

**Version
as at 4 December 2021**



Financial Markets Conduct (US Futures Commission Merchants) Exemption Notice 2021

(LI 2021/47)

Financial Markets Conduct (US Futures Commission Merchants) Exemption Notice 2021: revoked, on the close of 3 December 2021, by clause 3.

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 (US Futures Commission Merchants) Exemption Notice 2021.

2 Commencement

This notice comes into force on 31 March 2021.

Note

The Parliamentary Counsel Office has made editorial and format changes to this version using the powers under subpart 2 of Part 3 of the Legislation Act 2019.

Note 4 at the end of this version provides a list of the amendments included in it.

This notice is administered by the Financial Markets Authority.

3 Revocation

This notice is revoked on the close of 3 December 2021.

4 Interpretation

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

Act means the Financial Markets Conduct Act 2013

CFTC means the Commodity Futures Trading Commission of the United States of America

CFTC Regulations means any rules or regulations made under the Commodity Exchange Act, and includes the regulations contained in Title 17 of Chapter 1 of the Code (or any other rules or regulations that, with or without modification, replace, or correspond to, those rules or regulations)

Code means the Code of Federal Regulations of the United States of America

Commodity Exchange Act means the Commodity Exchange Act of 1936 of the United States of America (or any other enactment that, with or without modification, replaces, or corresponds to, that Act)

Form 1-FR-FCM means the form required by the CFTC under the Commodity Exchange Act to be used by futures commission merchants to report their net capital position and other financial information

futures commission merchant means a derivatives issuer that—

- (a) is registered with the CFTC as a futures commission merchant; and
- (b) is resident or incorporated in the United States of America

New Zealand investor means, in respect of specified derivatives, an investor that is resident, incorporated, or carrying on business in New Zealand

NZX means NZX Limited

NZX derivatives market means the derivatives market operated by NZX as a licensed market

registration terms, in relation to a futures commission merchant, means the terms and conditions of that merchant's registration as a futures commission merchant

Regulations means the Financial Markets Conduct Regulations 2014

separate account means a separate account that is a secured account maintained in accordance with the Commodity Exchange Act, the CFTC Regulations, and the futures commission merchant's registration terms

specified derivative means a derivative that is available for trading by US derivatives participants on the NZX derivatives market

US derivatives participant means a futures commission merchant that is authorised by NZX to participate in the NZX derivatives market.

- (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

Every US derivatives participant is exempted from regulations 238 to 250 of the Regulations in respect of specified derivatives.

6 Conditions of exemption

- (1) The exemption in clause 5 is subject to the conditions that—
- (a) the US derivatives participant must comply with the requirements of each of the following in respect of derivatives investor money and derivatives investor property of a New Zealand investor received from an investor in connection with 1 or more specified derivatives as if that investor were a person located in the United States of America:
 - (i) its registration terms; and
 - (ii) the Commodity Exchange Act; and
 - (iii) the CFTC Regulations; and
 - (b) in respect of each fiscal year, when the US derivatives participant gives its annual Form 1-FR-FCM (or equivalent) for that fiscal year to the CFTC, it must, at the same time, give a copy of it to the FMA; and
 - (c) the US derivatives participant must ensure that derivatives investor money and derivatives investor property of New Zealand investors is held in a separate account; and
 - (d) the US derivatives participant may withdraw derivatives investor money of New Zealand investors from a separate account only in the circumstances specified in regulation 242(1)(a) to (g) of the Regulations; and
 - (e) the US derivatives participant may return, use, or dispose of derivatives investor property of New Zealand investors only in the circumstances specified in regulation 243(1)(a) to (f) of the Regulations; and
 - (f) before acting for the investor in respect of specified derivatives, the US derivatives participant must inform each New Zealand investor that—
 - (i) the participant—
 - (A) is acting in reliance on this notice; and
 - (B) is not required to comply with the obligations in relation to derivatives investor money and derivatives investor property in regulations 238 to 250 of the Regulations; and
 - (C) is instead required to comply with the CFTC Regulations; and

- (ii) in making investment decisions, the investor should take into account the practical difficulties of taking enforcement action if there is a contravention of the CFTC Regulations; and
 - (g) if the US derivatives participant receives an external auditor's report that shows that it has failed to comply with 1 or more of the following, it must provide the FMA with a copy of the report as soon as is reasonably practicable:
 - (i) its registration terms;
 - (ii) the Commodity Exchange Act;
 - (iii) the CFTC Regulations;
 - (h) the US derivatives participant must not engage in conduct that—
 - (i) is intended to induce or solicit New Zealand investors in relation to specified derivatives; or
 - (ii) is likely to have that effect.
- (2) Subclause (1)(h) does not apply in relation to a New Zealand investor in respect of which the US derivatives participant held derivatives investor money or derivatives investor property on or before 30 March 2021.

