

# Overseas Investment Amendment Regulations: Implementing the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

Summary Note for Exposure Draft

July 2018

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ISBN: 978-1-98-855652-9 (Online)

The Treasury URL at July 2018 for this document is <https://treasury.govt.nz/publications/information-release/overseas-investment-act-2005-exposure-draft-regulations>

# About This Paper

This document sets out the Government's proposals for changes to the Overseas Investment Regulations 2005 to implement higher investment screening thresholds for overseas investments in significant business assets. It is aimed at supporting understanding of the proposed Regulations and providing transparency around New Zealand's approach to implementing the CPTPP. The changes will enable New Zealand to comply with the Investment Chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and other related existing international agreements.

The Regulations largely mirror those previously prepared and released for public consultation in 2016 for the Trans-Pacific Partnership Agreement (TPP). Changes made to the earlier TPP regulations relate primarily to technical changes required to refer to the CPTPP.

These Regulations have been developed jointly by the Treasury and the Ministry of Foreign Affairs and Trade.

## Further information

Further information on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the investment outcomes in the Agreement can be found on the Ministry of Foreign Affairs & Trade's website: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/>

Further information on the other trade agreements that the proposed regulations relate to can also be found on the Ministry of Foreign Affairs & Trade's website. The text of the agreements are available here:

- New Zealand-China Free Trade Agreement:  
<https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/China-FTA/NZ-ChinaFTA-Agreement-text.pdf>
- New Zealand-Hong Kong, China Closer Economic Partnership:  
<https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/Hong-Kong-FTA/NZ-HK-CEP.pdf>
- New Zealand-Korea Free Trade Agreement:  
<https://www.mfat.govt.nz/assets/FTAs-agreed-not-signed/Korea-FTA/NZ-Korea-FTA-consolidated-text.pdf>
- Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation:  
<https://www.nzcio.com/assets/ANZTEC/ANZTEC-Final-Text-10-July-2013-NZ.pdf>
- New Zealand-Australia Closer Economic Relations Investment Protocol:  
<https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/Australia/CER-investment-protocol-16-2-11.pdf>

# Proposed Overseas Investment Amendment Regulations

## Overview

1. The Trans-Pacific Partnership Agreement (CPTPP) Amendment Bill (the Bill) would amend the Overseas Investment Act 2005 (the Act) to insert a new regulation-making power and make minor amendments to section 13 of the Act. The new provision would provide a power to make regulations to implement higher investment screening thresholds for overseas investments in significant business assets in New Zealand. The regulation-making power only extends to making regulations in order to implement the trade agreements which, following the passage of the Bill, will be named in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Amendment Act 2018:
  - the CPTPP
  - the Trans-Pacific Partnership (TPP) (only if this agreement were to enter into force for New Zealand)
  - New Zealand's existing trade agreements with China, Chinese Taipei, South Korea and Hong Kong that contain most favoured nation (MFN) commitments that would be engaged by CPTPP entering into force,
  - Trans-Pacific Strategic Economic Partnership (P4) Agreement with Brunei, Singapore and Chile, and
  - the Closer Economic Relationship Investment Protocol with Australia.
2. The Bill is currently before the Foreign Affairs, Defence and Trade Select Committee.
3. This document provides an overview of draft Overseas Investment Amendment Regulations that the Government proposes making under the new regulation making power to be contained in the Act.
4. The Bill and these Regulations are required to implement New Zealand's obligations in respect of some overseas investments in New Zealand in significant business assets by certain investors under the existing trade agreements specified in the proposed new provision. Each of those existing trade agreements, and the aspects of the Regulations that relate to them, are outlined below.
5. The Regulations will only take effect from the date CPTPP enters into force for New Zealand. CPTPP would enter into force 60 days after 6 parties have completed their necessary domestic procedures and ratify the agreement.

## Screening threshold for investment in significant business assets

6. The Overseas Investment Act 2005 generally requires overseas investments in significant business assets in New Zealand to be screened by the Overseas Investment Office if the value of that investment is greater than \$100 million<sup>1</sup> (section 13 of the Act provides further detail). Under the CPTPP, New Zealand has agreed to lift this value to \$200 million for non-government investors from CPTPP parties. This also triggers MFN obligations in existing trade agreements which means, in certain circumstances, investors from these territories will also receive the higher screening threshold.
7. The details of who is eligible for the higher value threshold are set out in New Zealand's international obligations. This results in a complex set of rules for determining whether an investment qualifies for a higher monetary threshold. The discussion below outlines how the proposed Overseas Investment Amendment Regulations will implement the higher screening threshold arising from the different agreements.

