

# The Treasury

## Overseas Investment Act Reform Information Release

October 2020

This document has been proactively released by the Treasury on the Treasury website at

<https://www.treasury.govt.nz/publications/information-release/phase-2-overseas-investment-act-reform>

### Information Withheld

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act).

Where this is the case, the relevant sections of the Act that would apply have been identified.

Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to sections of the Act under which information has been withheld:

- [34] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions
- [35] 9(2)(g)(ii) - to maintain the effective conduct of public affairs through protecting ministers, members of government organisations, officers and employees from improper pressure or harassment
- [36] 9(2)(h) - to maintain legal professional privilege
- [39] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage

Where information has been withheld, a numbered reference to the applicable section of the Act has been made, as listed above. For example, a [39] appearing where information has been withheld in a release document refers to section 9(2)(k).

### Copyright and Licensing

Cabinet material and advice to Ministers from the Treasury and other public service departments are © **Crown copyright** but are licensed for re-use under **Creative Commons Attribution 4.0 International (CC BY 4.0)** [<https://creativecommons.org/licenses/by/4.0/>].

For material created by other parties, copyright is held by them and they must be consulted on the licensing terms that they apply to their material.

### Accessibility

The Treasury can provide an alternate HTML version of this material if requested. Please cite this document's title or PDF file name when you email a request to [information@treasury.govt.nz](mailto:information@treasury.govt.nz).

**Treasury Report:** Draft LEG paper: “Overseas Investment Amendment Regulations (No 2)”

---

<b>Date:</b>	15 June 2020	<b>Report No:</b>	T2020/1855
		<b>File Number:</b>	IM-5-3-8-9 (COVID Response Reforms)

**Action sought**

---

	<b>Action sought</b>	<b>Deadline</b>
Minister of Finance (Hon Grant Robertson)	<b>Note</b> the contents of this report.	N/A
Associate Minister of Finance (Hon David Parker)	<p><b>Provide feedback</b> on the draft paper seeking approval from the Cabinet Legislation Committee (LEG) to submit the Overseas Investment Amendment Regulations (No 2) to the Executive Council.</p> <p><b>Agree</b> to two clarifications to the changes to the exemption for shareholder creep.</p> <p><b>Agree</b> to consult your colleagues on the draft paper.</p>	17 June 2020

**Contact for telephone discussion (if required)**

---

<b>Name</b>	<b>Position</b>	<b>Telephone</b>	<b>1st Contact</b>
[35]	Analyst, International	[39]	N/A (mob) ✓
Chris Nees	Principal Advisor, Overseas Investment	[35]	

**Minister’s Office actions (if required)**

---

<b>Return</b> the signed report to Treasury.
--

Note any  
feedback on  
the quality of  
the report

**Enclosure:**

Yes (attached)

# Treasury Report: Draft LEG paper: “Overseas Investment Amendment Regulations (No 2)”

---

## Purpose of Report

---

1. This report provides you with the draft paper “*Overseas Investment Amendment Regulations (No 2)*” (attached), for your feedback. The paper seeks approval from the Cabinet Legislation Committee (LEG) to submit the Overseas Investment Amendment Regulations (No 2) (No 2 Regulations) to the Executive Council.
2. This report also seeks your agreement to:
  - a clarify the effect of a Cabinet-approved change to the exemption for shareholder creep, and
  - b consult your colleagues on the LEG paper.
3. Officials will also consult with technical experts on a draft of the No 2 Regulations, as we did with parts of the first batch of regulations.

## Background

---

4. On 28 May 2020, Parliament passed the Overseas Investment (Urgent Measures) Act (Urgent Measures Act) which reformed the Overseas Investment Act 2005 (Act). The Urgent Measures Act received Royal assent on 2 June 2020 and comes into force on 16 June 2020.
5. The first tranche of regulations (Essential Regulations), that operationalised changes to the Urgent Measures Act, also come into force on 16 June 2020. If endorsed, the No 2 Regulations would come into force on 14 July 2020.
6. A separate tranche of regulations was considered by Cabinet on 15 June 2020 to resolve an urgent issue with the transitional provisions in the Urgent Measures Act.

## Draft Cabinet paper

---

7. A draft paper seeking LEG’s authorisation to submit the No 2 Regulations to the Executive Council is attached to this report, for your consideration. The No 2 Regulations will give effect to the following matters that you have provided policy approval for:
  - a extend the existing exemption for less than 10 per cent increases in shareholdings,
  - b remove retirement schemes from the definition of overseas person,
  - c introduce a limited power for the regulator to refund fees in whole or in part,
  - d establish an interim fee structure for the national interest test,
  - e expand the existing exemption for permitted security arrangements to significant business assets,

- f clarify that the exemption for a single permitted security arrangement applies to both the origination and transfer of an arrangement, and
- g a transitional provision for existing transactions that are covered by new exemptions.

*Transitional provision for existing transactions that fall within new exemptions*

- 8. You asked us to consider whether that the second tranche of regulations could be applied retroactively so that the benefits of the exemptions are not delayed. The LEG paper proposes a new transitional arrangement for exemptions. It provides that transactions that were entered into before a new exemption comes into force, and that would be covered by the new exemption, can proceed without consent. This would not apply to transactions that have already received consent or been given effect to.
- 9. The proposal is consistent with the new transitional provision in clause 15(3) of Schedule 1AA of the Act.

