

Reprint
as at 1 April 2011

**Securities Act (Employee Share
Purchase Schemes—Unlisted
Companies) Exemption Notice
2005**

(SR 2005/276)

Securities Act (Employee Share Purchase Schemes—Unlisted Companies)
Exemption Notice 2005: revoked, on 1 April 2011, by clause 15 of the
Securities Act (Employee Share Purchase Schemes—Unlisted Companies)
Exemption Notice 2011 (SR 2011/58).

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).

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Note

Changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in this eprint.

A general outline of these changes is set out in the notes at the end of this eprint, together with other explanatory material about this eprint.

This notice is administered by the Securities Commission.

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1 Title

This notice is the Securities Act (Employee Share Purchase Schemes–Unlisted Companies) Exemption Notice 2005.

2 Commencement

This notice comes into force on the day after the date of its notification in the *Gazette*.

3 Expiry

This notice expires with the close of 30 September 2012.

Clause 3: amended, on 21 September 2007, by clause 3 of the Securities Act (Extension of Term, Amendment, and Revocation of Certain Exemptions) Exemption Notice 2007 (SR 2007/277).

4 Interpretation

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

Act means the Securities Act 1978

control has the same meaning as in section OD 1(1) of the Income Tax Act 2004

control: this definition was inserted, as from 22 December 2006, by clause 4(2) Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Amendment Notice 2006 (SR 2006/386).

eligible person means, in relation to an unlisted company,—

- (a) an employee or director of that company or of any of its subsidiaries; or
- (b) a person who provides personal services (other than as an employee) principally to that company or any of its subsidiaries; or
- (c) a relative (as defined in the Act) or a de facto partner of a person described in paragraphs (a) or (b); or
- (d) a trustee for a person described in paragraphs (a), (b), or (c); or
- (e) a company that is controlled by a person described in paragraph (a), (b), (c), or (d)

eligible person: paragraph (d) of this definition was amended, as from 22 December 2006, by clause 4(1) Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Amendment Notice 2006 (SR 2006/386) by adding the expression “; or”.

eligible person: paragraph (e) of this definition was inserted, as from 22 December 2006, by clause 4(1) Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Amendment Notice 2006 (SR 2006/386).

employee share purchase scheme means a scheme established by an unlisted company under which eligible persons may acquire specified equity securities issued by that company

FRS–24 means the financial reporting standard known as Financial Reporting Standard No 24 (Interim Financial Statements) that has been approved under the Financial Reporting Act 1993

NZ IAS 34 means the financial reporting standard known as the New Zealand Equivalent to International Accounting Standard 34 (Interim Financial Reporting) that has been approved under the Financial Reporting Act 1993

Regulations means the Securities Regulations 1983

specified equity securities means any interest in or right to an ordinary share in an unlisted company offered under its employee share purchase scheme

unlisted company means a company incorporated in New Zealand that is not a party to a listing agreement with New Zealand Exchange Limited.

- (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 Exemptions

An unlisted company, any of its subsidiaries, a trustee of that company's employee share purchase scheme, and any person acting on their behalf, are exempted from the following provisions in respect of specified equity securities:

- (a) section 37A(1)(c) of the Act; and
- (b) clauses 1(3) and (4), 4 to 20, 22 to 38, and 40 to 42 of Schedule 1 of the Regulations; and
- (c) clause 21 of Schedule 1 of the Regulations, to the extent that it requires the registered prospectus to contain the dates, time periods, and price terms relevant to the particular offer under the employee share purchase scheme and information personal to the person to whom the registered prospectus is distributed; and
- (d) clause 5(1)(c) of Schedule 3D of the Regulations; and
- (e) regulation 17 of the Regulations, in relation to advertisements containing information personal to a person to whom the advertisement is distributed.

Clause 5 was substituted, as from 22 December 2006, by clause 5 Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Amendment Notice 2006 (SR 2006/386).

