

Overseas Investment Amendment Bill 2020: Summary of Approach to Supporting Regulations

15 May 2020

Context and Purpose

Many of the proposed changes to the Overseas Investment Act 2005 are set out in the Overseas Investment (Urgent Measures) Amendment Bill (the Urgent Measures Bill) and the Overseas Investment Amendment Bill (No 3) (the Other Measures Bill) (collectively, the Bills). However, some of the detail of those changes will be implemented through regulations. Many of the regulations have not yet been drafted. Even so, the Government has made some policy decisions about the material to be included in regulations, with most of these to come into effect to support the Urgent Measures Bill but some potentially not coming into effect on an enduring basis until the Other Measures Bill has been passed.

The purpose of this document is assist those with an interest in the Bill to understand the overall shape of the reforms and how the regulations will support the primary legislation once the Bills have been passed.

This document has been prepared by The Treasury. It sets out the policy decisions Ministers have made. It does not cover some minor and technical amendments that will be made to existing regulations.

Further detail on the reforms is available on the Treasury's website <https://treasury.govt.nz/news-and-events/reviews-consultation/overseas-investment-consultation>. The Treasury welcomes feedback, to inform the drafting of the regulations, as the Select Committee considering the Bill will not be considering these proposed regulations, and timeframes do not allow for an exposure draft. You can provide feedback to overseasinvestment@treasury.govt.nz.

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Exemptions from the Overseas Investment Act: overseas persons

Context:

1. The Urgent Measures Bill provides for exemptions to be made for classes of fundamentally New Zealand entities (see clause 49 of the Urgent Measures Bill).
2. The Bill does so because the way the Act defines overseas persons works well for individuals, but not always as well for legal persons like companies and managed investment schemes. A non-listed New Zealand incorporated company will be an overseas person if it is 25 per cent or more owned or controlled by one or more overseas persons. Equally, a managed investment scheme will be an overseas person if it is managed by an overseas person (even if it is investing on behalf of New Zealanders who could buy sensitive assets in their own right without obtaining consent).

Proposed new regulations to support those changes:

3. The grounds for an exemption will be set out in regulations. Those exemptions will allow some investors to *not* be overseas investors for the purposes of the Act, and therefore not subject to the regime.

Domestically incorporated bodies corporate not listed on the NZX will be able to apply for an exemption if:

- they are neither 50 per cent or more owned by overseas persons, nor have overseas persons holding 10 per cent or more of the listed entity's shares who cumulatively control more than 25 per cent of the voting rights, or rights to control the composition of 50 per cent of the governing body, and
- no foreign government (or their associates) holds 10 per cent or more of the entity's securities.
- Before granting an exemption, Ministers would also be required to consider:
 - the body corporate's compliance record, reflecting that non-listed entities are subject to less regulation than listed entities, and
 - the degree of control or access that a foreign Government and its associates may have reflecting that small holdings can result in disproportionate access or control

Domestically regulated managed investment schemes will be able to apply for an exemption if:

- 50 per cent or more of the value of the scheme is not invested on behalf of overseas persons, and

- more than 25 per cent of the value of the scheme is not invested on behalf of overseas persons that each have 10 per cent or more of the scheme's value invested on their behalf, and
- any foreign government or its associates does not hold 10 per cent or more of the scheme's value.

Before granting an exemption, Ministers would again be required to consider legal compliance and foreign governments' degree of control or access when deciding whether to grant an exemption.

Qualifying retirement schemes (where 75 per cent or more of the members are New Zealand citizens or ordinarily resident in New Zealand) will no longer be overseas persons, even if their supervisor or manager is an overseas person.

Exemptions from the Overseas Investment Act: shareholder creep

Context:

4. The Government has decided to expand the circumstances under which exemptions for small increases in an existing shareholding are available (the 'shareholder creep' exemptions), to reduce the Act's regulatory burden in respect of small transactions that do not materially change control of an entity. This did not require a corresponding change to the Act.
5. The Act requires overseas persons to get consent whenever they increase a shareholding in a company to more than a 25 per cent interest. The Regulations include an exemption from the requirement to get consent for:
 - an increase of 10 per cent or less of the shares held by a consent holder, provided that increase does not go over 'control limits' of 25 per cent, 50 per cent, 75 per cent, 90 per cent or 100 per cent shareholding, and
 - an increase of five per cent or less of the shares held by the overseas person (regardless of whether the increase crosses a control limit).

