



Takeovers Code (Class Exemptions) Notice (No 2) 2001 Amendment Notice 2017

Pursuant to sections 45 and 45A(3) of the Takeovers Act 1993, the Takeovers Panel, being satisfied of the matters set out in section 45(6) of that Act, gives the following notice.

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Notice

1 Title

This notice is the Takeovers Code (Class Exemptions) Notice (No 2) 2001 Amendment Notice 2017.

2 Commencement

This notice comes into force on 17 February 2017.

3 Principal notice

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

4 Clause 3 amended (Interpretation)

- (1) In clause 3(1), replace the definition of **aggregate associate increase** with:

aggregate associate increase, in respect of any person whose control percentage has decreased in the manner referred to in clause 6(1), 9(2), or 10(2) (the **relevant decrease**) and whose voting control is subsequently increased (the **relevant increase**), means,—

- (a) in clauses 6, 9(3)(b)(i), and 10,—
- (i) if the aggregate of the control percentages of the person and the person's associates after the relevant decrease was less than 20%, the increase (if any) in the aggregate of the control percentages of the person's associates after the relevant decrease and before the relevant increase; and
 - (ii) if the aggregate of the control percentages of the person and the person's associates after the relevant decrease was equal to or greater than 20%, zero; and
- (b) in clause 9(3)(b)(ii),—
- (i) if the aggregate of the control percentages of the person and the person's associates immediately before the first allotment made under the offer was less than 20%, the increase (if any) in the aggregate of the control percentages of the person's associates after the first allotment and before the relevant increase; and
 - (ii) if the aggregate of the control percentages of the person and the person's associates immediately before the first allotment was equal to or greater than 20%, zero

- (2) In clause 3(1), insert in its appropriate alphabetical order:

overseas shareholder means a shareholder whose last known address, as recorded in the code company's financial products register, is an address outside New Zealand

5 Clause 8 replaced (Exemption for allotments pursuant to pro rata offer: increased voting control eliminated within 6 months after increase)

Replace clause 8 with:

8 Exemption for allotments pursuant to pro rata offer or scheme: increased voting control eliminated within 6 months after increase

- (1) This clause applies if a code company makes an allotment of voting securities pursuant to—
 - (a) an offer of voting securities that is made pro rata to all holders of a class of voting securities in the code company; or
 - (b) a scheme for the reinvestment of dividends in return for voting securities or the issue of voting securities instead of dividends that is available on the same terms to all holders of the relevant class of voting securities in the code company.
- (2) Every person who increases voting control as a result of the allotment is exempted from rule 6(1) of the Code in respect of that increase in voting control.
- (3) The exemption is subject to—
 - (a) conditions A, B, and C, if the allotment is pursuant to an offer of the kind described in subclause (1)(a); or
 - (b) conditions B and C, if the allotment is pursuant to a scheme of the kind described in subclause (1)(b).
- (4) Condition A is that each person, the allotment to whom of voting securities resulted in the increase, or part of the increase, in voting control (an **allottee**),—
 - (a) acquired no more than the allottee's pro rata share of the securities offered; or
 - (b) if the allottee is a nominee company, bare trustee of a trust, or broker, acting for a beneficiary whose increase in voting control resulted in the person's increase (or part of the person's increase) in voting control, acquired on behalf of the beneficiary no more than the beneficiary's pro rata share of the securities offered to the allottee.
- (5) Condition B is that the control percentage of the person is decreased within 6 months after the increase in the person's voting control to, or below, either—
 - (a) the control percentage of the person immediately before the increase in the person's voting control; or
 - (b) if—
 - (i) the control percentage of the person immediately before the increase in the person's voting control was more than 50%, the maximum control percentage to which the person would have been entitled under rule 7(e) of the Code at the time of the decrease had the increase not occurred; or

- (ii) the aggregate of the control percentages of the person and the person's associates immediately before that increase was less than 20%, 20% less the aggregate of the control percentages of the person's associates at the time of the decrease.
- (6) Condition C is that the additional voting rights of the person are not exercised before the condition B decrease.

