

# The Treasury

## Overseas Investment Act - Phase Two: Policy Advice December 2020 - April 2021 Information Release

September 2021

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- [1] 6(a) - to avoid prejudice to the security or defence of New Zealand or the international relations of the government
- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [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
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## Treasury Report: Overseas Investment: Technical amendments to the Regulations

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<b>Date:</b>	24 February 2021	<b>Report No:</b>	T2020/3665
		<b>File Number:</b>	IM-5-3-8-9

### Action sought

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	Action sought	Deadline
<b>Minister of Finance</b> (Hon Grant Robertson)	<b>Note</b> the contents of this briefing.	N/A
<b>Associate Minister of Finance</b> (Hon David Parker)	<b>Agree</b> to amend the Overseas Investment Regulations to give effect to Cabinet's decisions on reforming the Overseas Investment Act and to clarify the operation of some existing exemptions.	3 March 2021

### Contact for telephone discussion (if required)

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Name	Position	Telephone	1st Contact
John-David Chaker	Analyst, International	[39]	N/A (mob) ✓
Thomas Parry	Manager, International	[35]	

### Minister's Office actions (if required)

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**Return** the signed report to Treasury.

**Refer** the report to the Minister for Land Information.

Note any feedback on the quality of the report

**Enclosure:** No

# Treasury Report: Overseas Investment: Technical amendments to the Regulations

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## Executive Summary

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This paper seeks your (Minister Parker's) agreement to a set of minor and technical amendments to the Overseas Investment Regulations 2005 which you have Cabinet authority to make (DEV-20-MIN-0066 refers). These fall under two categories:

- amendments that give effect to previous Cabinet decisions – in relation to farmland advertising, corporate dealing, covenants, debt transactions, and the national interest test, and
- minor amendments that clarify and improve the operation of existing exemptions – in relation to redeemable preference shares, transmissions and underwriting.

The amendments need to be in place in time for the entry into force of the Overseas Investment Amendment Bill No 3 (No 3 Bill) to support the operation of key provisions. We are seeking your decisions now as the No 3 Bill is due to be reported back by the Finance and Expenditure Committee on 4 March, with possible commencement in late-May 2021 (subject to the Bill's priority).

If you agree to the proposed amendments (detailed below), we will provide a draft Cabinet Legislation Committee (LEG) paper and regulations in late March, for subsequent lodging with LEG in early-April. We note that the LEG paper will also include the following amendments already agreed by Cabinet:

- making regulations to implement the tax information provisions of the Overseas Investment Act 2005 previously agreed under delegation from Cabinet (LEG-20-MIN-0039), and
- reducing the scope of the exemption for shareholder creep reflecting Cabinet's decision to replace the vast majority of the existing exemption by provisions in the Bill to allow movements within control limits without consent (which were approved as part of the No 3 Bill Departmental Report – CAB-21-MIN-0007).

<b>Amendments to give effect to previous Cabinet decisions:</b>	
<b>Topic:</b>	<b>Proposed amendments:</b>
Farmland advertising	<p>We recommend updating the advertising requirements to ensure they are effective, by requiring at least two unique forms of advertising, with one being the internet, and removing 'notice', 'sign' and 'placard' as appropriate forms of advertising. We also recommend updating the farmland advertising regulations so they align with when advertising is required in the primary legislation and to reduce confusion for investors.</p> <p>We will also include in the LEG paper your decision to extend the minimum advertising period from 20 working days to 30 working days.</p>