*Waiver of 28-day rule sought*

- 10. The LEG paper also seeks agreement to waive Standing Order 7.96, which requires that regulations must not come into force until at least 28 days after they have been notified in the New Zealand Gazette. Standing Order 7.97 permits a waiver to be sought in certain circumstances, including where regulations are made in response to an emergency. Otherwise, the LEG paper is consistent with standard practice and notes that the No 2 Regulations comply with the relevant requirements and guidelines.

*Next steps*

- 11. We will reflect your feedback in an updated version of the LEG paper and provide it to you on 18 June 2020 for Ministerial consultation. We recommend that you take the paper to LEG on 30 June 2020.

**Policy issue: shareholder creep**

---

- 12. Cabinet agreed to expand eligibility for the existing exemption that allows for entities to increase existing interests by less than 10 percent, so long as they do not breach the control limits of 25 per cent, 50 per cent and 75 per cent [CAB-20-MIN-0212 refers]. This expansion means the exemption could be used by:
  - a 25 per cent holding companies and 25 per cent subsidiaries of consent holders, and
  - b entities that acquired an interest in an asset when it was not sensitive (for example, an entity that acquired residential land prior to 2018).
- 13. During the drafting process, we have identified two technical points requiring clarification.

*Screening of more than 25 per cent holding companies and subsidiaries as part of the investor test*

14. Cabinet agreed to expand eligibility for the exemption to include holding companies and subsidiaries of consent holders. However, our initial advice [T2019/2426 refers] did not indicate that 25 per cent or more holding companies and 25 per cent or more subsidiaries of consent holders will not necessarily all be screened as part of the initial consent. We wish to confirm with you that those entities that have not been screened will still be able to use the exemption.
15. When the Overseas Investment Office ('OIO') screens a transaction it looks at the acquirer's ownership structure and identifies which entities and/or individuals have actual control over the investment. Only those entities that have actual control are screened under the investor test. This means that entities that do not have actual control of the investment are not subject to screening (e.g. an upstream entity in a multinational with a complex multi-tiered ownership structure will not be screened if the upstream entity does not play a role in the control of the investment).
16. Under the revised exemption, all more than 25 per cent holding companies and subsidiaries of the consent holder will be able to use the exemption to increase their shareholding by less than 10 per cent regardless of whether they were subject to detailed screening. This is consistent with your previous policy decision because the policy behind the exemption is that less than 10 per cent increases within control limits do not alter control and should not be subject to screening. Therefore, if the Overseas Investment Office does not consider an entity relevant to the ownership or control of an investment and does not screen that entity, then that entity cannot be relevant to the ownership or control of the investment following a 10 per cent or less increase, and should not be required to get consent.
17. Accordingly, we recommend that you confirm that more than 25 per cent holding companies and more than 25 per cent subsidiaries of entities that hold consent are able to use the exemption regardless of whether they have been subject to screening.

*Screening of more than 25 per cent holding companies and subsidiaries that acquired an interest in a sensitive asset before it became sensitive*

18. Cabinet also agreed to extend the exemption to include entities that may have acquired an interest in a sensitive asset before it became sensitive (and therefore did not need to get consent). However, our initial advice did not specify that the extension should also allow more than 25 per cent holding companies or subsidiaries of the entity holding the sensitive asset to use the exemption.
19. As per paragraph 16, the policy position behind the exemption is that less than 10 per cent increases within control limits do not alter control or ownership of a sensitive asset and therefore should not require consent. In addition, any (negligible) risk resulting from a holding company's or subsidiary's shareholding increase is identical to the entity holding the sensitive asset because neither entity has been subject to screening.
20. Accordingly, we recommend that you confirm that a more than 25 per cent holding companies or subsidiary of an entity that acquired an interest in a sensitive asset before it was sensitive may use the exemption.

*Clarification of these points falls within your delegated authority*

21. We consider that these decisions fall within the authority delegated to you by Cabinet to “make decisions on any additional policy or drafting issues that arise during the implementation of the Emergency Measures Bill [subsequently, the Urgent Measures Bill] and Other Measures Bill, and the Regulations including minor technical changes, in consultation with relevant portfolio Ministers as necessary” [CAB-20-MIN-0212 refers].

## **Recommended Action**

---

We recommend that you:

- a **Provide feedback** on the attached LEG paper “Overseas Investment Amendment Regulations (No 2)”.

*Agree/disagree.*

- b **Agree** to clarify that a more than 25 per cent holding company or subsidiary of an entity that holds a consent is eligible to use the exemption to increase its interest in a sensitive asset by less than 10 per cent.

*Agree/disagree.*

- c **Agree** to clarify that a more than 25 per cent holding company or subsidiary of an entity that acquired an interest in a sensitive asset when it was not sensitive is eligible to use the exemption to increase its interest in a sensitive asset by less than 10 per cent.

*Agree/disagree.*

- d **Agree** to consult on the LEG paper with your colleagues.

*Agree/disagree.*

- e **Note** that officials will consult with technical experts on a draft of the No 2 Regulations.

- f **Note** that officials recommend you take the paper to LEG on 30 June 2020.

Chris Nees  
**Principal Advisor, Overseas Investment**

Hon David Parker  
**Associate Minister of Finance**