

**Reprint  
as at 1 December 2016**

**Securities Act (Employer Superannuation Schemes)  
Exemption Notice 2004  
(SR 2004/215)**

Securities Act (Employer Superannuation Schemes) Exemption Notice 2004: revoked, on the close of 30 November 2016, by clause 3.

Pursuant to the Securities Act 1978, the Securities Commission gives the following notice (to which is appended a statement of reasons of the Securities Commission).

**Contents**

	Page
1 Title	2
2 Commencement	2
3 Revocation	2
4 Interpretation	2
5 Exemption from section 37(1) of Act for employer superannuation schemes	3
6 Exemption from section 37(1) of Act for small employer superannuation schemes	4
7 Condition relating to employer funding of shortfall	4
8 Condition relating to annual report	4
9 Condition relating to requests for investment objectives and policy of scheme	5
10 Condition relating to investment statements	6
10A Condition relating to successors in business	6
11 Most of exemption notice does not apply to employer superannuation schemes exempted by section 5A of Act	7
12 Transitional exemption for small employer superannuation schemes previously exempted by Regulations [ <i>Expired</i> ]	7

---

**Note**

Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this eprint. See the notes at the end of this eprint for further details.

**This notice is administered by the Financial Markets Authority.**

## Notice

### 1 Title

This notice is the Securities Act (Employer Superannuation Schemes) Exemption Notice 2004.

### 2 Commencement

This notice comes into force on 23 July 2004.

### 3 Revocation

This notice is revoked on the close of 30 November 2016.

Clause 3: replaced, on 25 July 2014, by clause 3 of the Securities Act (Extension of Term) Exemption Notice 2014 (LI 2014/241).

### 4 Interpretation

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

**Act** means the Securities Act 1978

**custodian** does not include a bare trustee

**de facto partner** has the same meaning as in the Property (Relationships) Act 1976

**employer superannuation scheme** means a registered superannuation scheme (within the meaning of section 2(1) of the Superannuation Schemes Act 1989) that is promoted by either—

(a) 1 employer only; or

(b) 1 employer and 1 or more of the following:

(i) an associated person of that employer:

(ii) a successor in business of that employer or of any associated person of that employer

employer superannuation scheme: this definition was substituted, as from 19 November 2004, by clause 3(1) Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2004 (SR 2004/402).

**manager** means an administration manager or an investment manager (as those terms are defined in section 2(1) of the Superannuation Schemes Act 1989)

**Regulations** means the Securities Regulations 1983

**small employer superannuation scheme** means a registered superannuation scheme (within the meaning of section 2(1) of the Superannuation Schemes Act 1989)—

(a) that is promoted by 1 or more employers or associated persons of 1 or more employers; and

(b) that was in existence on 1 October 1997; and

- (c) the total assets of which (measured in accordance with generally accepted accounting practice) were less than \$5 million at the end of the financial year to which the most recent annual financial statements for the scheme relate

**specified date** means, in relation to an annual report for a financial year, the date on which the financial year ends

**spouse** has the same meaning as in the Property (Relationships) Act 1976.

**successor in business** means,—

- (a) if an employer or an associated person of an employer disposes of all or part of a business by disposing of all or any of the securities that it holds in a body corporate that operates the business, the body corporate in which the securities are held; and
- (b) in all other cases, the person to whom an employer or an associated person of an employer disposes of all or part of its business.

successor in business: this definition was inserted, as from 19 November 2004, by clause 3(2) Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2004 (SR 2004/402).

- (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.

## **5 Exemption from section 37(1) of Act for employer superannuation schemes**

Every superannuation trustee of an employer superannuation scheme, and every person acting on the trustee's behalf, is exempted from section 37(1) of the Act in respect of any interests in that scheme that are offered only to—

- (a) employees of a person promoting the scheme; or
- (b) employees of any associated person of a promoting person; or
- (ba) employees of any successor in business who either—
  - (i) were employed by a promoting person or an associated person immediately before the disposal of the business; or
  - (ii) are employed in the business that was disposed of; or
- (c) relatives, spouses, civil union partners, de facto partners, or dependants of those employees.

Paragraph (ba) was inserted, as from 19 November 2004, by clause 4 Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2004 (SR 2004/402).

Paragraph (c) was amended, as from 20 January 2006, by clause 3 Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2006 (SR 2006/3) by inserting the words "civil union partners," after the expression "spouses,".

## 6 Exemption from section 37(1) of Act for small employer superannuation schemes

Every superannuation trustee of a small employer superannuation scheme, and every person acting on the trustee's behalf, is exempted from section 37(1) of the Act in respect of any interests in that scheme that are offered only to—

- (a) employees of a person or persons promoting the scheme; or
- (b) employees of any associated person of a promoting person; or
- (c) relatives, spouses, civil union partners, de facto partners, or dependants of those employees.

Paragraph (c) was amended, as from 20 January 2006, by clause 4 Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2006 (SR 2006/3) by inserting the words "civil union partners," after the word "spouses,".

## 7 Condition relating to employer funding of shortfall

- (1) The exemptions in clauses 5 and 6 are subject to the condition that it is a term of the offer that, if there is a **shortfall** for a financial year, 1 or more specified persons will incur costs (by way of contributions, expense payments, or both), in respect of that year, at least equal to the amount of the shortfall.
- (2) To determine whether there is a shortfall for a financial year,—
  - (a) determine the costs of administering the scheme for the year (these are the **administrative costs**); and
  - (b) then determine how much (if any) of the surplus has been applied to meet contribution liabilities, expense payments (which may include administrative costs), or both, for that year (this is the **applied surplus**); and
  - (c) then deduct the applied surplus from the administrative costs (and the remaining amount of administrative costs, if any, is the **shortfall**).
- (3) In this clause—

**administrative costs** do not include costs that are directly attributable to the management of the investments of the scheme

**specified person** means the person promoting the scheme or any associated person of that person

**surplus** means the excess in the value of the scheme's assets over the value of the members' accrued benefits.

## 8 Condition relating to annual report

The exemptions in clauses 5 and 6 are subject to the condition that it is a term of the offer that each annual report prepared under section 14 of the Superannuation Schemes Act 1989 for a financial year during which the superannuation trustees of the scheme relied on that exemption must include the following statements and information:

- (a) if any superannuation trustee, promoter, or manager of the scheme, or any director of that superannuation trustee, promoter, or manager, has, during the 5 years preceding the specified date, been adjudged bankrupt or insolvent, convicted of any crime involving dishonesty (within the meaning of section 2(1) of the Crimes Act 1961), prohibited from acting as a director of a company, or placed in statutory management or receivership, a statement to that effect including the name and any alternative or former name or names of the superannuation trustee, promoter, manager, or director concerned:
- (b) if more than 10% of the value of the scheme's assets (calculated in accordance with generally accepted accounting practice) was, at any time during the year preceding the specified date, represented directly or indirectly by any securities that were issued by a superannuation trustee, manager, or custodian of the scheme (or any associated person of any of them), a description of those securities:
- (c) a brief description of any legal proceedings or arbitrations that are pending at the specified date and that may have a material adverse effect on the scheme:
- (d) a statement by the superannuation trustees of the scheme (or, if a superannuation trustee is a body corporate or unincorporate, by the directors of that body) as to whether, in their opinion, after due enquiry by them, either or both of the following have materially and adversely changed since the specified date:
  - (i) the value of the scheme's assets relative to its liabilities (including contingent liabilities):
  - (ii) the ability of the scheme to pay its debts as they become due in the normal course of business:
- (e) a statement as to whether a person was required (under the terms of the offer required by clause 7) to incur costs for that financial year and, if so, a statement that those costs have been incurred.

**9 Condition relating to requests for investment objectives and policy of scheme**

The exemptions in clauses 5 and 6 are subject to the condition that it is a term of the offer that—

- (a) the superannuation trustees of the scheme must send, or cause to be sent, to any member who requests it a description of the investment objectives and policy for the scheme or of the means by which changes can be made to those objectives and that policy (except to the extent that those matters have been disclosed in the investment statement); and
- (b) they must do so within 5 working days of receiving the member's request and without fee.

**10 Condition relating to investment statements**

- (1) The exemption in clause 5 (which relates to employer superannuation schemes) is subject to the condition that a statement in the following form is included at the end of the statement required by clause 1(1) of Schedule 3D of the Regulations in the investment statement for the scheme:

“WARNING—RESTRICTED DISCLOSURE

The law requires that persons considering whether to join a superannuation scheme must be supplied on request with a prospectus about that scheme.

However, this employer superannuation scheme has been exempted from this requirement under the Securities Act (Employer Superannuation Schemes) Exemption Notice 2004.

You should be aware that in choosing to become a member of this superannuation scheme you may be doing so on the basis of more limited information than is generally available to investors making important decisions about investments. However, every prospective member of this scheme has a right, under the Superannuation Schemes Act 1989, to request to receive certain information about the scheme (including a copy of the trust deed).”

- (2) The exemption in clause 6 (which relates to small employer superannuation schemes) is subject to the condition that a statement in the form set out in sub-clause (1) is included at the end of the statement required by clause 1(1) of Schedule 3D of the Regulations in the investment statement for the scheme.
- (3) The exemptions in clauses 5 and 6 are subject to the further condition that the terms of the offer referred to in clauses 7(1), 8, and 9 are stated in the investment statement for the scheme.
- (4) *[Revoked]*
- (5) *[Revoked]*

Clause 10(2): substituted, on 23 July 2009, by clause 5 of the Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2009 (SR 2009/201).

Clause 10(3): substituted, on 23 July 2009, by clause 5 of the Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2009 (SR 2009/201).

Clause 10(4): revoked, on 23 July 2009, by clause 5 of the Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2009 (SR 2009/201).

Clause 10(5): revoked, on 23 July 2009, by clause 5 of the Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2009 (SR 2009/201).

**10A Condition relating to successors in business**

- (1) This clause applies to—
- (a) the exemption in clause 5(ba); and
  - (b) the exemption in clause 5(c) to the extent that it applies to any relative, spouse, civil union partner, de facto partner, or dependant of an employee of a successor in business who is referred to in clause 5(ba).

- (2) Those exemptions are subject to the condition that the offer must be made within 12 months after the promoter of an employer superannuation scheme, or an associated person of that promoter, disposes of all or part of the business in question.

Clause 10A was inserted, as from 19 November 2004, by clause 5 Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2004 (SR 2004/402).

Subclause (1)(b) was amended, as from 20 January 2006, by clause 5 Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2006 (SR 2006/3) by inserting the words “civil union partner,” after the expression “spouse,”.

**11 Most of exemption notice does not apply to employer superannuation schemes exempted by section 5A of Act**

Nothing in this notice (except clause 12) applies to an offer of an interest in a superannuation scheme that is exempted under section 5A of the Act (which relates to employer superannuation schemes).

**12 Transitional exemption for small employer superannuation schemes previously exempted by Regulations**

*[Expired]*

Clauses 10(2)(b) and 12 expired, as from the close of 23 October 2004, pursuant to clause 3 Securities Act (Employer Superannuation Schemes) Exemption Notice 2004 (SR 2004/215).

Dated at Wellington this 20th day of July 2004.

The Common Seal of the Securities Commission was affixed in the presence of:

[LS]

J Diplock,  
Chairperson.

**Statement of reasons**

This notice, which comes into force on 23 July 2004 and expires on 23 July 2009, exempts 2 types of employer superannuation schemes from the registered prospectus requirements of the Securities Act 1978 (the Act).