'Corporate dealing' exemption	<p>We recommend no longer requiring consent for the transfer of sensitive NZ assets between entities that are directly or indirectly at least <u>75 per cent</u> owned by the same overseas person. The current exemption has a <u>95 percent</u> threshold. We also recommend clarifying that the exemption applies where the ultimate ownership is made up of more than one overseas person, provided the overseas person ownership is the same for both parties.</p> <p>These changes will bring the exemption in line with Cabinet's decision regarding incremental investment and increase New Zealand's attractiveness to overseas investors, with minimal additional risk.</p>
Covenants	<p>We recommend no longer requiring consent for land covenants that may be granted in favour of an overseas person, that do not include anything that amounts to a lease, easement, mortgage or other distinct type of interest, and are entered into in good faith. This gives effect to your decisions (under delegation from Cabinet) to clarify the treatment of estates or interests in land (other than freehold or leasehold interests).</p>
Debt transactions	<p>We recommend making the standing consent for financing transactions introduced in the Urgent Measures Act permanent, clarifying that the exemption will include debt arising from non-financing like receivables, and related rights or interests acquired as part of securitisation transactions.</p>
National interest test exemption	<p>We recommend confirming the criteria for passive foreign government investors being exempted from the automatic application of the national interest test presented to you in T2020/3523 (such as the government(s) of one country not controlling more than 25 per cent of the entities voting rights).</p>
<b><i>Amendments to clarify and improve the operation of existing exemptions:</i></b>	
<b><i>Topic:</i></b>	<b><i>Proposed amendment:</i></b>
Redeemable preference shares	<p>We recommend extending the exemption from consent requirements for overseas investments in redeemable preference shares, so that the holding of such shares by overseas persons do not contribute to the issuing entity being defined as an overseas person. This is consistent with the approach taken for New Zealand-funded retirement schemes with shares in other New Zealand entities.</p>
Transmissions	<p>We recommend extending the existing exemption for the beneficiaries of a deceased person's estate to ensure that overseas trustees, executors and administrators of estates don't inadvertently breach the Act when they are appointed and the deceased's assets are transmitted to them.</p>
Underwriting	<p>We recommend exempting the underwriting of shares sales, to ensure consistency with the current exemption for underwriting of share issues. Both types of underwriting are similarly low-risk.</p>

Returning to previous interest	<p>We recommend that the existing exemption for transactions that allow an overseas person (A) to reacquire an interest they previously held without consent be narrowed, so that it does not apply where:</p> <ul style="list-style-type: none"><li>• A (or an associate of A) did not hold consent for the initial acquisition, or</li><li>• A disposed of its interest entirely.</li></ul> <p>These changes would ensure that some high risk transactions are not within the scope of the exemption and are therefore subject to screening. For example, without these changes, an overseas person that acquired residential land before it was made sensitive in 2017 and subsequently sold the residential land, could reacquire that land without consent.</p> <p>[36]</p>
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## Recommended Action

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We recommend that you:

- a **note** that Cabinet has delegated authority for you to make policy decisions to amend the Overseas Investment Regulations 2005 (the 'Regulations' - DEV-20-MIN-0066 refers).
- b **note** that the amendments recommended below are minor and technical in nature, and need to be in place in time for the entry into force of the Overseas Investment Amendment Bill No 3 (No 3 Bill) to support the operation of key provisions.
- c **note** that if you agree to the amendments below, we will provide a draft Cabinet Legislation Committee (LEG) paper in late-March seeking approval for those amendments, as well as approval to:
  - make regulations to implement the tax information provisions of the Overseas Investment Act 2005 previously agreed to under delegation from Cabinet (LEG-20-MIN-0039), and
  - reduce the scope of exemptions for shareholder creep so that it applies only to entities returning to their previous level of control (removing the matters now covered in the No 3 Bill as agreed by Cabinet - CAB-21-MIN-0007).
- d **refer** a copy of this report to the Minister for Land Information, for his information.

*referred/not referred.*

### Amendments to give effect to previous Cabinet decisions:

#### ***Ensure farmland advertising requirements are effective:***

- e **agree** to require at least two unique forms of prescribed advertising, with one being internet advertising and remove 'notice', 'sign' and 'placard' as appropriate forms of advertising.  
  