6 New clauses 8A to 8C inserted

After clause 8, insert:

8A Exemption for allotments pursuant to offer with accelerated features but otherwise pro rata: increased voting control eliminated within 6 months after increase

- (1) This clause applies if a code company makes an allotment of voting securities pursuant to an offer that is—
 - (a) made by a series of offers with accelerated features; but
 - (b) in all other respects, made pro rata to all holders of a class of voting securities.
- (2) Every person who increases voting control as a result of the allotment is exempted from rule 6(1) of the Code in respect of that increase in voting control.
- (3) The exemption is subject to conditions A, B, and C in clause 8(4) to (6) (but *see* subclause (4) of this clause in applying condition B).
- (4) If, under the terms of the offer, 1 or more persons are allotted voting securities up to 2 months earlier than other persons, references in condition B to a control percentage or percentages immediately before the increase in voting control must be read as references to a control percentage or percentages immediately before the first allotment is made under the offer.
- (5) In this clause, **accelerated features** means 1 or more of the following is a feature of the offer that is made by the series of offers:
 - (a) it is made to 1 or more persons (**earlier recipients**) before it is made to other persons (**later recipients**):
 - (b) earlier recipients are given less time to accept the offer than is given to later recipients:
 - (c) its terms provide for 1 or more earlier recipients to be allotted voting securities on a date or dates up to 2 months earlier than the date for allotment of all other securities under the offer:
 - (d) under its terms, 1 or more (but not all) recipients may trade rights to be allotted the voting securities.

8B Exemption for allotments pursuant to certain offers with excluded overseas shareholders: increased voting control eliminated within 6 months after increase

- (1) This clause applies if a code company makes an allotment of voting securities pursuant to an offer that would be of the kind described in clause 8(1)(a) or 8A(1) except that—
 - (a) the offer is not made to, or its terms prevent acceptance by, 1 or more overseas shareholders (the **excluded overseas shareholders**); and
 - (b) an NZX trading and advising firm will instead be issued the excluded overseas shareholders' aggregate pro rata share of the rights offered.
- (2) Every person who increases voting control as a result of the allotment is exempted from rule 6(1) of the Code in respect of that increase in voting control.
- (3) However, the exemption does not apply to an increase in voting control acquired pursuant to rights sold by the NZX trading and advising firm.
- (4) The exemption is subject to—
 - (a) the condition that the terms of the offer comply with subclause (5); and
 - (b) conditions A, B, and C in clause 8(4) to (6) (but *see* subclause (6) of this clause in applying condition B).
- (5) The terms of the offer must—
 - (a) include statements to the effect that—
 - (i) the code company has appointed a registered financial service provider on behalf of the excluded overseas shareholders; and
 - (ii) the code company has appointed an NZX trading and advising firm to sell the rights issued to the registered financial service provider; and
 - (iii) to the best of the code company's knowledge, neither the registered financial service provider nor the NZX trading and advising firm appointed is the subject of a complaint or action that is being investigated or prosecuted by the FMA or NZX Limited; and
 - (b) require the code company to issue to the registered financial services provider, on behalf of the excluded overseas shareholders and consistent with the terms of the offer, the excluded overseas shareholders' aggregate pro rata share of the rights offered; and
 - (c) require the code company to use its best endeavours to ensure that—
 - (i) the NZX trading and advising firm, as soon as practicable and consistent with the terms of the offer, sells the rights that are issued to the registered financial service provider; and
 - (ii) the registered financial service provider pays the excluded overseas shareholders their pro rata share of the sale proceeds, net of brokerage costs and taxes.

- (6) In applying condition B, if, under the terms of the offer, 1 or more persons are allotted voting securities up to 2 months earlier than other persons, references in condition B to a control percentage or percentages immediately before the increase in voting control must be read as references to a control percentage or percentages immediately before the first allotment is made under the offer.
- (7) In this clause,—
- NZX trading and advising firm** means an NZX Trading and Advising Firm within the meaning of the NZX Participant Rules made by NZX Limited
- registered financial service provider** means a person registered under Part 2 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008
- rights** means rights to acquire voting securities.

8C Exemption for allotments pursuant to certain scheme with excluded overseas shareholders: increased voting control eliminated within 6 months after increase

- (1) This clause applies if a code company makes an allotment of voting securities pursuant to a scheme that would be of the kind described in clause 8(1)(b) except that the terms of the scheme exclude 1 or more overseas shareholders from participating in the scheme.
- (2) Every person who increases voting control as a result of the allotment is exempted from rule 6(1) of the Code in respect of that increase in voting control.
- (3) The exemption is subject to conditions B and C in clause 8(5) and (6).

7 Clauses 9 and 10 replaced

Replace clauses 9 and 10 with:

9 Exemption for increased voting control within 6 months after allotments pursuant to clauses 8 to 8C offer or scheme result in reduced control percentage

- (1) This clause applies if a code company makes an allotment of voting securities pursuant to—
- (a) an offer or a scheme of the kind described in clause 8(1); or
 - (b) an offer of the kind described in clause 8A(1); or
 - (c) an offer of the kind described in clause 8B(1) (including an allotment of voting securities pursuant to rights sold by the NZX trading and advising firm); or
 - (d) a scheme of the kind described in clause 8C(1).
- (2) Every person whose control percentage is, or has been, decreased as a result of the allotment is exempted from rule 6(1) of the Code in respect of any increase in the person's voting control after the decrease.

