

Version
as at 17 July 2024



Financial Markets Conduct (Market Index) Exemption Notice 2023 (SL 2023/126)

Financial Markets Conduct (Market Index) Exemption Notice 2023: revoked, on the close of 16 July 2024, by clause 3.

This exemption is granted by the Financial Markets Authority under section 556 of the Financial Markets Conduct Act 2013 after being satisfied of the matters set out in section 557 of that Act.

Contents

	Page
1 Title	1
2 Commencement	2
3 Revocation	2
4 Interpretation	2
5 Exemptions	3
6 Condition relating to identifying peer group index	3
7 Conditions if peer group index is identified	3
8 Conditions if peer group index is not identified but appropriate market index is likely to be useful	7
9 Conditions if there is neither market index nor peer group index for any assets of exempt fund	10

Notice

1 Title

This notice is the Financial Markets Conduct (Market Index) Exemption Notice 2023.

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.

2 Commencement

This notice comes into force on 17 July 2023.

3 Revocation

This notice is revoked on the close of 16 July 2024.

4 Interpretation

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

Act means the Financial Markets Conduct Act 2013

appropriate market index has the same meaning as in clause 61(3) of Schedule 4 of the Regulations

composite index means an index used in accordance with clause 7(3)(e)(ii) or (iii)

exempt fund means a fund that invests, directly or indirectly, in whole or in part, in relevant assets

peer group index means an index that—

- (a) is based on the performance of a group of funds that invest in a particular sector or particular sectors; and
- (b) is either or both of the following:
 - (i) widely recognised and widely used in the financial markets;
 - (ii) administered by a person who is not a person specified in clause 61(4) of Schedule 4 of the Regulations; and
- (c) is likely to be useful to investors when assessing the performance of the relevant assets and the exempt fund as a whole for all relevant periods

Regulations means the Financial Markets Conduct Regulations 2014

relevant assets means assets for which there is no appropriate market index

relevant periods has the same meaning as in clause 59(2) of Schedule 4 of the Regulations.

- (2) In this notice, a **return**, in relation to a peer group index or composite index and a period, is the percentage change in the index over the period.
- (3) However, for the purposes of subclause (2), the peer group index or composite index must be adjusted to take account of reasonable assumptions (to the extent that the index does not already take account of these assumptions) that reflect the operation of the exempt fund.
- (4) 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

The manager of an exempt fund is exempted from the following provisions of Schedule 4 of the Regulations in respect of the fund:

- (a) clause 6(2):
- (b) clause 7(b):
- (c) clause 33(4):
- (d) clause 52(1)(b):
- (e) clause 53(1)(c)(iii) and (iv):
- (f) clause 54(1)(a)(i):
- (g) clause 59(1)(c), (3), (4)(b), and (6):
- (h) clause 62(3).

6 Condition relating to identifying peer group index

The exemptions in clause 5 are subject to the condition that the manager of the exempt fund must use reasonable endeavours to identify a peer group index for each relevant asset.

7 Conditions if peer group index is identified

- (1) This clause applies if the manager identifies a peer group index for 1 or more of the relevant assets.
- (2) Despite subclause (1), subclause (3) does not apply if the manager of the exempt fund reasonably considers that disclosure of the peer group index annual return or composite index annual return as required by subclause (3)(e) is not likely to be useful to investors when assessing the performance of the exempt fund as a whole.
- (3) The exemptions in clause 5 are subject to the following conditions:

Risk indicator

- (a) if, but for this notice, clause 6(2) of Schedule 4 of the Regulations would otherwise apply, the risk indicator for the exempt fund must be calculated and filled in using—
 - (i) the returns on the peer group index, or the composite index, for that part of the 5-year period during which the investment policy of the exempt fund was significantly different from the current investment policy or during which the exempt fund was not in existence; and
 - (ii) the available returns data for the fund for the rest of the 5-year period not covered by subparagraph (i); and

Performance-based fee

- (b) if a performance-based fee may be paid even if the exempt fund does not achieve (after fees but before tax) the return on the peer group index

or the composite index, section 5 of the product disclosure statement (the **PDS**) for the offer of interests in the exempt fund must contain a statement to that effect; and

