



Takeovers Code (Class Exemptions—Buybacks and Rule 16(b)) Amendment Notice 2010

Pursuant to section 45 of the Takeovers Act 1993, the Takeovers Panel gives the following notice (to which is appended a statement of reasons of the Takeovers Panel).

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Notice

- 1 **Title**
This notice is the Takeovers Code (Class Exemptions—Buybacks and Rule 16(b)) Amendment Notice 2010.

- 2 **Commencement**
This notice comes into force on 29 November 2010.

3 Principal notice amended

This notice amends the Takeovers Code (Class Exemptions) Notice (No 2) 2001.

4 New clause 4 substituted

Clause 4 is revoked and the following clause substituted:

“4 Exemption for buyback approved by shareholders

“(1) Every person who increases voting control as a result of the acquisition by a code company of its own voting securities is exempted from rule 6(1) of the Code in respect of that increase in voting control.

“(2) The exemption is subject to the conditions in Schedule 1.”

5 New clause 10A inserted

The following clause is inserted after clause 10:

“10A Rule 16(b) exemption

“(1) In relation to an increase in voting control resulting from the allotment of voting securities under a specified transaction,—

“(a) every person is exempted from rule 7(d) of the Code to the extent that that rule requires compliance with rule 16(b) of the Code; and

“(b) every person who issues a notice of meeting containing the proposed resolution to approve the specified transaction is exempted from rule 16(b) of the Code.

“(2) The exemptions are subject to the conditions in Schedule 2.

“(3) For the purpose of subclause (1) and Schedule 2, **specified transaction** means any transaction of a kind referred to in subclause (4) that is identified in a notice of meeting containing a proposed resolution to approve the transaction; and if there is more than 1 such transaction referred to in the notice of meeting, means each of those transactions.

“(4) The kinds of transactions that can be specified transactions are as follows:

“(a) a rights issue;

“(b) an underwriting arrangement (where the Takeovers Code (Professional Underwriters) Exemption Notice 2004 is not relied on);

“(c) the conversion of options and other convertible securities.”

6 New Schedules 1 and 2 added

The Schedules 1 and 2 set out in the Schedule of this notice are added.

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Conditions of buyback exemption	

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1 Interpretation

In this schedule, unless the context otherwise requires,—

annual report includes any concise annual report

approved maximum number means the maximum number of the Company’s own voting securities that the Company could acquire under the buyback, and is the number required to be disclosed under clause 3(c)(i)

approved maximum percentage means the maximum percentage of voting securities on issue that person P could hold

Schedule 1—*continued*

or control after the buyback, and is the percentage required to be disclosed under clause 3(c)(iii)

buyback means the acquisition by the Company of its own voting securities, whether the buyback is achieved by a single acquisition or a series of acquisitions

buyback exemption means the exemption granted by clause 4 of this notice

buyback period means the period starting on the date of the meeting that approves the buyback, and ending on the date on which the Company completes the acquisition or series of acquisitions required for the buyback

calculation date means the date, identified in the notice of meeting referred to in clause 3, used for determining the matters referred to in clause 4

Company means the code company that is acquiring its own voting securities under the buyback

other-means increase means an increase in voting control in the Company that is effected by a means other than the buyback

person P means a person who holds or controls voting securities and is relying on the buyback exemption

person P's exempt associates means the class of persons who are associates of person P and who are also relying on the buyback exemption in relation to the buyback

voting security means a voting security in the Company.

2 Shareholder resolution to approve buyback

- (1) A buyback effected in reliance on the buyback exemption must be approved by ordinary resolution of the shareholders of the Company.
- (2) Neither person P nor any associate of person P may vote in favour of any resolution concerning the buyback that relates to person P's increase in voting control.
- (3) If a buyback is pursuant to a non-pro rata offer to shareholders, neither the seller (being a person who accepts a non-pro rata

Schedule 1—*continued*

offer) nor any associate of the seller may vote in favour of the resolution.

