The Treasury

Phase two Overseas Investment Act reform (April - September) Information Release

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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

[25] 9(2)(b)(ii) - to protect the commercial position of the person who supplied the information or who is the subject of the information

[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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TE TAI ŌHANGA
THE TREASURY

Treasury Report: Draft Cabinet paper: "Overseas Investment Amendment Regulations 2021"

Date:	2 June 2021	**Report No:**	T2021/820
		File Number:	IM-5-3-8-12

Action sought

	Action sought	Deadline
Hon Grant Robertson **Minister of Finance**	**Note** the contents of this report.	N/A
Hon David Parker **Associate Minister of Finance**	**Provide feedback**, if any, on the draft Cabinet Legislation Committee (LEG) paper and Regulations. **Agree** to consult your colleagues on the draft Cabinet paper and regulations before lodging with LEG on 17 June for consideration by that Committee on 24 June. **Note** that in our advice seeking your agreement to expand the exemption for 'corporate dealing' (T2020/3665 refers), rather than referring to a legal corporate group, we were referring to groups of overseas persons.	8 June 2020

Contact for telephone discussion (if required)

Name	Position	Telephone		1st Contact
Harry Nicholls	Senior Analyst, International	[39]	N/A (mob)	✓
Thomas Parry	Manager, International		N/A (mob)	

Minister's Office actions (if required)

Return the signed report to Treasury.

Note any feedback on the quality of the report

Enclosure: Yes (attached)

Treasury Report: Draft Cabinet paper: "Overseas Investment Amendment Regulations 2021"

Purpose of Report

1. This report provides you with the draft Cabinet paper "Overseas Investment Amendment Regulations 2021" and associated regulations, for consideration by the Cabinet Legislation Committee (LEG). These regulations are necessary to operationalise the Overseas Investment Amendment Act 2021 (the Act) when it commences on 5 July 2021, and to streamline certain low risk instruments to support capital flows and the economy.

2. This report seeks your (Minister Parker's):

   a feedback on the draft Cabinet paper and regulations;

   b agreement to consult with your colleagues on the draft Cabinet paper, and

   c agreement to lodge the paper, subject to any requested changes, on 17 June ahead of consideration by LEG on 24 June 2021.

3. The report also, in respect of the proposed amended exemption for 'corporate dealing' [T2020/3665 refers], clarifies previous advice [1]

4. Suggested talking points and additional background information to support the introduction of the paper at LEG are attached at Annex 2.

Background

5. On 28 February [T2020/3665 refers], under delegation from Cabinet [DEV-20-MIN-0666 refers; CAB-20-MIN-0212 confirms] you agreed to set of minor and technical amendments to the Overseas Investment Regulations 2005 (the Regulations). These amendments fall under two categories:

   a amendments that give effect to previous Cabinet decisions – in relation to farmland advertising, corporate dealing, covenants, debt transactions, the national interest test, and tax information to be provided with applications involving significant business assets, and

   b minor amendments that clarify and improve the operation of existing exemptions – in relation to redeemable preference shares, transmissions and underwriting.

6. As signalled in previous reports, the draft Cabinet paper also includes amendments to:

   a implement the tax information provisions of the Overseas Investment Act 2005 previously agreed by Cabinet [T2020/3665 refers],

   b fees to recover the regulator's costs associated with processing new application and exemption types [BRF 21-275 refers], and

   c specify systemically important banks and financial market infrastructures as 'Strategically Important Businesses' for the purposes of the Overseas Investment Act [T2021/1157 refers].

7. The regulations are summarised in Annex 1. We have consulted with legal experts in their development to ensure they capture the policy intent.

8. Consistent with Cabinet's requirements, the draft Cabinet paper includes a Cost Recovery Impact Statement prepared by Land Information New Zealand considering the proposed amendments to fees.

Scope of the proposed exemption for corporate dealing

9. This section of the report draws your attention to two matters related to the proposed exemption for corporate dealing – the meaning of 'group' in previous advice [1]

The meaning of 'group' in T2020/3665

10. When seeking agreement for part of the proposed exemption for corporate dealing (see row 7, annex 1), we referred to the exemption being expanded to make it available to entities owned by a 'group of overseas persons'. To clarify, the phrase 'group' in this previous advice meant 'more than one overseas person' (that may be unrelated) rather than a legal corporate group. This means, under the expanded exemption, where multiple overseas persons have an interest in a sensitive asset, a transaction would be exempt if those overseas persons' proportion of interest in the asset remains the same before and after the transaction.[1] This is reflected in the draft regulations.

