

The Treasury

Overseas Investment Amendment Regulations 2020 Information Release

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Office of the Associate Minister of Finance (Hon David Parker)

Chair,

Cabinet Legislation Committee

Overseas Investment Amendment Regulations 2020

Proposal

1. This paper seeks authorisation for submission to the Executive Council of the Overseas Investment Amendment Regulations 2020 ('the Essential Amendment Regulations'), which amend the Overseas Investment Regulations 2005 ('the Regulations').
2. The Essential Amendment Regulations can be made pursuant to sections 61, 61C and new section 127 of the Overseas Investment Act 2005 ('the Act').

Policy

3. The Essential Amendment Regulations will implement policy decisions made by Cabinet on 11 May 2020 [CAB-20-MIN-0212 refers], and one additional decision made under delegated authority regarding the Act's treatment of loans.
4. Changes to the Regulations are required to operationalise changes to the Act in the Overseas Investment (Urgent Measures) Amendment Bill 2020 ('Urgent Measures Bill'). The Urgent Measures Bill is an urgent priority.

Background

Phase Two reform of the Act

5. The Act is New Zealand's principal tool for regulating foreign investment in New Zealand's sensitive assets. The Act provides a framework for screening foreign investments in sensitive land (which includes farmland, the foreshore, and lakebed), significant business assets (generally assets valued at or above \$100 million), and fishing quota to ensure that they benefit New Zealand. It seeks to balance the need to support high quality investment with ensuring the government has the necessary tools to manage risks associated with foreign investment.
6. The Phase Two reform of the Act, which the Cabinet Economic Development committee ('DEV') endorsed in November 2019 [DEV-19-MIN-0306 refers], aimed to improve the balance struck by the Act, through strengthening the government's ability to manage high risk investments with the introduction of a national interest test, and removing consent requirements for a range of low risk transactions, such as minor adjustments to existing shareholdings.

Changes to the reform resulting from COVID-19 and the economic downturn

7. The COVID-19 pandemic has disrupted the global economy and triggered a severe economic downturn. Public health measures taken by governments across the world to restrict public transmission, together with the economic disruption, are combining to increase the risks posed by foreign investment.
8. Accordingly, on 6 May 2020, DEV agreed to a further package of reforms to the Act, as part of the Government's economic response to the COVID-19 pandemic and its impact on the foreign investment risk environment [DEV-20-MIN-0066 refers]. On 11 May 2020, Cabinet agreed to these changes [CAB-20-MIN-0212 refers].
9. On 14 May 2020, the Urgent Measures Bill, and the Overseas Investment Amendment Bill (No 3) ('the Other Measures Bill'), which give effect to Cabinet's decision, were introduced.
10. The Urgent Measures Bill contains measures that resolve new issues and some longstanding issues (which form part of the Phase Two reform) with the Act. These are needed to ensure the Act can be used to manage the escalating security and economic risks caused by the COVID-19 pandemic and protect domestic living standards.
11. The Other Measures Bill comprises the remaining provisions proposed as part of the Phase Two reform (that is, those not critical to the COVID-19 response), and is being progressed on an ordinary legislative track.
12. The Urgent Measures Bill anticipates amendments to the Regulations, which I proposed to amend in two phases in order to alleviate agency capacity constraints. Under my proposed process:
 - 12.1. the Essential Amendment Regulations, which this paper seeks approval for, will come into force on 11 June 2020, and
 - 12.2. I will seek authority to submit the second phase of regulations on 30 June 2020, which will then come into force on 7 July 2020.

Essential Regulations

13. The Essential Amendment Regulations effect a number of changes to the Regulations agreed to by Cabinet [DEV-19-MIN-0306 and CAB-20-MIN-0212 refer]. These include:
 - 13.1. defining assets covered by the new emergency notification regime,
 - 13.2. defining strategically important businesses covered by the new national interest test and call in power, and
 - 13.3. specifying the reserves and land managed by governance entities of collective group of Māori, which are included in the definition of sensitive land.
14. Under authority delegated to me by Cabinet to make decisions on additional policy or drafting issues [CAB-20-MIN-0212 refers], I have decided to give effect to Cabinet's

decision to exempt certain loans from screening by proposing amendments to Act. This approach was recommended in the Departmental Report, which the Select Committee agreed to. Accordingly, the Essential Amendment Regulations do not include that exemption. This change responds to targeted consultation with experts, which concluded that there is market uncertainty as to whether acquisitions of loans require consent in the first place – if consent is not required, an exemption would be superfluous. I consider that the acquisition of loans should not require consent in any case, and that this should be clarified in the Act.