Proposed new regulations to support these changes:

- allowing the exemption to be used where a 25 per cent or more subsidiary, or 25 per cent or more parent entity, of a consent holder makes incremental increases in an existing interest, or where the overseas person acquired the interest in the asset before it became sensitive,
- removing the requirement that the exemption be used within five years of the date of consent, and

- removing the requirement that a consent holder obtain consent to increase their holding beyond a 90 per cent interest in the relevant entity.

Exemptions from the Overseas Investment Act: portfolios or bundles of permitted security arrangements

Context:

6. The Government has decided to expand the circumstances under which exemptions for investing in portfolios or bundles of permitted security arrangements are available. This will reduce the Act's regulatory burden in respect of transactions that support financial institutions ability to manage risks associated with their loan portfolios, thereby supporting their lending in New Zealand. This did not require a corresponding change to the Act.
7. The Act requires overseas persons to get consent whenever they acquire portfolios or bundles of permitted security arrangements where the value of the investment is \$100 million or greater (or the relevant greater amount available under a free trade agreement, if one applies).
8. The Regulations already include an exemption from the requirement to get consent for the acquisition of portfolios or bundles of permitted security arrangements where these grant an interest in sensitive land or fishing quota.

Proposed new regulations to support these changes:

- Allowing the acquisition of portfolios or bundles of permitted security arrangements without consent as long as the transaction is:
 - entered into in the ordinary course of business,
 - occurs in good faith, and
 - does not have the intent of acquiring the sensitive New Zealand assets that underlie the relevant security arrangement.

Exemptions from the Overseas Investment Act: loans by financial institutions

Context:

9. The Urgent Measures Bill expands the purposes for which exemptions can be granted, to allow loans by financial institutions (clause 49 of the Urgent Measures Bill).
10. The Act requires overseas persons to get consent whenever they issue a loan through one or a series of related transactions and the total value of that loan is \$100 million or greater (or the relevant greater amount available under a free trade agreement, if one applies). These requirements can limit New Zealand businesses' access to debt finance.
11. The Regulations already include an exemption from the requirement to get consent for the acquisition of permitted security arrangements that may be provided as security for a loan (such as a mortgage), subject to a number of conditions.

Proposed new regulations to support these changes:

- Allowing the acquisition of loan-assets worth \$100 million or greater (or the relevant greater amount available under a free trade agreement, if one applies), by overseas persons, without consent as long as the transaction is:
 - entered into in the ordinary course of business,
 - occurs in good faith, and
 - does not have the intent of acquiring sensitive New Zealand assets that underlie the relevant loan.

Exemptions from the Overseas Investment Act: residential mortgage-backed securities

Context:

12. The Urgent Measures Bill expands the purposes for which exemptions can be granted, to allow exemptions for persons, transactions, rights, interests, or assets that the Minister considers to support the issuance or management of residential mortgage-backed securities complying with a standard created or endorsed by the Reserve Bank (clause 49 of the Urgent Measures Bill).
13. This change is being made to allow the Minister to exempt transactions to issue or manage a new type of debt security called residential mortgage obligations ('RMOs') from consent requirements. RMOs were developed by the Reserve Bank of New Zealand, and support banks meeting their liquidity requirements and the Reserve

Bank's role as lender of last resort.

Proposed new regulations to support those changes:

14. Exempt transactions involving the purchase of permitted security arrangements from the Act's consent requirements, where:
 - the transaction is necessary or desirable to support the issuance or management of RMOs
 - the transaction is between a registered bank or non-bank deposit taker (the loan originator), and a licensed supervisor in respect of debt securities under the Financial Markets Supervisors Act 2011 (the trustee), and
 - the transaction is entered into in good faith and in the ordinary course of business.

Foreshore, seabed, riverbed and lakebed land (currently known as 'special land')

Context:

15. The Other Measures Bill makes a number of changes to clarify and streamline the requirements and process for acquiring special land (renamed 'fresh or seawater areas) in clause 11 and Schedule 3. Existing provisions make it difficult for the Crown to secure ownership.