[1]

[36]

[1] For example, five persons own sensitive land in equal shares. Three of the five are overseas persons. The 5 owners set up a holding company and sell the land to the holding company ready to list it. The holding company is 60 per cent owned by overseas persons, so is an overseas person. So the sale of the land to the holding company requires consent. The exemption applies provided the three existing overseas owners each have the same percentage interest in the holding company as they had in the sensitive land, i.e. 20 per cent each.

Next steps

14. We will reflect your feedback, if any, in an updated version of the LEG paper and provide it to you on 9 June 2020 for Ministerial consultation.

15. To ensure that these amendments are in place in time for the entry into force of the Act, we recommend that you agree to lodge the paper to LEG (subject to your feedback being incorporated) on 17 June, for consideration by LEG on 24 June.

Recommended Action

We recommend that you:

a) **provide feedback**, if any, on the attached draft Cabinet paper "*Overseas Investment Amendment Regulations (No 2)*", regulations and Statement of Reasons.

agree/disagree

b) **note** that consistent with Cabinet's requirements, the draft Cabinet paper includes a Cost Recovery Impact Statement prepared by Land Information New Zealand considering the proposed amendments to fees.

c) **agree** to consult on the draft Cabinet paper with your colleagues.

agree/disagree

d) **agree** to lodge the paper to LEG (subject to your feedback being incorporated) on 17 June, for consideration by that Committee on 24 June.

agree/disagree

e) **note** that in our advice seeking your agreement to expand the exemption for corporate dealing (T2020/3665 refers), we did not mean a legal corporate group, but groups of overseas persons.

f) **agree** to clarify the recommendation referred to above so the exemption applies where multiple overseas persons retain the same proportion of ownership (both collectively and individually) over the sensitive asset before and after the transaction (as is reflected in the attached drafting of regulation 37(1)(bb)).

agree/disagree

g) **note** that we have also clarified the definition of ownership in the exemption for corporate dealing to resolve existing ambiguity.

[1], [36]

Thomas Parry
Manager, International

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance

Annex 1: Amendments to the Regulations proposed in the draft Cabinet paper

Amendments to give effect to previous Cabinet decisions		
No.	***Topic:***	***Proposed amendments:***
1.	Ensure farmland advertising requirements are effective	Require at least two unique forms of advertising for farmland, with one being the internet, and removing 'notice or sign' and 'placard' as appropriate forms of advertising. Extend the minimum farmland advertising period from 20 working days to 30 working days. Update the farmland advertising regulations so that they align with the requirements for when advertising is required in the primary legislation.
2.	Confirm the criteria for exempting covenants	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 freehold or leasehold estate or other right to occupy the land, a mortgage or charge on the land, or a profit à prendre or other right to take resources from the land.
3.	Clarify the treatment of debt transactions	Clarify that the following types of debt transactions are exempt: • all rights to be repaid money, including trade receivables, and • rights or interests under insurance contracts acquired as part of securitisation transactions that go beyond the right to be repaid money (for example, rights under a home insurance policy that would entitle the holder to repair work).
4.	Confirm the national interest test exemption criteria for certain transactions with a foreign government interest	Confirm 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, and there must be appropriate limitations on the government's ability to influence, control or direct the investor's investment or management decisions, other an on a commercial basis (but the ability to appoint members of the Board is permitted), and • any earlier use of influence by a government (for example, any previous strategic directive to the entity, or to any member of the entity's governing body) were not contrary to New Zealand's national interest.

5.	Designate systemically important banks and financial market infrastructures as 'Strategically Important Businesses'	Define the following classes of entities as strategically important businesses: • banks registered in New Zealand with total assets of $80 billion or greater. This would capture the four major banks: the Bank of New Zealand, Westpac New Zealand, ANZ Bank New Zealand and ASB Bank, and • financial market infrastructures designated as systemically important under the recently passed Financial Markets Act 2021. The Act requires you to have regard for international obligations when you decide to designate a class of business as a strategically important asset. Consistent with this, officials consider that the proposed definition of strategically important financial institutions is no wider than necessary to manage significant risks to New Zealand's national security or public order, and consistent with New Zealand's international obligations.
6.	Specify the tax information to be provided with applications involving significant business assets	Specify information including a description of the investor's plan for the asset and tax residence, the capital structure for the investment, any cross border related party transactions, and any relevant double taxation agreements and whether an application to Inland Revenue will be made for a ruling or advance pricing agreement in respect of any aspect of the investment.
	Amendments to clarify and improve the operation of existing exemptions:	
	Topic:	***Proposed amendment:***
7.	Improve and rationalise the operation of the 'corporate dealing' exemption	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 or persons. Clarify that the exemption for transactions where there is no increase in ownership by overseas persons applies where: • the ownership of the asset is made up of more than one overseas person, and • each overseas person's proportion of ultimate ownership of the asset (and the total overseas ownership) is the same before and after the transaction.
8.	Extend the exemption for redeemable preference shares	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.
9.	Exempt both steps of the transmission of assets from consent requirements	No longer require consent for the transmission of sensitive assets between a deceased person and an administrator, executor or trustee of their estate.
10.	Exemption for underwriting block trades	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.

