

10 December 2020

Committee Secretariat
Finance and Expenditure Committee
Parliament Buildings
Wellington
New Zealand

By email: fe@parliament.govt.nz

NZX Limited Submission: Overseas Investment Amendment Bill (No 3)

1. Thank you for the opportunity to provide this submission in respect of the Overseas Investment Amendment Bill (No 3) (the **Bill**) that was introduced to the House on 14 May 2020.
2. As NZX Limited (**NZX**) is a licensed market operator whose listed issuers will be directly affected by the proposed Bill, we request that we are provided the opportunity to present our submission orally, before the Select Committee.

Background

3. NZX is a licensed market operator of the NZX Securities Markets¹ and the NZX Derivatives Market, and is New Zealand's Exchange. The NZX Securities Markets comprise 196 listed issuers with a total market capitalisation of \$224.2 billion². NZX supports vital sectors of New Zealand's economy and lowers the cost of capital for listed New Zealand companies, delivering \$2.4 billion of value to the New Zealand economy³. Companies listed on the NZX Main Board within the S&P/ NZX 50 contributed \$24.6 billion GDP for the financial year ended 2017.
4. NZX is regulated under the Financial Markets Conduct Act 2013 (**FMCA**) by the Financial Markets Authority (**FMA**) an independent Crown entity with responsibility to the Minister of Commerce.

¹ The NZX securities markets comprise the NZX Main Board, NZX Debt Market, NZAX and the NXT Market. NZX also operates the Fonterra Shareholders' Market which is a private market on which shares in Fonterra Co-operative Group Limited may be traded by Fonterra farmers.

² Please refer to NZX's monthly shareholder metrics for November 2020, available [here](#).

³ Refer to the New Zealand Institute of Economic Research Report "[The economic contribution of NZX](#)" dated February 2018.

5. NZX supports appropriate regulation of overseas investment to enable a productive, sustainable and inclusive economy. New Zealand is a small domestic market which needs international investment to support productivity and to enable access to global distribution networks. NZX agrees that such investment needs to be appropriately regulated, to mitigate the risk to New Zealand that its core assets are either used inefficiently or New Zealand's wealth is distributed off-shore.
6. NZX's submission focusses on the proposed treatment of New Zealand listed issuers within the definition of 'overseas person' that is contained in the Bill. We support the positive steps being taken in the Bill to recognise New Zealand listed issuers' strong economic and physical connection to New Zealand and regulatory treatment, but suggest that further refinement of the definition would be appropriate.

Regulation of NZX Issuers

7. NZX Issuers are FMC reporting entities, and are required to file financial statements that provide transparency of the tax they contribute to the New Zealand economy in addition to the other NZX disclosure requirements. NZX Issuers are also encouraged to include disclosure in their annual reports of their sustainability practices (including their impact on employees, stakeholders and the broader New Zealand economy). This level of transparency, which is driven by the NZX listing, is a benefit to New Zealand as it facilitates a high degree of tax compliance, and promotes consideration of broader contributions by these companies to New Zealand. This supports a view that an NZX listing should be treated by the Government as a preferred vehicle for holding assets in New Zealand.
8. NZX Issuers operate in a highly regulated environment, and are subject to obligations under the NZX Listing Rules, the Companies Act, the FMCA and the Takeovers Code. These obligations ensure that there is both visibility of foreign ownership and monitoring of increases in control, and that shareholders approve major transactions and related party transactions undertaken by NZX Issuers, along with certain transactions that materially increase effective control of an NZX Issuer.
9. These obligations are established and enforced by New Zealand regulators, primarily the FMA and NZX. The FMA enforces the substantial product holder regime prescribed by the FMCA, and regulates NZX's conduct as a licensed market operator, including through the approval of amendments to the Listing Rules. NZX is the frontline regulator of the NZX Securities Markets and is subject to a statutory control limit that prevents any one holder having the ability to control more than 10% of NZX's voting rights.
11. The current scope of the definition of an "overseas person" in the Act currently imposes disproportionate compliance costs on NZX Issuers and their shareholders, thereby inhibiting overseas investment in New Zealand that would otherwise enhance the development of a productive New Zealand economy. We support the direction of travel of the definition of "overseas person" which is contained in the Bill, but suggest that it could be enhanced by further refinements to the ownership test.

Definition of 'overseas person' within the Bill

13. The Bill proposes that a New Zealand listed issuer who meets the ownership test or the control test (or both) will be an overseas person.

14. The current formulation of the ownership test results in the potential for very small unrelated foreign holdings to be aggregated and cause a New Zealand listed issuer to become an overseas person because 2 or more overseas persons cumulatively have a beneficial entitlement to more than 50% of the New Zealand listed issuer's securities.
15. We recommend further amendments to the ownership test, such that only overseas holders (together with their associates) with a 10% or more beneficial interest a New Zealand listed issuer (**10%+ overseas holder**) are included within the ownership test. This is consistent with the approach taken to the 'notional single person' test under the Income Tax Act, which treats the 10% threshold as a proxy for influence. This approach would also more easily enable New Zealand listed issuers to determine whether they are overseas persons, given the frequent changes in share ownership arising from market trading activity.
17. We understand that officials rejected restricting the ownership test to **10%+ overseas holders** in the context of the consideration of the Overseas Investment (Urgent Measures) Amendment Bill. We understand that this approach was rejected by because it could result in a wholly foreign owned company not being subject to the Act. We note that the purpose of the Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets. We consider that the purpose of the Act is not offended, where a large number of unrelated overseas persons who do not act jointly, own a New Zealand asset through small holdings in a New Zealand listed issuer, where each of those holdings does not allow the holder to influence the issuer. We note that the New Zealand listed issuers are fundamentally New Zealand companies with a significant New Zealand presence (including the requirement to have at least two directors ordinarily resident in New Zealand⁴).
16. As an alternative to restricting the ownership test to 10%+ overseas holders, we suggest the adoption of a 5% standard. This would align with the approach taken under the FMCA substantial product holder regime, which requires disclosure of beneficial interests in New Zealand listed issuers once a holder has a 5% or greater holding.
17. We suggest that if the Committee elects to retain the ownership test as formulated in the Bill, that the Committee consider amending section 61B of the Act to allow listed issuers to seek an individual exemption from the Minister where the operative provisions of the Act are triggered because the issuer is an overseas person solely because it meets the ownership test, in circumstances where the issuer can demonstrate that it is fundamentally a New Zealand person.
18. We also suggest that regardless of the formulation of the overseas person test in the Bill, that compliance with the Bill could be enhanced by introducing consequential amendments to sections 290 and 291 of the FMCA. These amendments could enable listed issuers to require persons whom receive a written notice under those sections (being holders of 5% or more of the issuers' voting products or persons whom the issuer

⁴ NZX Listing Rule 2.1.1(b).

suspects may be such a holder) to declare whether or not, and the extent to which they are an overseas person for the purposes of the Act.

Tipping point

19. Clause 6 of the Bill proposes amendments to section 12(2) of the Act in relation to the threshold that must be met in order for an overseas person to “tip” a New Zealand listed issuer into being regarded as holding an overseas investment in sensitive land. We strongly support the amendments proposed by clause 6 of the Bill which will significantly alleviate the difficulties with the current approach in the Act.

Next steps

20. We would be pleased to appear before the Committee to discuss the comments made in this submission with you.

Yours faithfully,



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NZX Limited