Proposed new regulations to support those changes:

16. Regulations will provide further detail on the process by which the Crown acquires interests in fresh or seawater interests, including:
 - the information the consent holder must include in the 'water areas acquisition notice' they must register as a condition of consent. The purpose of the notice is to secure the Crown's right to acquire fresh or seawater areas, by giving any future purchaser of the land notice of that right, and making their purchase subject to that right,
 - the standard terms and conditions for the acquisition of the fresh or seawater interest, including in relation to access, will be set out in the regulations.

These terms and conditions will be mandatory unless both parties agree to vary them, and will be based on existing terms and conditions prepared by the OIO for the current special land process, with appropriate modifications, and
 - regulations may also be made to specify a timeframe in which the Crown must make a decision on whether or not to waive its interest in a fresh or seawater area. This timeframe will be set along with the statutory timeframes for making consent decisions (see the Timeframes for decisions section, at page 16).

Transactions subject to the emergency notification power: acquisition of business assets

Context

17. The Urgent Measures Bill provides that:
 - overseas persons must notify the government of transactions to acquire certain assets used to undertake an existing New Zealand business, and
 - that such transactions cannot proceed until the government has concluded its review of that transaction.

Proposed new regulations to support those changes:

18. Regulations will provide that investments in assets worth more than 25 per cent of the relevant business must be notified under the emergency notification power.

Transactions subject to call-in and national interest screening: detailed definitions

Context

19. The Urgent Measures Bill provides that investments in specified strategically important businesses (SIBs) that ordinarily require consent are 'transactions of national interest' and will be automatically subject to the national interest test.
20. The Urgent Measures Bill also introduces a call in power that empowers the government to manage significant national security and public order risks posed by foreign investments not ordinarily subject to screening. Investments in the same SIBs covered by the national interest test (with one addition and two exceptions) are 'call in' transactions.

Proposed new regulations to support those changes:

21. Most SIBs are specified at a high-level in clause 6 of the Urgent Measures Bill. Regulations will be used to refine the definitions of these SIBs, except for critical direct suppliers to defence and security services and media businesses with significant impact which are defined in the Bill (clause 17, new sections 20D and 20G respectively, of the Urgent Measures Bill). This will ensure that New Zealand's screening regime remains responsive to any change in the nature of the relevant business, and changes in the risks that New Zealand faces. For the call in power, the definitions set in regulations must not go wider than necessary to manage risks to New Zealand's national security and public order.
22. Regulations can also be made to specify new SIB's that will be automatically subject to the national interest test (if they are investments ordinarily screened under the Act –

that is, they are significant business assets, sensitive land or fishing quota). This does not apply to the call in power, as noted in the table below.

Proposed regulations: The Government proposes to issue regulations to refine the definitions of SIBs as follows:

Proposed approach, as set out in the Bill:	Proposed approach to regulations:	Applies to:
<p>Military or dual-use technology means—</p> <p>(a) any goods listed in the strategic goods list, but not of a class set out in regulations;</p> <p>(b) any technology that—</p> <p style="padding-left: 20px;">(i) control of, or access to, could pose a significant risk to national security or public order; and</p> <p style="padding-left: 20px;">(ii) is within a class of technology set out in regulations</p>	<p>No regulations are intended to be made on commencement. The empowering provision in (a) provides flexibility for the government to exempt certain technologies on the strategic goods list from being automatically subject to the national interest test where appropriate.</p> <p>The empowering provision in (b) provides the government flexibility to prescribe additional military or dual use technologies that are not contained in the strategic goods list but pose national security or public order risks.</p>	<p>Both call in power and national interest test</p>
<p>A business that is involved in ports or airports of a class set out in regulations:</p>	<p>The ports at Auckland, Bluff, Port Chalmers, Gisborne, Lyttelton, Napier, Nelson, Picton, Port Taranaki, Tauranga, Timaru, Wellington, Westport, and Whangarei.</p> <p>The airports at Auckland, Bay of Islands, Blenheim, Christchurch, Dunedin, Gisborne, Hamilton, Hokitika, Invercargill, Napier, Nelson, New Plymouth, Palmerston North, Queenstown, Rotorua, Tauranga, Wanganui, Wellington, Westport, Whakatane, and Whangarei.</p> <p>These are the same ports and airports deemed lifeline utilities under the Civil Defence and Emergency Management Act 2002.</p>	<p>Both call in power and national interest test</p>