3 Notice of meeting to approve buyback

The notice of meeting containing the proposed resolution to approve the buyback must contain, or be accompanied by, the following:

- (a) full particulars of the buyback:
- (b) a statement of the name of person P:
- (c) the following particulars of the voting securities that may, if the resolution is carried, be acquired by the Company under the buyback:
 - (i) the maximum number (the **approved maximum number**) of its own voting securities that the Company could acquire under the buyback:
 - (ii) the percentage of all voting securities on issue that the approved maximum number represents:
 - (iii) the maximum percentage (the **approved maximum percentage**) of all voting securities on issue that person P could hold or control if the Company acquired the approved maximum number of voting securities:
 - (iv) the maximum percentage of all voting securities on issue that person P and person P's associates, excluding person P's exempt associates, could hold or control, in aggregate, if the Company acquired the approved maximum number of voting securities:
 - (v) the maximum percentage of all voting securities on issue that person P and all person P's associates could hold or control, in aggregate, if the Company acquired the approved maximum number of voting securities:
- (d) the consideration for the buyback, or the manner in which the consideration will be determined, and when it will be payable:
- (e) the reasons for the buyback:

Schedule 1—*continued*

- (f) a statement to the effect that the increase in person P's voting control that would result from the buyback would, if approved, be permitted as an exception to rule 6(1) of the Code in reliance on the buyback exemption in clause 4 of the Takeovers Code (Class Exemptions) Notice (No 2) 2001:
- (g) a report from an independent adviser, in relation to the buyback, that complies with rule 18 of the Code as if—
 - (i) references in that rule to an acquisition under rule 7(c) of the Code were references to the buyback by the Company made in accordance with the buyback exemption; and
 - (ii) the references to a notice of meeting were references to the notice of meeting referred to in this clause:
- (h) a statement by the directors of the Company, in relation to the buyback, that complies with rule 19 of the Code as if the reference in that rule to an acquisition under rule 7(c) of the Code were a reference to the buyback by the Company made in accordance with the buyback exemption:
 - (i) the assumptions on which the particulars referred to in paragraph (c) are based, which must include the assumptions referred to in clause 4:
 - (j) the calculation date.

4 Assumptions

The following assumptions must be applied for the purposes of providing the particulars of voting securities, as specified in clause 3(c):

- (a) that the number of voting securities in the Company is the number of voting securities on issue on the calculation date:
- (b) that there is no change in the total number of voting securities on issue between the calculation date and the end of the buyback period, other than as a result of the buyback:

Schedule 1—*continued*

- (c) that person P does not participate in the buyback:
- (d) that the Company acquires the approved maximum number of its own voting securities:
- (e) any other assumptions that are reasonably necessary to ensure that shareholders are provided with the material information required for them to be able to determine whether to approve the resolution.

5 Restriction on increase above approved maximum percentage

During the buyback period, person P must not hold or control a percentage of the voting securities that exceeds the approved maximum percentage of voting securities, except as a result of an other-means increase that complies with clause 9.

6 Standard provisions consistent with rule 19A of Code

- (1) At the same time that the notice of meeting containing the proposed resolution is sent to shareholders of the Company, the Company must send to the Panel, in hard copy and (if possible) in electronic form, a copy of the notice and any documents accompanying it that relate to the meeting.
- (2) If, before the meeting to approve the buyback, a person publishes or sends to shareholders of the Company a statement or information that relates to the meeting but that was not required by the Code to be published or sent, the person must send to the Panel, in hard copy and (if possible) in electronic form, a copy of that statement or information.

7 Annual report disclosures for long-term buybacks

If the buyback takes place over a period of more than 12 months, every annual report of the Company issued during the buyback period must include the following matters, in a prominent position:

- (a) a summary of the terms of the buyback, as approved at the meeting at which shareholder approval of the buyback was given:

Schedule 1—*continued*

- (b) a statement, as at the end of the financial year to which the report relates, of—
 - (i) the number of voting securities on issue acquired by the Company under the buyback; and
 - (ii) the number of voting securities on issue that are held or controlled by person P, and the percentage of all voting securities on issue that that number represents; and
 - (iii) the percentage of all voting securities on issue that are held or controlled, in aggregate, by person P and person P's associates; and
 - (iv) the maximum percentage of all voting securities on issue that could be held or controlled by person P if the Company acquires the approved maximum number of voting securities; and
 - (v) the maximum percentage of all voting securities on issue that would be held or controlled, in aggregate, by person P and person P's associates if the Company acquires the approved maximum number of voting securities;
- (c) a statement of the assumptions on which the particulars referred to in paragraph (b) are based.