*agree/disagree.*
- f **note** that we will update the farmland advertising regulations so that they align with the requirements for when advertising is required in the primary legislation.
- g **note** that in T2020/228 you agreed to extend the minimum farmland advertising period from 20 working days to 30 working days and we will include this in the LEG paper.

#### ***Improve the operation of the 'corporate dealing' exemption***

- h **agree** to no longer require consent for the transfer of sensitive New Zealand assets between entities that are directly or indirectly at least 75 per cent owned by the same overseas person.  
  
*agree/disagree.*
- i **agree** to clarify that the exemption for 'corporate dealing' in Regulation 37 applies where the ownership of each party to the transaction is the same group of overseas persons (holding the same proportions of ownership) rather than just the same single overseas person.  
  
*agree/disagree.*

**Confirm the criteria for exempting covenants:**

- j **agree** to no longer require consent for land covenants that may be granted in favour of an overseas person, as long as:
- the covenant does not include anything that amounts to a lease, easement, mortgage or other distinct type of interest, and
  - the covenant is entered into in good faith.

*agree/disagree.*

**Clarify the treatment of debt transactions:**

- k **agree** to clarify, when making the current standing consent for debt transactions a permanent exemption in the regulations, that debt transactions include:
- debt arising from non-finance like receivables, and
  - rights or interests related to security arrangements acquired as part of securitisation transactions (subject to the same provisions as the existing security arrangement exemptions).

*agree/disagree.*

**Confirm the national interest test exemption criteria for certain transactions with a foreign government interest:**

- l **agree** that the Minister can exempt investors from automatic application of the national interest test where:
- the government(s) of one country does not control more than 25 per cent of the voting rights of the investor, or otherwise has no the ability to influence, control or direct members of the governing body of the investor (but the ability to appoint members of the Board is permitted), and
  - any strategic directives from a foreign government to the investor (for example, to pursue environmental objectives) are not contrary to New Zealand's national interest.

*agree/disagree.*

**Amendments to clarify and improve the operation of existing exemptions:**

**Extend the exemption for redeemable preference shares:**

- m **agree** to no longer count redeemable preference shares acquired by overseas persons that are redeemable in cash and do not carry voting rights, when determining if a New Zealand incorporated entity is an overseas person.

*agree/disagree.*

***Exempt both steps of the transmission of assets from consent requirements:***

- n **agree** to no longer require consent for the transmission of sensitive NZ assets between a deceased person and an administrator, executor or trustee of their estate.

*agree/disagree.*

***Treat two types of underwriting consistently***

- o **agree** to no longer require consent for transactions that have the effect of underwriting a sale of securities by a professional underwriter that is an overseas person, as long as the underwriter is a professional underwriter, does not exercise any voting rights in unsold securities it acquires, and sells such securities within 6 months.

*agree/disagree.*

***Restricting investors' ability to return their previous shareholding***

- p **note** that:

- a majority of the existing incremental investment exemption will be replaced by provisions in the Bill that allow movements within control limits, but
- the element of the exemption that allows an overseas person (A) to reacquire an interest they previously held without consent ('dipping transactions') will be retained as an exemption.

- q **agree** to narrow the exemption for dipping transactions so that the exemption does not apply where:

- A (or an associate of A) did not hold consent for the initial acquisition, or
- A disposed of its interest entirely following the A (or an associate of A's) consent.

*agree/disagree.*

- r [36]

Thomas Parry  
**Manager, International**

Hon Grant Robertson  
**Minister of Finance**

Hon David Parker  
**Associate Minister of Finance**



# Treasury Report: Overseas Investment: Amendments to the Regulations

## Purpose of Report

1. This briefing seeks your (Minister Parker) agreement to a set of minor and technical amendments to the Overseas Investment Regulations 2005 (the Regulations). These amendments are largely required to give effect to previous Cabinet decisions.
2. These amendments need to be in place in time for the entry into force of the Overseas Investment Amendment Bill (No 3) (the 'No 3 Bill'), which – subject to the Bill's priority – could occur in late-May 2021.
3. Cabinet has authorised you (Minister Parker) to make policy decisions regarding amendments to the Regulations (DEV-20-MIN-0066 refers). As such, you can submit the proposed regulatory amendments directly to the Cabinet Legislation Committee (LEG).
4. Land Information New Zealand and the Ministry of Foreign Affairs and Trade were consulted on this briefing and agree with the recommendations.

