

# The Treasury

## Phase 2 Reform of Overseas Investment Act Information Release

March 2021

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Reference: T2020/1886 IM-5-3-8-9 (COVID Response Reforms)

Date: 20 July 2020

To: Minister of Finance (Hon Grant Robertson)  
Associate Minister of Finance (Hon David Parker)

Deadline: 21 July 2020 (for LEG)  
(if any)

## **Aide Memoire: Overseas Investment Amendment Regulations (No 2): talking points for LEG**

### **Purpose**

On 21 July 2020, Cabinet's Legislation Committee (LEG) is scheduled to consider the Overseas Investment Amendment Regulations (No 2) (the Regulations). This Aide Memoire provides talking points and background to support discussion at the Committee.

The Regulations implement the remaining measures in Overseas Investment (Urgent Measures) Amendment Act (Urgent Measures Act). The Urgent Measures Act introduced reforms that respond to the COVID-19 pandemic and its economic impact.

### **Suggested talking points**

- On 11 May 2020, Cabinet agreed to a suite of overseas investment reforms, as part of the Government's economic response to the COVID-19 pandemic. The reforms included a new temporary emergency notification regime, which allows the government to scrutinise any controlling investment in an existing New Zealand business irrespective of its value. The reforms also included a new national interest test which can apply to both investments already subject to screening, and those in the emergency notification regime.
- These changes were introduced through the Urgent Measures Act, which came into force on 16 June 2020.
- The changes to the Overseas Investment Regulations 2005 required to operationalise the Urgent Measures Act were divided into two tranches. The first tranche (the Essential Regulations) also came into force on 16 June 2020.

- I am now seeking LEG's authority to a second tranche of regulations that implement Cabinet's agreed policy decisions to:
  - clarify that investors do not need to notify the government of the establishment of a new business entity,
  - extend the existing exemption for less than 10% increases in shareholding (the 'shareholder creep' exemption)
  - remove retirement schemes from the definition of overseas person,
  - extend the existing exemption for portfolios or bundles of permitted security arrangements to transactions involving significant business assets (rather than just sensitive land and fishing quota),
  
- I am also seeking agreement to regulations that reflect additional minor policy decisions that I have made under Cabinet's delegated authority:
  - in response to feedback from technical experts, clarify that the both origination and transfer of a single permitted security arrangement is exempt from screening,
  - allow the regulator to refund fees in limited circumstances where investors have paid for consents that are no longer required as a result of the reforms,
  - introduce a new fee of \$52,000 to give effect to earlier agreement to recover the costs of the national interest test from investors, and
  - ensure that transactions entered into before the Regulations come into force, but would not need consent after they come into force, can proceed without consent.
  
- It is important that the Regulations are implemented quickly. This will support the regulator to operationalise the regime, recover its operating costs, and remove red tape. This should remove additional disincentives to investment in New Zealand, at an economically critical time. I have therefore recommended that LEG agree to waive the 28-day rule.

### **Background detail on the regulations**

#### *Clarification that the establishment of new business entities is not within scope of the emergency notification regime*

- Cabinet agreed that the emergency notification regime would only apply to investments in existing businesses and certain business assets.
- This is because the establishment of a new business is unlikely to raise national security or economic risks to New Zealand.
- This change responds to uncertainty from the legal profession about whether investments to establish a new business are subject to the emergency notification regime.

### *Changes to the shareholder creep exemption*

- The Act requires that overseas persons get consent to increase an existing more than 25% interest in sensitive assets.
- However, there are limited exemptions which allow overseas persons to make minor increases to an existing (consented) interest in a sensitive New Zealand asset without further consent in certain circumstances.
- The No 2 Regulations will broaden the circumstances in which a person can make such small increases to their ownership without consent. This will reduce compliance costs on low risk investment while still ensuring that New Zealand's sensitive assets are protected.
- The regulations give effect to Cabinet's agreement to extend the existing exemption for 10% or less increases in shareholding, as long as the investor does not increase their control of the entity, to:
  - allow associates of a consent holder to use the exemption (for example, the shareholder of the consent holder),
  - remove the five-year time limit (from the date of consent) to use the exemption so overseas person can use the exemption at any time,
  - remove the 90% control threshold so entities can use the exemption to increase shareholdings over 90% without automatically requiring consent (recognising that increasing an interest beyond 90% does not increase an investor's level of control over sensitive New Zealand assets)- this means that an overseas persons will only require consent for 10% or less increases if they cross control thresholds of 25%, 50%, 75% or 100%, and
  - allow entities that do not hold consent because they acquired an interest in a sensitive asset when the asset was not sensitive to use the exemption.
- These transactions do not allow an investor to materially increase their control over sensitive New Zealand assets because of the exemption limits 'shareholder creep' to 10% increases within control limits. This means that removing the transactions from screening will have minimal impact from a government risk-management perspective.

