

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Foreign Acquisitions and Takeover Act 1975

Foreign Acquisitions and Takeovers Amendment (Interfunding Exemption) Regulations 2024

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) establishes a regime for the notification, review and approval of foreign investment in Australia.

Section 139 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Regulations may be made pursuant to sections 37, 98C, 98D, 98E and 130ZU of the Act. Section 37 of the Act enables regulations to provide for exemptions from the Act or from specified provisions of the Act. Paragraph 98C(1)(c) enables regulations to be made in relation to notifying the Treasurer of taking an action under a no objection notification. Paragraph 98D(1)(c) enables regulations to be made in relation to notifying the Treasurer of an action under an exemption certificate. Paragraph 98E(1)(e) enables regulations to be made in relation to notifying the Treasurer of situations following core Part 3 actions. Section 130ZU of the Act provides the regulations may prescribe circumstances in which a person specified must give a notice to the Registrar to be recorded on the Register of Foreign Ownership of Australian Assets (the Register).

The purpose of the *Foreign Acquisitions and Takeovers Amendment (Interfunding Exemption) Regulations 2024* (the Regulations) is to amend the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations) to exempt transactions that meet certain requirements from mandatory notification requirements under the Act. The Regulations also make minor technical updates to the Principal Regulations to ensure that existing exemptions relating to certain interests held by foreign custodian corporations and pro rata rights issues, which were intended to apply to the Act as a whole, also apply to Part 7A of the Act and continue to operate as intended.

As required by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020*, the Secretary to the Treasury undertook an evaluation of the foreign investment reforms that came into effect on 1 January 2021. The Government accepted all seven of the evaluation's findings and in doing so committed to making further refinements to the foreign investment framework to ensure it remains fit for purpose.

The Regulations give effect to part of this response by reducing the regulatory burden for a particular category of lower-risk and passive investment activities, known as 'interfunding'. Interfunding refers to transactions between investment entities (such as unit trusts) that are managed by the same responsible entity or a related responsible entity. Interfunding transactions may be used by investors to achieve investment objectives, reduce risk, and provide operational and cost efficiencies. Interfunding activities generally consist of high-volume and low-value transactions, which can occur multiple times per day.

The Regulations make amendments to exempt interfunding transactions from mandatory notification requirements and fees under the Act. However, interfunding transactions which were previously reviewable national security actions will remain national security actions and a register notice will be required to be given to the Registrar. This reduces the regulatory burden for foreign investors while providing the Government with appropriate oversight. The Treasurer will continue to be able to exercise the power in section 66A of the Act in relation to an action of this kind if the action may pose a national security concern. The register notice obligations will ensure that the Register continues to provide a comprehensive picture of foreign investment in Australia (including assisting with identification of potential national security concerns that may arise).

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

Details of the Regulations are set out in Attachment A.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commenced on the day after they were registered on the Federal Register of Legislation.

The Office of Impact Analysis has been (OIA) has been consulted (OIA23-04875) and considered the proposal unlikely to have a more than minor regulatory impact. The preparation of an Impact Analysis (IA) is not required.

Details of the *Foreign Acquisitions and Takeovers Amendment (Interfunding Exemption) Regulations 2024*

Section 1 – Name

This section provides that the name of the regulations is the *Foreign Acquisitions and Takeovers Amendment (Interfunding Exemption) Regulations 2024* (the Regulations).

Section 2 – Commencement

Schedule 1 to the Regulations commences on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the *Foreign Acquisitions and Takeovers Act 1975* (the Act).

Section 4 – Schedule

This section provides that each instrument that is specified in the Schedules to this instrument are amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Section 1 – Amendments to the *Foreign Acquisitions and Takeovers Regulation 2015 (the Principal Regulations)*

Legislative references in this attachment are to the Principal Regulations unless otherwise stated.

Item 1 – Definitions

Item 1 amends section 5 to insert four new definitions for the purposes of supporting the readability and operation of new section 40A, which provides for an exemption of interfunding transactions from mandatory notification requirements and fees under the Act.

Registered scheme has the same meaning as the *Corporations Act 2001* (Corporations Act), which specifies a registered scheme to mean a managed investment scheme that is registered under section 601EB of the Corporations Act.