## Background and context

5. The Government's 'Phase Two' reform of the Overseas Investment Act 2005 ('the OI Act') sought to strengthen how the OI Act manages foreign investment risks and simplify the screening process for sustainable and productive investment. The review resulted in the introduction of two Bills:
  - the Urgent Measures Act, which received Royal assent on 2 June 2020, and
  - the No 3 Bill, which is currently before the Finance and Expenditure Committee.
6. We have identified a range of minor and technical amendments to the Regulations (listed below), that give effect to previous Cabinet and Ministerial decisions, and clarify and improve the operation of some existing exemptions.

<b>Giving effect to Cabinet's decisions</b>	<b>Clarifying and improving existing exemptions</b>
Ensuring farmland advertising requirements are effective	Extending the exemption for redeemable preference shares
Improving the operation of the 'corporate dealing' exemption	Exempting both steps of the transmission of assets from consent requirements
Confirming the criteria for exempting covenants	Treating two types of underwriting consistently
Clarifying the treatment of debt transactions	Restricting investors' ability to return to their previous shareholding
Confirming the national interest test exemption criteria for certain transactions with a foreign government interest	

### **Amendments to give effect to previous Cabinet decisions:**

7. This section lists minor and technical changes that clarify and give effect to previous Cabinet decisions (and Ministerial decisions delegated from Cabinet). They are all low-risk and technical in nature. You are able to make decisions on these matters under delegation from Cabinet (DEV-20-MIN-0066 refers).

### ***Ensuring farmland advertising requirements are effective***

#### **Recommendation:**

- Update the prescribed forms of advertising by requiring at least two unique forms of advertising, with one being the internet, and removing 'notice', 'sign' and 'placard' as appropriate forms of advertising.
- Align the period for when advertising must occur in the regulations with the primary legislation (see detail below).
- Note that you previously agreed to extend the minimum advertising period to 30 working days, and this will be included in the LEG paper.

### ***Bringing the advertising requirements up to date and in line with best practice***

8. Cabinet has agreed to strengthen the requirements for the advertising of farmland, to ensure that New Zealanders have the opportunity to acquire, enjoy and use farmland (DEV-19-MIN-0306). This change reflected that the current requirements are not operating as intended and need to be updated. For example, farmland can be said to have been 'advertised' by placing a sign at the real estate agent's office or a placard on the relevant land. These methods are unlikely to attract attention and can lead to New Zealanders not having reasonable notice that the land is available for acquisition.
9. To give effect to Cabinet's decision to strengthen the advertising requirements, the No 3 Bill will amend the Act to ensure that advertising must occur before an agreement to obtain farmland has been entered into with an overseas person. The Regulations prescribe the content, form, and minimum period for this advertising.
10. To ensure that the policy rational for advertising is given effect, and to bring the requirements into line with common advertising practices, we recommend amending the regulations to:
  - require at least two unique forms of advertising, with one being the internet, and
  - remove 'notice', 'sign' and 'placard' as appropriate forms of advertising.

### ***Additional updates to the farmland advertising requirements***

11. We will also include two additional technical changes in the list of amendments in the LEG paper to reflect decisions already taken by Cabinet and yourself:
  - clarifying the period in which an advertisement must be published to refer to when the transaction is "entered into" rather than "given effect", to bring the regulation into line with the criterion in primary legislation. This will reduce confusion for investors as to when these provisions apply.
  - extending the minimum advertising period from 20 to 30 working days (as agreed in T2020/228).