Proposed approach, as set out in the Bill:	Proposed approach to regulations:	Applies to:
A business that is involved in electricity generation, distribution, metering, or aggregation of a class set out in regulations:	<p>Generation: transactions in entities engaged in the generation or aggregation of electricity (within the meaning of the Electricity Industry Act 2010) with the total installed generation capacity or demand controlled by an entity exceeding 250 MW.</p> <p>Distribution: transactions in entities that provide electricity lines services within the meaning of the Commerce Act 2005.</p>	Both call in power and national interest test
A business that is involved in drinking water, waste water, or storm water infrastructure of a class set out in regulations	<p>Transactions in entities that operate drinking water supply schemes serving 5,000 or more people as registered under Part 2A of the Health Act 1956 (and its successor legislation).</p> <p>Transactions in entities that provide a waste water or sewerage network, or that dispose of sewage or storm water, that service 5,000 or more people.</p>	Both call in power and national interest test
A business that is involved in telecommunications infrastructure or services of a class set out in regulations	Transactions in entities that provide telecommunications services to other entities that allow communication between telecommunications devices. Definitions of 'telecommunications service' and 'telecommunications device' will be drawn from the Telecommunications (Interception Capability and Security) Act 2013.	Both call in power and national interest test
A business that is a financial institution or is involved in market infrastructure of a class set out in regulations	<p>Transactions in:</p> <ul style="list-style-type: none"> • domestic systemically important banks as determined by the Reserve Bank of New Zealand • financial markets infrastructure designated as systemically important under the forthcoming Financial Markets Infrastructure Bill 	Both call in power and national interest test

Proposed approach, as set out in the Bill:	Proposed approach to regulations:	Applies to:
A business that is involved in an irrigation scheme of a class set out in regulations	An irrigation scheme is a water supply system involving the collection, storage, and/or reticulation of water primarily for agricultural production, with a resource consent or consents to abstract more than 25 million cubic metres of water per year.	Only national interest test
Any other business that is involved in a strategically important industry or that owns or controls high-risk critical national infrastructure of a class set out in regulations.	No regulations are proposed to be made under this section upon commencement.	Only national interest test

Sensitive information:

23. The call in power (but not the national interest test) will also apply to investments in businesses that develop, produce, maintain, or otherwise have access to **sensitive information**. Sensitive information is defined in clause 6(2) of the Urgent Measures Bill to include information that—
- (a) is genetic, biometric, health, or financial information, or relates to the sexual orientation or sexual behaviour of individuals (sensitive personal information), or
 - (b) is official information (as defined in section 2 of the Official Information Act 1982 or section 2 of the Local Government Official Information and Meetings Act 1987) that is relevant to the maintenance of national security or public order.
24. The Government proposes to issue regulations refining the definition of sensitive personal information in the Bill by:
- excluding data that poses little risk (that is anonymised, publically available, or data about the entities own employees),
 - clarifying the scope of genetic, biometric, health and financial data or data that relates to the sexual orientation or sexual behaviour of individuals as set out in the table below, and
 - only including with scope of the definition businesses targets sensitive populations, by either:
 - having tendered to or supplied services to sensitive government employees or contractors (that is, individuals considered to be “high risk”), including the Government Communications Security Bureau, the New Zealand Security Intelligence Service, the Department of the Prime

Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Ministry of Defence and the New Zealand Defence Force, or

- producing, maintaining, or otherwise having access to datasets on 30,000 or more individuals.

25. The four categories of data are proposed to be refined in the regulations as follows:

High level definition	Proposed refined definition for the regulations
Genetic data	Any information about a person's inherited or acquired genetic characteristics resulting from the analysis of a biological sample.
Biometric data	<p>Biometric data for the purpose of uniquely identifying a natural person in accordance with the Customs and Excise Act 2018 (with one addition):</p> <ul style="list-style-type: none"> • a photograph of all or any part of the person's head and shoulders, • impressions of the person's fingerprints, • a scan of the person's irises, and • an electronic record of the information that is capable of being used for biometric matching. <p>This definition will be extended to include behavioural indicators (such as speech and gait analysis).</p>
Data concerning health or a natural person's sexual behaviour and/or sexual orientation	<p>Any information about a person's:</p> <ul style="list-style-type: none"> • drug or alcohol abuse or addiction and any other addictions • mental health • physical health • sexual behaviour and/or sexual orientation.
Data about the financial position of a natural person or entity/juridical person	Any information that can be used to analyse or determine a person's financial position (i.e. information about a person's total assets, liabilities, or cash flow), as well as credit scores.

