

Exemptions - Schedules 3 and 4

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There are no recent updates to this resource.

Introduction

Under regulation 34 of the Overseas Investment Regulations 2005 specified persons are exempt from the requirement to obtain consent.

"Specified persons" means persons who:

- are overseas persons only because of their direct or indirect connection with a person listed in Schedule 3 (Portfolio Investors) or Schedule 4 (New Zealand Controlled Persons) of the Regulations, but
- would not be overseas persons if one or more of the persons listed in Schedule 3 or Schedule 4 of the Regulations were not overseas persons.

Portfolio investors

The exemption enables portfolio investment in New Zealand companies, without that investment, in itself, making the New Zealand company an overseas person as defined in the Act. Note that the exemption does not apply to individuals. Exempt overseas persons are listed in Schedule 3 of the Regulations.

New Zealand controlled persons

The exemption enables a company that is an overseas person as defined in the Act, but clearly in "New Zealand hands", to invest in New Zealand without requiring consent. Exempt overseas persons are listed in Schedule 4 of the Regulations.

Applications for exemption

Unlike the regulation 33 exemptions, an application under Regulation 37 must be applied for to enable a person to be added to Schedule 3 or Schedule 4 of the Regulations. However, as the addition involves an amendment to the Regulations, it may take some time for the exemption to become effective. Normally there is a yearly review of the Regulations, at which time exemptions are considered.

Legislation

Regulation 34 exempts specified persons listed in Schedule 3 and 4 of the Regulations from the requirement to obtain consent.

Every person listed in Schedule 3 (portfolio investors) and Schedule 4 (New Zealand controlled persons) are exempted from the consent requirements in section 10(1)(a) (sensitive land) and section 10(1)(b) (significant business assets) of the Overseas Investment Act 2005.

This exemption does not extend to section 57D of the Fisheries Act 1996.

Portfolio investors (Schedule 3)

The effect of the exemption is that any shares in any New Zealand company which are held by any company that is listed on Schedule 3 are not included when calculating the aggregate number of shares held by overseas persons.

The exemption does not apply to ownership or control interests of:

- 25% or more by any one person listed in Schedule 3, or
- 75% or more by two or more overseas persons listed in Schedule 3.

The exemption has no effect on the activities in New Zealand of any company included on Schedule 3, but is rather designed to avoid the company in which shares are held as a minority portfolio investment, from becoming an overseas person.

Exemption criteria (Schedule 3)

A person can be added to Schedule 3 by way of application to the OIO. For an overseas person to be included on Schedule 3, the company must provide an undertaking in writing to the OIO that:

- it is the company's policy to limit its interest in New Zealand companies to purely portfolio minority investments, and that control of such companies would not be sought
- it is the company's policy to not seek representation on the boards of companies in which it holds shares, and
- the company must pay an annual fee (as set out in Part 4 of Schedule 2 of the Regulations) to the OIO for monitoring compliance with the conditions of the exemption, such fee to be paid by the 20th of the month following receipt of an invoice.

The exemption does not apply to individuals.

The relevant Ministers or the regulator (as the case may be) may impose any other terms or conditions as the Ministers or regulator thinks fit, having regard to the particular circumstances of the company which is to be added to Schedule 3 or 4.

New Zealand Controlled Persons (Schedule 4)

The effect of the inclusion on Schedule 4 is that as long as the control of the company remains clearly in "New Zealand hands" the company is exempted from the requirement for consent provisions of the Act. Other companies are exempted if those companies are overseas persons only because of a relationship with an overseas person listed in Schedule 4.

In establishing whether a company is clearly in "New Zealand hands" the OIO has adopted the following general parameters that:

1. the majority of voting securities should normally be beneficially held by parties who are not overseas persons
2. the majority of the voting securities, after deducting those held by parties who are persons listed on Schedules 3 and 4 of the Regulations, should be beneficially held by parties who are not overseas persons
3. the voting securities beneficially held by persons who are not overseas persons and persons listed on Schedule 4 of the Regulations should normally exceed those securities beneficially held by overseas persons and persons listed on Schedule 3 of the Regulations
4. the voting securities beneficially held by the top twenty shareholders who are not overseas persons should normally exceed the voting securities beneficially held by the top twenty overseas person shareholders
5. New Zealand control is more likely to exist where the percentage of overseas shareholding exists as a wide spread of holders rather than a concentrated holding by one or a few overseas person(s)
6. "blocks" of voting securities beneficially held by an overseas person(s) need to be counter balanced by blocks beneficially held by parties who are not overseas persons or by parties who are not overseas persons but who can clearly establish they exercise their rights as a block
7. the largest beneficial shareholder should normally be a person who is not an overseas person
8. it would be unusual for any company which has one overseas shareholder (or a group of shareholders who are identified as being in any way associated) holding beneficially more than 25% of the total voting securities to be included on Schedule 4. The applicant would need to show very strong New Zealand control factors under other categories. An example where an application could be successful would be where a New Zealand entity had formed a joint-venture with a minority overseas partner
9. the cumulative voting powers of substantial security holders who are overseas persons should normally be outweighed by the cumulative voting powers of substantial security holders who are not overseas persons or clearly established voting blocks who are not overseas persons
10. a majority of directors and the chair should be persons who are not overseas persons and who represent New Zealand beneficial shareholder interests or are independent directors representing no particular shareholders' interest
11. a majority of non-executive directors and the chair should be persons who are not overseas persons and who represent New Zealand beneficial shareholder interests or are independent directors representing no particular beneficial shareholders' interest
12. where directors have been appointed to represent particular overseas person beneficial shareholders there should normally be a larger number of directors who are clearly appointed to represent particular non-overseas person beneficial shareholders. Representation would usually indicate that the overseas person has a significant interest/stake in the company and accordingly is capable of influencing the company's activities, and
13. weight is given to any formal arrangement(s) (either by way of the constitution/articles of the company or other means), which restrict/limit the powers of the overseas beneficial shareholders(s), particularly in relation to appointing or removing directors and controlling the operational activities of the