## ***Improving the operation of the ‘corporate dealing’ exemption***

### **Recommendations:**

- No longer require consent for the transfer of sensitive NZ assets between entities that are directly or indirectly at least 75 per cent owned by the same overseas person.
- Clarify that the exemption applies where the ultimate ownership is made up of more than overseas person, provided the overseas person ownership is the same for both parties.

### ***Aligning the ‘corporate dealing’ exemption with the treatment of incremental investments***

12. Cabinet agreed to only require consent for incremental investments by a consent-holding investor if the investment breaches certain control limits,<sup>1</sup> given the limited risk arising from transactions between those limits (CAB-21-MIN-0007).
13. Regulation 37 exempts from the consent requirements the transfer of sensitive assets between related overseas persons that are directly or indirectly at least 95 per cent owned by the same overseas person (‘corporate dealing’). For example, consent is not needed for transfer of assets:
  - between two subsidiary companies with the same parent company that owns at least 95 per cent of both subsidiaries, and
  - from a parent company to a subsidiary of which it owns at least 95 per cent.
14. The purpose of this exemption is to no longer screen transactions that do not involve a material change in ultimate ownership and control of a sensitive asset (i.e. transfers between entities with largely the same parent).
15. We recommend that this exemption be updated to bring it in line with Cabinet’s decision to allow incremental investments within control limits by reducing the threshold for common ownership from 95 to 75 per cent. Consistent with the rationale for the broader incremental investment change, this recommendation does not increase risk to New Zealanders because ownership changes within a control limit do not increase an overseas persons’ ability to direct the use of sensitive New Zealand assets.

### ***Additional clarification to the ‘corporate dealing’ exemption***

16. We also recommend clarifying that the current exemption applies where the ownership of each party to the transaction is the same group of overseas persons, rather than just the same single overseas person. There is no reason to distinguish between groups with a plurality of owners versus a single owner, so this merely resolves an existing inconsistency.

### ***Confirming the criteria for exempting covenants***

**Recommendation:** No longer require consent for land covenants that may be granted in favour of an overseas person, and do not amount to a lease, easement, mortgage or other distinct type of interest. Exempt covenants must be entered into in good faith (as an anti-avoidance provision).

17. Under delegated authority from Cabinet (DEV-20-MIN-0066) you agreed to enable regulations to be made to exempt estates or interests in land on either an individual or class basis, including covenants, from the need to obtain consent (T2021/3523 refers). This was to ensure that estates or interests that do not result in an overseas person gaining substantive ownership or control over sensitive land do not require consent.

<sup>1</sup> The control limits are more than 25%, 50% or more, 75% or more, or 100%. These limits reflect points at which an investor can increase their control over a New Zealand business.

18. A land covenant is a provision contained in a deed to land. A covenant may affect or limit the use of land, including giving a landowner some say over what is permissible on neighbouring property. Land covenants are screened by the Act because in some cases, they can effectively grant an overseas person substantive ownership or control over sensitive land. However, the current definition also captures land covenants that do not result in an overseas person gaining substantive ownership or control over sensitive land, and as a result are inherently very low risk.
19. To give effect to your decision (under delegation from Cabinet) to exempt low risk covenants from the Act (T2021/3523), we recommend specifying in the Regulations that consent is no longer required for covenants that may be granted in favour of an overseas person, and:
  - do not include anything that amounts to a lease, easement, mortgage or other distinct type of interest, and
  - are entered into in good faith (i.e. not for the purposes of avoiding consent requirements).

