



## **Financial Markets Conduct (Employee Share Purchase Schemes) Exemption Notice 2016**

Pursuant to section 556 of the Financial Markets Conduct Act 2013, the Financial Markets Authority, being satisfied of the matters set out in section 557 of that Act, gives the following notice.

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## Notice

### 1 Title

This notice is the Financial Markets Conduct (Employee Share Purchase Schemes) Exemption Notice 2016.

### 2 Commencement

This notice comes into force on 8 August 2016.

### 3 Revocation

This notice is revoked on the close of 6 August 2021.

### 4 Interpretation

(1) In this notice, unless the context otherwise requires,—

**Act** means the Financial Markets Conduct Act 2013

**eligible investor** means a person who is, at the time of the offer or at the time when the equity securities are acquired, 1 or more of the following:

- (a) an employee or a director of the issuer of the equity securities or of any of its subsidiaries; or
- (b) a person who provides personal services (other than as an employee) principally to the issuer of the equity securities or to any of its subsidiaries; or
- (c) a relative of a person described in paragraph (a) or (b); or
- (d) a trustee of a trust of which a person described in paragraph (a), (b), or (c) is a beneficiary; or
- (e) a company that is controlled by a person described in paragraph (a), (b), (c), or (d) (within the meaning of clause 48 of Schedule 1 of the Act)

**employee share purchase scheme** means a scheme established by an entity under which eligible investors may acquire equity securities

**overseas exchange** means a securities exchange in a specified overseas jurisdiction

**overseas issuer** means either of the following:

- (a) an issuer that—
  - (i) is incorporated in a specified overseas jurisdiction; and
  - (ii) has issued equity securities that are approved for trading by an overseas exchange that has primary jurisdiction for the listing requirements for the issuer and the quotation of its financial products; or
- (b) an issuer—
  - (i) that is incorporated in a specified overseas jurisdiction; and

- (ii) that has, in respect of equity securities that it has issued, made an application for approval for trading to an overseas exchange (being an overseas exchange that will, after the securities are approved for trading, have primary jurisdiction for the listing requirements for the issuer and the quotation of its financial products); and
- (iii) who, at the time of an offer of equity securities made in reliance on this notice, complies with all the requirements of the overseas exchange relating to that application that the issuer is required to comply with at that time

**Regulations** means the Financial Markets Conduct Regulations 2014

**relative**, in relation to a person (A), means any of the following:

- (a) A's spouse, civil union partner, or de facto partner (B):
- (b) a grandparent, parent, child, grandchild, brother, or sister of A or B, whether or not by a step relationship

**specified overseas jurisdiction** means a jurisdiction named in the Schedule.

- (2) Any term or expression that is defined in the Act or the Regulations and used, but not defined, in this notice has the same meaning as in the Act or the Regulations.
- (3) Regulation 9 of the Regulations applies, with all necessary modifications, to a warning statement required to be provided by this notice.

## 5 Exemption for employee share purchase schemes

Every offeror is exempted from Part 3 of the Act in respect of equity securities offered under an employee share purchase scheme.

## 6 Exemption does not apply to offer made only to eligible persons under Schedule 1 exclusion

- (1) Clause 5 does not apply to an offer of equity securities under an employee share purchase scheme if the only investors who are able, under the terms of the offer, to acquire the equity securities are eligible persons (as defined in clause 8(2) of Schedule 1 of the Act).
- (2) Despite subclause (1), clause 5 applies to an offer referred to in subclause (1) if—
  - (a) the equity securities—
    - (i) are not voting products; and
    - (ii) are offered only under the employee share purchase scheme; or
  - (b) all of the following apply:
    - (i) the issuer has another employee share purchase scheme (the **second scheme**); and

- (ii) an offer of securities will be made under the second scheme in the same 12-month period as the offer referred to in subclause (1); and
- (iii) the offer under the second scheme will be made in reliance on this notice.