8 Internet site disclosures for long-term buybacks

- (1) This condition applies only if—
 - (a) the buyback takes place over a period of more than 12 months; and
 - (b) the Company has an Internet site.
- (2) Following the issue of the first annual report during the buyback period and up to the issue of the first annual report after the end of the buyback period, the Company must disclose on its Internet site the information required under clause 7 to be disclosed in an annual report.
- (3) During the buyback period and up to the issue of the first annual report after the end of the buyback period, the Company must—

Schedule 1—*continued*

- (a) announce on its Internet site any aggregate increase of 1% or more in the voting securities held or controlled by person P since the date of the last disclosure under this paragraph or, where no prior disclosure has been made, since the date of the first aggregate increase of 1% or more in the voting securities held or controlled by person P; and
 - (b) maintain every such announcement on its Internet site in a prominent position.
- (4) The announcement referred to in subclause (3)(a) must be made as soon as the Company is aware, or ought to be aware, that the relevant increase has occurred.

9 Other-means increases

- (1) During the buyback period, person P must not increase its voting control in the Company by way of an other-means increase unless the other-means increase—
- (a) is by an acquisition of voting securities approved in accordance with rule 7(c) of the Code; or
 - (b) is by an allotment of voting securities approved in accordance with rule 7(d) of the Code; or
 - (c) is permitted by another exemption granted by the Panel.
- (2) If approval of the Company's shareholders is required under subclause (1)(a) or (b), the notice of meeting containing the resolution to approve the other-means increase must contain or be accompanied by the following:
- (a) a summary of the terms of the buyback, as approved at the meeting at which shareholder approval of the buyback was given:
 - (b) a statement, as at the date of the notice of meeting containing the resolution to approve the other-means increase, of the following particulars:
 - (i) the numbers and percentages referred to in clause 7(b):
 - (ii) the maximum percentage of all voting securities on issue that could be held or controlled by per-

Schedule 1—*continued*

- son P after the other-means increase and completion of the buyback:
- (iii) the maximum percentage of all voting securities on issue that could be held or controlled by person P and person P's associates after the other-means increase and completion of the buyback:
 - (c) a statement of the assumptions on which the particulars referred to in paragraph (b) are based.
- (3) If an other-means increase is approved by shareholders in accordance with this clause, the reference in clause 5 to the approved maximum percentage must be taken to be a reference to the approved maximum percentage adjusted to take account of the other-means increase.

10 Change of control in person P

- (1) During the buyback period, there must be no change of control in person P that results in another person becoming the holder or controller of an increased percentage of the voting rights in the Company unless the change of control in person P—
- (a) is by an acquisition of voting securities in person P approved by an ordinary resolution of the Company in accordance with rule 7(c) of the Code; or
 - (b) is by an allotment of voting securities in person P approved by an ordinary resolution of the Company in accordance with rule 7(d) of the Code; or
 - (c) is permitted under another exemption granted by the Panel.
- (2) If approval of the Company's shareholders is required under subclause (1)(a) or (b), the notice of meeting containing the resolution to approve the change of control must contain or be accompanied by the following information:
- (a) a summary of the terms of the buyback, as approved at the meeting at which shareholder approval of the buyback was given:
 - (b) a statement, as at the date of the notice of meeting containing the resolution to approve the change of control,

Schedule 1—*continued*

- of the numbers and percentages referred to in clause 7(b):
- (c) a statement of the assumptions on which the particulars referred to in paragraph (b) are based.