Further definition of ‘sensitive adjoining land’

26. The Bills make a number of changes to no longer require investments in certain types of sensitive adjoining land to be screened. The majority of these changes are contained in the Other Measures Bill, with the Urgent Bill referencing changes contained in that Bill on a transitional basis. The Urgent Bill also includes regulation making powers to support the identification of sensitive adjoining land under the Act.
27. The Urgent Measures Bill allows regulations to be made to specify the Acts that list reserve land, greater than 0.4 ha, that is managed wholly or jointly by the governance entity of a collective group of Māori (as required under rows 10 and 11 of new Table 2 in the Other Measures Bill). The enactments referred to are various Crown / iwi settlement Acts. Land that adjoins this land will be sensitive under the Act and require consent.
28. To provide investors with additional certainty, in addition to the regulations listing the relevant Acts, the regulator will be required to list each piece of land that those Acts refer to (clause 25, new section 37A of the Urgent Measures Bill).

What is a complete application?

Context:

29. The Urgent Measures Bill allows regulations to be made that will set out what constitutes a complete application. This will be important because the reforms will introduce statutory timeframes for decisions by the Overseas Investment Office and Ministers. The timeframes will include an initial QA period during which the Overseas Investment Office can:
 - reject an application if it is incomplete,
 - require significant change (for example, where more than one transaction is not sufficiently linked to be considered as one consent), and/or
 - the applicant has selected the wrong pathway.

Proposed new regulations to support those changes:

30. Regulations will require a complete application for **consent** to include:
 - key information including: applicant details (which may include upstream ownership) and transaction details (including land and assets, for example if the land includes any fresh or seawater interests),
 - identification of the relevant consent pathway and information to satisfy the relevant criteria,

- completion of the investor test requirements as prescribed in s 18A of the Act. That includes identification of relevant overseas persons and individuals with control, the relevant disclosures (which generally go to good character, in a broad sense), and where applicable, statutory declarations for repeat investors.
 - where applicable, completion of the relevant criteria for the consent pathway, including: a counterfactual submission, expert reports and an investment plan.
 - details of the results of any third party consultation, and
 - relevant information from the vendor (unless the requirement is waived).
31. Regulations will also require an investor making a notification under the **call in power** to disclose information relevant to determining the national security or public order risks posed by the proposed transactions. This information will be sought through a form, around five pages long, similar in approach to those in the United States and Canada. Information sought will include information to:
- determine, verify, and validate all the parties to the investment, and their ownership and control (where they are not natural persons). This information will help the regulator assess national security and public order risks present in a transaction by identifying all those persons or entities that will (or could) obtain control, access to, or otherwise influence the operation of the target entity via the investment (e.g., does the investor, or its parent company, have links to a foreign government?),
 - determine the risks posed by the target entity's activities or assets. This information will reveal whether the target entity holds assets or conducts business activities that may pose risks (e.g., does the target entity hold health data on sensitive government employees?),
 - determine the risks posed by the size and nature of the interest acquired. This information will reveal whether the ownership interest to be acquired by the investor is sufficient to grant access to, control, or influence over the target entity's assets (e.g., will the investment give the investor the right to appoint board members or others grant disproportionate access or control over the company?).

Provision of tax information as part of an application to the OIO

Context:

32. The Other Measures Bill will require applicants to submit certain information the structure and tax treatment of a proposed investment in significant business assets as part of their application, which would be provided to Inland Revenue. This information would be required for a complete application, but would not be considered as part of the screening process (see clause 16 of the Other Measures Bill).