## **7 Exemptions for debt securities offered in connection with employee share purchase schemes**

- (1) This clause applies to any of the following:
  - (a) a bank that is licensed or otherwise authorised by the central banking authority of an overseas jurisdiction to carry on banking business in that jurisdiction;
  - (b) an overseas issuer;
  - (c) a company incorporated in New Zealand or in a specified overseas jurisdiction that—
    - (i) is a wholly owned subsidiary of an overseas issuer; and
    - (ii) offers or issues debt securities in connection with the acquisition of equity securities under the overseas issuer's employee share purchase scheme.
- (2) Every person to whom this clause applies is exempted from Parts 3 and 4 of the Act in respect of debt securities offered in connection with the acquisition of equity securities under an overseas issuer's employee share purchase scheme.

## **8 Condition that offer made only to eligible investors**

The exemptions in clauses 5 and 7 are, in respect of the offer of the equity securities under the employee share purchase scheme or the offer of the debt securities, subject to the conditions that—

- (a) the only investors who are able, under the terms of the offer, to acquire the equity securities or debt securities are eligible investors; and
- (b) all of the investors who acquire the equity securities or debt securities under the offer are eligible investors.

## **9 Condition relating to 10% limit on number of equity securities**

- (1) The exemptions in clauses 5 and 7 are subject to the condition that the total number of equity securities issued or transferred under all of the issuer's employee share purchase schemes to eligible investors in any 12-month period does not exceed,—
  - (a) in the case of an offer of voting products or options over voting products, 10% of the voting products of the issuer as at the start of the 12-month period;

- (b) in the case of any other offer of equity securities, 10% of the equity securities of the issuer that are of the same class as at the start of the 12-month period.
- (2) Subclauses (3) to (7) apply for the purpose of calculating, under subclause (1), the total number of equity securities issued or transferred under all of the issuer's employee share purchase schemes to eligible investors.
- (3) An issue or a sale to a person must be disregarded if the issue or sale results from an offer that—
  - (a) does not require disclosure under Part 3 of the Act for any reason other than as a result of the application of clause 8 of Schedule 1 of the Act or this notice; or
  - (b) is not received in New Zealand; or
  - (c) is a regulated offer that is separate from the offer under the employee share purchase scheme.
- (4) If an offer of an option to acquire a number of equity securities is made,—
  - (a) the offer must be treated as being an offer of that number of equity securities (with the offer of the option itself being disregarded in the calculation); and
  - (b) the underlying equity securities must be treated as being issued when the option is issued (regardless of whether or when the option is actually exercised); and
  - (c) in a case where the number of underlying equity securities to be acquired will be determined under a formula or other calculation, the offeror must apply the formula or make the calculation as at the time that the option is offered or issued using any assumptions that the offeror considers are reasonable.

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**Example**

At the start of a 12-month period, ABC Limited has 1 000 ordinary shares.

ABC Limited is planning to offer to each of 7 employees an option to acquire shares. Each option allows the employee to acquire 10 shares (giving a total of up to 70 new ordinary shares). No other equity securities are issued or transferred under ABC Limited's employee share purchase scheme.

Under subclause (4), the offer is treated as being an offer of 70 shares (and the 7 options are not counted separately). The condition in subclause (1) is satisfied because the 70 shares represent only 7% of the shares at the start of the 12-month period.

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- (5) If an offer of a convertible is made,—
    - (a) the offer must be treated as being an offer of the number of equity securities into which the convertible is or may be converted (with the offer of the convertible itself being disregarded in the calculation); and

- (b) the equity securities into which the convertible is or may be converted must be treated as being issued when the convertible is issued (regardless of whether or when the conversion occurs); and
- (c) in a case where the number of equity securities into which the convertible is or may be converted will be determined under a formula or other calculation, the offeror must apply the formula or make the calculation as at the time that the convertible is offered or issued using any assumptions that the offeror considers are reasonable.

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**Example**

At the start of a 12-month period, RST Limited has 2 000 ordinary shares.

RST Limited is planning to offer convertibles to 10 employees (with each employee acquiring 5 convertibles). Each convertible will convert into 10 ordinary shares (giving a total of 500 ordinary shares after the conversion). No other equity securities are issued or transferred under RST Limited's employee share purchase scheme.