### Introduction and definitions

8. A new Part 2A is proposed to be inserted in the Overseas Investment Regulations 2005. It will contain all of the changes required to implement the higher screening threshold. Regulation 38A provides an introduction to what the new Part achieves and the agreements to which it relates. Regulation 38B provides definitions for the purposes of the new Part. These definitions primarily relate to the categories of investors who are eligible for the higher screening threshold.
9. Regulation 38C provides a definition for the Regulation's ownership or control test. This is an important test used throughout the Regulations to establish whether or not an investor that is an enterprise - and that does not have substantial business activities in a relevant territory - is entitled to the higher screening threshold. In order to qualify for the higher screening threshold in those circumstances, 75% or more of the investors must be from a party that qualifies for the higher screening threshold. This is the inverse of the 25% threshold for who is an 'overseas person', which is contained in the Act. There is also a further test of control in regulation 38C(3), based on the Act's definition of "associate".
10. Regulation 38D provides a definition of what constitutes a relevant government enterprise, this being an investor that is 25% or more owned by a foreign government. This mirrors the 25% threshold for who is an overseas person, which is contained in the Act.
11. The definitions of type A enterprise, type A individual and type A territory list all the parties to the CPTPP. This list would be reviewed before CPTPP enters into force for New Zealand, when the Regulations would take effect, to remove any parties that had not yet ratified CPTPP. Parties would subsequently be added as they ratify CPTPP.

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<sup>1</sup> Australian non-government investors have a higher screening threshold (currently \$516 million) arising from the 2011 New Zealand-Australia Closer Economic Relationship Investment Protocol.

## Comprehensive and Progressive Agreement for Trans-Pacific Partnership

12. Under the CPTPP, New Zealand has agreed to increase the screening threshold from \$100 million to \$200 million for non-government investors from CPTPP parties. The CPTPP signatories are:
  - Australia
  - Brunei Darussalam
  - Canada
  - Chile
  - Japan
  - Malaysia
  - Mexico
  - Peru
  - Singapore, and
  - Viet Nam.
  
13. New Regulation 38F provides for the higher screening threshold for investors from CPTPP territories. Consistent with New Zealand's obligations under the CPTPP, investors from these territories will be entitled to the higher screening threshold if all the relevant investors are type 1 investors. The definition of "relevant investor" means an investor needs to consider if it has any 'associates', as defined in the Act. Regulation 38G defines a type 1 investor as:
  - an individual from one of the above named CPTPP territories, South Korea or Chinese Taipei (Regulation 38B provides relevant definitions)
  - an enterprise from one of the above named CPTPP territories, South Korea or Chinese Taipei that has substantial business activities in a CPTPP territory, South Korea or Chinese Taipei, or meets the ownership or control test in Regulation 38C, or
  - a branch of an enterprise that is located in one of the above named CPTPP territories, South Korea or Chinese Taipei and that branch has substantial business activities in a CPTPP territory, South Korea or Chinese Taipei, or meets the ownership or control test in Regulation 38C.

### Most Favoured Nation Obligations

14. In certain existing trade agreements, New Zealand has made most favoured nation commitments. These commitments mean that New Zealand is obligated to treat investors from the relevant territories on terms no less favourable than the terms or conditions it accords to investors from other territories in like circumstances.
  
15. This means that New Zealand is obligated to also extend the higher screening threshold of \$200 million to non-government investors from the following parties in certain circumstances:
  - the Republic of Korea (South Korea)
  - the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu (Chinese Taipei)

- Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong), and
- the People's Republic of China (China).

### South Korea and Chinese Taipei

16. New Zealand's trade agreements with South Korea and Chinese Taipei mean that the treatment extended to investors from CPTPP territories must also be extended to investors from these territories. Regulations 38F and 38G also provide for the higher screening threshold in these circumstances on the same basis as outlined above.