company. Such arrangements could include a large overseas shareholding (eg those that are required to furnish substantial security holder notices to the stock exchange) furnishing the OIO with a written undertaking that:

14. its holding in the company is purely a portfolio investment and that control of the company would not be sought
15. it would not seek representation on the board of the company.

Notwithstanding the general parameters, the OIO is prepared to consider "other matters" which may warrant the inclusion of a company on Schedule 4. Such applications would be considered on a case by case basis having regard to that company's circumstances.

Exemption criteria (Schedule 4)

For an overseas person to be added to Schedule 4, a company must satisfy the OIO that:

- the control of the company in relation to voting power at shareholder meetings and board representation/allegiances is clearly in "New Zealand hands", and
- the necessity for pre-notification and formal approval of transactions will pose a significant burden on the company/the OIO. In assessing whether complying with the requirements of the legislation is likely to cause such a burden the OIO gives consideration to the direct impact on the company concerned (in terms of compliance costs, type and number of transactions, status/perception flow-on effects, circumstances etc) and the indirect impact on other persons if the company concerned is not included on Schedule 4.

The OIO will also require the company seeking inclusion on Schedule 4 to provide an undertaking in writing to the OIO of the acceptance of the following terms and conditions:

- that the OIO is notified in writing within 10 working days of any one or more of the following events:
 - any changes in the composition of the board of directors or the effective control of the company. Relevant details of such changes must be provided, including:
 - in relation to any changes relating to any new or existing directors:
 - name
 - nationality
 - address of usual place of abode, and
 - directors appointed to represent a particular overseas person, beneficial shareholder or class of shareholders
 - changes to the address of the head office or address for service
 - changes to any rights to appoint board members
 - changes to any voting rights of a shareholder or class of shareholder
 - any change of five percent or more in the total level of the company's overseas ownership that the company becomes aware of by way of a substantial security holder notice or other means, and
 - any change of one percent or more in the individual beneficial holding of any of the company's existing major overseas shareholdings, (including their associates) whether or not that holding may be held by persons with New Zealand addresses that the company becomes aware of by way of substantial security holder notice or other means.
- that the company reports in writing to the OIO within four weeks of the end of each quarter of each year (31 March, 30 June, 30 September and 31 December) with:

- details of transactions entered into by it, or a specified person, during that quarter that would have required consent were it not for the exemption
- a best estimate of the percentage of beneficial interests in the company held by the overseas person(s) together with the method by which such estimate was calculated, and
- a statement signed by the Chair of the board that the company has throughout the period complied with the conditions of the exemption and that the company is still clearly New Zealand controlled both in relation to voting power at shareholder meetings and at board level.
- that the company provides a copy of its annual report and audited accounts to the OIO within 28 days of the financial statements of the company being signed pursuant to section 10(1)(b) of the Financial Transactions Reporting Act 1993, together with a written report including, to the extent they are not covered by the annual report and audited accounts, the following items:
 - aggregate details of transactions set out in the previous four quarterly reports provided and
 - details of the company's activities in New Zealand during the year to which the report pertains.
- that the company acknowledges that the exemption may be revoked and that the OIO may take steps to remove the company from Schedule 4 (for example, for non-compliance with the conditions) at any time
- that the company must pay an annual fee (as set out in Part 4 of Schedule 2 of the Regulations) to the OIO for monitoring compliance with the conditions of the exemption, such fee to be paid by the 20th of the months following receipt of an invoice.

The relevant Ministers or the regulator (as the case may be) may impose any other terms or conditions as the Ministers or regulator thinks fit, having regard to the particular circumstances of the company which is to be added to Schedule 3 or 4.

Apply for exemption

Contact the OIO to find out how to apply for exemption.

Disclaimer

This resource provides general information only. The OIO and LINZ do not assume any responsibility for giving legal or other professional advice and disclaim any liability arising from the use of the information. If you require legal or other expert advice you should seek assistance from a professional adviser.

Further information

Visit the OIO website at www.linz.govt.nz/oio to find related links, documents and answers to frequently asked questions. Read the Overseas Investment Act 2005 and the Overseas Investment Regulations on www.legislation.govt.nz.

If you require further information, please contact the OIO.

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