Under subclause (5), the offer is treated as being an offer of 500 shares (and the 50 convertibles are not counted separately). The condition in subclause (1) is not satisfied because the 500 shares represent 25% of the shares at the start of the 12-month period.

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- (6) If an offer of a right attaching to, or a legal or equitable interest in, a number of equity securities is made,—
    - (a) the offer must be treated as being an offer of that number of equity securities (with the offer of the right or interest itself being disregarded in the calculation); and
    - (b) if any of the equity securities are subsequently transferred to the eligible investor, those securities must not be counted again in the calculation.

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**Example**

At the start of a 12-month period, XYZ Limited has 1 000 ordinary shares.

XYZ Limited is planning on offering to each of 6 employees a beneficial interest in 10 shares (a total of 60 new ordinary shares). The 60 shares are issued to a trust on behalf of the employees. No other equity securities are issued or transferred under XYZ Limited's employee share purchase scheme.

The shares are voting products and the interests in the shares are non-voting equity securities. However, under subclause (6), the offer is treated as being an offer of 60 shares and the calculation is made under subclause (1)(a) (rather than subclause (1)(b)). The condition in subclause (1) is satisfied because the 60 shares represent only 6% of the shares at the start of the 12-month period.

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- (7) The offeror must make a reasonable adjustment to the number of financial products at the start of the 12-month period (using any assumptions that the offeror considers are reasonable) if, after the start of the period but before the equity securities are issued or transferred under the employee share purchase

scheme, any proportionate consolidation or subdivision of financial products is made in respect of all of the holders of a class of financial products.

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**Example**

At the start of a 12-month period, ABC Limited has 500 ordinary shares.

However, before the issue of the equity securities under the employee share purchase scheme, ABC Limited carries out a share split under which each share is exchanged for 10 shares.

For the purposes of the calculation under this clause, the number of shares at the start of the 12-month period is treated as being 5 000 shares.

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**10 Other conditions**

- (1) The exemptions in clauses 5 and 7 are, in respect of an offer made by a person (A) to an investor (B), subject to the conditions that—
  - (a) the offer is made as part of the remuneration arrangements for any of the following or is otherwise made in connection with the employment or engagement of any of the following:
    - (i) an employee or a director of the issuer of the equity securities or of any of its subsidiaries; or
    - (ii) a person who provides personal services (other than as an employee) principally to the issuer of the equity securities or to any of its subsidiaries; and
  - (b) raising funds for the issuer of the equity securities is not the primary purpose of the offer; and
  - (c) A must not accept an application for the equity securities that is made by B, or issue or transfer the equity securities to B, if the following were not provided, before the application was made, to B (or to a person referred to in paragraph (a) whose relationship with B causes B to be an eligible investor):
    - (i) a document that contains, in a prominent position, the warning statement referred to in clause 11 in respect of the equity securities; and
    - (ii) a document that contains a description of the employee share purchase scheme and its terms and conditions; and
    - (iii) the document or documents referred to in clause 12; and
  - (d) if B (or another person referred to in paragraph (c)) requests a document referred to in paragraph (c) or clause 12(1)(a), A must provide that document to that person within 5 working days after A receives the request.
- (2) One or more of the documents specified in subclause (1)(c) may be combined in a single document.

- (3) For the purposes of subclause (1)(c) and (d), a document must be provided to a person by giving it to the person or delivering or sending it to the person's address.

## 11 Warning statement

- (1) The warning statement must be in the following form:

### “Warning

This is an offer of [*name of financial products, for example, ordinary shares*]. [*Name of financial products*] give you a stake in the ownership of [*name of issuer*]. You may receive a return if dividends are paid.\*

If [*name of issuer*] runs into financial difficulties and is wound up, you will be paid only after all creditors and holders of preference shares† have been paid. You may lose some or all of your investment.

New Zealand law normally requires people who offer financial products to give information to investors before they invest. This information is designed to help investors to make an informed decision.

The usual rules do not apply to this offer because it is made under an employee share purchase scheme. As a result, you may not be given all the information usually required. You will also have fewer other legal protections for this investment.