11.	Clarify investors' ability to return to their previous shareholding	Narrow the existing exemption for transactions that allow an overseas person (A) to reacquire an interest so that it cannot re-acquire a previously held interest without consent if: • A (or an associate of A) did not hold consent for the initial acquisition, or • A disposed of its interest entirely.
	Amendments to fees (all GST inclusive):	
	Topic:	***Proposed amendment:***
12.	Treatment of repeat investors	The regulations propose: • a fee of $25,500 for standalone consideration of an investor's suitability to invest in New Zealand (that is, not as part of an application to acquire a sensitive asset); • a reduction in application fees of $12,500 for applications to acquire sensitive assets where all individuals with control have repeat investor status and there has been no change in their suitability to invest in New Zealand; • a fee of $13,000 for an application to change the information supporting an investor's pre-approval; and • a fee of $13,000 to add new members to a group of pre-approved investors (such as where there has been a change in directors).
13.	Exemption from farmland advertising requirements	The regulations propose a fee of $13,000 to apply for an exemption from the farmland advertising requirements.
14.	Exemption for passive state-linked investors from the definition of 'non-New Zealand government investor'	The regulations propose a fee of $25,000 to apply for an exemption from the definition of 'non-New Zealand government investor'.

Annex 2: Suggested talking points and additional detail

Suggested talking points

- On 24 May, the Overseas Investment Amendment Act (No 3) received Royal assent.
- This Act's passage marks the substantial conclusion of our Government's work to reform New Zealand's investment screening regime. The No 3 Act significantly streamlines the regime to better facilitate productive, sustainable investment, while introducing new protections for important assets like farmland.
- To support the Act's commencement on 5 July, I am seeking LEG's agreement to a range of minor and technical regulations that reflect decisions I have made under delegation to:
    - give effect to previous Cabinet decisions – such as:
        - prescribing which financial institutions and financial market infrastructures should be treated as 'strategically important businesses' and therefore subject to additional protection,
        - what types of tax information needs to be provided alongside significant business investments to support Inland Revenue's intelligence and compliance functions, and
        - the fees to accompany new application and exemption types, and
    - minor amendments that clarify and improve the operation of existing exemptions such as the execution of wills and deceased estates, and underwriting large transactions.
- It is important that most of these regulations take effect at the same time as the No 3 Act. This is necessary to support the Act's operation and ensure that the regulator can recover its costs, recognising its existing budget deficit.
- I therefore recommend that LEG agree to waive the 28-day rule in respect of these regulations, except those relating to designating systemically important banks and financial market infrastructures as strategically important businesses.
- I consider that delaying the commencement of these specific regulations beyond the commencement of the No 3 Act is appropriate given:
    - the additional regulatory requirements that will be associated with investments in these entities as a result of these changes, and
    - the need to give investors time to familiarise themselves with those.

Additional detail on the regulations giving effect to Cabinet's decisions if required

Ensure farmland advertising requirements are effective

- Cabinet has agreed to strengthen the requirements for advertising farmland, to ensure that New Zealanders have a better opportunity to acquire it.

- To give effect to this, the No 3 Act requires advertising to occur before an agreement to sell farmland to an overseas person is entered into, but regulations are required to specify things like the form and duration of that advertising.

- The proposed regulations set out that this advertising must occur in line with best practice by:

    - Requiring at least two forms of advertising, with one being online,

    - Requiring a minimum advertising period of 30 days, and

    - Removing things like notices as appropriate forms of advertising, recognising that investors had relied on such methods to effectively circumvent the intent of the advertising requirements.

