafting of the exemption has now been separated into two regulations. One exemption will address the situation addressed in the consultation draft of the regulations. The second will address the situation involving the definition of overseas person, in relation to bodies corporate in whom an overseas custodian holds securities.</p>

Exemption	Submissions	Treasury Response
	<p>One submission suggested that 33A(1)(c) should be amended to allow a custodian to hold limited beneficial interests in the form of security interests that may be used for protection against any unpaid money from the custodian's client.</p>	<p>We agree. Such security interests are limited in nature and do not affect control. An existing exemption 33(1)(h) already permits them in other contexts. Not allowing such security interests to be held by custodians would limit the effectiveness of the exemption. The exemption has been amended to allow such limited security interests.</p>
	<p>One submission suggested that 33A(2)(a) and (b) should be amended to provide the possibility of 'intermediate' custodians.</p>	<p>We agree. This is consistent with the purpose of the exemption to look through to the ultimate beneficial ownership.</p>
	<p>One submission was received regarding 33A(2)(d) and suggesting that the clause be deleted as custodians sometimes do have limited decision-making powers, generally having the power to terminate the custodial relationship and return the property.</p>	<p>We consider no change is necessary, as we consider returning the custodial property only as part of the termination of the custodial relationship would not affect the ability to use the exemption.</p>

## Further Exemptions

The Government also invited submissions on ideas for potential further exemptions. Submissions were received relating to nine new exemptions from both this consultation and workshops with stakeholders in June 2016.

A summary of the ideas received is outlined below, along with an indication of the exemptions on which further work is likely. Ideas where further work is unlikely are where the suggested exemption may significantly alter the policy of the screening regime.

Exemptions where further work is likely	Exemptions where further work is unlikely
<ul style="list-style-type: none"> <li>• Exempt overseas persons, who have previously obtained consent, from the requirement to gain consent when acquiring or disposing of shares in an entity if the transaction does not result in a change in effective control of that entity.</li> <li>• Exempt company restructures involving more than one owner (exemption exists where one owner is involved – regulation 33(1)(a)).</li> <li>• Exempt the acquisition by an overseas person, of <i>shares in a company</i>, that has entered into security arrangement.</li> <li>• Exempt increases in shareholdings resulting from capital restructurings that don't raise additional capital but may increase the number of shares on issue e.g. share splits.</li> <li>• Exempt overseas persons from the requirement to gain consent where the only sensitive land is a shared interest in common property.</li> <li>• Exempt boundary adjustments when a property (usually rural) has been developed to the natural features of the land as opposed to the true legal boundary.</li> <li>• Exempt changes of interest from freehold to leasehold where consent has previously been granted.</li> <li>• Exemption of New Zealand associates of exempted overseas investors.</li> </ul>	<ul style="list-style-type: none"> <li>• Narrowing the scope of land captured through the associated land test.</li> <li>• Exemption for New Zealand and overseas vendors selling to overseas purchasers of good character who wish to invest in an asset which has its own existing protections.</li> <li>• Overseas shareholders (and their associates) who hold or have the right to control less than 5% of any class of shares in a listed entity should be excluded from the 25% 'overseas person' threshold calculation.</li> </ul>

Submissions were also received relating to amendments to existing exemptions under Regulation 33. We intend to progress work on these ideas.

The Treasury is in the process of considering its response (beyond the initial assessment above) to the ideas for further new exemptions. The Treasury expects to provide advice to the Minister of Finance in the first quarter of 2017 on recommendations for progressing any further exemptions.