Ask questions, read all documents carefully, and seek independent financial advice before committing yourself.”

\*Omit the sentence about dividends if it is inapplicable or may be false, misleading, deceptive, or confusing.

†Omit the words “and holders of preference shares” if those words are inapplicable or may be false, misleading, deceptive, or confusing.

- (2) The warning statement must also—
- (a) include a statement as to whether the equity securities are quoted; and
  - (b) include whichever of the following statements better applies:
    - (i) “The trading market for the investment is likely to be limited and you may not be able to sell it.”;
    - (ii) “[*Name of issuer*] intends to quote these [*name of financial products*] on [*name of licensed market or other established market available for trading*]. This means you may be able to sell them on the [*name of market*] if there are interested buyers. You may get less than you invested. The price will depend on the demand for the [*name of financial products*].”; and
  - (c) explain any other arrangements under which the investor may redeem or sell the investor's investment (if any) and any restrictions on their ability to do so.

## 12 Annual report and financial statements

- (1) The document or documents are—
  - (a) each of the following:
    - (i) a copy of the issuer's latest annual report prepared under any enactment or overseas law (if any);
    - (ii) a copy of the relevant financial statements (within the meaning of clause 2 of Schedule 8 of the Regulations) and, if those statements are not audited or reviewed by an auditor, a statement to that effect;
    - (iii) a copy of the auditor's report on those financial statements (if any); or
  - (b) a notice that contains—
    - (i) a statement to the effect that the investor has a right to receive from the offeror, free of charge, a copy of the documents referred to in paragraph (a) if the investor makes a request to the offeror to receive a copy of those documents; and
    - (ii) a statement to the effect that the investor may obtain a copy of those documents by electronic means; and
    - (iii) a statement as to how the investor may obtain a copy of those documents by electronic means (for example, from a specified Internet site address).
- (2) Subclause (1)(a)(ii) does not apply if, at the date on which the application from B is made, the issuer has not completed its first accounting period or has not prepared its financial statements for that first accounting period.

## 13 Further condition for debt securities exemptions requiring equity securities to be offered overseas

- (1) The exemptions in clause 7 are subject to the further condition that, at the time of the offer of the equity securities under the overseas issuer's employee share purchase scheme, equity securities are also offered, or have previously been offered, under the employee share purchase scheme, or a parallel scheme, in—
  - (a) the jurisdiction in which the overseas issuer is incorporated; or
  - (b) the jurisdiction of the securities exchange that has (or will have) primary jurisdiction for the listing requirements for the overseas issuer and the quotation of its financial products.
- (2) In this clause, **parallel scheme** means a scheme—
  - (a) under which eligible investors may acquire equity securities; and
  - (b) that is established under the laws of the jurisdiction in which the overseas issuer is incorporated or listed; and

- (c) the terms of which are substantially the same as those of the employee share purchase scheme except to the extent that variations are necessary or desirable to comply with, or to take into account, the laws of the jurisdictions in which equity securities are offered (whether under the parallel scheme or the employee share purchase scheme).

#### **14 Further conditions of exemptions for debt securities that funds held in separate bank account**

- (1) This clause applies to money paid to an issuer or offeror of debt securities to which clause 7 applies if the money is paid to acquire the debt securities or an increased interest in those securities.
- (2) The exemptions in clause 7 are subject to the conditions that—
  - (a) the money is held in a bank account until the equity securities that are offered under the employee share purchase scheme are issued or transferred or the money is otherwise disposed of in accordance with the employee share purchase scheme, whichever is the earlier; and
  - (b) the bank account holds only the following kinds of money:
    - (i) money paid to acquire debt securities offered in connection with the acquisition of equity securities under an overseas issuer's employee share purchase schemes;
    - (ii) money paid to acquire an increased interest in those securities;
    - (iii) any interest on money referred to in subparagraph (i) or (ii).

#### **15 Offers not regulated offers**

An offer of equity securities or debt securities made in reliance on this notice is not a regulated offer.