6 Condition that equity securities allotted only to eligible persons

The exemptions in clause 5 are subject to the condition that the specified equity securities are allotted only to the following persons:

- (a) persons who are eligible persons at the time of allotment of the equity securities;
- (b) in the case of equity securities that are allotted on the exercise of rights or options to acquire shares, persons who are eligible persons at the time of allotment of those rights or options.

7 Condition that information sent to subscribers

The exemptions in clause 5 are subject to the condition that, before an eligible person or a person referred to in clause 6(b) subscribes for specified equity securities, the unlisted company provides that person with the following:

- (a) a copy of the most recent audited consolidated financial statements of the issuing group that comply with the Financial Reporting Act 1993; and
- (b) if the specified equity securities are offered more than 9 months after the date of the most recent audited consolidated financial statements of the issuing group, a copy of interim financial statements for the most recently completed financial half-year of the issuing group that complies with FRS-24 or NZ IAS 34; and
- (c) the company's most recent annual report, which includes or is accompanied by a statement setting out the following matters:
 - (i) particulars of entries in the interests register concerning directors of the company made during the accounting period to which the report relates; and
 - (ii) the date of, names of the parties to, and general nature of any material contract (excluding a contract entered into in the ordinary course of business) entered into by a member of the issuing group at any time in the 2 years preceding a date not more than 20 working days before the date of circulation of the annual report; and
 - (iii) a brief description of any legal proceedings or arbitrations concerning the issuing group that are pending at a date not more than 20 working days before the date of circulation of the annual report and that might have a material adverse effect on the issuing group; and
 - (iv) a statement by 2 directors of the company as to whether, after inquiry by them in relation to the period between the date of the latest statement of financial position attached to, or contained in, the annual report and a date not more than 20 working days before the date of circulation of the an-

nual report, there have, in their opinion, arisen any circumstances that materially adversely affect the issuing group's—

- (A) trading or profitability; or
- (B) asset value; or
- (C) ability to pay liabilities due within the next 12 months.

8 Condition about sale arrangements

The exemptions in clause 5 are subject to the condition that the investment statement relating to the specified equity securities must contain a description of the arrangements under which persons who hold specified equity securities can sell those securities (before and after they cease to be eligible persons).

9 Condition that terms of employee share purchase scheme available

The exemptions in clause 5 are subject to the condition that the investment statement relating to the specified equity securities contains—

- (a) a brief description of the terms of the employee share purchase scheme; and
- (b) a statement of the place or places where the terms of the employee share purchase scheme are available free of charge to a person who is able to acquire securities under the scheme.

10 Condition that there is either established market or repurchase offer by unlisted company

The exemptions in clause 5 are subject to the condition that either—

- (a) there is an established market for the specified equity securities; or
- (b) the unlisted company offers to repurchase the specified equity securities under the Companies Act 1993 from eligible persons when they cease to be eligible persons (so long as at that time the company satisfies the solvency test set out in section 4 of the Companies Act 1993).

11 Condition of cap on specified equity securities

- (1) The exemptions in clause 5 are subject to the condition that—
- (a) the number of specified equity securities allotted in any 12-month period is capped at 5% of the ordinary shares of the company; and
 - (b) the total number of specified equity securities held by eligible persons or persons referred to in clause 6(b) is capped at 15% of the ordinary shares of the company.
- (2) Calculations of the number of specified equity securities for the purposes of subclause (1) must exclude the specified equity securities allotted to or held by or on behalf of directors of the unlisted company and any other person who—
- (a) is, at the commencement of any year, a wealthy or experienced person under section 5 of the Act; or
 - (b) would not be regarded as a member of the public under the Act.

12 Condition of exemptions from clause 1(3) and (4) of Schedule 1 of Regulations

The exemptions in clause 5 from clause 1(3) and (4) of Schedule 1 of the Regulations are subject to the further condition that the registered prospectus states—

- (a) the cap on the specified equity securities that can be allotted under the employee share purchase scheme; and
- (b) the formula or method by which the price or consideration for the specified equity securities will be determined.