Registrable superannuation entity has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*, which specifies a registrable superannuation entity to be a regulated superannuation fund, an approved deposit fund or a pooled superannuation trust, but does not include a self-managed superannuation fund.

Responsible entity of a registered scheme has the same meaning as in the Corporations Act, which specifies a responsible entity of a registered scheme to be the company named in ASIC's record of a registered scheme's registration as the responsible entity or temporary responsible entity of that scheme.

RSE licensee has the same meaning as in the *Superannuation Industry (Supervision) Act 1993* (SIS Act), which specifies a RSE licensee to be a constitutional corporation, body corporate, or group of individual trustees that hold a RSE licensee granted under section 29D of the SIS Act.

Item 2 – exemption for interfunding transactions

Subdivision A of Division 4 of Part 3 of the Principal Regulations provides for exemptions relating to particular actions. Item 2 inserts new section 40A into Subdivision A to provide for a new exemption for actions that satisfy certain requirements. These actions are known as interfunding transactions..

For transactions that satisfy the requirements of subsection 40A(2), subsection 40A(1) has the effect of turning off the provisions in the Act relating to significant actions under Division 2 of Part 2, notifiable actions under Division 3 of Part 2, and notifiable national security actions under section 55B. Therefore, transactions that satisfy the requirements of subsection 40A(2) will only continue to be reviewable national security actions under sections 55D to 55G of the Act. This means the Treasurer will retain the national security call-in power (section 66A) and last resort power (Division 3 of Part 3) in relation to interfunding transactions.

Subsection 40A(2) outlines the requirements that must be met for a foreign person's acquisition of an interest in securities in an entity to constitute an interfunding transaction and therefore be exempt from the provisions in the Act outlined in subsection 40A(1). The requirements ensure that the exemption targets lower-risk interfunding transactions.

Paragraphs 40A(2)(a) and (b) provide that the foreign person acquiring the interest (acquiring fund) must be a corporation and acquire the interest in its capacity as a responsible entity (RE) of a registered scheme or a registerable superannuation entity. Paragraph 40A(2)(d) provides that that the acquisition must be of an interest in a registered scheme or registrable superannuation entity (target fund).

Paragraph 40A(2)(c) provides that the acquiring fund must be passively held. Subsection 40A(3) provides that an acquiring fund will be passively held if it meets the conditions of paragraph 40A(3)(a), or if the securities in the acquiring fund are held on behalf of entities that meet the conditions of the conditions of paragraph 40A(3)(a). Paragraph 40A(3)(a) provides that a registered scheme or registrable superannuation entity will be passively held if all of the following apply:

- people make contributions to acquire rights to benefits produced by the scheme;
- the contributions are pooled to produce financial benefits or benefits consisting of rights or interests in property for its members; and
- no individual member is able to influence any individual investment decision (for example, the individual member must not individually be able to authorise the purchase or sale of particular shares or property), or the management of any individual investments under the scheme (for example, the individual member must not be able to require the fund to exercise voting rights in respect of an individual investment in a particular way).

The purpose of requiring the acquiring fund to be passively held is to ensure that investments that result in a change of control external to the family of funds do not benefit from the interfunding exemption. A change of control external to the family of funds may require review under the foreign investment framework and should not be captured by the new exemption. The intention of subsection 40A(3) is to ensure that investments into the family of funds are passive; that is, top-level funds within the family of funds are passively held, and investments by the family of funds into assets external to the family of funds are also passively held. However, it does not matter if the interfunding transaction results in a change of control within the family of funds.

Paragraph 40A(2)(e) provides that the acquisition must only occur in the ordinary course of the acquiring fund adhering to an investment mandate communicated to fund members before the acquisition is taken. This means that the acquisition must be in line with, for a registered scheme, its Product Disclosure Statement or constitution, or for a registrable superannuation entity, its governing rules. Otherwise, the acquisition must align with a written investment strategy or mandate that was published and sent to members before the acquisition was undertaken.

The requirement for interfunding transactions to be for the purpose of giving effect to an investment mandate communicated to fund members in advance, in combination with the requirement that the acquiring fund is a registered scheme or a registrable superannuation entity, ensures that other transactions internal to the family of funds (such as internal corporate reorganisations) do not benefit from the interfunding exemption.

