

# Unsolicited Offers Monitoring Report

March 2014



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## Introduction

The Securities Markets (Unsolicited Offers) Regulations 2012 (**Regulations**) came into force on 1 December 2012, in response to concerns about 'low ball' offers. FMA closely monitored compliance with the new regulations as one of our focus areas in 2013 for building customer trust (see [FMA's Compliance Focus for 2013](#)<sup>1</sup>). In this report we set out our findings and observations. These are based on our monitoring activities to 14 February 2014.

Our monitoring activities have been greatly supported by issuers and share registries proactively providing us with information relating to unsolicited offers. We acknowledge and appreciate their input and support.

## Summary of key findings

- Companies making unsolicited offers under the Regulations have proactively engaged with FMA, both in seeking clarification on the new requirements of the Regulations to ensure compliance, and in responding to issues raised by FMA.
- Our monitoring indicates that there is a good level of compliance with the Regulations in relation to unsolicited offers received by investors. Instances of non-compliance have been relatively minor and in all cases were rectified to FMA's satisfaction.
- While there continues to be a significant number of unsolicited offers, the number of complaints received by FMA has reduced since the Regulations came into force.
- The decrease in complaints and the types of offers being accepted indicate that the disclosure required by the Regulations is assisting investors to make more informed decisions about unsolicited offers. In particular, we found that:
  - investors with large holdings appear less likely to accept unsolicited offers than those with small holdings
  - deeper discounts to market price appear to result in a lower rates of acceptance.
- Investors continue to accept 'low ball' offers despite being able to get more for their investments by selling through a broker. In some cases the difference between the amount received and market value is substantial.

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<sup>1</sup> See [www.fma.govt.nz/news/reports-and-papers/fmas-compliance-focus-for-2013/](http://www.fma.govt.nz/news/reports-and-papers/fmas-compliance-focus-for-2013/)

## Background to unsolicited offers

An unsolicited offer is an offer to buy investments, such as shares or bonds, where the offer has not been sought by the investor.<sup>2</sup> Typically an unsolicited offer is made by posting an offer to investors to buy their investments at below market price.

Prior to FMA's intervention and the passing of the Regulations, offer documents were often made to look like documents issued by the company itself and they did not disclose the investment's market value. Less experienced investors, in particular those who received shares through demutualisations and privatisations, often accepted these offers without understanding that they were receiving considerably less than they could have obtained if they sold through a broker.

While unsolicited offers, including offers below market price, have never been illegal, the potential for investor harm and loss of market confidence is high if conduct goes unchecked.

In the past, the activities of David Tweed and Bernard Whimp and their associated entities have caused particular concern. In 2012, successful High Court proceedings were brought against Bernard Whimp and his related entities for making offers that were misleading and deceptive. Also, Stock & Share Trading Company Pty Limited (**Stock & Share**), an Australian company owned and controlled by John Armour, was particularly active from 2010 to 2012, and made a large number of offers that generated a significant number of complaints and queries to FMA.

Prior to the Regulations, FMA's interventions were solely based on the prohibition against engaging in misleading or deceptive conduct, our power to give public warnings, our power to require those warnings to be included with offers, and our power to accept enforceable undertakings. Although many offerors gave enforceable undertakings to FMA which provided for improved disclosure, including about the current market price of investments, FMA's regulatory reach and enforcement options were limited. Significant concerns also continued to be raised by investors and the issuers whose investors received offers. This led to the Regulations being made.

The Regulations introduced a more focused and comprehensive regulatory regime. Clear and concise disclosure of key information is now required, including the recent market price or the fair value of the investment and the payment terms. The Regulations also introduced a 10 working day 'cooling off' period, during which people who accept offers can cancel their contracts without loss, and gave FMA a wider range of powers to respond to non-compliance.

For more information investors should read FMA's brochure '[Low Ball' offers – Guidance for Investors'](#).<sup>3</sup>

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<sup>2</sup> See section 48DA of the Securities Markets Act 1988 and the Regulations for a full definition and statutory exclusions from the Regulations. An unsolicited offer is not subject to the Regulations where it is part of an offer process such as a company share buyback, an amalgamation or a takeover.

<sup>3</sup> See <http://www.fma.govt.nz/consumers/free-resources/>



## Findings and observations

### Offerors

To date, we are aware of only two companies that have made unsolicited offers under the new Regulations – Washington Securities Pty Limited (**Washington Securities**) and Zero Commission NZ Limited (**Zero Commission**). Both companies made their first offers in February 2013 and then made regular offers throughout 2013.