[1]

#### *Remove retirement schemes from the definition of overseas person*

- Following Cabinet's agreement, the Urgent Measures Act introduced changes to remove a number of fundamentally New Zealand entities from the definition of overseas persons, meaning that they can now acquire sensitive assets without consent.
- The Regulations will build on these changes to exclude regulated retirement schemes (such as KiwiSaver funds) from the definition of overseas person where the scheme is for the benefit of members, at least 75% of whom are New Zealanders.

#### *Extension of permitted security arrangements exemption to significant business assets*

- The Regulations already allow transactions to proceed without screening where an overseas person acquires securitised assets that grant a notional interest in sensitive land and fishing quota (for example, a mortgage over sensitive land), subject to doing so without any intent of acquiring the underlying asset (and other conditions to protect New Zealand).
- However, these transactions can require consent if they are valued at more than \$100 million.<sup>1</sup> This is despite these transactions being very low risk because they do not give the overseas person an interest in the underlying real sensitive asset (such as the firm).
- The Regulations will remove the need for investors to obtain consent for the acquisition of securitised loans, for transactions of any value.
- Removing this consent requirement will support banks and other lenders to provide credit to the real economy, providing critical funds at this economically precarious time. It will also ensure security interests in business assets and other types of assets are treated consistently.

#### *Clarification of the exemption relating to a single permitted security arrangement*

- The regulations include a related exemption for transactions that relate to interests acquired under a single permitted security arrangement (which is a term defined in the Act), in addition to the existing exemption for multiple securitised assets (discussed above).
- However, consultation with legal experts revealed that there is uncertainty in the market about whether this exemption only allows the origination of such an asset without consent, or also allows subsequent transfers of that asset without consent.
- These Regulations will clarify that both the origination of a securitised asset (for example, issuing a loan) and any subsequent transfer do not require screening.

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<sup>1</sup> Or higher amount under the relevant free trade agreement. For example, CPTPP partners are subject to a screening threshold of \$200 million.

- This is consistent with the operation of the existing regulation relating to ‘multiple securitised assets’, where both the origination and subsequent transfer of multiple securitised assets do not require screening.
- Given that an investment in a single securitised asset is likely to be lower risk than an investment in multiple securitised assets, I consider that this clarification is justified and will support the economy at this time.

#### *Limited power to refund fees*

- Cabinet has previously agreed that the regulator have a power to refund fees.
- These regulations provide for the regulator be able to refund fees paid by an investor in limited circumstances where, as a result of the Urgent Measures Act, the investor will now no longer need to apply for consent. An example of this is where an investor is no longer treated as an overseas person because they are predominantly New Zealand owned and controlled.
- The regulator will be able to refund fees where:
  - the investor is a listed entity,
  - they have paid residential standing consent fees in advance under the predecessor Act,
  - the investor is now eligible for a standing consent because they are ‘a fundamentally New Zealand entity’, and
  - the regulator has not already used the fees that were paid in advance to process the standing consent application.

#### *Fee for national interest test*

- The Minister for New Zealand Security Intelligence Service and Government Communications Security Bureau, the Minister for Land Information, and Minister Parker in his capacity as Associate Minister of Finance previously decided that the cost of administering the national interest test should be fully recovered.
- The Regulations propose a fee of \$52,000 for transactions of national interest. This fee is:
  - based on modelling that LINZ did of the administrative costs of a relatively uncomplex national interest assessment, and
  - aligns with the current fee for transactions that are subject to the ‘Benefit to New Zealand test’ (that is, sensitive land and fishing quota transactions).
- This fee would be charged in addition to other application fees, to reflect the additional cost associated with administering the national interest test.

*Transitional provisions*

- I propose that the transitional provisions in these regulations be aligned with the new transitional provisions in the Urgent Measures Act.
- This means that for any transactions that were entered into before the new exemptions in these Regulations come into force:
  - where the transaction would now be covered by a new exemption, it can proceed without consent, provided
  - the transaction has not already received consent, or
  - the transaction has not already been given effect to.

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