Proposed new regulations to support those changes:

33. Regulations will specify the information that must be included on a proposed investment's structure and tax treatment. This information is envisaged to be:

<i>Description of activities</i>	
1.	A short description of the investor's plan for the asset over the next 3 years (i.e. maintain status quo, expand or pivot), including any details of significant capital expenditure over that period.
2.	Tax residence of the investor entity, its holding company and ultimate holding company
<i>Capital structure for the investment</i>	
3.	Equity funding for the investment
4.	Debt funding for the investment
5.	Use of a hybrid instrument or hybrid entity to fund the investment
<i>Cross border related party transactions</i>	
6.	The nature and likely extent of any cross border related party transactions
7.	Expected sales from New Zealand to non-New Zealand related parties
8.	Expected breakdown as to the purchases of goods, services, royalties, interest/guarantee fees or any other charges to non-New Zealand related parties
<i>Other</i>	
9.	Any relevant double taxation agreements
10.	Whether an application to Inland Revenue will be made for a ruling or advance pricing agreement in respect of any aspect of the investment

Advertising farmland

Context:

34. Regulations under the Other Measures Bill will be made to give greater definition of how and when farmland has to be advertised for acquisition (see clause 7 of the Other Measures Bill).

Proposed new regulations to support those changes:

- update the list of appropriate forms of advertising to include, for instance, advertising on the internet, and
- increase the minimum advertising period to 30 days.

Timeframes for decisions

Context:

35. The Urgent Measures Bill will allow for regulations to create specific timeframes for each of the different consent pathways, and also for various other notifications to support, for instance, transactions subject to the call-in power (see clause 25 of the Urgent Measures Bill). This will align New Zealand's screening regime with those in almost all other comparable countries, which do require decisions on applications within a specified timeframe.
36. The timeframes for all consent pathways and the call in power will be settled once the Bill has passed and all provisions are in force, to ensure that timeframes appropriately reflect the legislation. Recognising the need for additional certainty to support the emergency notification power, the timeframes for this process will come into effect two weeks after the Urgent Measures Bill receives Royal assent.
37. To encourage timeliness, the regulator will be required to publicly report on compliance with statutory timeframes. However, decisions will not be void if they are made outside the timeframes, and the Crown will not be liable for any loss suffered by investors.
38. When setting timeframes the following objectives will be taken into account:
 - timeframes provide a meaningful improvement over existing processing times, with the goal of improving New Zealand's attractiveness to high quality foreign investment, taking into account international best practice
 - timeframes should be reasonable and achievable for investors and their advisors, the OIO and decision-makers alike
 - timeframes should be simple and clear to applicants

- timeframes should provide greater certainty for investors about when they will get a decision
- timeframes will promote efficiency and effectiveness from all parties involved, including investors, the OIO, third parties and Ministers
- timeframes should reflect efficiency gains from the broader reform package, and
- timeframes will need to ensure that the OIO can appropriately manage risk.

Proposed new regulations to support those changes:

- establishing specific timeframes for each different consent pathways under the Act, and applying to all decisions, including Ministerial decisions.
- enabling the decision-maker to unilaterally extend the statutory timeframe by up to a period prescribed in regulations, or a different period agreed with the applicants.
- timeframes will apply to all parts of the process, from Quality Assurance to decision. This includes providing the regulator with an initial period to quality assure an application and reject applications that are incomplete, and enabling the regulator to charge a fee for this.
- there will be additional time available for national interest transactions, and may be additional time for decisions involving farm land or requiring Ministerial consideration (which would allow for shorter base timeframes).
- there will be timeframes for lodging call-in notifications, for notification of an investor about the status of a non-public critical direct supplier, and for an investor to notify about an investment in a non-public critical direct supplier.

Proposed new timeframes for the emergency notification power

39. The regulations will prescribe that notifications received under the emergency notification power must be processed within 40 days, with the potential for this to be extended by up to 30 days. The Government's intention is that investors would hear within 10 days whether a notified transaction could be contrary to New Zealand's national interest, with those transactions that could not be then able to proceed.

Fees and charges

40. The Act empowers the responsible Minister to recover the costs of administering the regime by setting fees or charges in regulations. Several regulations will be made to clarify or set fees.

Proposed new regulations:

- clarifying that the OIO has the authority to refund fees in full or in part, and
- agreeing that the timing of fees paid under a standing consent to acquire residential land such that the fixed fee component must be paid at the time of lodging the application and variable fees are payable whenever a transaction to acquire residential land covered by the standing consent is completed and notified to the OIO.

Benefits test streamlined

41. The Other Measures Bill will considerably streamline the benefit to New Zealand test by removing existing regulations in the Overseas Investment Regulations 2005, and providing the requirements in the Act itself.