### Compliance

FMA's monitoring indicates that there is a good level of compliance with the Regulations in relation to unsolicited offers received by investors. Washington Securities and Zero Commission have proactively engaged with us and have sought clarification on their new obligations. Instances of actual or potential non-compliance have been relatively minor, and in all cases have been promptly rectified to our satisfaction. The nature of the issues raised and the prompt responses meant that investors were unlikely to have been detrimentally affected. There was, however, a proposed non-compliant offer by an entity controlled by Bernard Whimp but, following our intervention, the offer was not made.

### Complaints and Queries

While Washington Securities and Zero Commission have made a significant number of offers, the number of complaints and queries received by FMA has been lower since the Regulations came into force. We received only six complaints from recipients of offers made under the Regulations, and only one of those related to an accepted offer. The number of complaints and queries from issuers whose investors received unsolicited offers also dropped. In contrast, we received 22 complaints from recipients of unsolicited offers in the three months before the Regulations came into force.

We have also continued to receive complaints and queries about transactions resulting from unsolicited offers made by David Tweed, Bernard Whimp, and Stock & Share predating the Regulations, and in some instances going back several years.

Complaints and queries to FMA peaked soon after the first offers were made under the Regulations and are now infrequent, indicating an increased awareness amongst market participants and investors. Media reports have followed a similar trend. Prior to the Regulations, complaints, queries and media reports were more frequent.

Overall, the nature and level of complaints and queries do not, in themselves, give rise to concerns with the operation of the Regulations or the activities of the offerors.

## Zero Commission NZ Limited

Zero Commission is a New Zealand company that also made unsolicited offers before the Regulations came into force. Its offers are typically at a discount of about 10 percent to market price and are targeted at investors with relatively small holdings. While the cost to investors (in terms of returns foregone) often exceeds brokerage fees that would otherwise be payable, the difference between the total offer price and total market value tends not to be substantial.

FMA is aware of Zero Commission having made unsolicited offers to investors in nine companies since February 2013, and we are aware of a total of 1,275 acceptances from those offers. Our analysis, based on the market price at the date of the offers, shows an average total discount to market value of about \$45 per investor.

Zero Commission continues to be active and the last offer we are aware of was made in early February 2014.

## Washington Securities Pty Limited

Washington Securities is an Australian company owned and controlled by John Armour, whose company Stock & Share previously made unsolicited offers. As noted below, Washington Securities has now ceased carrying on business in New Zealand. Washington Securities' offers were made at discounts of between 25 and 75 percent of the current market price and to investors with a wide range of holdings.

We are aware of a total of 35 separate offers made by Washington Securities between February and October 2013, in respect of 17 different investments (in some cases there have been multiple offers for the same investments). In some instances Washington Securities appears to have made offers to tens of thousands of investors.

We are aware of a total of 521 acceptances for all offers made by Washington Securities. Of those, 396 related to one investment, and based on the market price at the date of the offers, represented an average total discount to market value of approximately \$225 per investor. The remaining 125 acceptances, spread across a range of offers, represented an average total discount to market value of approximately \$1,154 per investor.

Clearly these figures are of greater concern than the corresponding figures for Zero Commission. The difference is due not only to the larger discounts but also reflects that Washington Securities made offers to investors with a wider range of holdings. However, with more effective disclosure, these factors are also likely to have contributed to Washington Securities' lower strike rate. In that regard we also note that in making offers to tens of thousands of investors, Washington Securities' costs are likely to have been significantly greater than Zero Commission's in terms of total cost per acceptance gained. However, the fact remains that a number of investors continue to accept these 'low ball' offers.

Washington Securities also met with significant resistance from issuers. When Washington Securities gave notice (as required by the Regulations) to issuers that it intended to make unsolicited offers to their investors, many responded with publicity to highlight the 'low ball' nature of the offer. Contact Energy Limited (**Contact Energy**) and Heartland New Zealand Limited also sought and obtained exemptions from



FMA to allow them to facilitate offers to shareholders at market value, in order to pre-empt offers from Washington Securities.