Confirm the criteria for exempting covenants

- Cabinet agreed to make regulations to exempt certain covenants – for example, rights of access for utilities – from the need for consent. However, in doing so recognised that it was important that such an exemption could not be used to acquire covenants that grant effective ownership or control of sensitive land.

- On the advice of officials, I recommend that covenants that do not amount to a lease, easement, mortgage or other distinct type of interest in land, and are entered into in good faith, are exempt from the need for consent.

- This is a low risk exemption that will streamline the Act and support our goal of facilitating sustainable investment. The protections are consistent with those in other regulations, and have effectively managed compliance risks.

Clarify the treatment of debt transactions

- In 2020, Cabinet agreed to a standing consent for a range of debt transactions and an exemption for securitisation transactions. This was to support New Zealand businesses' access to finance and reflected the low risk nature of these transactions.

- Following a year's experience with those provisions, it has become clear that the standing consent inadvertently did not apply to debt-like assets – like trade receivables – and the exemption did not apply to non-monetary rights or interests under insurance contracts that may form part of a securitisation transaction despite these features not increasing risks.

- To resolve this inconsistency, I recommend that LEG endorse regulations that extend the exemption for financing transactions to ensure that they also apply to transactions involving:

    - non-finance receivables, and

    - rights or interests under insurance contracts that are incidental to a securitisation transaction and are entered into in good faith, the ordinary course of business and not with the intention of acquiring sensitive assets.

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

- The national interest test applies automatically to applications that warrant greater scrutiny, including transactions where foreign government investors obtain control over sensitive assets to manage the risk that they are doing so for strategic reasons.

- Our experience to date has indicated that this requirement is unnecessarily slowing high-quality investment by state-linked pension funds – that operate similarly to the New Zealand Superannuation Fund. Given this, Cabinet agreed to exempt effectively independent state-linked investors from automatic application of the national interest test.

- Consistent with Cabinet's intent, I propose that the exemption be available to investors where in general terms the government of one country does not control more than 25% of the entity's voting rights, has no other ability to influence the entity's board, and any strategic directives - for example, to pursue environmental objectives - are not contrary to our national interest.

Designate systemically important banks and financial market infrastructures as 'Strategically Important Businesses'

- Investments in strategically important businesses – like ports, airports and electricity companies – are subject to additional scrutiny under the Act. This reflects their importance to the day-to-day lives of New Zealanders.

- In particular, such investments are:

    - always subject to the national interest test, meaning they can be declined if contrary to our national interests, or

    - in scope of the 'call in' power, which means we can take action to manage significant national security or public order risks.

- While the Act specifies high-level categories of what strategically important businesses are, regulations are used to refine their definition. The only categories of businesses where regulations have not yet been made are financial institutions and financial market infrastructures, however Cabinet had reached in-principle agreement that the:

    - Financial institutions category should align with what banks the Reserve Bank considers to be domestically systemically important; and

    - Financial markets infrastructure category should capture entities designated as systemically important under the then Financial Markets Infrastructure Bill.

- Following the substantial conclusion of the Reserve Bank's work and the passage of the Financial Markets Infrastructure Act, I seek LEG's approval to designate the following as strategically important businesses:

    - banks registered in New Zealand with total assets of $80 billion or greater. This would capture the four major banks.

    - Financial market infrastructures designated as systemically important under the Financial Markets Act 2021.

- *If raised:* The Reserve Bank and Financial Markets Authority are currently finalising the framework for determining which financial market infrastructures will be systemically

important.[33]

Specify the tax information to be provided with applications involving significant business assets

- To support Inland Revenue's knowledge of large transactions and by extension its compliance functions, Cabinet decided that investments in significant business assets must be accompanied by information on those investment's tax structure. Regulations will specify exactly what information is required.

- I seek LEG's agreement, on Inland Revenue's advice, to require such investments in general terms to provide a description of the investor's plan for the asset and tax residence, the capital structure for the investment, any cross border related party transactions, and any relevant double taxation agreements.

New fees to support the operation of the No 3 Act

- The No 3 Act introduces some new requirements and application types that we must set fees for. If we do not, the regulator will not recover their costs and their deficit will increase.

- As an interim measure ahead of the regulator conducting a thorough fees review next year, I propose to set temporary fees for these pathways that are aligned with the fees payable for similar activities under the Act.

- In particular, I seek LEG's agreement to:

    - a fee of $25,500 for standalone consideration of an investor's suitability to invest in New Zealand with a further fee of $13,000 payable for any changes to that pre-approval;

    - a fee of $13,000 for an exemption from the requirement to advertise farmland, and

    - a fee of $25,000 to apply for an exemption from the definition of 'non-New Zealand government investor'.