### Hong Kong

17. The most favoured nation clause in New Zealand's trade agreement with Hong Kong has a different scope of application compared to the clauses contained in the agreements with South Korea and Chinese Taipei. This agreement obligates New Zealand to extend the higher value screening threshold to Hong Kong investors only with regard to those that are also 'service suppliers' and that are seeking to establish, or that have, a 'commercial presence' in New Zealand.
18. Regulation 38H provides for the higher screening threshold for this type of investment. Regulation 38I provides definitions for what is meant by 'commercial presence', a 'type 2 service supplier', and 'supply' (in relation to a service). The definitions of 'commercial presence' and 'supply' incorporate by reference their definition from the New Zealand-Hong Kong, China Closer Economic Partnership Agreement. This is to provide certainty that the definitions in the Regulations align with the definitions contained in the original agreement.
19. The drafting of Regulation 38I also includes reference to 'type A' investors (i.e. investors from a CPTPP territory, South Korea or Chinese Taipei). This drafting provides for situations where a consortium of different investors from such territories and Hong Kong may be seeking to invest in New Zealand.
20. The following types of investor from Hong Kong, or qualifying consortiums involving Hong Kong investors, will be entitled to the higher screening threshold (defined as a 'type 2 investor' in Regulation 38I):
  - an individual from Hong Kong (defined as 'Hong Kong individual' in Regulation 38B), a CPTPP territory, South Korea or Chinese Taipei
  - a Hong Kong enterprise (or enterprise from CPTPP territories, South Korea or Chinese Taipei) that has substantial business activities in Hong Kong, a CPTPP territory, South Korea or Chinese Taipei, or meets the ownership or control test in Regulation 38C, or
  - a branch of an enterprise that is located in Hong Kong, a CPTPP territory, South Korea or Chinese Taipei and that branch has substantial business activities in Hong Kong, a CPTPP territory, South Korea or Chinese Taipei, or meets the ownership or control test in Regulation 38C.

## China

21. The most favoured nation clauses in New Zealand's agreement with China obligate New Zealand to extend the higher value screening threshold to China. The higher threshold applies differently where the investors are 'service suppliers'.
22. If the investors are 'services suppliers', the higher value screening threshold applies if the investor is seeking to establish, or has, a 'commercial presence' in New Zealand, and only in certain services sectors. These sectors (defined in the Regulations as an 'Annex 9 service') are:
  - Environmental services (CPC 9401-9406, 9409)
  - Construction and related engineering services (CPC 512, 514, 516 and 517)
  - Services incidental to agriculture and forestry (CPC 8811 and 8814)
  - Engineering services (CPC 8672)
  - Integrated Engineering services (CPC 8673)
  - Computer and related services (CPC 841, 842, 843 844, 845 and 849), and
  - Tourism and travel related services (CPC 641, 642, 643, 7471 and 7472).
23. CPC refers to the Central Product Classification code from the United Nations Statistics Division (see <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1>).
24. Regulation 38J provides for the higher screening threshold for this type of investment. Regulation 38K provides definitions for what is meant by a 'type 3 service supplier', an 'Annex 9 service', a 'commercial presence', and 'supply' (in relation to a service). The definitions of 'Annex 9 service', a 'commercial presence' and 'supply' incorporate by reference their definition from the Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China. This is to provide certainty that the definitions in the Regulations align with the definitions contained in the original agreement.
25. The following types of investor from China, or qualifying consortiums involving Chinese investors, will be entitled to the higher screening threshold (referred to as a 'type 3' investor in Regulation 38K):
  - an individual from China (defined as a China individual in Regulation 38B), a CPTPP territory, South Korea, Chinese Taipei and Hong Kong
  - a China enterprise (or an enterprise from a CPTPP territory, South Korea, Chinese Taipei or Hong Kong) that has substantial business activities in China, a CPTPP territory, South Korea, Chinese Taipei or Hong Kong, or meets the ownership or control test in Regulation 38C, or
  - a branch of an enterprise that is located in China, a CPTPP territory, South Korea, Chinese Taipei or Hong Kong and that branch has substantial business activities in China, a CPTPP territory, South Korea, Chinese Taipei and Hong Kong, or meets the ownership or control test in Regulation 38C.

26. For China investors, or qualifying consortiums involving China investors, who are **not** 'service suppliers', regulations 38L and 38M apply. This situation is defined as a 'type 4' investor, which can include individuals and enterprises from CPTPP territories, South Korea and Chinese Taipei, as well as China.

#### **P4 Agreement: Chile, Brunei and Singapore**

27. New Zealand signed the Trans-Pacific Strategic Economic Partnership (P4) Agreement with Brunei, Singapore and Chile in 2005 (See [www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/p4/](http://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/p4/)). The most-favoured nation clause in the P4 Agreement mirrors the provision in New Zealand's agreement with Hong Kong. It obligates New Zealand to extend the higher value screening threshold to investors from these territories only with regard to those that are also 'service suppliers' and that are seeking to establish, or that have, a 'commercial presence' in New Zealand. As Chile, Brunei and Singapore are all CPTPP signatories, and the most-favoured nation threshold from the P4 Agreement is more limited than under CPTPP, regulations would only be made for the P4 Agreement if Chile, Brunei and Singapore were not parties to CPTPP at the time it entered into force for New Zealand. The exposure regulations provide for these parties to have access to the CPTPP provisions.

#### **Australian investments**

28. The 2011 Investment Protocol to the Australia New Zealand Closer Economic Partnership (the CER Investment Protocol) provided for a higher value threshold of \$477 million for non-government Australian investors and \$100 million for Australian government investors. The Investment Protocol came into force on 1 March 2013.
29. The value thresholds for this agreement are indexed for GDP growth. The current thresholds are \$516 million for non-government Australian investors and \$108 million for Australian government investors.
30. The CER Investment Protocol is currently implemented via regulation 36A and Schedule 5 of the Overseas Investment Regulations 2005.
31. Given the range of parties impacted, the Government determined that the best approach for implementing the changes necessitated by CPTPP was to amend the Overseas Investment Act 2005 (and provide a specific regulation making power for the detail of how higher screening thresholds apply). However, this approach differs from the approach taken to implement the Investment Protocol. Therefore, to ensure consistency in the regulatory regime, it is proposed that the existing Australian regulations that implement the CER Investment Protocol be remade under the new regulation making power in the Act.
32. Separate regulations will be made to exempt Australian investors in relation to residential (but not otherwise sensitive) land and regulated profits à prendre, which are being included in the Act by the Overseas Investment Amendment Bill.

#### **Australian non-government investments**

33. Regulation 38P provides for the higher value threshold for Australian non-government investors. It references the value threshold of \$477 million originally agreed in the Investment Protocol and provides for the indexation of that threshold (against the GDP implicit price deflator index table published by Statistics New Zealand).

34. The following types of non-government investors from Australia will be entitled to the higher screening threshold of \$200 million (referred to as an 'Australian non-government investor' investor in Regulation 38Q):
- an individual from Australia (defined as an 'Australian individual' in Regulation 38O)
  - an Australian enterprise that has substantive business operations in Australia, or meets the ownership or control test in Regulation 38C, or
  - a branch of an enterprise that is located in Australia and that branch has substantive business operations in Australia, or meets the ownership or control test in Regulation 38C.

#### **Australian government investments**

35. Regulation 38R provides for Australian government investors to also be entitled to an indexed value threshold. It references the value threshold of \$100 million originally agreed in the Investment Protocol and provides for the indexation of that threshold (against the GDP implicit price deflator index table published by Statistics New Zealand). Regulation 38S defines who an Australian Government investor is.

#### **Indexation of Australian thresholds**

36. Regulation 38T provides for the operation of the indexation of the screening threshold for both Australian non-government and government investors. It is consistent with the existing implementation and will mean that the current thresholds of \$516 million for non-government investors and \$108 million for government investors will apply on entry into force of the proposed Regulations (or any higher number depending on the date of the entry into force of CPTPP – which is when these Regulations to enter into force).

### **Other provisions**

37. It is intended that Regulation 2 will provide that the proposed Regulations will enter into force at the same time as the CPTPP Agreement enters into force for New Zealand.
38. Regulation 7 provides that Schedule 5 in the current Overseas Investment Regulations 2005 will be revoked. This reflects that implementation of the Australian higher screening thresholds will be remade under the new regulation making power.