BUDDLE FINDLAY

Overseas Investment Act amendments – Exemption of loans and security arrangements

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Changes made by the Overseas Investment Amendment Regulations 2021 (Amendment Regulations) came into force at the end of July 2021. The Amendment Regulations are one of the final pieces of the program of reforms to New Zealand's overseas investment regime that began in October 2018.

This article sets out how the Amendment Regulations have provided some much-welcome clarity to the treatment of loans and other debt obligations under the Overseas Investment Act 2005 (OIA) and the extent to which these debt obligations are exempt from the requirement for consent under the OIA.

If you would like some advice on how the Amendment Regulations or the reforms to the OIA regime may affect your transactions, please contact a member of our financial services regulation or overseas investment team.

Background

Foreign investment in sensitive New Zealand assets is primarily regulated by the OIA and related Overseas Investment Regulations 2005 (OIA regime).

The OIA regime has been the subject of a number of reforms in recent years.

The 'first phase' of reform to the OIA came into force in October 2018, and brought residential property and forestry rights into the scope of the OIA regime. Following this, the government commenced 'phase two' of reform to the OIA, and several changes were made during 2020, bringing forward part of the proposed phase two reforms as well as implementing a temporary notification regime (now replaced by a permanent call in regime) in response to the COVID-19 situation. See our April 2020 and June 2020 updates for more information on these changes.

On 24 May 2021, the Overseas Investment Amendment Act 2021 (Amendment Act) received royal assent, following a period of public and stakeholder consultation. For further details on the Amendment Act, including when the various changes made by that Act take effect, please see our May 2021 update.

Exemptions

Under the OIA, consent is required from the Overseas Investment Office for investments by overseas person in sensitive New Zealand assets. Part 2 of the Overseas Investment Regulations 2005 (Regulations) sets out certain circumstances where transactions are exempt from the requirement under the OIA to gain consent.

Permitted security arrangements

Regulation 41 of the Regulations sets out an exemption from the requirement for consent for 'permitted security arrangements'. Specifically, consent is not required for:

- The acquisition by an overseas person of property under a permitted security arrangement, or as a result of the overseas person enforcing a permitted security arrangement in good faith, or
- The reacquisition by an overseas person of property as a result of the discharge of a permitted security arrangement.

The Regulators define a 'security arrangement' as an arrangement that, in substance, secures payment or performance of an obligation and define a 'permitted security arrangement' as a security arrangement that either requires that property be retransferred to the original transferor or is extinguished on the payment, or performance of the obligation. The transaction must be entered into in good faith and not with the intention of using the security arrangement to make an overseas investment in sensitive assets without consent. This exemption was aimed at lending in the ordinary course of business that involved the taking of security for those loans.

While Regulation 41 commonly applied to the origination of security arrangements, Regulation 42 covered the acquisition of existing arrangements - but the scope was limited in two ways: First, it related to the acquisition of '2 or more' security

arrangements as a portfolio, meaning that the acquisition of a single security arrangement was not covered under that regulation. Second, if the consideration for the portfolio exceeded NZ$100m, consent was still required.

Last year, the Overseas Investment Amendment Regulations (No 2) 2020 helpfully broadened the scope of exemption for the acquisition of permitted security arrangements, so that the acquisition of a single permitted security arrangement was covered, and removed the requirement for consent where consideration exceeded NZ$100m.

While these expanded exemptions were helpful, they were still limited to the acquisition of permitted security arrangements and did not deal with the potential requirement for consent for the acquisition of loans or other debt obligations by overseas persons under the OIA where there were no permitted security arrangements.

Debt obligations

Section 13 of the OIA categorises the acquisition of property in New Zealand by an overseas person for a sum greater than NZ$100m (whether in a single transaction, or through a series of related or linked transactions) as an 'overseas investment in significant business assets' which requires consent. Section 82 of the OIA categorises the acquisition of property used in carrying on a 'strategically important business' (SIB) in New Zealand by an overseas person as an 'overseas investment in SIB assets'.

In June 2020, the OIA was amended to clarify and confirm that references to an acquisition of property in sections 13 and 82 do not include the making of a loan or subscription for an interest or right that is solely an interest in or right to be paid money. This was consistent with the approach within the banking and finance sectors in relation to the origination of loans, but the clarification was nevertheless welcomed.

At that time, the OIA was also amended to include a temporary 'standing consent' which applied where the transaction had the effect of a *transfer* of an interest or right that is solely an interest in or right to be paid money that has been deposited with or lent to, or is otherwise owing by any person (and which is not convertible into a security).

The standing consent expired on the Amendment Act coming into force. However, the effect of that standing consent has been made permanent by the Amendment Regulations, which introduced a new exemption (Regulation 42B), but also extended the exemption to the transfer of contingent liabilities (such as guarantees or insurance contracts), and the transfer of debts which may not arise under a financing transaction (such as trade receivables).

As with permitted security arrangements, in order to fall within the exemption the transaction must be entered into in good faith and not with the intention of using the transfer to make an overseas investment in sensitive assets without consent.

New regulation 42B is a welcome change, and removes any question as to whether a transaction that involves the acquisition of receivables by a bank or financial institution in excess of the thresholds specified in the OIA requires consent as an overseas investment.

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