

MAY 2024

# Consultation: Renewal of class exemptions for disclosure of relevant interests by directors and senior managers, and NZCDC Settlement System

The Financial Markets Authority – Te Mana Tātai Hokohoko (FMA) is reviewing whether to renew two existing class exemption notices for a further five years:

- **The Financial Markets Conduct (Disclosure of Relevant Interests by Directors and Senior Managers) Exemption Notice 2019** – this provides conditional relief for directors and senior managers of listed issuers from the requirements of the Financial Markets Conduct Act 2013 (FMC Act) to disclose relevant interests in quoted financial products of the listed issuer or a related body corporate where:
  - the financial product is an interest in a passive fund; or
  - financial products of the listed issuer are approved for trading on a financial product market authorised to operate in Australia or the United Kingdom, and a valid disclosure has been made under the listing rules of that other market.
- **The Financial Markets Conduct (NZCDC Settlement System) Exemption Notice 2019** – this provides relief for clearing and depository participants from the substantial holding disclosure requirements of the FMC Act for interests that arise in the course of certain clearing and settlement activities and not on a participant's own account.

We invite your feedback to support our review of these exemption notices. Please use the feedback form provided. **Submissions close at 5pm on Friday 21 June 2024.**

## Next steps

After considering submissions, we will finalise our policy proposals and aim to have any exemptions in place prior to the expiring of the existing notices. If you have any questions, please email [questions@fma.govt.nz](mailto:questions@fma.govt.nz) or call us on 0800 434 566.

This consultation is for listed issuers, including directors and senior managers of listed issuers, and clearing and depository participants.

It seeks feedback on whether the current exemption notices providing relief from the disclosure of relevant interests and substantial holding requirements of the FMC Act should be renewed, and, if so, what changes (if any) should be made.

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# Review timing and process

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We plan to complete our review of these two class exemptions and have any replacement notices in place before the existing notices expire on 30 November 2024.

An indicative timetable is noted below. This is subject to change.

Date	Step
21 June 2024	Consultation period closes
July – August 2024	Decision whether to renew the exemption notices made
August – November 2024	If the decision is made to renew the exemption notices, during this period we will draft replacement notices to give effect to the policy decisions. We will aim to have these in place in advance of the expiry of the existing notices
On or before 30 November 2024	Replacement notices (if granted) come into effect

# FMA's power to grant class exemptions

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We have powers to exempt persons from compliance with requirements in the FMC Act and associated regulations.

Before we do so, we must be satisfied that the exemption is not broader than is reasonably necessary to address the matters that gave rise to it. We must also be satisfied that the exemption is necessary or desirable to promote one or more of the following purposes of the FMC Act regime:

- to promote the confident and informed participation of businesses, investors, and consumers in the financial markets
- to promote and facilitate the development of fair, efficient, and transparent financial markets
- to provide for timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products or the provision of financial services
- to ensure that appropriate governance arrangements apply to financial products and certain financial services that allow for effective monitoring and reduce governance risks
- to avoid unnecessary compliance costs
- to promote innovation and flexibility in the financial markets.

We can only grant exemptions (including renewing existing exemptions) where we are satisfied that the statutory requirements are met. We need information from you to support our decision-making, so we encourage you to provide feedback.

# Disclosure of relevant interests by directors and senior managers

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## Obligations to disclose relevant interests under the FMC Act

Section 297 of the FMC Act requires directors and senior managers of a listed issuer to disclose 'relevant interests' in quoted financial products of the listed issuer or a related body corporate.

Section 297(1) requires that they disclose the interest within 5 trading days of the issuer becoming listed or their appointment as a director or senior manager. Section 297(2) requires that they disclose an acquisition or disposal of the interest within 20 working days of the types of transactions listed in the section, or within 5 trading days in any other case.

The purpose of the requirements is to promote good corporate governance, and to deter, and to assist in the monitoring of, insider conduct and market manipulation, by

- ensuring that information about directors' and senior managers' trading activities in listed issuers is available to participants in financial products markets; and
- enabling the dates of trades to be checked against the dates at which material information becomes generally available to the market.

This ensures information is made available to the market about trading by persons who may have access to company information by virtue of their position within a company.

## Background

The disclosure obligations were first introduced in 2004 with the commencement of subpart 2 of Part 2 of the Securities Markets Act 1988 and the Securities Markets (Disclosure of Relevant Interests by Directors and Officers) Regulations 2003.

A predecessor notice under the former regime, [the Securities Market Act \(Disclosure of Relevant Interests by Directors and Officers\) Exemption Notice 2004](#), provided a number of exemptions from these requirements, which were intended to address unforeseen difficulties arising from the disclosure regime. This included significant privacy and practical compliance issues for directors and officers in relation to interests in certain securities where the risk of insider trading was minimal.