The notice exempts superannuation schemes promoted by an employer (or associated persons) and offered to its employees or employees of associated persons (or to relatives, spouses, de facto partners, or dependants of those employees). This exemption

applies to schemes that would have come within the exemption for employer superannuation schemes in section 5A of the Act except for any or all of the following reasons:

- the offer is only made to employees, etc, but it is not a term of the trust deed itself that only these persons may be admitted to membership of the scheme so membership is not strictly conditional on being an employee, etc:
- it is a term of the offer, but it is not a term of the trust deed itself (so is not a legal requirement for the scheme), that the employer will incur costs to cover any shortfall in the administrative costs of the scheme:
- those employer costs are incurred by an associated person of the employer, rather than the employer itself:
- those employer costs are incurred in respect of the year in which there is a shortfall, but not in that year itself:
- the employer (or associated person) does not incur costs equal to the full administrative costs of the scheme, but the surplus of the scheme is applied to meet contribution liabilities, expense payments (including administrative costs), or both, and the employer incurs costs at least equal to the difference between that applied surplus and the administration costs.

The notice also exempts small employer superannuation schemes. The key differences from the other employer superannuation schemes are that these schemes may have more than 1 unassociated participating employer, but must have total assets of less than \$5 million and have been in existence on 1 October 1997. This exemption is similar to that previously contained in regulation 2C of the Securities Regulations 1983 (the **Regulations**) before they were amended by the Securities Amendment Act 2004. These schemes would have come within the exemption in section 5A of the Act except for the reasons (set out above) applying to the other employer superannuation schemes or because they have more than 1 unassociated participating employer.

Both exemptions are subject to conditions similar to those applying to employer superannuation schemes exempted under section 5A of the Act. The main differences (other than those relating to the employer costs requirement, which are covered above) are that—

- the annual report must state whether the employer was required to incur costs to fund any shortfall; and
- the employer costs requirement (in clause 7), the requirement as to the annual report (in clause 8), and the requirement to respond to requests for the investment objectives and policy of the scheme (in clause 9) must be included, as terms of the offer, in the investment statement (except there is a transitional period of 3 months during which this condition does not apply to small employer superannuation schemes, to allow them to continue using their existing investment statements); and

- for a transitional period of 3 months, small employer superannuation schemes may continue to use the statement warning of restricted disclosure in the form previously required by the Regulations.

These exemptions do not apply to employer superannuation schemes that are in fact exempt under section 5A of the Act (which means that it is clear which exemption and related conditions apply in each case).

However, there is an additional transitional exemption for small employer superannuation schemes (as previously defined in regulation 2C of the Regulations) that were previously exempt under section 5(2E) of the Act but are exempt now under section 5A of the Act. As with small employer superannuation schemes relying on this notice, for 3 months these schemes may continue to use the statement warning of restricted disclosure in the form previously required by the Regulations.

The Securities Commission (the **Commission**) considers that it is appropriate to grant the exemptions because—

- the Commission considers that the purpose of section 5A of the Act is to grant an exemption from the requirement to have a registered prospectus to employer superannuation schemes where the costs of the scheme are met by the employer. Some schemes meet this policy purpose, but are unable to comply with the terms of the statutory exemption for various technical reasons. The Commission considers that it is consistent with the purpose of the Act to grant an exemption to extend the effect of the exemption in section 5A of the Act to these schemes, and to schemes that previously enjoyed the benefit of the section 5(2E) exemption for small employer superannuation schemes before the Securities Amendment Act 2004 came into force:
- the Commission is of the view that it is appropriate to have a transitional period in which issuers of schemes that previously enjoyed the benefit of the exemption in the Regulations for small employer superannuation schemes can rely on the exemption from the requirement to have a registered prospectus while using their existing investment statements. The content of those existing investment statements is sufficiently similar to the content required under the new exemptions that the benefit of immediately preparing new investment statements is outweighed by the cost of doing so.

## Eprint notes

### **1**    *General*

This is an eprint of the Securities Act (Employer Superannuation Schemes) Exemption Notice 2004 that incorporates all the amendments to that notice as at the date of the last amendment to it.

### **2**    *About this eprint*

This eprint is not an official version of the legislation under section 18 of the Legislation Act 2012.

### **3**    *Amendments incorporated in this eprint*

Securities Act (Extension of Term) Exemption Notice 2014 (LI 2014/241): clause 3

Securities Act (Employer Superannuation Schemes) Exemption Amendment Notice 2009 (SR 2009/201)

Securities Act (Employer Superannuation Schemes) Exemption Notice 2004 (SR 2004/215): clause 3