A number of issuers, including Contact Energy, added watermarks to copies of registers provided to Washington Securities, which made it more difficult to use optical character recognition software to extract the data. In response to this, Andrew Kennedy, a lawyer who acts for Mr Armour's companies, brought proceedings in the High Court against Contact Energy. We believe that the register request was made and the proceedings were taken on behalf of Washington Securities.

Mr Kennedy sought a declaration that the copy of the share register provided by Contact Energy (which it was required to provide on request under the Securities Act) did not comply with the Securities Act because the watermark was not part of the original register.<sup>4</sup> In August 2013 the High Court held that Contact Energy had not breached the Securities Act. See below for information on upcoming changes to register request requirements introduced by the Financial Markets Conduct Act 2013.

The last offer we are aware of from Washington Securities was made on 14 October 2013. Washington Securities has since given notice of ceasing to carry on business in New Zealand and was removed from the Companies Register on 12 February 2014. No new company directly owned or controlled by John Armour has since been registered on the New Zealand Companies Register.

## **Bernard Whimp**

In July 2013, as required by the Regulations, an entity owned and controlled by Bernard Whimp gave notice of an intention to make an unsolicited offer. Mr Whimp and the issuer concerned both provided the notice to FMA. We considered that the proposed offer would have failed to comply with the Regulations in a number of respects and also gave rise to concerns under the Securities Act. After corresponding with Mr Whimp, he agreed to withdraw the proposed offer before it was sent to investors. We are not aware of any offers having been made by Mr Whimp or his related entities since then. Mr Whimp and his related entities continue to be subject to a section 49 order made by FMA on 6 May 2012.<sup>5</sup> That order requires Mr Whimp and his related entities to make disclosure additional to that required by the Regulations.

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<sup>4</sup> See *Kennedy v Contact Energy Ltd* [2013] NZHC 2576. Note that the Securities Act does not require that an electronic copy of the share register be provided; a paper copy is sufficient.

<sup>5</sup> See <http://www.fma.govt.nz/assets/media/305113/warning-disclosure-order-under-section-49-of-the-financial-markets-authority-act-2011.pdf>



## Exemptions

FMA has the power to grant exemptions from obligations imposed on offerors under the Regulations. This reflects their potentially wide application, which may not always be appropriate. Since the Regulations were introduced we have granted total or partial exemptions from obligations under the Regulations to four companies:

- Contact Energy Ltd (in relation to a proposed small holdings plan)
- Bathurst Resources Ltd and Bathurst Resources (NZ) Ltd (in relation to a proposed group restructure made pursuant to an Australian scheme of arrangement)
- Fonterra Co-operative Group Ltd (in relation to a proposed supply offer to farmer shareholders)
- Heartland New Zealand Ltd (in relation to a proposed share sale plan).

The type and number of exemptions granted do not indicate that the Regulations are unduly broad, although we will continue to monitor this. Some changes proposed in restated regulations (see page 10 below) address technical issues that have arisen around exemptions, and should, in some cases, remove the need for exemptions or allow for better customising of exemptions.



## Upcoming changes to the law

### **Updated Unsolicited Offers Regulations**

Regulations to be made under the Financial Markets Conduct Act (**FMC Act**) will include restated regulations governing unsolicited offers. These are likely to come into force on 1 December 2014. The restated regulations largely repeat the Regulations, but include amendments to address technical issues identified in the implementation of the Regulations.

### **Register requests**

Unsolicited offerors have relied on obtaining copies of share registers from issuers in order to obtain investor details. Currently, issuers must provide share registers to anyone requesting them and the law is silent on the circumstances, if any, in which requests can be declined. The provisions in the FMC Act governing register requests, which are likely to come into force on 1 December 2014, will change the law with respect to issuers as they transition to the FMC Act.<sup>6</sup>

Under the FMC Act anyone requesting copies of registers will have to give reasons for making the request, and the Act limits the uses to which information from registers can be put. While making unsolicited offers is not specified in the Act as a prohibited use, prohibited uses can be added to by regulation. The FMC Act also gives FMA the power to permit issuers to decline register requests.

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<sup>6</sup> See sections 221 to 226 of the FMC Act.



## Future monitoring of unsolicited offers

FMA will continue to monitor unsolicited offers, but it will be less of a focus than it was during 2013. This reflects the good level of compliance we have seen to date, the pro-active actions of companies whose investors have received offers, and the relatively small number of complaints received from investors. We remain, however, well placed to respond promptly to any complaints or to any significant increase in activity.