Schedule 2
Conditions of rule 16(b) exemption

cl 10A

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1 Interpretation

- (1) In this schedule, unless the context otherwise requires,—
- allotment** means the allotment of voting securities under a specified transaction; and, where the specified transaction involves allotments that will occur over a period of time, means all of those allotments
- allotment period** means the period starting on the date of the meeting that approves a specified transaction, and ending on the date of the last allotment under the specified transaction
- annual report** includes any concise annual report
- approved maximum number** means, in relation to a specified transaction, the maximum number of voting securities that could be allotted to person P under the specified transaction, and is the number required to be disclosed under clause 2(c)(i)

Schedule 2—*continued*

approved maximum percentage means, in relation to a specified transaction, the maximum percentage of all voting securities on issue that person P could hold or control on completion of the specified transaction, and is the percentage figure required to be disclosed under clause 2(c)(iii)

calculation date means the date, identified in the notice of meeting referred to in clause 2, used for determining the matters referred to in clause 3

combined specified transactions means the class of all specified transactions that are identified in a notice of meeting containing a proposed resolution to approve those transactions

Company means the code company whose voting securities are to be allotted under a specified transaction

other-means increase means an increase in voting control in the Company that is effected by a means other than an allotment under a specified transaction

person P means an allottee under a specified transaction who is relying on the rule 16(b) exemption

person P's exempt associates means the class of persons who are associates of person P who are also relying on the rule 16(b) exemption in relation to the specified transaction

rule 16(b) exemption means the exemption granted by clause 10A of this notice

specified transaction has the meaning given in clause 10A(4) of this notice

voting security means a voting security in the Company.

- (2) If person P or any of person P's exempt associates is relying on the rule 16(b) exemption in relation to more than 1 specified transaction, a reference in this schedule to the specified transaction is a reference to each of those specified transactions.

2 Notice of meeting to approve specified transaction

The notice of meeting containing the proposed resolution to approve the specified transaction (as referred to in rule 16 of the Code) must contain, or be accompanied by, the following:

- (a) full particulars of the specified transaction:

Schedule 2—*continued*

- (b) a statement of the name of person P:
- (c) the following particulars of the voting securities to be allotted under the specified transaction:
 - (i) the maximum number of voting securities that could be allotted to person P under the specified transaction (the **approved maximum number**):
 - (ii) that number expressed as a percentage of all voting securities on issue after the allotment under the specified transaction:
 - (iii) the potential maximum percentage (the **approved maximum percentage**) of all voting securities on issue that could be held or controlled by person P on completion of the specified transaction:
 - (iv) the maximum percentage of all voting securities on issue that person P and person P's associates, excluding person P's exempt associates, could hold or control in aggregate on completion of the specified transaction:
 - (v) the maximum percentage of all voting securities on issue that person P and all person P's associates could hold or control in aggregate on completion of the specified transaction:
- (d) if there is more than 1 specified transaction, the particulars of voting securities referred to in paragraph (c) as if references to the specified transaction were references to the combined specified transactions:
- (e) a statement, in addition to the statement required by rule 16(f) of the Code, that the disclosures made in the notice of meeting have been modified in reliance on the exemption set out in clause 10A of the Takeovers Code (Class Exemptions) Notice (No 2) 2001:
- (f) the assumptions on which the particulars referred to in paragraphs (c) and (d) are based, which must include the assumptions referred to in clause 3(2):
- (g) the calculation date.