Dated at Wellington this 18th day of March 2021.

Liam Mason,
Director of Regulation,
Financial Markets Authority.

Statement of reasons

This note is not part of the notice, but is intended to indicate its general effect.

This notice is made under the Financial Markets Conduct Act 2013 (the **FMC Act**) and comes into force on 31 March 2021.

The Financial Markets Conduct (US Futures Commission Merchants) Exemption Notice 2020 currently exempts certain US participants in NZX Limited's derivatives market from various provisions of the Financial Markets Conduct Regulations 2014 (the **FMC Regulations**). That notice will be revoked on the close of 30 March 2021. This notice continues those exemptions with 1 additional condition relating to the non-solicitation of new investors. This is because the exemption is being extended on a temporary basis while discussions continue as to the future of the dairy derivatives market. This notice will be revoked on the close of 3 December 2021.

The exemption covers derivatives participants that are registered with the Commodity Futures Trading Commission (the **CFTC**) as futures commission merchants and are participants in NZX Limited's derivatives market (US derivatives participants). They are exempted from regulations 238 to 250 of the FMC Regulations, which impose various requirements relating to the holding of derivatives investor money and derivatives investor property. The exemption applies only to derivatives contracts that US derivatives participants are authorised to trade as NZX derivatives participants, being those derivatives contracts that are subject to NZX Limited's registration as a Foreign Board of Trade under the Commodity Exchange Act of 1936 of the United States of America. Currently, this is the dairy derivatives contracts.

The conditions of the exemption instead require US derivatives participants to hold derivatives investor money and derivatives investor property in accordance with applicable US requirements.

The Financial Markets Authority, after satisfying itself as to the matters set out in section 557 of the FMC Act, considers it appropriate to grant the exemption because—

- US futures commission merchants are subject to regulation by the CFTC. This exemption will allow US derivatives participants who are authorised NZX derivatives market participants to carry on business with New Zealand investors and trade on the NZX derivatives market under the same rules as apply in respect of dealings with US investors; and
- the US regulatory requirements, together with the conditions in the notice, are broadly equivalent to those under the FMC Regulations and provide adequate protection for New Zealand investors' derivatives investor money and property; and
- by requiring US derivatives participants to hold New Zealand investors' derivatives investor money and property in a separate account at all times in accordance with the US requirements, and by restricting the way New Zealand investors' derivatives investor money and property can be invested by US derivatives participants, the conditions of the exemption provide adequate alternative safeguards for the protection of derivatives investor money and property. Given the substantial similarities between the FMC Regulations requirements, the US requirements, and the conditions in this notice, the exemption is not broader than is reasonably necessary to address the matters to which it relates; and
- the exemption is desirable in order to promote several of the purposes of the FMC Act, specifically, by promoting and facilitating the development of fair, efficient, and transparent financial markets and innovation and flexibility in the financial markets, and by avoiding unnecessary compliance costs.

Notes

1 *General*

This is a consolidation of the Financial Markets Conduct (US Futures Commission Merchants) Exemption Notice 2021 that incorporates the amendments made to the legislation so that it shows the law as at its stated date.

2 *Legal status*

A consolidation is taken to correctly state, as at its stated date, the law enacted or made by the legislation consolidated and by the amendments. This presumption applies unless the contrary is shown.

Section 78 of the Legislation Act 2019 provides that this consolidation, published as an electronic version, is an official version. A printed version of legislation that is produced directly from this official electronic version is also an official version.

3 *Editorial and format changes*

The Parliamentary Counsel Office makes editorial and format changes to consolidations using the powers under subpart 2 of Part 3 of the Legislation Act 2019. See also PCO editorial conventions for consolidations.

4 *Amendments incorporated in this consolidation*

Financial Markets Conduct (US Futures Commission Merchants) Exemption Notice 2021 (LI 2021/47): clause 3