Register entry

- (c) the register entry for the offer of interests in the exempt fund must contain, in respect of each fund update, at the same time as or before each fund update is lodged with the Registrar, the following information as at the relevant date of the fund update or for the period or periods ending on that date or for the most recent scheme year (as the case may be):
 - (i) the information specified in paragraph (e):
 - (ii) the numbers used to generate the bar graph under paragraph (g):
 - (iii) the numbers used to generate a bar graph under clause 62 of Schedule 4 of the Regulations (but disregarding clause 62(3)):
 - (iv) the information required by clause 53(1)(c)(ii) of Schedule 4 of the Regulations (but with the risk indicator presented, calculated, and filled in in accordance with paragraph (a) if it applies):
 - (v) the information required by clause 53(1)(c)(v) to (xi) and (d) to (i) of Schedule 4 of the Regulations; and
- (d) the register entry for the offer of interests in the exempt fund must contain, in respect of each fund update, at the same time as or before each fund update is lodged with the Registrar, the following information:
 - (i) a description of the peer group index that has been used to calculate the peer group index annual return published in the fund update or, if a composite index has been used, a description of the appropriate market index (if any) and peer group index or indices that have been used to calculate the composite index annual return published in the fund update:
 - (ii) a statement on where more information can be obtained about—
 - (A) the peer group index or indices; and
 - (B) the appropriate market index (if a composite index has been used in accordance with paragraph (e)(ii)):
 - (iii) if a peer group index cannot be identified for some of the relevant assets of the exempt fund, a statement to that effect:
 - (iv) an explanation of why the peer group index is, or peer group indices are, likely to be useful to investors when assessing the performance of the relevant assets and the exempt fund as a whole; and

Fund update

- (e) each fund update for the exempt fund must, in a table in the format set out in subclause (5) and otherwise in accordance with clauses 59(4) and (5) and 60 of Schedule 4 of the Regulations, disclose for each of the relevant periods the information required by clause 59(1)(a) and (b) of that schedule and the return on one of the following:
 - (i) the peer group index, if there is only 1 peer group index identified under clause 6 for any of the relevant assets and there are no assets in the exempt fund that are not relevant assets;
 - (ii) a composite index that reflects—
 - (A) the peer group index or indices for those relevant assets in respect of which the index or indices have been identified under clause 6; and
 - (B) an appropriate market index for the assets (if any) that are not relevant assets (and clause 61 of Schedule 4 of the Regulations applies for that purpose);
 - (iii) a composite index that reflects the peer group indices for those relevant assets in respect of which indices have been identified under clause 6, if there are different peer group indices for different relevant assets and there are no assets that are not relevant assets; and
- (f) each fund update for the exempt fund must include an explanatory note that—
 - (i) explains that the annual return on a peer group index, or a composite index, has been used in the following ways because there is no appropriate market index for the exempt fund as a whole:
 - (A) in the table relating to how the exempt fund has performed as required under paragraph (e);
 - (B) in the bar graph required by clause 62 of Schedule 4 of the Regulations;
 - (C) to calculate and fill in the risk indicator (if paragraph (a) applies); and
 - (ii) explains that a peer group index or peer group indices, or a composite index, may be a less reliable indicator of performance than an appropriate market index; and
 - (iii) if the exempt fund has relevant assets that have no identified peer group index, explains that the annual return on the peer group index or indices, or composite index, used in the fund update is not directly relevant for all of the relevant assets of the exempt fund; and

- (iv) if paragraph (a) applies,—
- (A) explains that the risk indicator may provide a less reliable indicator of the potential future volatility of the exempt fund because a peer group index or peer group indices, or a composite index, has been used; and
- (B) states the period for which the returns on a peer group index or peer group indices, or a composite index, have been used; and
- (v) if a peer group index, or composite index, has changed since the last fund update, explains the reasons for the change; and
- (vi) states whether the return for the peer group index or indices reflected in the table and the bar graph is net of fund charges, trading expenses, and tax; and
- (vii) states that additional information about the peer group index or indices is available on the offer register; and
- (viii) if a composite index has been used in accordance with paragraph (e)(ii), states that additional information about the appropriate market index is available on the offer register; and
- (g) the information provided in each fund update for the exempt fund under clause 62(1) of Schedule 4 of the Regulations must be provided for the peer group index or composite index used for the purposes of paragraph (e) (and the bars relating to the peer group index or composite index must be clearly identified).
- (4) Subclause (3)(a) does not apply if the risk indicator calculated and filled in in accordance with that paragraph would be likely to deceive or mislead with regard to any particular that is material to the offer of the managed investment products because of the nature of the fund, and, in that case, the exemptions in clause 5 are subject to a condition that the risk indicator must be calculated and filled in in accordance with clause 8(2) of Schedule 4 of the Regulations.
- (5) The table under subclause (3)(e) must be in the following format:

	Average over past 5 years	Past year
Annual return (after deductions for charges and tax)	<i>[specify]</i>	<i>[specify]</i>
Annual return (after deductions for charges but before tax)	<i>[specify]</i>	<i>[specify]</i>
*Peer group index annual return (after deductions for charges but before tax)	<i>[specify]</i>	<i>[specify]</i>
<i>[or]</i>		
*Composite of market index annual return (reflects no deduction for charges and tax) and peer group index or indices annual return (after deductions for charges but before tax)	<i>[specify]</i>	<i>[specify]</i>
<i>[or]</i>		

	Average over past 5 years	Past year
*Composite of peer group indices annual return (after deductions for charges but before tax)	[specify]	[specify]

*Select one.

- (6) For the purposes of subclause (3)(e), if the exempt fund has not been in existence for the whole of the 12-month period up to the relevant date, the rows in the table relating to the returns for the exempt fund must state “Not applicable” (but the information for the peer group index or composite index must still be included in the table).
- (7) If the manager cannot, under clause 6, identify a peer group index for a particular relevant asset, an index need not be disclosed under this clause in respect of that asset.

8 Conditions if peer group index is not identified but appropriate market index is likely to be useful

- (1) This clause applies if—
 - (a) the manager of an exempt fund—
 - (i) determines, under clause 6, that none of the relevant assets have a peer group index; or
 - (ii) considers that clause 7(2) applies; and
 - (b) there are assets of the exempt fund that are not relevant assets; and
 - (c) the manager considers that the appropriate market index for the assets that are not relevant assets is likely to be useful to investors when assessing the performance of the exempt fund as a whole for all relevant periods.
- (2) The exemptions in clause 5 are subject to the following conditions:

Risk indicator

 - (a) if, but for this notice, clause 6(2) of Schedule 4 of the Regulations would otherwise apply, the risk indicator for the exempt fund must be calculated and filled in using—
 - (i) the returns on the appropriate market index for those assets of the exempt fund that are not relevant assets for that part of the 5-year period during which the investment policy of the exempt fund was significantly different from the current investment policy or during which the exempt fund was not in existence; and
 - (ii) the available returns data for the fund for the rest of the 5-year period not covered by subparagraph (i); and

Performance-based fee

 - (b) if a performance-based fee may be paid even if the exempt fund does not achieve (after fees but before tax) the return on the appropriate market

index used for the assets of the exempt fund that are not relevant assets, section 5 of the PDS for the offer of interests in the exempt fund must contain a statement to that effect; and

Register entry

- (c) the register entry for the offer of interests in the exempt fund must contain, in respect of each fund update, at the same time as or before each fund update is lodged with the Registrar, the following information as at the relevant date of the fund update or for the period or periods ending on that date or for the most recent scheme year (as the case may be):
 - (i) the information specified in clause 59(1)(a) and (b) and (6)(a) of Schedule 4 of the Regulations, and the return on the market index for assets that are not relevant assets, for each of the relevant periods:
 - (ii) the numbers used to generate the bar graph under paragraph (h):
 - (iii) the numbers used to generate a bar graph under clause 62 of Schedule 4 of the Regulations (but disregarding clause 62(3)):
 - (iv) the information required by clause 53(1)(c)(ii) of Schedule 4 of the Regulations (but with the risk indicator presented, calculated, and filled in in accordance with paragraph (a) if it applies):
 - (v) the information required by clause 53(1)(c)(v) to (xi) and (d) to (i) of Schedule 4 of the Regulations; and
- (d) the register entry for the offer of interests in the exempt fund must contain, in respect of each fund update, at the same time as or before each fund update is lodged with the Registrar, the following information:
 - (i) a description of the appropriate market index that has been used to calculate the market index annual return published in the fund update:
 - (ii) a statement on where more information on the appropriate market index can be obtained:
 - (iii) an explanation of why neither a market index nor a peer group index has been used to calculate the return on relevant assets of the exempt fund:
 - (iv) an explanation of why the appropriate market index used to calculate the market index annual return is likely to be useful to investors when assessing the performance of the exempt fund as a whole; and

Fund update

- (e) each fund update for the exempt fund must, in a table in the format set out in subclause (4) and otherwise in accordance with clauses 59(4) and