Schedule 2—*continued*

3 Assumptions

- (1) The assumptions set out in subclause (2) must be applied for the purpose of providing the particulars of the specified transaction and, if necessary, of the combined specified transactions, as those particulars are specified in clause 2(c).
- (2) The assumptions are as follows:
 - (a) that the number of voting securities is the number of voting securities on issue on the calculation date:
 - (b) that there is no change in the total number of voting securities on issue between the calculation date and the end of the allotment period, other than as a result of the specified transaction:
 - (c) that, in relation to clause 2(c)(i) to (iii), person P is allotted the approved maximum number under the specified transaction, as follows:
 - (i) in the case of a rights issue, person P takes up all of its rights and no other person takes up their rights:
 - (ii) in the case of the conversion of convertible securities, person P converts all of its securities and no other holder of convertible securities converts theirs:
 - (iii) in the case of an underwriting arrangement, person P is allotted the approved maximum number of securities under the arrangement:
 - (d) that, in relation to clause 2(c)(iv), person P and each of person P's associates are allotted the maximum number of voting securities under the specified transaction in the manner described in paragraph (c)(i) to (iii) (which must be read as if the references to person P were references to person P together with all person P's associates):
 - (e) that, in relation to clause 2(c)(v), person P and each of person P's associates who is not an exempt associate are allotted the maximum number of voting securities under the specified transaction in the manner described in paragraph (c)(i) to (iii) (which must be read as if the

Schedule 2—*continued*

references to person P were references to person P together with each of person P's associates who is not an exempt associate):

- (f) any other assumptions that are reasonably necessary to ensure that shareholders are provided with the material information required for them to be able to determine whether to approve the resolution.

4 Restriction on increase above approved maximum percentage

Until the end of the allotment period, person P must not hold or control a percentage of voting securities that exceeds the approved maximum percentage, except as a result of an other-means increase that complies with clause 7.

5 Annual report disclosures for ongoing allotments

- (1) If allotments under a specified transaction, or under combined specified transactions, occur over a period of more than 12 months, every annual report of the Company issued during the allotment period, and the first annual report issued after the end of the allotment period, must include the matters set out in subclause (2) in a prominent position.
- (2) The matters to be included in annual reports are as follows:
 - (a) a summary of the terms of the specified transaction, as approved at the meeting at which approval for the allotment of voting securities under the specified transaction was given;
 - (b) a statement, as at the end of the financial year to which the report relates, of—
 - (i) the number of voting securities allotted to person P under the specified transaction; and
 - (ii) the number of voting securities on issue that are held or controlled by person P, and the percentage of all voting securities on issue that that number represents; and

Schedule 2—*continued*

- (iii) the percentage of all voting securities on issue that are held or controlled, in aggregate, by person P and person P's associates; and
 - (iv) the maximum percentage of all voting securities on issue that could be held or controlled by person P on completion of the specified transaction and, if there is more than 1 specified transaction under which allotments could yet be made, on completion of all those specified transactions; and
 - (v) the maximum percentage of all voting securities on issue that could be held or controlled, in aggregate, by person P and person P's associates on completion of the specified transaction and, if there is more than 1 specified transaction under which allotments could yet be made, on completion of all those specified transactions:
- (c) a statement of the assumptions on which the particulars referred to in paragraph (b) are based.

6 Internet site disclosures for ongoing allotments

- (1) This condition applies only if—
 - (a) allotments under the specified transaction, or under combined specified transactions, occur over a period of more than 12 months; and
 - (b) the Company has an Internet site.
- (2) Following the issue of the first annual report during the allotment period and up to the issue of the first annual report after the end of the allotment period, the Company must disclose on its Internet site the information required under clause 5 to be disclosed in an annual report.
- (3) During the allotment period and up to the issue of the first annual report after the end of the allotment period, the Company must—
 - (a) announce on its Internet site any aggregate increase of 1% or more in the voting securities held or controlled by person P since the date of the last disclosure under this

Schedule 2—*continued*

- paragraph or, where no prior disclosure has been made, since the date of the first aggregate increase of 1% or more in the voting securities held by person P; and
- (b) maintain every such announcement on its Internet site in a prominent position.
- (4) The announcement referred to in subclause (3)(a) must be made as soon as the Company is aware, or ought to be aware, that the relevant increase has occurred.