### **Schedule Specified overseas jurisdictions**

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Australia  
Austria  
Canada  
Denmark  
Finland  
France  
Germany  
Hong Kong  
Ireland

The Netherlands  
Norway  
Singapore  
South Africa  
Spain  
Sweden  
Switzerland  
United Kingdom  
United States of America

Dated at Auckland this 1st day of August 2016.

Nick Kynoch,  
General Counsel.

### Statement of reasons

This notice comes into force on 8 August 2016 and is revoked on the close of 6 August 2021.

The notice relates to certain offers of financial products that are made under, or in connection with, employee share purchase schemes. The notice exempts those offers from disclosure requirements under Part 3 of the Financial Markets Conduct Act 2013 (the **Act**). Offers of debt securities are also exempted from Part 4 of the Act.

The notice also provides that the offers exempted by this notice are not regulated offers under the Act. This means that other requirements of the Act, or other Acts, that apply in connection with regulated offers (such as the financial reporting requirements) will not apply. Any other financial market conduct obligations the exempted entity may have, including obligations under Part 2 of the Act, are not affected.

The exemptions are similar to an exclusion relating to employee share purchase schemes in clause 8 of Schedule 1 of the Act (the **Schedule 1 exclusion**). However, the exemptions go further than the Schedule 1 exclusion to—

- cover offers of financial products to trusts and relatives of employees and of other eligible persons to which the Schedule 1 exclusion relates (or to companies controlled by any of those persons);
- cover offers of debt securities made in connection with the acquisition of equity securities under an employee share purchase scheme;

- address certain technical issues with the operation of the 10% limit on the number of equity securities issued or transferred in a 12-month period.

The exemptions are subject to conditions that are consistent, as far as practicable, with the requirements of clause 8 of Schedule 1 of the Act and clauses 10 to 12 of Schedule 8 of the Financial Markets Conduct Regulations 2014 (which relate to the Schedule 1 exclusion). Offers of debt securities are subject to the additional conditions—

- that the employee share purchase scheme is also offered in a specified overseas jurisdiction; and
- that provide for the money paid to acquire the debt securities to be held in a separate bank account.

The Financial Markets Authority (the **FMA**), after satisfying itself as to the matters set out in section 557 of the Act, considers it appropriate to grant the exemptions because—

- the exemptions recognise situations where eligible persons do not elect to participate directly in employee share purchase schemes, but participate instead through other vehicles such as family trusts. The FMA considers that offers to these vehicles remain in substance employee share offers and would otherwise have fallen within the Schedule 1 exclusion; and
- debt securities are commonly offered in connection with the employee share purchase schemes operated by large overseas companies or their local subsidiaries. These debt securities are savings arrangements. The savings arrangement is temporary, does not have an investment purpose, and is oriented towards the eventual issue of an equity security. In these circumstances, Part 3 disclosure would provide limited value to investors. As the offer of the debt security is typically connected to a larger international employee share scheme, the requirement to prepare Part 3 disclosure may result in these offers not being extended to New Zealand; and
- for technical reasons, there are circumstances where issuers cannot satisfy (or find it difficult in practice to satisfy) clause 8(1)(c)(ii) of Schedule 1 of the Act (which limits the number of products issued or transferred under the scheme to 10% of the products of the issuer). The effect of the exemptions is to provide a meaningful basis for the 10% limit; and
- as such, the FMA is satisfied that the granting of the exemptions is desirable in order to promote the purposes of the Act, specifically to avoid unnecessary compliance costs to promote flexibility in financial markets; and
- the exemptions are limited to the particular difficulties experienced by certain offer types that are made under, or in connection with, employee share purchase schemes. Given the limited application of the exemptions and that eligible investors will still have access to all of the information required by the Schedule 1 exclusion, the exemptions are not broader than is reasonably necessary to address the matters to which they relate.

2016/175

**Financial Markets Conduct (Employee Share Purchase  
Schemes) Exemption Notice 2016**

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Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*: 4 August 2016.

This notice is administered by the Financial Markets Authority.

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Wellington, New Zealand:

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