- (3) The exemption is subject to the condition that—
- (a) the increase in the person’s voting control occurs within 6 months after the decrease of the person’s control percentage; and
 - (b) either—
 - (i) the increase in the person’s voting control does not result in the person’s control percentage exceeding the control percentage of the person immediately before its decrease, less any aggregate associate increase; or
 - (ii) in the case of an offer with accelerated features, if, pursuant to the terms of that offer, some voting securities are allotted on a date or dates up to 2 months earlier than the date for allotment of all other voting securities under the offer, the increase in the person’s voting control does not result in the person’s control percentage exceeding the control percentage of the person immediately before the first allotment made under the offer, less any aggregate associate increase.
- (4) In subclause (3)(b)(ii), **accelerated features** has the same meaning as in clause 8A(5) (*see*, in particular, clause 8A(5)(c)).

10 Exemption for increased voting control within 6 months after allotments pursuant to other kind of offer or scheme result in reduced control percentage

- (1) This clause applies if a code company makes an allotment of voting securities other than an allotment pursuant to an offer or a scheme of one of the kinds described in clause 9(1)(a) to (d).
- (2) Every person whose control percentage is, or has been, decreased as a result of the allotment is exempted from rule 6(1) of the Code in respect of any increase in the person’s voting control after the decrease.
- (3) The exemption is subject to the condition that—
- (a) the increase in the person’s voting control occurs within 6 months after the decrease of the person’s control percentage; and
 - (b) the increase in the person’s voting control does not result in the person’s control percentage exceeding the lesser of—
 - (i) the percentage that exceeds by 5 the control percentage of the person immediately before the increase in the person’s voting control, less any aggregate associate increase; or
 - (ii) the control percentage of the person immediately before its decrease, less any aggregate associate increase.

Dated at Auckland this 14th day of February 2017.

Roger Frederick Wallis,
Member.

Statement of reasons

This notice, which comes into force on 17 February 2017, amends the Takeovers Code (Class Exemptions) Notice (No 2) 2001 (the **principal notice**).

This notice replaces the existing class exemptions in Part 2 of the principal notice, which apply in the case of certain allotments of voting securities by a code company. The effect of this notice is to—

- continue the class exemption for allotments under pro rata offers and dividend reinvestment schemes (*see new clause 8*):
- insert, with conditions, new class exemptions for allotments that contain accelerated features but are otherwise pro rata (**accelerated offers**), offers that exclude 1 or more overseas shareholders from direct participation, and schemes that exclude 1 or more overseas shareholders (*see, respectively, new clauses 8A to 8C*):
- continue the class exemption for increases in voting securities resulting from allotments under pro rata offers and schemes and extend this exemption for increases in voting securities resulting from allotments under accelerated offers and offers and schemes that exclude 1 or more overseas shareholders (*see new clause 9*). The class exemption for increases in voting securities resulting from allotments not covered by clause 9 also continues (*see new clause 10*) but will no longer apply to allotments pursuant to the offers and schemes described in *new clauses 8A to 8C* (as these will now be covered by the class exemption in *new clause 9*). The net effect is that a different condition will apply to the class exemption for increases in voting securities resulting from those offers and schemes.

The Takeovers Panel considers it appropriate to amend the principal notice and grant the exemptions, and considers the amendments and the exemptions to be consistent with the objectives of the Takeovers Code, because—

- the class exemptions in clauses 8 and 9 prior to this notice (the **existing pro rata exemptions**) facilitate pro rata offers by avoiding inadvertent breaches of the fundamental rule by shareholders that take up their pro rata allotment and by avoiding the application of the fundamental rule to a shareholder that does not fully participate in a pro rata offer and later seeks to return to a previous level of voting control:
- there is no material difference for the purposes of the existing pro rata exemptions between a pro rata offer to all holders of a class of securities and an accelerated offer made to all holders of a class of securities or an offer that excludes direct participation by overseas shareholders:

- it is impracticable and unreasonably expensive in the context of an offer under a dividend reinvestment scheme to make that offer to all overseas shareholders because of the costs of complying with securities laws in overseas jurisdictions:
- the exemptions are consistent with the principle of providing equal consideration to all shareholders of the same class.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*: 16 February 2017.

This notice is administered by the Takeovers Panel.