



FINANCIAL MARKETS AUTHORITY  
TE MANA TATAI HOKOHOKO - NEW ZEALAND

## Securities Act (BetaShares Capital Limited) Exemption Notice 2012

Pursuant to section 70B of the Securities Act 1978, the Financial Markets Authority gives the following notice (to which is appended a statement of reasons of the Financial Markets Authority).

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### Notice

- 1 Title**  
This notice is the Securities Act (BetaShares Capital Limited) Exemption Notice 2012.
- 2 Commencement**  
This notice comes into force on 14 December 2012.
- 3 Expiry**  
This notice expires on the close of 31 October 2017.
- 4 Interpretation**
  - (1) In this notice, unless the context otherwise requires,—  
**Act** means the Securities Act 1978  
**AQUA products** means 'Financial Products' which are 'Managed Fund Products', 'ETF Securities' or 'Structured Products', each as defined in the AQUA Rules, and which are admitted under rule 2121 of the AQUA Rules  
**AQUA Rules** means the ASX operating rules relating to AQUA products

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**ASX** means the Australian Securities Exchange

**BetaShares** means BetaShares Capital Limited, a company incorporated in Australia

**ETFs** means:

- (a) exchange traded funds managed by BetaShares; and
- (b) that are 'ETFs' or 'Managed Funds' as defined by, and offered in accordance with, the AQUA Rules; and
- (c) that are either:
  - (i) quoted on the ASX; or
  - (ii) in respect of which an application for quotation on the ASX has been made and, at the time of the offer of the units in the ETFs, BetaShares has complied with all requirements in respect of the application with which it is required to comply at that time

**MRSO** means the Securities (Mutual Recognition of Securities Offerings – Australia) Regulations 2008

**Regulations** means the Securities Regulations 2009

**specified information** means information in relation to BetaShares or the ETFs that is not publicly available and that would, or would be likely to, affect materially the price of the units in the ETF if it were so disclosed

**specified participants** means ASX trading participants or other market professionals who have an agreement in place with BetaShares pursuant to which they offer for sale previously allotted securities in ETFs and sell the securities on-market at the prices established by the market, where the securities have not previously been offered for sale to the public in New Zealand.

- (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 Exemptions

BetaShares and specified participants are exempted in respect of units in ETFs from Part 2 of the Act except sections 35 (restrictions on door-to-door sales), 38B (prohibition of advertisements), and 58 (criminal liability for misstatement in advertisement or registered prospectus), and the Regulations.

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**6 Conditions of exemptions in clause 5**

- (1) The exemptions in clause 5 are subject to the condition that the requirements set out in regulations 9 to 12 of the MRSO are complied with (as if the MRSO applied) except to the extent provided in paragraphs (3) and (5).
- (2) The exemptions in clause 5 are subject to the further condition that it is a term of the offer of units in ETFs that the requirements set out in regulations 13(1) to (3) of the MRSO are complied with (as if the MRSO applied) except to the extent provided in paragraph (6).
- (3) A specified participant is not required to comply with regulation 11 of the MRSO if, except to the extent disclosed for the purposes of the offer of the units in the ETF, the specified participant has no specified information.
- (4) For the purposes of paragraph (3), a specified participant is not to be taken to have specified information if:
  - (a) arrangements exist to ensure that no individual who took part in the decision of that specified participant to offer the units in the ETFs to the public received, or had access to specified information, or was influenced, in relation to that decision, by an individual who had that specified information; and
  - (b) no individual who took part in the decision of that specified participant to offer the units in the ETFs to the public received, or had access to, specified information or was influenced, in relation to that decision, by an individual who had that specified information.
- (5) Instead of the statement required by regulation 11(3)(a) of the MRSO, the notice must state that the Australian issuer intends to make an offer in accordance with the Securities Act (BetaShares Capital Limited) Exemption Notice 2012 which provides exemptions from the Securities Act 1978 and the Securities Regulations 2009 consistent with those available to Australian issuers under the MRSO.
- (6) Instead of the warning statement required by paragraph (a) of regulation 13(1)(d) of the MRSO, paragraph (a) of the warning statement must state "(a) This offer to New Zealand investors is a regulated offer made under Australian and New Zealand law. In Australia, this is Chapter 8 of the Corporations Act 2001 and Regulations. In New Zealand, this is the Securities Act (BetaShares Capital Limited) Exemption Notice 2012."

**7 Minor or technical failure to comply with regulation 11 or 12**

If a failure to meet a requirement contained in regulation 11 or 12 of the MRSO (as if the MRSO applied) is minor or technical only, the

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requirement in question, and the applicable condition of clause 6(1),  
is deemed to have been complied with.

Dated at Wellington this 11<sup>th</sup> day of December 2012.



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Sue Brown  
Head of Primary Regulatory Operations  
Financial Markets Authority

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### Statement of reasons

This notice comes into force on 14 December 2012 and expires on 31 October 2017.

This notice provides exemptions from most of the requirements of Part 2 of the Securities Act 1978 (**Act**), and from the Securities Regulations 2009 (**Regulations**) in relation to the offer of exchange traded funds and managed funds (**ETFs**) by BetaShares Capital Limited (**BetaShares**) and certain Australian Securities Exchange (**ASX**) trading participants or other market professionals. The particular ETFs offered by these persons are AQUA Products under the ASX operating rules. The exemptions replicate the exemptions available to Australian issuers under the Securities (Mutual Recognition of Securities Offerings – Australia) Regulations 2008 (**MRSO**).

The Financial Markets Authority (**FMA**), after satisfying itself as to the matters set out in section 70B(2) of the Act, considers it appropriate to grant the exemptions in clause 5 because –

- The objective of the MRSO is to reduce regulatory barriers for trans-Tasman offers of securities. To achieve this the MRSO enables an Australian issuer lawfully offering securities in Australia to offer those securities in New Zealand on the basis of the same offer documents and other key offer and allotment compliance requirements. The exemptions from the Act and Regulations requirements provided by MRSO are consistent with the policy of the Act because they allow New Zealand investors to be offered securities where the securities

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law disclosure and compliance requirements are comparable to those prescribed by New Zealand law:

- Before making an offer in reliance on the MRSO an Australian issuer must give an opt-in notice to the Registrar of Financial Services. This notifies the intention to make offers under MRSO, specifies the securities to be offered and the offer period, acknowledges submission to the jurisdiction of the New Zealand courts and provides details of an address for service in New Zealand. The notice must be accompanied by the offer documents and other important information relating to the offer. The opt-in notice provides a record of the offer and key information about the offer so that the issuer can be held accountable for any non-compliance with securities law requirements:
  
- If there is more than one Australian issuer of the securities, each Australian issuer must give an opt-in notice. Under the MRSO in the case of previously allotted securities, by definition 'issuers' include the original allotter and any offeror of the securities. The ETFs are initially allotted to a number of ASX trading participants and other market professionals, and then will be offered to the public at a price established on a registered market. In circumstances where these offerors do not have any information which is not otherwise publically available that would, or would be likely to, materially affect the price of the security if it was disclosed, the offeror is therefore a means of distribution. In the circumstances that BetaShares remains required to file an opt-in notice, we consider that an exemption to these offerors from the requirement to also file an opt-in notice will not cause significant detriment to New Zealand investors. The purpose of the opt-in notice is met by the notice required to be filed by BetaShares. The requirement to file additional notices by offerors with no non-public material information would impose an administrative burden and cost ultimately borne by investors and outweighed by any benefit to investors:
  
- The exemption is limited to providing relief from the requirement for offerors who do not hold any material non-public information to file additional opt-in notices. In these circumstances its extent is not broader than is reasonably necessary to address the matters giving rise to the exemption.