The FMC Act largely replicated the requirements of the Securities Markets Act 1988 in relation to disclosure of relevant interests in securities. However, the FMC Act only requires disclosure of interests in quoted financial products or specified derivatives. This means that a number of the exemptions in the 2004 notice were no longer required. Other exemptions in the notice were carried over in the drafting of the FMC Act and the Financial Markets Conduct Regulations 2014 (FMC Regulations).

## Current exemption and policy rationale

The current exemption, the Financial Markets Conduct (Disclosure of Relevant Interests by Directors and Senior Managers) Exemption Notice 2019, provides relief from section 297 of the FMC Act for:

- relevant interests in financial products that are the managed investment products of a passive fund;
- relevant interests in financial products where the listed issuer's financial products are approved for trading on a financial product market that is authorised to operate in Australia or the United Kingdom.

These are the remaining two exemptions from the 2004 notice that have not been otherwise addressed by the FMC Act or FMC Regulations.

### Listed passive funds

- For the purposes of the exemption, **passive fund** means a fund that is required under the terms of its trust deed, or the terms of the offer of the interests in the fund, to hold financial products as near as practicably possible to the financial products' proportions in an index.
- Where listed passive funds are structured and operated in a way that confers on the holder an interest in financial products as near as practicably possible to the financial products of an index, a holder of units in a listed passive fund cannot control the investments held by the fund. The risk of insider trading of relevant interests in quoted financial products that are listed passive funds is minimal. Compliance with section 297 of the FMC Act would not provide information that furthers the market information or anti-insider trading purposes of the disclosure regime, and would raise practical compliance issues for directors and senior managers.
- No conditions are associated with the exemption in relation to listed passive funds.

### Financial products of listed issuer approved for trading on overseas market

- Directors and senior managers of listed issuers also trading on overseas markets may be subject to rules in other jurisdictions about disclosure of their relevant interests. If a relevant interest has been disclosed to an overseas market, and this disclosure has also been notified to a licensed market operator in New Zealand for the purposes of making the information in that disclosure available to the market, the requirements in section 297 would cause unnecessary duplication.
- For example, issuers approved for trading on overseas markets may be listed with NZX as an NZX Foreign Exempt Issuer. NZX Foreign Exempt Issuers are required to release through NZX's market announcement platform (MAP) any notice or information provided to their Home Exchange, promptly and without delay. This includes disclosures equivalent to those required under section 297 of the FMC Act made by directors and senior managers under the listing rules of the Home Exchange or applicable laws.<sup>1</sup>
- The definition of **overseas market** in the exemption notice means a financial product market that is authorised to operate in Australia and the United Kingdom. This is because when the exemption was first granted under the Securities Markets Act, we did not receive any evidence that an exemption was

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<sup>1</sup> Rule 1.7.2 (b) of [NZX Listing Rules](#), 15 January 2024

required for other jurisdictions (noting that exemptions must not be broader than reasonably necessary). If we hear feedback that market participants require an exemption from other jurisdictions, we would require submitters to provide evidence of similar compliance in those overseas jurisdictions.

- This exemption was granted with the following conditions (paraphrased below):
  - That the director or senior manager has made a valid disclosure in relation to the relevant interest, under the listing rules of an overseas market in either Australia or the United Kingdom;
  - That the disclosure has, within the time frame for disclosure under the listing rules of the overseas market, been disclosed to a licensed market operator for the purpose of making the information to which the disclosure relates available to market participants in the licensed market on which the listed issuer's financial products are quoted;
  - That a relevant interest disclosed in relation to these types of financial products is noted in the interests register as if it was disclosed under section 297 of the FMC Act. The interest register must be kept at the registered office of the listed issuer and be available for public inspection and copying in accordance with sections 305 and 306 of the FMC Act.

## Proposed amendments

In our review we have identified places where the language may benefit from clarification to better describe the kinds of financial products captured by the exemption.

### Quoted financial products

- The exemption refers to “financial products of the listed issuer or a related body corporate”. Section 297 only triggers disclosure obligations in respect of “quoted financial products”. We propose to modify the language used to refer to “quoted financial products of the listed issuer or a related body corporate”, as relief under the exemption is not required in relation to listed issuer's financial products that are not quoted.

### Scope of ‘passive fund’

- Passive fund management typically refers to investment strategies aimed at replicating the performance of a specific index or benchmark. However, there is an increasing tendency to use the term ‘passive’ more broadly to encompass a spectrum of approaches that may involve elements of active management. We consider the term **index-tracking fund** may better reflect the definition used in the exemption.