### ***Clarifying the treatment of debt transactions***

<p><b>Recommendation:</b> No longer require consent for transactions involving non-finance like receivables, and certain rights or interests acquired as part of securitisation transactions.</p>
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20. Through the 2018 and 2020 reforms of the OI Act, Cabinet agreed to introduce exemptions<sup>2</sup> and a standing consent<sup>3</sup> for a number of transactions involving debt which would otherwise require consent (DEV-20-MIN-0066). These standing consents were reflected in the Urgent Measures Act and in January 2021 Cabinet agreed to make these a permanent through new exemptions in regulations (CAB-21-MIN-0007).
21. Moving these standing consents into the regulations provides an opportunity to fix unintended outcomes of the current legislation. Submitters have indicated that some of the terms used in the Urgent Measures Act mean that certain transactions, which are materially the same as those that are exempt, require consent. This is contrary to Cabinet's intent in establishing these standing consents and includes:
  - transfer or assignment of non-finance like debts, like trade receivables, and
  - rights or interests that are transferred as part of securitisation transactions, such as the right to claim under a guarantee or insurance contract that do not fall within the legal definition of security arrangement.
22. To resolve this unintended oversight, we therefore recommend that the exemptions for debt transactions, which replaces the standing consents, be clarified to include:
  - non-finance receivables, and
  - related rights or interests that are acquired as part of a securitisation transaction but do not fall within the definition of security arrangement, provided that those transactions are entered into in good faith, the ordinary course of business and not with the intention of acquiring a sensitive asset.<sup>4</sup>

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<sup>2</sup> The exemptions in regulations 41 and 42 apply to security arrangements – specifically, the security itself (e.g. the amount paid by the investor), and the underlying assets (e.g. residential homes in the case of mortgage backed securities).

<sup>3</sup> The standing consent in clause 31 of Schedule 1 of the Act applies to transfers of loan obligations (i.e. the right to be paid money under a loan).

<sup>4</sup> These are the same provisions as the existing exemption for security arrangements.

## ***Confirming the national interest test exemption criteria for certain transactions with a foreign government interest***

**Recommendation:** agree to the proposed control and influence exemption criteria for the mandatory national interest test, which will prevent foreign governments from pursuing strategic objectives contrary to New Zealand's national interest.

23. The national interest test applies automatically to consent applications that warrant greater scrutiny. This includes transactions where foreign government investors obtain control over sensitive New Zealand assets, reflecting that these investors may have strategic rather than commercial objectives (for example, acquiring assets with the intention of conducting espionage or sabotage).
24. Cabinet recently agreed to empower the Minister to exempt investors from automatic application of the national interest test where the foreign government would not have enough control or influence to pursue strategic objectives, with the intention of setting criteria in Regulations (CAB-21-MIN-0007).
25. Cabinet agreed to introduce the exemption power because the relevant factors can vary significantly by jurisdiction, and an exemption power allows the Minister to consider these factors on a case-by-case basis.<sup>5</sup> For example, the governance structures of investment vehicles set up by governments can vary significantly by jurisdiction.
26. We recommend setting the following exemption criteria in Regulations, to provide meaningful exemptions without increasing risks from foreign government involvement:
  - the government(s) of one country does not control more than 25 per cent of the voting rights of the investor, or otherwise has no ability to influence, control or direct members of the governing body of the investor (but the ability to appoint members of the Board is permitted), and
  - any strategic directives from the foreign government to the investor (for example, to pursue environmental objectives) are not contrary to New Zealand's national interest.

### **Amendments to clarify and improve the operation of existing exemptions**

27. This section lists minor and technical changes to improve the operation of existing exemptions in the Regulations, which you are empowered to make decisions on these matters in reliance on your delegated authority from Cabinet (DEV-20-MIN-0066). We consider that each of these proposals is low risk, given existing safeguards in the regulations and primary legislation.

### ***Extending the exemption for redeemable preference shares***

**Recommendation:** No longer count redeemable preference shares (RPS) acquired by overseas persons that are redeemable in cash and do not carry voting rights, when determining if a New Zealand incorporated entity is an overseas person.

28. RPS are a special type of security that resembles debt that do not generally carry voting rights and are redeemable for cash, usually within a specified timeframe. Accordingly, RPS are low risk investments because they provide:
  - only a temporary ownership interest in a New Zealand entity, which expires when the RPS is redeemed, and
  - no control of the entity, as the RPS carries no voting rights.