Internal reorganisations, as defined in section 41 of the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020*, are generally one-off actions taken by a corporation to restructure debt or to reduce tax liabilities. In contrast, interfunding transactions are actions taken in the ordinary course of business to execute an investment mandate communicated to their members in advance between funds within the same corporate structure. The intent is that internal reorganisations are not covered by the new exemption.

To ensure there is a sufficient connection between the acquiring fund and the target fund to constitute an interfunding transaction, paragraph 40A(2)(f) provides that any of the following must apply to the transaction:

- the acquiring fund and the RE or RSE licensee of the target fund must both have the same holding entity;
- the acquiring fund is a subsidiary of the RE or RSE licensee of the target fund; or
- the RE or RSE of the target fund is a subsidiary of the acquiring fund.

Paragraph 40A(2)(f) ensures that the transactions captured by section 40A are transactions between entities that are either managed together by the same RE or RSE or come within the same family of funds. That is, the transactions are the reallocation of interests within a family of funds to achieve investment objectives which do not result in a change of control external to the funds and therefore do not require scrutiny under the Act.

Items 3 and 6 – register notice obligations for pro-rata issues

Section 130ZU of the Act allows the Principal Regulations to prescribe circumstances in which a person specified in the Principal Regulations must give a register notice to the Registrar, and section 37 allows the regulations to provide for exemptions from the Act or from specified provisions of the Act.

Section 41(1) exempts actions from being notifiable actions under the Act where a person acquires an interest in securities under any of the following, as provided by subsection 41(2):

- a rights issue within the meaning of the *Corporations Act 2001*;
- a rights issue within the meaning of a foreign country, if that issue is regulated by a law of a foreign country; or
- an issue that is similar to a rights issue within the meaning of the *Corporations Act 2001* and is provided for under an instrument made by the Australian Securities Investment Corporation (ASIC) under the *Corporations Act 2001*.

Section 41 covers circumstances where a foreign person acquires an additional interest in an entity under a pro-rata rights issue. Pro-rata rights issues are rights issues in which existing shareholders acquire additional rights in proportion to their existing shareholdings. These are rights, but not obligations, to buy new shares which may sometimes be assigned (sold) to a third party.

Division 4 provides exemptions for Register purposes for certain kinds of interests. Item 6 inserts section 58KA into Division 4 to provide that Part 7A of the Act does not apply in relation to the acquisition of an interest in securities in an entity in the circumstances outlined in subsection 41(2). Item 3 inserts a note after section 41 to clarify that Part 7A of the Act (which contains requirements and other provisions relating to the Register) does not apply to these circumstances. That is, a foreign person is not required to give a register notice to the Registrar of an interest acquired through a rights issue which does not change their existing shareholding.

The effect of this amendment is to limit the range of interests in securities that must be registered on the Register under the Act to only the interests that are most important and sensitive. This means foreign persons do not have to bear the regulatory burden of reporting most pro-rata rights issues to the Registrar. Where a foreign person has reasonable grounds to believe that their holding will increase following the pro-rata rights issue, the exemption in section 41 will not apply and they may be required to give notice to the Registrar (and the Treasurer of the proposed action).

Items 4 and 6 – register notice obligations for foreign custodian corporations

Section 130ZU of the Act allows the Principal Regulations to prescribe circumstances in which a person specified in the Principal Regulations must give a register notice to the Registrar, and section 37 allows the regulations to provide for exemptions from the Act or from specified provisions of the Act.

Section 30 provides an exemption from significant and notifiable actions under the Act for the acquisition of interests by foreign custodian corporations in their capacity as

custodians. Further, subsection 41A(1) exempts actions from being notifiable actions under the Act when an entity becomes a foreign person by virtue of a foreign custodian corporation holding an interest in the entity in the course of providing custodian services as outlined in subsection 41A(2).

Custodians provide a range of services for their clients, who are generally institutional investors, money managers and broker/dealers. These services typically include: settlement of trade and safekeeping of financial assets on behalf of the client; collection of income arising from portfolios; application of entitlements to reduce rates of withholding tax at source and reclaiming tax withheld; and notification and dealing with corporate action.

Generally, custodians only exercise voting rights attached to their holdings under direct instruction from their client and do not normally exercise influence independent of their client.

Division 4 provides exemptions for Register purposes for certain kinds of interests. The exemption in section 41A reflects the fact that actions taken by persons which are only foreign persons because of an interest held in them by one or more foreign custodian corporations generally pose a lesser risk to the national interest. However, since the commencement of the Register, some of these entities have been subject to register notice obligations under Part 7A of the Act, creating a discrepancy between the current exemptions from notifications and register notice obligations.

Item 6 inserts section 58KB into Division 4 to also provide that Part 7A of the Act does not apply in relation to the actions taken by a foreign person as outlined in subsection 41A(2). Item 4 inserts a note at the end of subsection 41A(1) to clarify that Part 7A of the Act (which contains requirements and other provisions relating to the Register) does not apply to actions taken by persons which are only foreign persons because of an interest held in them by one or more foreign custodian corporations.

The effect of the amendments is to remove the requirement to register on the Register for acquisitions of interests that are not likely to significantly increase risks that the foreign investment framework seeks to address.

Item 5 – register notice obligations for interfunding transactions

Section 130ZU of the Act allows regulations to prescribe circumstances in which a person specified in the regulations must give a register notice to the Registrar.

Division 2 of Part 5B prescribes actions which require notification to the Registrar for the purposes of section 130ZU of the Act.

Sections 98C, 98D and 98E of the Act set out certain notification requirements to the Treasurer in a number of situations relating to actions taken under no objection notifications and exemption certificates. This would include interfunding transactions. Interfunding transactions that meet the requirements of subsection 40A(2) will now be exempt from these notification requirements because of new section 40A. However, information about such transactions would assist the Treasurer to monitor investments in Australia and assess potential for risks to national security to arise.

Item 5 inserts new subsection 58GA into Subdivision C of Division 2 of Part 5B to provide register notice obligations for interfunding transactions covered by new section 40A. The

register notice obligations are consistent with the approach to requiring registration of foreign interests covered by exemption certificates, to ensure the Register has a comprehensive picture of foreign investment in Australia.

Further, the obligations will only impose additional requirements for interfunding transactions that are acquisitions of interests in securities as most acquisitions of an interest in land (including those which are through land entities) already required to be reported to the Registrar.

Subsection 58GA(1) provides that if a foreign person takes an action that is an interfunding transaction that is covered by section 40A and is therefore exempt from being a notifiable or significant action under the Act, the foreign person must give a register notice to the Registrar.

Subsection 58GA(2) is made for the purposes of paragraphs 130ZU(1)(c) and (d) of the Act, which allow regulations to prescribe registered circumstances that relate to a foreign person who gives such a register notice and the circumstances in which such a registered circumstance ceases. Paragraph 58GA(2)(a) provides that if a foreign person gives a register notice under 58GA in relation to an interfunding transaction covered by section 41A, then a registered circumstance will exist in relation to the foreign person. Paragraph 58GA(2)(b) provides that the registered circumstance will cease if the foreign person no longer holds an interest in the target fund as part of the interfunding transaction.

Subsection 58GA(3) sets out the registrable event day for a register notice for an interfunding transaction covered by subsection 58GA(1). The registrable event day is the day on which the foreign person takes the action that triggers the requirement to give a register notice under subsection 58GA(1), that being the foreign person takes an action that is an interfunding transaction. A register notice must be given to the Registrar within 30 days of the applicable registrable event day, in accordance with section 130W of the Act (unless extended by the Treasurer).

Section 130ZN of the Act provides that where the Register records a foreign person holding an interest in an entity or business of a particular percentage in relation to a registered circumstance and there is a change in that interest of 5% or more, the foreign person must give a register notice to the Registrar of that change. For the purposes of paragraph 130ZN(4)(g) of the Act, new subsection 58GA(4) provides that the obligations under 130ZN will exist in relation to registered circumstances arising from interfunding transactions. Therefore, if a foreign person's interest in a target fund that was acquired as part of an interfunding transaction changes by 5% or more, the foreign person must give a register notice to the Registrar of that change.

Item 7 - Application

The amendments made by these Regulations will apply in relation to an action taken on or after the commencement of the Regulations (noting the Regulations commence the day after registration – see Item 2).