### Statement of investment policy and objectives

- The definition of ‘passive fund’ currently requires the fund's investment strategy to be set out in the terms of its trust deed, or the terms of the offer of the interests in the fund. In many cases, the fund's investment strategy, whether passive or active, is outlined in the statement of investment policy and objectives (**SIPO**) in addition to, or instead of, the trust deed or the terms of the offer. A SIPO is

mandated under section 164 of the FMC Act, and sets out the investment governance and management framework, philosophy, strategies and objectives of a managed investment scheme and its investment funds or portfolios. We propose to update the definition in the exemption to include funds that have their investment strategy set out in the SIPO.

## Definition of ‘index’

- The term **index** is currently undefined in the exemption. We consider the intent of the exemption is to capture a broad-based market index, and propose to clarify this by adopting a similar definition to that used in cl 61(3) of Schedule 4 of the FMC Regulations in relation to an appropriate market index.

### *Disclosure of relevant interests by directors and senior managers*

Q1	Are you (or your clients) currently relying on the Disclosure of Relevant Interests by Directors and Senior Managers Exemption Notice? If so, please tell us whether your reliance is in relation to relevant interests in passive funds, financial products of the listed issuer approved for trading on overseas markets, or both.
Q2	If you have relevant interests in passive funds, or applicable financial products approved for trading on overseas markets, but are unlikely to rely on the exemption, please explain why not.
Q3	Does the exemption allow you to avoid unnecessary compliance costs? Please explain (and, if possible, quantify) the compliance costs you would face if this exemption was not in place.
Q4	Does the policy rationale behind the exemption remain relevant and valid? Please explain your view.
Q5	Do you agree with the conditions attached to the exemption, and are any changes required? Please explain your view.
Q6	Do you agree with the proposed inclusion of the term ‘quoted financial products of the listed issuer’? Why or why not?
Q7	Do you agree with the proposed amendments to the term and definition of ‘passive fund?’ Does the term ‘index tracking fund’ better describe the intended concept? Is the scope of the exemption in relation to passive funds still fit for purpose? Please explain your view.
Q8	Do you have any feedback on the exemption regarding financial products of the listed issuer that are approved for trading on an overseas market (in Australia or the United Kingdom)?
Q9	Do you think any other amendments are needed to the notice if it is renewed? If so, please specify the amendments you propose, the reasons for these, and the impact of the amendments on issuers, investors and the market.



# NZCDC Settlement System exemption

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## Substantial holding disclosure obligations

A person has a substantial holding in a listed issuer if that person has a relevant interest in quoted voting products that comprise 5% or more of a class of quoted voting products of the listed issuer.

Sections 276 to 279 require a person to make a disclosure in any of the following circumstances:

- they begin to have a substantial holding in a listed issuer;
- there is a subsequent movement of 1% or more in the substantial holding;
- there is a subsequent change in the nature of any relevant interest in the substantial holding; and
- they cease to have a substantial holding.

The disclosures must be given as soon as the person knows, or ought reasonably to know, that any of the above circumstances apply.

The purposes of the substantial holding disclosure obligations are to promote an informed market, and to deter insider conduct, market manipulation, and secret dealings in potential takeover bids, by ensuring that participants in financial product markets have access to information concerning the identity and trading activities of persons who are, or may at any time be, entitled to control or influence the exercise of significant voting rights in a listed issuer.

## Background

The NZCDC Settlement System exemption notice provides relief for specified participants from the substantial holding disclosure obligations in sections 276 to 279 of the FMC Act.

NZX's clearing and settlement system, **NZCDC**, was launched in 2010. It comprises a central counterparty clearing house operated by New Zealand Clearing Limited (NZC), and a central securities depository operated by New Zealand Depository Limited (NZD).

The NZCDC settlement system enables a broad range of financial products, including voting products in public issuers, to be cleared and settled. This process may give rise to substantial holding disclosure obligations under the FMC Act.

The purpose of the exemption is to ensure that disclosure obligations will not be imposed on specified participants where these obligations arise solely as a result of clearing and settlement of trades through the system, and not on the participants' own behalf.

Similar relief was provided in a predecessor notice, the Securities Market Act (NZCDC Settlement System) Exemption Notice 2010. This was granted by the Securities Commission prior to the commencement of operations of the NZCDC Settlement System in September 2010.

This exemption was carried over into the FMC Act regime in a notice issued in 2014, and renewed most recently in 2019.

## Target of the relief

The relief is provided to 'specified participants', defined in the exemption notice as a person that is both a clearing participant and a depository participant of the NZCDC.