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<sup>5</sup> It would have been challenging to establish a bright line test that only allowed exemptions for the relevant types of control and influence.

29. Regulation 39 exempts overseas investments in RPS from the consent requirement (as long as the RPS are redeemable only in cash and carry no voting rights). However, these investments – despite being temporary and non-controlling – are still counted towards the total overseas ownership and control of a New Zealand business. This means that the business could become an overseas person as a result of an overseas person owning RPS, despite the temporary and non-controlling nature of the interest.
30. Consistent with Cabinet's decision to exempt retirement schemes from the definition of overseas person,<sup>6</sup> we recommend no longer counting overseas investments in RPS that do not require consent, when determining the total overseas ownership and control of a New Zealand entity.

### ***Exempting both steps of the transmission of assets from consent requirements***

**Recommendation:** No longer require consent for the transfer of sensitive NZ assets between a deceased person and an administrator, executor or trustee of their estate.

31. 'Transmission' is the process by which ownership of a deceased person's assets is transmitted to beneficiaries. This is a two-step process:
  - First, the deceased person's assets are transmitted to an administrator, executor or trustee (the 'first step').
  - Second, the administrator, executor or trustee distributes the assets to beneficiaries in accordance with the deceased person's will, if any (the 'second step').
32. The Regulations already exempt the second step, when the beneficiaries of an estate are overseas persons. This ensures that consent is not required for a transaction that poses little to no risk to New Zealand's national interest, at a particularly sensitive time for individuals.
33. However, there is no exemption for the first step. This appears to be an oversight, as we do not see any good reason to treat the first step and second step differently. This is because:
  - Transmitting assets from a deceased person to an administrator, executor or trustee of their estate (who is an overseas person) is very unlikely to pose risks. Administrators, executors and trustees have obligations under other New Zealand legislation to only make use of the assets in accordance with the deceased person's will. They do not have discretion to use the assets for their own benefit or gain.
  - It is appropriate to remove unnecessary delays and costs incurred by the Act during the transmission process, which is can be a difficult time for investors.
34. Accordingly, we recommend extending the existing exemption to include both steps in the transmission process.

### ***Treating two types of underwriting consistently***

**Recommendation:** No longer require consent for transactions that have the effect of underwriting a sale of securities by a professional underwriter that is an overseas person, within the same parameters as the current exemption for underwriting an issue of securities.

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<sup>6</sup> Cabinet previously agreed to exempt New Zealand-funded retirement schemes from the definition of overseas person. This was to ensure that such entities (which were previously only exempt from the screening requirements) do not count towards the total overseas ownership and control of a New Zealand entity. Without this change, a New Zealand business could have become an overseas person if they were partly owned by a New Zealand-funded retirement scheme.

35. Underwriting arrangements are agreements whereby an underwriter (often an investment bank) guarantees the purchase or subscription to a certain number of shares if they are not otherwise sold.
36. Underwriting arrangements are important to the functioning of New Zealand's financial markets, and they help companies to raise capital by providing certainty about prices to vendors and issuers. They are commonly used to support share issues by listed companies,<sup>7</sup> or large share sales that can have a major impact on market valuations.<sup>8</sup> They are also low risk, because underwriters usually look to sell off any shares they acquire under the underwriting agreement (known as a 'shortfall') as soon as possible.
37. A majority of professional underwriters in New Zealand are overseas persons. This means that consent would normally be required if the assets being underwritten are 'significant business assets' or include sensitive land.
38. Recognising the low risk (and importance) of underwriting arrangements, regulation 46 provides an exemption for the underwriting (or sub-underwriting) of issues of shares by an overseas person, so long as the underwriter:
  - is in the business of providing underwriting agreements (i.e. be a 'professional underwriter'),
  - holds any shortfall securities for less than 6 months, and
  - does not exercise any voting rights attached to any shortfall securities acquired.
39. However, the exemption does not apply to underwriting or sub-underwriting of the sale of securities by an overseas person. This appears to be an oversight in the drafting of the exemption, because there is little difference in the two types of underwriting, and both present minimal risk (particularly given the existing safeguards in the exemption outlined in paragraph 38). Accordingly, we recommend treating both types of underwriting in the same way.