- (5), 60, and 61 of Schedule 4 of the Regulations, disclose for each of the relevant periods the information required by clause 59(1)(a) and (b) of that schedule and the return on the appropriate market index for those assets of the exempt fund that are not relevant assets; and
- (f) each fund update for the exempt fund must, under the table, contain the information specified in clause 59(6) of Schedule 4 of the Regulations in respect of those assets of the exempt fund that are not relevant assets; and
 - (g) each fund update for the exempt fund must include an explanatory note that—
 - (i) explains that, because there is no appropriate market index for all of the assets of the exempt fund, the annual return on a market index that has been used in the following ways has been calculated based on the appropriate market index for some, but not all, of the assets of the exempt fund:
 - (A) in the table relating to how the exempt fund has performed as required under paragraph (e):
 - (B) in the bar graph required by clause 62 of Schedule 4 of the Regulations:
 - (C) to calculate and fill in the risk indicator (if paragraph (a) applies); and
 - (ii) explains that, as a result, the annual return on the market index used may be a less reliable indicator of performance of the fund as a whole than in circumstances where the market index used is appropriate for all of the assets of the fund; and
 - (iii) if paragraph (a) applies,—
 - (A) explains that the risk indicator may provide a less reliable indicator of the potential future volatility of the exempt fund than in circumstances where the market index used is appropriate for all of the assets of a fund; and
 - (B) states the period for which the market index return has been used; and
 - (h) the information provided in each fund update for the exempt fund under clause 62(1) of Schedule 4 of the Regulations must also be provided for the market index used for the purposes of clause 61 of that schedule in respect of those assets of the exempt fund that are not relevant assets (and the bars relating to the market index must be clearly identified).
- (3) Subclause (2)(a) does not apply if the risk indicator calculated and filled in in accordance with that paragraph would be likely to deceive or mislead with regard to any particular that is material to the offer of the managed investment products because of the nature of the fund, and, in that case, the exemptions in

clause 5 are subject to a condition that the risk indicator must be calculated and filled in in accordance with clause 8(2) of Schedule 4 of the Regulations.

- (4) The table under subclause (2)(e) must be in the following format:

	Average over past 5 years	Past year
Annual return (after deductions for charges and tax)	[specify]	[specify]
Annual return (after deductions for charges but before tax)	[specify]	[specify]
Market index annual return (reflects no deduction for charges and tax)	[specify]	[specify]

- (5) For the purposes of subclause (2)(e), if the exempt fund has not been in existence for the whole of the 12-month period up to the relevant date, the rows in the table relating to the returns for the exempt fund must state “Not applicable” (but the information for the market index must still be included in the table).

9 Conditions if there is neither market index nor peer group index for any assets of exempt fund

- (1) This clause applies if—
- (a) the manager of an exempt fund—
 - (i) determines, under clause 6, that none of the relevant assets have a peer group index; or
 - (ii) considers that clause 7(2) applies; and
 - (b) clause 8 does not apply.
- (2) The exemptions in clause 5 are subject to the following conditions:
- Risk indicator*
- (a) the risk indicator for the exempt fund must be calculated and filled in in accordance with clause 8(2) of Schedule 4 of the Regulations; and
- Performance-based fee*
- (b) if a performance-based fee may be paid even though there is no market index and no peer group index against which to measure performance, section 5 of the PDS for the offer of interests in the exempt fund must contain a statement to that effect; and
- Register entry*
- (c) the register entry for the offer of interests in the exempt fund must contain, in respect of each fund update, at the same time as or before each fund update is lodged with the Registrar, the following information as at the relevant date of the fund update or for the period or periods ending on that date or for the most recent scheme year (as the case may be):

- (i) the information specified in clause 59(1)(a) and (b) of Schedule 4 of the Regulations;
- (ii) the information required by clause 53(1)(c)(ii) of Schedule 4 of the Regulations presented, calculated, and filled in in accordance with paragraph (a);
- (iii) the information required by clause 53(1)(c)(v) to (xi) and (d) to (i) of Schedule 4 of the Regulations;
- (iv) the numbers used to generate a bar graph under clause 62(1), (2), and (4) to (6) of Schedule 4 of the Regulations; and
- (d) the register entry for the offer of interests in the exempt fund must contain, in respect of each fund update, at the same time as or before each fund update is lodged with the Registrar, a document that explains why there is no appropriate market index and no suitable peer group index or indices for the exempt fund; and
- Fund update*
- (e) each fund update for the exempt fund must, in a table in the format set out in subclause (3) and otherwise in accordance with clause 59(4) and (5) of Schedule 4 of the Regulations, disclose for each of the relevant periods the information required by clause 59(1)(a) and (b) of that schedule; and
- (f) each fund update for the exempt fund must include an explanatory note that explains that there is no appropriate market index and no suitable peer group index or indices for the exempt fund against which to assess either movements in the market in relation to the returns from the assets in which the exempt fund invests or the performance of the exempt fund as a whole.
- (3) The table under subclause (2)(e) must be in the following format:
- | | Average over
past 5 years | Past year |
|--|------------------------------|-----------|
| Annual return (after deductions for charges and tax) | [specify] | [specify] |
| Annual return (after deductions for charges but before tax) | [specify] | [specify] |
- (4) For the purposes of subclause (2)(e), the requirement for information for the market index in clause 59(4)(b) of Schedule 4 of the Regulations must be disregarded.