A clearing participant must be a company and meet specified criteria, including meeting minimum capital requirements on an initial and ongoing basis.<sup>2</sup> Every clearing participant is also required to be a depository participant. Depository participation is intended for institutional investors including brokers, custodians and fund managers; retail participation is not catered for.

NZX keeps a list of clearing and depository participants on its website here: [All Market Participants](#)

The predecessor exemption notice under the Securities Markets Act applied to both operators of the system (New Zealand Clearing Limited and New Zealand Depository Limited), and participants of the system. However, the FMC Act includes a statutory exclusion for operators of a designated settlement system<sup>3</sup>, therefore the current exemption notice only relates to participants of the system.

## Operation of NZCDC Settlement System

NZC's Clearing and Settlement Rules and NZD's Depository Operating Rules describe the operation of the NZCDC Settlement System and the activities of the clearing and depository participants.

The system operates by replacing every transaction between a buyer and a seller with two separate and independent settlement transactions: one between the buyer's clearing participant and NZC, and another between the seller's clearing participant and NZC. In each case, that clearing participant becomes a party to the settlement transaction and will be required to deliver or receive financial products in settlement of its net open positions.

Settlement occurs in settlement accounts in the depository (therefore clearing participants must also be depository participants). The clearing participant acquires possession of the relevant financial products and lodges these financial products in the depository in its capacity as a depository participant.

Under the depository operating rules, the depository participant is considered to hold the beneficial interest in the financial products in those depository accounts.<sup>4</sup>

## Policy rationale

Relevant interests acquired by specified participants in relation to the operation of the NZCDC are not relevant to investors, as they are incidental to the operation of the system and are not acquired for the purpose of exercising, or influencing of, voting rights in public issuers.

Additionally, the NZCDC Settlement System clears and settles thousands of transactions daily. Without an exemption, specified participants would be required to produce complex and detailed notices to comply with the substantial holding disclosure obligations in respect of relevant interests arising from the operation of the system. This would be an expensive process (and the costs would need to be reflected in the costs of settling trades on the market), which would not produce useful or relevant information for investors. As

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<sup>2</sup> Rule 2.2 Clearing Participants, [New Zealand Clearing Limited, Clearing and Settlement Rules](#)

<sup>3</sup> Section 238(1)(h), Financial Markets Conduct Act 2013

<sup>4</sup> Rule 3.6 Consequences of Lodgement, [New Zealand Depository Limited Depository Operating Rules](#)

disclosure may need to be made on a daily (or more frequent) basis, the market could be overwhelmed with largely irrelevant disclosures. Compliance with the substantial holding obligations may inhibit an informed market, as the increased volume of disclosures may confuse rather than clarify control of public issuers.

The exemption is also consistent with the policy of the FMC Act, which sets out situations not giving rise to relevant interests in section 238, in particular section 238(1)(b). This provides that a person (A) does not have a relevant interest where A is authorised to undertake trading activities on a licensed market and A acts for another person to acquire or dispose of the product on behalf of that person in the ordinary course of A's business of carrying out those trading activities. The exemption extends, on similar terms, the benefit of the statutory relief to those persons with the obligation to clear and settle the trades on behalf of the trading participant (both in the capacity as a clearing participant and a depository participant).

## Circumstances where exemption does not apply

The definition of 'settlement transaction' for the purposes of the exemption excludes:

- trading activities on a licensed market operated by NZX Limited where the specified participant acquires or disposes of financial products on its own behalf;
- a lending transaction (as defined in the depository operating rules). This is because lending transactions do not typically arise due to the novation of trades on NZX's markets (which a clearing participant must clear and settle under the clearing and settlement rules). Lending transactions entered into by clearing participants would normally be conducted by the clearing participant acting as principal, so the relief provided in the exemption would not apply.

<i>NZCDC Settlement System</i>	
Q10	Are you (or your clients) currently relying on the NZCDC Settlement System Exemption Notice? If you are a specified participant but are not likely to rely on this exemption, please explain why not.
Q11	Does the notice allow you to avoid unnecessary compliance costs? Please explain (and, if possible, quantify) the compliance costs you would face if this exemption was not in place.
Q12	Does the policy rationale behind the notice remain relevant and valid? Please explain your view.
Q13	Do you agree with the circumstances in which the notice does not apply, including the definition of settlement transaction? Please explain your view.
Q14	Do you think any amendments are needed to the notice if it is renewed? If so, please specify the amendments you propose, the reasons for these, and the impact of the amendments on issuers, investors and the market.

<i>Other</i>	
Q15	Do you have any other comments on either of the exemption notices?