- I also seek LEG's agreement to provide a $12,500 fee discount for approved investors of good character that, under the No 3 Act, will no longer need to re-satisfy each of the Act's tests each time they invest.

- This is a tangible reflection of the benefits that our changes are making for investors and support us as an investment destination.

Additional detail on the regulations to clarify and improve existing exemptions if required

Improve the operation of the 'corporate dealing' exemption – lowering the threshold to 75%

- Cabinet agreed to only require consent for incremental investments by a consent-holder if the investment breached control limits of 50%, 75% or 100%. This reflects the limited risk associated with investments by approved investors that do not increase their control over sensitive New Zealand assets.

- There is an existing exemption in the Act that allows sensitive assets to be transferred between overseas persons that are at least 95% owned by the same overseas person – for example, two subsidiaries of the same parent company.

- I recommend that this threshold be reduced from 95% to 75%, which will align the threshold with the control limits we have adopted across the Act.

- This does not increase the exemption's risk, because overseas persons with a less than 25% share in an asset cannot direct the use of our sensitive assets.

- [1], [36]

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Rationalise the operation of the corporate dealing exemption – multiple owners

- The second part of the existing corporate dealing exemption allows sensitive assets to be transferred between overseas persons, where the same overseas person owns all of the securities in each party to the transaction that are owned by overseas persons.

- Through consultation it was discovered that this exemption does not apply where there are multiple overseas persons with an interest in the sensitive asset and each of their interests (and the total ownership by overseas persons) remain the same.

- I propose to resolve this inconsistency by that the exemption applies where multiple overseas persons have an interest in the sensitive asset because there is no policy rationale for treating these transactions differently from transactions involving a single overseas person owner.

Extend the exemption for redeemable preference shares

- Redeemable Preference Shares are a special type of security that resembles debt and only provide their owners with a temporary ownership interest and no control over the issuing entity. Reflecting this, the acquisition of these shares does not require consent under the Act.

- Through consultation we discovered, however, that while acquiring these interests does not require consent, ownership of these securities by overseas persons still contributes to the issuing entity itself being treated as an overseas person. This could result in New Zealand companies being unfairly treated as overseas companies under the Act.

- I consequently recommend that we amend the regulations to no longer count investments in Redeemable Preference Shares that do not require consent when determining whether the issuing entity is an overseas person.

Exempt both steps of the transmission of assets from consent requirements

- When a deceased person's assets are transferred to their beneficiaries there are two steps.

    - First, the assets are transmitted to an administrator or trustee.

- Second, the assets are distributed to the beneficiaries, in line with the deceased's will.

- The Act clearly exempts the distribution of property to beneficiaries, however there is uncertainty about whether consent is required for the administrator to acquire the assets before distributing them.

- To clarify the law, I recommend that regulations clearly exempt this stage in the process of distributing a will. This is very low risk, recognising that administrators have statutory obligations to only make use of assets in line with the deceased's will.

Exemption for underwriting block trades

- Underwriting arrangement are agreements where an underwriter, often an investment bank, guarantees the purchase of a certain number of shares if they are not otherwise sold. They are commonly used in respect of large trades and initial public offerings because they provide certainty to the entity selling its shares around the price and volume of shares that will be sold.

- Underwriting arrangements are low risk because underwriters look to sell off any shares they acquire under the underwriting agreement as soon as possible.

- Reflecting this, there is already an exemption for underwriting initial public offerings, as long as the underwriter does not exercise any control and sells off any securities they acquire within six months.

- I propose that this exemption be extended to the underwriting of large trades as well – subject to the same protections that currently apply to public offerings - to support the functioning of our markets. This reflects that there is no difference in the risk posed by each of these transaction types.

Restrict investors' ability to return to their previous shareholding

- While drafting these Regulations, we discovered a potential loophole that would allow an investor that previously had consent in a New Zealand company to completely sell down their interest and then reacquire the same interest – potentially many years in the future – without the need for consent again.

- I do not consider that this is consistent with the objectives of our overseas investment regime and seek agreement to amend the Regulations to ensure that investors that have previously exhausted their interest cannot reacquire a similar interest without getting consent.

- I also propose to close a related loophole that, in rare cases, would allow someone who never even had consent for their interest – because, for example, the investment did not require consent at the time – to similarly bypass consent requirements.

- [1], [36]