Dated at Wellington this 25th day of May 2023.

Liam Mason,

General Counsel,
Financial Markets Authority.

Statement of reasons

This notice comes into force on 17 July 2023 and is revoked on the close of 16 July 2024. This notice replaces, on substantially the same terms, the Financial Markets Conduct (Market Index) Exemption Notice 2018, which is revoked on the close of 16 July 2023.

Every manager of a registered scheme that is a managed fund is required to publish a quarterly (or, in the case of a restricted scheme, an annual) fund update that complies with Schedule 4 of the Financial Markets Conduct Regulations 2014 (the **Regulations**). The fund update must include, for the purposes of benchmarking the fund's performance, information on the return that would have been obtained on a broad-based securities index or broad-based securities indices that are appropriate in terms of assessing movements in the market in relation to the returns from the assets in which the fund invests (the **market index requirement**).

If there is no broad-based securities index that is appropriate in terms of assessing the returns from certain assets that the fund has invested in (**relevant assets**), the manager of the fund is exempted by this notice from the market index requirement.

Instead, under the conditions of the exemptions, the manager must include the return on a peer group index or peer group indices, provided the manager can identify a peer group index that is both suitably independent (or widely recognised and widely used in financial markets) and likely to be useful to investors. A fund may have different types of relevant assets with different peer group indices, or both relevant assets and assets for which there is an appropriate market index. In these cases, under the conditions of the exemption, the manager may create a composite index based on the different indices and use the return on that composite index in the fund update. The manager must also record information on each identified peer group index or composite index in the register entry for the offer and include an explanatory note in the fund update. This must include a statement that the peer group index or composite index may be a less reliable indicator of performance than an appropriate market index.

If there is no appropriate market index and no appropriate peer group index for the relevant assets, the manager is exempt from the market index requirement in respect of those assets. Instead, under the conditions of the exemptions, the manager must include an explanation in the register entry for the offer as to why there is neither an appropriate market index nor an appropriate peer group index for those assets and include an explanatory note in the fund update.

The risk indicator for the exempt fund, as disclosed in the PDS and in the fund update, must be calculated and filled in in a manner consistent with the approach taken in reliance on the exemptions.

The Financial Markets Authority (the **FMA**), after satisfying itself as to the matters set out in section 557 of the Financial Markets Conduct Act 2013 (the **Act**), considers it appropriate to grant the exemptions because,—

- without the exemptions, managers of funds with no appropriate broad-based securities index cannot comply with the market index requirement and might publish the returns on an index or indices that do not reflect the assets the fund invests in and are therefore not relevant to investors when assessing the performance of the fund. This may be confusing for investors:
- the conditions to the exemptions require managers to give investors the return on a suitable peer group index, or composite index instead (if one is available). The peer group index must be independently administered or widely recognised and widely used in financial markets. Information must be provided about the peer group index, or composite index, disclosed:
- the FMA is satisfied that the exemptions are desirable in order to promote the purposes of the Act. Specifically, to promote the confident and informed participation of businesses, investors, and consumers in the financial markets and to avoid unnecessary compliance costs. The conditions to the exemptions require managers to provide information that is fit for purpose. This is a practical way of fulfilling the aim of the market index requirement when the requirement cannot be complied with in accordance with its terms:
- the FMA is further satisfied that the extent of the exemptions is not broader than is reasonably necessary to address the matters that give rise to the exemptions, because only managers that cannot report against an appropriate market index will have the benefit of the exemptions.

Issued under the authority of the Legislation Act 2019.
Date of notification in *Gazette*: 9 June 2023.

Notes

1 *General*

This is a consolidation of the Financial Markets Conduct (Market Index) Exemption Notice 2023 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 (Market Index) Exemption Notice 2023 (SL 2023/126): clause 3