### ***Restricting investors' ability to return to their previous shareholding***

**Recommendation:** that the exemption for transactions that result in an overseas person (A) reacquiring an interest they previously held be narrowed so that it does not apply where:

- If A (or an associate of A) did not hold consent to acquire its interest in the first place or
- A disposed of its interest entirely following the A (or an associate of A's) consent.

40. The regulations currently exempt an overseas person from consent requirements for increases of less than 10%, including where an overseas person reacquires an interest they previously disposed of (a 'dipping transaction'). For example, an overseas person that previously had 26% ownership of a sensitive asset, then sold down to 20%, can increase back to 26% and up to any amount less than 36% without consent. These exemptions reflect the low risk nature of such transactions.
41. Cabinet recently approved replacing most of this exemption with provisions in the Bill that allow an overseas person to increase an interest in sensitive assets without consent, provided the transaction does not result in their total interest crossing a control limit.<sup>9</sup> However, the exemption that applies to 'dipping transactions' will remain in the regulations.

<sup>7</sup> Underwriting of a share issue is commonly done by investment banks to support initial public offerings.

<sup>8</sup> Underwriting of a share sale is commonly done to support large disposal of shares, referred to as 'block trades'.

<sup>9</sup> The control limits are more than 25%, 50% or more, 75% or more, or 100%. These limits reflect points at which an investor can increase their control over a New Zealand business.

42. During drafting to give effect to Cabinet’s decision on incremental investments, we have identified some areas in respect of ‘dipping transactions’ that could allow higher risk (albeit very unusual) transactions without consent, which have been slightly exacerbated by changes made during the Phase Two review, particularly when combined with some other changes made during the Phase Two review to liberalise and simplify the regime.<sup>10</sup> Specifically, we are concerned that the exemption could be used by investors to return and move beyond their previous interest in sensitive assets where the investor:

- disposed of their interest entirely prior to consent, and
- did not have (or require) consent to acquire the interest in the first place.

For example, without change, an overseas person that acquired 100% of a sensitive asset before it became sensitive (such as residential land, recognising that this was not sensitive until 2018), then sold down to 0%, could reacquire a 100% interest today without consent.

43. Accordingly, we recommend that the exemption be narrowed so that it does not apply if the overseas person (and their associates) have disposed of its interest entirely, or if the overseas person did not have consent in the first place.

44. [36]

45. [36]

46. [36]

[36]

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47. [36]

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<sup>10</sup> For example, the removal of a time limit on access to these exemptions in 2020.

<sup>11</sup> [36]



48. [36]

## Next Steps

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49. Cabinet has delegated decisions on amending the Regulations to you (DEV-20-MIN-0066 refers). As such, you do not need to seek policy decisions from Cabinet to amend the regulations.
50. The proposed amendments to the Regulations need to be in place in time for when the No 3 Bill enters into force, which could occur in late-May 2021.
51. As such, if you agree to the recommended amendments, we will provide you with a draft Cabinet Legislation Committee (**LEG**) paper by late-March, for consideration by LEG in early-April ahead of tabling with the Executive Council.
52. The LEG paper will also include the following amendments already agreed by Cabinet:
  - making regulations to implement the tax information provisions of the Overseas Investment Act 2005 previously agreed under delegation from Cabinet (LEG-20-MIN-0039), and
  - reducing the scope of the exemption for shareholder creep so that it only provides that entities can return to their previous level of control (noting that a vast majority of the existing exemption will be covered by the incremental investment provisions in the No 3 Bill, which were approved as part of the Departmental Report: CAB-21-MIN-0007).