15. Finally, the Essential Amendment Regulations also include some minor changes which do not require new policy decisions.
16. Section 61F(5) of the Act requires the Minister to publish a statement of reasons for recommending an exemption, together with the regulations. This is included at Annex 1.

Timing and 28-day rule

17. I propose that the 28-day rule be waived pursuant to Standing Order 7.97 and that the Essential Amendment Regulations take effect on and from 11 June 2020 (concurrently with the Urgent Measures Bill).
18. Standing Order 7.97 permits a waiver to be sought in certain circumstances, including where regulations are made in response to an emergency. The Essential Amendment Regulations reflects Cabinet's decisions on the reform of the Act, which forms part of the Government's economic response to the COVID-19 pandemic.

Compliance

19. As with the Other Measures Bill and the Urgent Measures Bill [CAB-20-MIN-0212 refers], officials were not able to make a full assessment of all the compliance risks of the Essential Amendment Regulations. On the basis that the Essential Amendment Regulations do not materially differ in intention from the Overseas Investment Amendment Bill (No 2) ('Phase Two Reform Bill') recently approved by Cabinet, I consider they comply with:
 - 19.1. the principles of the Treaty of Waitangi,
 - 19.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993,
 - 19.3. the principles and guidelines set out in the Privacy Act 1993 (if the regulations raise privacy issues, indicate whether the Privacy Commissioner agrees that they comply with all relevant principles),
 - 19.4. relevant international standards and obligations, and
 - 19.5. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

- 20.** Each regulation in the Essential Amendment Regulations can be made pursuant to sections 61 of the Act, as they provide for matters contemplated by the Act or are necessary for giving it full effect – except for:

20.1. clause 5 of the Essential Amendment Regulations, which can be made under sections 61C and 61E of the Act. In accordance with section 61E, clause 5 is on my recommendation (under delegated authority from the Minister of Finance) having regard to the purpose of the Act and other relevant factors, and

20.2. clause 9 of the Essential Amendment Regulations which can be made pursuant to section 127 of the Act (as amended by the Urgent Measures Bill).

Regulations Review Committee

- 21.** There are no grounds for the Regulations Review Committee to draw the Regulations to the attention of the House under Standing Order 319.

Certification by Parliamentary Counsel

- 22.** Parliamentary Counsel Office has certified the Essential Amendment Regulations as being in order for submission to Cabinet.

Impact Analysis

- 23.** The Treasury has determined that this proposal is a direct Covid-19 response and has suspended the Regulatory Impact Assessment ('RIA') requirements in accordance with the Cabinet decision [CAB-20-MIN-0138 refers]. The Treasury has included all available analysis in this paper and the Cabinet paper approving the Urgent Measures Bill [CAB-20-MIN-0212 refers].

- 24.** A RIA was prepared in accordance with the necessary requirements and was submitted at the time approval was sought for the policy relating to Phase Two Reform Bill [CAB-19-MIN-0593 refers]. The RIA was updated to reflect policy decisions I made under authorisation from DEV.

Publicity

- 25.** The Essential Amendment Regulations will be released on the Overseas Investment Office's website.

Proactive release

- 26.** I intend to publish this Cabinet paper when this reform is announced, subject to redactions as appropriate under the Official Information Act 1982.

Consultation

- 27.** This paper was developed in consultation with Ministry of Foreign Affairs and Trade and Overseas Investment Office.

Recommendations

I recommend that the Cabinet Legislation Committee:

1. **Note** that on 11 May 2020 Cabinet agreed to [CAB-20-MIN-0212 refers]:
 - 1.1. introduce a definition of assets covered by the new emergency notification regime
 - 1.2. introduce a definition of strategically important businesses covered by the new national interest test and call in power, and
 - 1.3. specify the reserves and land managed by governance entities of collective group of Māori, which is included in the definition of sensitive land.
2. **Note** that Cabinet agreed to exempt acquisitions of loan obligations by registered banks from screening requirements but, pursuant to authority delegated to me by Cabinet [CAB-20-MIN-0212 refers] to make decisions on additional policy or drafting issues, I have decided that the treatment of loans should instead be resolved in the Act.
3. **Note** that the Overseas Investment Amendment Regulations 2020 ('Essential Amendment Regulations') give effect to the decisions referred to in recommendations 1 and 2, above.
4. **Authorise** the submission to the Executive Council of the Essential Amendment Regulations.
5. **Note** that the Essential Amendment Regulations would come into force on 11 June 2020.
6. **Note** that a waiver of the 28-day rule is sought:
 - 6.1. so that the regulations can come into force concurrently with the Overseas Investment (Urgent Measures) Amendment Bill 2020, and
 - 6.2. on the grounds that it responds to an emergency.
7. **Agree** to waive the 28-day rule so that the regulations can come into force on 11 June 2020.
8. **Authorise** the Parliamentary Counsel Office to make minor and technical amendments to the Essential Amendment Regulations to resolve outstanding drafting issues, and to make consequential substantive amendments to the Essential Amendment Regulations in accordance with any changes to the Urgent Measures Bill during the Select Committee process, before the Essential Amendment Regulations are submitted to Cabinet.

Authorised for lodgement

Hon David Parker

Associate Minister of Finance

ANNEX 1: Statement of Reasons

The following statement of reasons is published for the purposes of s 61F(5) of the Act.

1. This statement sets out the Minister's reasons for recommending the exemption regulation in new regulation 37(1)(a) in the Overseas Investment Amendment Regulations 2020 and why the Minister considers each exemption to be necessary, appropriate or desirable. The Minister Responsible for the Act (the Minister of Finance) formally delegated authority to lead this review to the Associate Minister of Finance (Hon Parker).
2. Under the Act, the Minister may recommend exemptions under sections 61C and 61D only if the Minister considers:
 - 2.1. that there are circumstances that mean that it is necessary, appropriate or desirable to provide an exemption for any of the matters referred to in section 61B(a)-(c) of the Act; and
 - 2.2. that the extent of the exemption is not broader than is reasonably necessary to address those circumstances.
3. When considering whether to recommend that an exemption be made, the Minister must have regard to the purpose of the Act, which acknowledges that it is a privilege for overseas persons to own or control sensitive New Zealand assets, and that it is therefore appropriate for overseas investments in those assets to be made only after meeting consent criteria and subject to prescribed conditions.
4. The Minister may also have regard to all or any of the factors set out in section 61D(2)(b) of the Act, including any other factor that seems to the Minister to be relevant to the circumstances.

Reasons for exemptions for corporate dealing (new regulation 37(1)(a))

5. This exemption would allow members (companies and other entities) of the same group, which are overseas persons that own sensitive assets, to transfer those sensitive assets to different entities in the corporate group without consent, provided the ultimate ownership and control of the sensitive assets by overseas persons does not increase. For example, this exemption means that the transfer of sensitive assets from an initial overseas person consent holder to a wholly-owned subsidiary company would not require consent. This would replace existing regulation 37(1)(a).
6. This exemption is for the matters referred to in section 61B(a)-(b) of the Act. It is minor and technical and provides an exemption where compliance with the Act would be inefficient and unduly burdensome, taking into account the nature of the transaction.
7. I consider this exemption is appropriate and desirable, having regard to the Act's purpose, because it resolves an unintended consequence that has resulted from the drafting of the previous regulation introduced through the Overseas Investment Amendment Regulations 2018. Regulation 37(1)(a) previously provided an exemption for overseas persons restructuring their holdings of sensitive assets, but was limited to transactions in which the parent in the corporate structure acquired an

interest in the sensitive asset. This in effect meant that other overseas entities in the corporate group required consent to restructure their holdings of sensitive assets. This was not the intended outcome of the regulation. Requiring other entities that are overseas persons, to obtain consent to restructure in other circumstances would be inefficient and unduly burdensome. This is because there is no change in the ultimate ownership and control of the sensitive assets by overseas persons (having regard to the Act's purpose and general requirements, and the factors in s 61E(2)(b) (i)-(ii) of the Act).

8. Further, I consider this exemption is not broader than reasonably necessary because it is limited to situations where there is no change in the ultimate ownership and control of the sensitive asset by overseas persons. The exemption only operates where the ownership and control of the group by the relevant person is unchanged. In circumstances where there is an increase or other change in ultimate ownership and control, overseas persons would still be required to obtain consent according to the usual rules in the Act.