7 Other-means increases

- (1) During the allotment period, person P must not increase its voting control in the Company by way of an other-means increase unless the other-means increase—
- (a) is by an acquisition of voting securities approved in accordance with rule 7(c) of the Code; or
 - (b) is by an allotment of voting securities approved in accordance with rule 7(d) of the Code; or
 - (c) is permitted by another exemption granted by the Panel.
- (2) If approval of the Company's shareholders is required under subclause (1)(a) or (b), the notice of meeting containing the resolution to approve the other-means increase must contain or be accompanied by the following:
- (a) a summary of the terms of the specified transaction, as approved at the meeting at which approval for the allotment of voting securities under the specified transaction was given;
 - (b) a statement, as at the date of the notice of meeting containing the resolution to approve the other-means increase, of the following particulars:
 - (i) the numbers and percentages referred to in clause 5(2)(b):
 - (ii) the maximum percentage of all voting securities on issue that could be held or controlled by person P after the other-means increase and completion of the specified transaction and, if there is more than 1 specified transaction under which

Schedule 2—*continued*

allotments could yet be made, on completion of all those specified transactions:

- (iii) the maximum percentage of all voting securities on issue that could be held or controlled by person P and person P's associates after the other-means increase and completion of the specified transaction and, if there is more than 1 specified transaction under which allotments could yet be made, on completion of all those specified transactions:
 - (c) a statement of the assumptions on which the particulars referred to in paragraph (b) are based.
- (3) If an other-means increase is approved by shareholders in accordance with this clause, the reference in clause 4 to the approved maximum percentage must be taken to be a reference to the approved maximum percentage adjusted to take account of the other-means increase.

8 Change of control in person P

- (1) During the allotment period, there must be no change of control in person P that results in another person becoming the holder or controller of an increased percentage of voting rights in the Company unless the change of control in person P—
 - (a) is by an acquisition of voting securities in person P approved by an ordinary resolution of the Company in accordance with rule 7(c) of the Code; or
 - (b) is by an allotment of voting securities in person P approved by an ordinary resolution of the Company in accordance with rule 7(d) of the Code; or
 - (c) is permitted under another exemption granted by the Panel.
- (2) If approval of the Company's shareholders is required under paragraph (a) or (b), the notice of meeting containing the resolution to approve the change of control must contain or be accompanied by the following information:
 - (a) a summary of the terms of the specified transaction, as approved at the meeting at which approval for the allot-

Schedule 2—*continued*

ment of voting securities under the specified transaction was given:

- (b) a statement, as at the date of the notice of meeting containing the resolution to approve the change of control, of the numbers and percentages referred to in clause 5(2)(b):
- (c) a statement of the assumptions on which the particulars referred to in paragraph (b) are based.

Dated at Auckland this 22nd day of November 2010.

The Common Seal of the Takeovers Panel was affixed in the presence of:

[Seal]

D O Jones,
Chairperson.

Statement of reasons

This notice amends the Takeovers Code (Class Exemptions) Notice (No 2) 2001 and comes into force on 29 November 2010.

The notice replaces the existing class exemption relating to buybacks approved by shareholders (the **buyback exemption**), and inserts a new class exemption from the obligation to comply with rule 16(b) of the Takeovers Code (the **rule 16(b) exemption**) in relation to 3 kinds of transactions—rights issues, underwriting arrangements, and the conversion of options and other convertible securities. The con-

ditions of the buyback exemption and the rule 16(b) exemption are set out in schedules and are similar for both exemptions.

The buyback exemption is appropriate and consistent with the objectives of the Code because it closely mirrors the shareholder approval mechanism, which is an exception to the fundamental rule, set out in rules 7(c) and 15 of the Code.

The rule 16(b) exemption is appropriate and consistent with the objectives of the Code because, in respect of the 3 kinds of transactions specified,—

- it can be impossible to comply with the requirement in rule 16(b) of the Code to state, in the notice of meeting, the actual number of voting securities to be allotted, and the relevant percentages, because those numbers and percentages can be dependent on a number of factors outside the allottee's control; and
- all non-associated shareholders will have an opportunity to vote on the potential allotment of voting securities under the transactions; and
- if the non-associated shareholders approve the potential maximum allotment of voting securities to the allottee then, by implication, the shareholders also approve any lesser percentage of voting rights that may be allotted.

Issued under the authority of the Acts and Regulations Publication Act 1989.
Date of notification in *Gazette*: 2 December 2010.
This notice is administered by the Takeovers Panel.
