

The Treasury

Overseas Investment Act Phase Two - Tranche Three Information Release

June 2022

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Treasury Report: Overseas Investment Act: Additional Decisions on Statutory Timeframes

Date:	8 October 2021	Report No:	T2021/2548
		File Number:	IM-5-3-8-12

Action sought

	Action sought	Deadline
Minister of Finance (Hon Grant Robertson)	Note the report.	N/A
Associate Minister of Finance (Hon David Parker)	Agree to the recommended statutory timeframe for decisions on the standalone investor test, and that timeframes do not apply where there is an investigation or enforcement action underway. Refer this report to the Minister for Land Information and Associate Minister of Finance (Hon Woods) as decision-making Ministers under the Overseas Investment Act.	11 October 2021

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Hugo Van Dyke	Senior Analyst, International	[39]	N/A (mob) ✓
Sarah Key	Acting Manager, International		N/A (mob)

Minister's Office actions (if required)

<p>Return the signed report to the Treasury.</p> <p>Refer the report to the Minister for Land Information and Associate Minister of Finance (Hon Woods).</p>
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Note any feedback on the quality of the report

Enclosure: No

Treasury Report: Overseas Investment Act: Additional Decisions on Statutory Timeframes

Introduction

1. In T2021/1907, you agreed to statutory timeframes for each different application pathway under the Overseas Investment Act 2005 (the Act). Through the process of finalising the draft regulations, officials have identified that the advice did not seek approval to the timeframe for one of the new application types – the standalone investor test.
2. Accordingly, this report seeks your agreement to a statutory timeframe for standalone investor test applications. This will ensure all application pathways are prescribed in advance of their operation. It also seeks your agreement to exclude from statutory timeframe requirements applications where there is an investigation or enforcement action underway.
3. Note that Cabinet has authorised you (Minister Parker) to make decisions on any additional policy issues that arise during the drafting of the Overseas Investment Regulations 2005 [DEV-20-MIN-0066 refers].
4. If you agree with these recommendations, we will incorporate the required changes into the Overseas Investment (Fresh or Seawater Areas and Time Frames) Amendment Regulations 2021 (the Regulations).
5. No changes are required to the Cabinet Legislation Committee (LEG) paper you previously approved [T2021/2311 refers], as the LEG paper does not detail timeframes for each application type. Ministerial consultation on the LEG paper and draft Regulations is currently underway, and LEG is scheduled to authorise the Regulations for submission to the Executive Council on 21 October 2021.

Timeframes for standalone investor test

6. The Overseas Investment Amendment Act 2021 introduced a new standalone investor test.¹ This test allows an investor or group of investors to apply to be assessed under the investor test in advance of a consent application being made for an investment in a sensitive New Zealand asset. If an investor meets the test and ultimately applies for consent, the regulator can rely on that initial assessment and only has to determine whether any changes have occurred.²
7. The purpose of the standalone test is to give investors additional flexibility and certainty, particularly where an investment is time sensitive or there is uncertainty about whether the investors will meet the test.
8. The draft Regulations do not currently include a timeframe for the standalone investor test.

¹ Section 29A(1) of the Act.

² Under section 29A(4) of the Act, investors that have previously met the investor test must submit a statutory declaration as part of the application verifying whether there have any changes that may be relevant to the test.

Recommended timeframes for standalone investor test

9. The Overseas Investment Office (OIO) has recommended, and we recommend that you agree, that the standalone investor test timeframe should be set at 30 working days. This is on the basis that these applications will be similar to applications for consent to acquire Significant Business Assets (SBAs), which have a timeframe of 35 working days.
10. Much of the time taken to determine SBA applications is spent analysing and understanding the structure of the applicant, which is often complex. This analysis is necessary to determine whether the investor test is met. The standalone investor test applications will require the same level of analysis of the investor.
11. The suggested timeframe for standalone investor test applications is five days shorter than for SBA applications. This is because SBA applications also require analysis of the particular transaction, which standalone investor test applications will not (though, in practice, some of this is completed in parallel).

No change to timeframes for applications where the investor has satisfied the investor test

12. We considered whether there should be a separate timeframe for applications where the applicant has already satisfied the investor test (either through a previous application or the standalone test). However, we do not recommend this approach because having:
 - a a uniform discount on timeframes across all application types, which is the approach taken for fees³, is not possible, given the investor test would normally be completed in parallel to other work, and
 - b separate timeframes for each application type would be unduly complex and the granularity would be inconsistent with our high-level approach to the timeframes.
13. Instead, we will recommend that the upcoming Ministerial directive letter specify your expectation that, where the investor test has already been satisfied, applications for appropriate pathways should be assessed within shorter timeframes. We will also work with the OIO to ensure that reporting on timeframes allows this to be monitored.

Excluding applications involving investigations from timeframes

The regulator conducts investigations in parallel to applications

14. One of the functions of the OIO is to investigate conduct that may constitute a breach of the Act. Sometimes, investigations need to be carried out in parallel to an application. This may occur, for example, where:
 - a consent is applied for retrospectively (which means consent was not obtained before the transaction was given effect to, as required by the Act), or
 - b the OIO becomes aware that the investor has breached the Act by using an associate to hold the investment while consent is being sought.

³ Clause 30, Schedule 3 of the Overseas Investment Regulations specifies that applicants that have previously satisfied the investor test are eligible for a \$12,500 discount on their application.

15. There are cases where an investor has applied for consent after they become aware that the OIO is investigating. The outcome of these investigations may affect whether consent is granted to the application, and investors might try to use an application for consent to affect the outcome of an investigation. Accordingly, the OIO's current practice is to put the application on hold until the investigation is concluded.

Recommendation: exclude from timeframes applications with investigations or resulting enforcement action underway

16. As currently drafted, the Regulations provide that an investigation triggers the regulator's right to extend an application by 30 working days. However, investigations often take much longer than this to resolve (for example, 12 months or more in complex cases involving associates).
17. To ensure the OIO can continue to manage the risk associated with applications where a concurrent investigation is appropriate, we propose that the Regulations exclude from timeframe requirements any applications with investigations or resulting enforcement action underway. This would mean the timeframes only start when the investigation and any resulting enforcement action is complete.

Next steps

18. If you agree to these recommendations, the Treasury will work with the Parliamentary Counsel Office to give effect to these decisions in the Regulations, ahead of the LEG paper and associated Regulations being lodged on 14 October 2021.
19. The timetable for the finalisation of these Regulations is included in the table below.

Activity	Due date
Ministerial consultation on Regulations and draft LEG paper	Underway
LEG meeting to approve Regulations	21 October 2021
Cabinet meeting to approve Regulations	26 October 2021
Treasury advice on Ministerial directive letter	Mid-November 2021
Commencement of Regulations (following 28-day gazettal period)	24 November 2021

Recommended Action

We recommend that you:

- a **Agree** to a 30-working day timeframe for the standalone investor test, against which decision-makers will be statutorily obliged to make decisions on applications for consent with effect from 24 November 2021.

Agree/disagree.

- b **Agree** that the statutory timeframes do not apply to applications where there is an investigation or enforcement action underway, pending the resolution of the investigation or enforcement action.

Agree/disagree.

- c **Refer** this report to the Minister for Land Information and Associate Minister of Finance (Hon Woods) as decision-making Ministers under the Overseas Investment Act.

Refer/not referred.

Sarah Key
Acting Manager, International

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance