

# **Guidance note for overseas banks on limitations on the use of restricted words**

## About this guidance

Section 64 of the Reserve Bank of New Zealand Act 1989 (**the Act**) makes it an offence for persons to include in their names or titles certain restricted words, or carry on activities in New Zealand using names or titles that include those restricted words, except where an exemption or statutory exception applies or the Reserve Bank gives an authorisation.

This guidance is intended to help overseas banks that are not registered in New Zealand understand the scope of the limitation on using restricted words and the concept of carrying on activities in New Zealand under section 64(1)(c). By doing so, it aims to clarify some conditions under which the activities of overseas banks will be subject to the limitation in section 64(1)(c).

The guidance has four parts:

- Part 1 provides an outline of the relevant legislative provisions.
- Part 2 sets out the purposes of the limitations.
- Part 3 expands on the concept of carrying on activities in New Zealand under section 64(1)(c), including some of the factors that the Reserve Bank considers should be taken into account by overseas banks.
- Part 4 sets out how section 64(1)(c) applies to scenarios relating to establishing and maintaining bank account relationships with New Zealand persons.

The material in this document is guidance only, and does not override the provisions of the Act. It does not constitute legal advice. We encourage overseas banks to obtain their own legal advice if they are in any doubt as to their obligations under the law.

The guidance applies only to the limitations on restricted words in the Act. Provisions in other areas of New Zealand law may apply to activities carried on in New Zealand by overseas banks (e.g. Financial Service Providers (Registration and Dispute Resolution) Act 2008, Financial Markets Conduct Act 2013).

The Reserve Bank has published a separate document titled “Guidance note on the Reserve Bank’s approach to section 65 authorisations for overseas banks”. This document sets out the circumstances in which an overseas bank that wishes to ‘carry on an activity in New Zealand’ using a name or title that includes a restricted word, may do so without becoming a registered bank in New Zealand. The document also sets out what conditions of authorisation will generally apply.

All statutory references are references to the Act unless otherwise stated.

## Part 1: Limits on the use of restricted words in name or title

1. Under section 2, the following are restricted words:
  - 'bank', 'banker', and 'banking';
  - any of the above words as part of any other word (e.g. 'trusteebank'); and
  - a translation of the above words into any other language (whether or not the language is widely spoken or where the translation is part of another word) (e.g. 'banc', 'banco' or 'banque').
2. Under section 64(1), no person may:
  - be formed, incorporated, or registered using a name or title that includes a restricted word;
  - change a person's name or title to a name or title that includes a restricted word;
  - or
  - carry on any activity directly or indirectly in New Zealand (whether through an agent or otherwise) using a name or title that includes a restricted word.
3. The first limitation includes an overseas company that is required to be registered as an overseas company under the Companies Act 1993 (sections 332-336). The second limitation includes a New Zealand registered overseas company that wishes to change its name or title to a name or title that includes a restricted word. This guidance is directed at the third limitation and how it applies to activities of overseas banks whose name or title includes a restricted word.
4. Under section 64(2), the limits in section 64(1) on using restricted words in names or titles do not apply to:
  - the Reserve Bank;
  - a bank registered under the Act;
  - a person **authorised** by the Reserve Bank under section 65; or
  - a person **exempted** under section 66.
5. Overseas banks may use restricted words when carrying on activities in New Zealand if they register as registered banks or are authorised by the Reserve Bank (but only to the extent of the authorisation). The threshold question is whether activities are being carried on in New Zealand by the overseas bank. Where activities are not being carried on in New Zealand by an overseas bank (whether directly or indirectly) for the purposes of section 64(1)(c) then the limitation does not apply.

## Part 2: The purposes of the limitations on restricted words

6. One purpose of section 64(1) is to prevent potential customers being misled about the status or standing of an entity as a registered bank supervised by the Reserve Bank, with the potential harm that may result from this. A key harm is that a New Zealand person may place funds or otherwise transact with an entity lacking the financial strength that could be expected of a registered and supervised bank and believing that deposits may be more secure than is really the case. One example of where funds deposited with an overseas bank could be less secure for New Zealand resident depositors is where the home jurisdiction gives creditor priority to residents over non-residents.
7. Other purposes of the section 64(1) limitations are to:
  - protect the principal legal benefit of registration as a bank under the Act, being the ability of a registered bank to use a name or title that includes the word “bank” or its derivatives without limitation with banks entitled to this benefit being regulated and supervised by the Reserve Bank; and
  - enable the Reserve Bank to limit the use of restricted words to institutions that are registered and supervised as banks where this is necessary to fulfil the Reserve Bank’s purpose to promote the maintenance of a sound and efficient financial system.
8. The Reserve Bank takes a purposive approach to interpreting section 64(1), taking into account the above matters. This means the Reserve Bank will not take a formulaic approach to interpreting section 64(1)(c), rather it will consider the individual circumstances of each situation. Along the continuum of what might constitute carrying on activities in New Zealand (as described in Part 3) the purposive approach tends to exclude activities that may be regarded as passive. In addition, a purposive approach lends to an interpretation that the activities carried on relate to the business of borrowing and lending money, or providing financial services. For this reason, the Reserve Bank considers that the provision of back-office services by an overseas bank to an affiliated financial institution in New Zealand is unlikely to be subject to the limitations on restricted words.

### Part 3: The concept of carrying on activities in New Zealand under section 64(1)(c)

9. There are five elements to section 64(1)(c):

- there is an activity;
- the activity is being carried on;
- the activity may be carried on directly or indirectly;
- the activity is carried on in New Zealand; and
- the activity being carried on uses a name or title that includes a restricted word.

#### *There is an **activity***

10. The term “activity” is broad. It includes electronic and telephone activities such as online services, internet sites and telephone calls.

#### *The activity is being **carried on***

11. To be “carried on” an activity must be repeated or have some continuity. In determining whether an activity is “carried on”, the frequency of activities will be assessed on a case-by-case basis, taking into account the nature of the activity. Occasional or one-off activities are not “carried on”. A series of occasional acts, however, may collectively be an activity “carried on” if there is some connection between them.

#### *The activity may be carried on **directly or indirectly***

12. The activity does not need to be carried on directly by the overseas bank using a restricted word. Activities carried on indirectly through intermediaries such as agents in New Zealand will be subject to the limitations on restricted words. In these cases the activities of the intermediary are attributed to the overseas bank provided the name of the overseas bank is used by the intermediary.

#### *The activity is carried on **in New Zealand***

13. The fact that an activity is carried on in relation to a person in New Zealand does not mean the activity is carried on in New Zealand; something more is required. Any permanent physical presence on the part of the overseas bank in New Zealand (or of an agent or other representative of the overseas bank), such as establishing a place of business in New Zealand or maintaining staff on a permanent basis in New Zealand, will clearly constitute an activity being carried on in New Zealand. An overseas bank that is required to be registered as an overseas company under the Companies Act 1993 will be presumed to be carrying on activities in New Zealand.

14. Where the overseas bank (or an agent or other representative of the overseas bank) does not have a permanent physical presence in New Zealand, the Reserve Bank will look at where pre-contractual activities take place and how and where the contract is to be performed to assess whether the activities are carried on in New Zealand. Activities that may be regarded as occurring in New Zealand include:

- Marketing of financial products or services that targets a New Zealand audience;

- Making unsolicited visits to potential customers in New Zealand to offer financial products or services;
- Approaching potential customers in New Zealand by direct mail or email offering financial products or services, or through a New Zealand intermediary such as an agent;
- Registering and operating a New Zealand website domain; and
- Taking mortgages or registering other security over property in New Zealand.

15. For the purposes of section 64(1)(c), an activity is not carried on in New Zealand simply because:

- There is an overseas domain website accessible to New Zealanders, unless the website clearly targets New Zealand persons by having New Zealand specific information such as New Zealand contact details;
- A general publication of an overseas bank mentions current New Zealand customers; or
- There are direct communications with New Zealand persons in the context of an existing customer relationship that was established overseas or is otherwise not subject to section 64 (see paragraph 19 and Part 4 of this note).

16. Activities carried out on a reverse-inquiry basis (i.e. the customer directly approaches the overseas bank requesting certain services) will not generally be considered to be carried on in New Zealand (see paragraphs 22-23 for additional information).

17. Whether an activity is carried on “in New Zealand” is a fact-driven assessment. A relevant factor in the assessment may include the quantum of an overseas bank’s New Zealand connected business.

*The activity being carried on **uses** a name or title that includes a restricted word*

18. The name or title including the restricted word must be used to further the carrying on of the activity, i.e. the name is used to advance or promote the activity. It will usually be sufficient that the entity carrying out the activity operates under a name including a restricted word in the course of the activities carried on in New Zealand. However, activities carried on between an overseas bank and an affiliate in New Zealand are likely to be based on related party relationships and corporate control rather than use being made of a name or title that includes a restricted word.

*Applicability to wholesale activities involving New Zealand wholesale customers*

19. The Reserve Bank recognises that transactions involving overseas banks and New Zealand wholesale customers are often initiated by the customer independently and proactively requesting services from an overseas bank. These contacts may involve a request from the New Zealand person for a representative of an overseas bank to make a customer visit to New Zealand. If contacts of this nature lead to a one-off contract that is subject to an overseas legal and regulatory regime and clearly will be substantially performed overseas the Reserve Bank is likely to consider activities related to such a contract as of insufficient magnitude to engage section 64(1)(c). Similarly, transactions between registered banks and overseas banks participating in the international interbank

market will not be considered to engage section 64(1)(c). The interbank market is carried on through a global network of banks borrowing and lending among themselves. The market is generally facilitated by electronic platforms operated by overseas brokers with transaction activity based on the standing and creditworthiness of the banks involved.

## **Part 4: Scenarios relating to overseas banks establishing and maintaining bank account relationships with New Zealand persons**

20. There are three general scenarios in which overseas banks may establish and maintain bank account relationships with New Zealand persons:

- A person opens a bank account while living overseas and maintains it upon coming to New Zealand;
- A New Zealand person, on their own initiative, approaches an overseas bank to open a bank account (“reverse solicitation”); and
- An overseas bank actively offers New Zealand persons accounts with the overseas bank by targeting marketing efforts on the New Zealand market (“direct solicitation”).

*A person opens a bank account while living overseas and maintains it upon coming to New Zealand.*

21. In this scenario, the relevant activities of the overseas bank occur outside New Zealand. The activities are connected to the overseas bank’s jurisdiction, and have little to no bearing within New Zealand outside the customer’s nationality or residency. Retention of the account by the New Zealand person is not enough to cause the overseas bank to carry on activities in New Zealand.

*A New Zealand person, on their own initiative, approaches an overseas bank to open a bank account (“reverse solicitation”).*

22. In this scenario, the relevant activities occur outside New Zealand. The Reserve Bank considers that the section 64(1)(c) limitation is not intended to restrict the ability of New Zealand persons to contract with overseas banks if they wish. It would be unduly restrictive to treat an overseas bank as carrying on an activity in New Zealand simply because they are approached by a New Zealand person. Overseas banks relying on reverse solicitation to avoid the limitation in section 64(1)(c) are advised to document the unsolicited nature of the request to open a bank account. Reverse solicitation also presupposes the absence of any prior communication made to the person in relation to the requested account.

*An overseas bank actively offers New Zealand persons accounts with the overseas bank by targeting marketing efforts on the New Zealand market (“direct solicitation”).*

23. Where an overseas bank actively offers bank accounts to New Zealand persons (directly or indirectly), the Reserve Bank considers that the corresponding activities are carried on in New Zealand for purposes of section 64(1)(c). In this scenario, the actions of the overseas bank are designed to influence the behaviour of persons in New Zealand to enter into a customer relationship with the overseas bank. Direct solicitation may involve direct communications or advertisements, made through different forms of media (including internet sites). See above from paragraph 14 for further detail.

24. If a New Zealand customer applies to open a bank account with an overseas bank it can be expected that ongoing activities relating to that account relationship will be carried on outside New Zealand. However, the more that activities deviate from the account



relationship resulting from the initial request, (e.g. by unsolicited promotion of other financial products and services) the more likely it is those activities will be considered to be occurring in New Zealand.

The above scenarios and other information in this guidance note is provided as a guide to overseas banks, and their advisors, in applying section 64(1)(c). However, the application of section 64(1)(c) to particular circumstances calls for a fact driven analysis. It is possible other circumstances may arise, not covered by this guidance note, that relate to section 64(1)(c).