13 Conditions of exemption from clause 21 of Schedule 1 of Regulations

The exemption in clause 5 from clause 21 of Schedule 1 of the Regulations is subject to the further conditions that—

- (a) a document is given to every person who is offered specified equity securities under the employee share purchase scheme that contains any information that would but for this exemption be required by clause 21 of Schedule 1 of the Regulations to be contained in the registered prospectus; and

- (b) the registered prospectus contains all other terms of the offer and of the specified equity securities except—
- (i) those implied by law; or
 - (ii) those set out in the document that is registered with a public official and is available for inspection and referred to in the registered prospectus.

Clauses 13 to 15 were inserted, as from 22 December 2006, by clause 6 Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Amendment Notice 2006 (SR 2006/386).

14 Condition of exemption from clause 5(1)(c) of Schedule 3D of Regulations

The exemption in clause 5 from clause 5(1)(c) of Schedule 3D of the Regulations is subject to the further condition that a document containing the information required by clause 5(1)(c) of Schedule 3D of the Regulations is given to every person to whom the specified equity securities are offered under the employee share purchase scheme.

Clauses 13 to 15 were inserted, as from 22 December 2006, by clause 6 Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Amendment Notice 2006 (SR 2006/386).

15 Condition of exemption from regulation 17 of Regulations

The exemption in clause 5 from regulation 17 of the Regulations is subject to the further condition that the unlisted company has complied with regulation 17 of the Regulations in relation to another advertisement and the only difference between the 2 advertisements is information personal to a person to whom the advertisement is distributed.

Clauses 13 to 15 were inserted, as from 22 December 2006, by clause 6 Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Amendment Notice 2006 (SR 2006/386).

Dated at Wellington this 27th day of September 2005.

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

NO Todd,
Member,
[LS]

Statement of reasons

This notice comes into force on the day after its notification in the *Gazette* and expires with the close of 2 years after the date of its notification in the *Gazette*.

This notice exempts unlisted companies (subject to conditions) in respect of equity securities issued by those companies that are offered under employee share purchase schemes from section 37A(1)(c) of the Securities Act 1978 and from clauses 1(3), 1(4), 4 to 20, 22 to 38, and 40 to 42 of Schedule 1 of the Securities Regulations 1983. The effect is to allow unlisted companies to use an evergreen prospectus. The Securities Commission considers it appropriate to grant a class exemption for unlisted companies' employee share purchase schemes because—

- the exemptions recognise that the circumstances of employee share purchase scheme offers differ from many other offers in that they involve an ongoing scheme for the distribution of securities to persons who have a relationship with the issuer:
- most unlisted companies do not meet the Securities Commission's current policy requirements for being named as specified unlisted companies in the Schedule to the class notice for employee share purchase schemes (SR 2002/320):
- the conditions of the exemptions require that the level and nature of the disclosure and the entry and exit arrangements for participants are appropriate for the particular employee share purchase scheme:
- the exemptions help to minimise compliance costs for issuers offering these schemes on a continuous basis.

Issued under the authority of the Acts and Regulations Publication Act 1989.
Date of notification in *Gazette*: 29 September 2005.

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Notes**1 General**

This is an eprint of the Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Notice 2005. It incorporates all the amendments to the Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Notice 2005 as at 1 April 2011. The list of amendments at the end of these notes specifies all the amendments incorporated into this eprint since 4 September 2007. Relevant provisions of any amending enactments that contain transitional, savings, or application provisions are also included, after the Principal enactment, in chronological order.

2 About this eprint

This eprint has not been officialised. For more information about eprints and officialisation, please see <http://www.pco.parliament.govt.nz/eprints/>.

**3 List of amendments incorporated in this eprint
(most recent first)**

Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Notice 2011 (SR 2011/58): clause 15

Securities Act (Extension of Term, Amendment, and Revocation of Certain Exemptions) Exemption Notice 2007 (SR 2007/277): clause 3
