FMA
FINANCIAL MARKETS AUTHORITY
TE MANA TATAI HOKOHOKO - NEW ZEALAND

Updated 1 December 2014:

On 1 December 2014, upon the implementation of phase 2 of the Financial Markets Conduct Act 2013 (FMC Act), Part 5 of the FMC Act came into force and superseded the Securities Markets Act 1988 (SMA).

This report was first published by the Financial Markets Authority (FMA) in June 2013 and discusses disclosure obligations under the SMA. These disclosure obligations now fall under the FMC Act and are largely unchanged, therefore the findings and observations contained in this report remain relevant.

The FMC Act has introduced some amended terms, therefore in reading this report, references to the SMA should be read as the FMC Act and the following SMA terms should be replaced with the corresponding FMC Act term:

SMA term	**FMC Act term**
Registered exchange	Licensed financial product market
Securities	Financial products
Public issuer	Listed issuer
Officer	Senior manager
Substantial security holder	Substantial product holder

The following table shows the sections of the FMC Act corresponding to sections of the SMA referred to in this report:

SMA sections	**FMC Act sections**
5 – 5B (relevant interests)	235 – 238
19T – 19Y (directors' and officers' disclosures)	296 – 307
22 – 33 (substantial security holder disclosures)	273 – 294

Anyone who is affected by the disclosure discussed in this report should refer to Part 5 of the FMC Act for full details of the legislative requirements.

Financial Markets Authority review of market disclosures

The Financial Markets Authority's (FMA) Compliance Focus For 2013 included, as a priority, 'raising standards in existing regimes'. It stated that we had conducted a number of enquiries into trading on registered exchanges, including some that revealed poor administrative practices by substantial shareholders, and directors and officers, resulting in delays in notifying the market of trading.

As a result of those enquiries, we carried out a review of all directors' and officers' (D&O) relevant interest disclosures and substantial security holder (SSH) disclosures, made on the NZX Limited (NZX) Market Announcement Platform (MAP), over a five week period.

The purpose of this report is to:

- inform market participants of the findings of our review and highlight areas of concern
- remind directors, officers and substantial security holders of their statutory disclosure obligations under the Securities Markets Act 1988 (the Act)
- clarify FMA's expectations of market participants to whom these requirements apply.

FMA does not aim to give legal advice on the various aspects of the disclosure regime, however we wish to make it known that we are willing to engage with parties in respect of any questions they may have regarding the disclosure regime.

Purpose of disclosure regime

The purposes of the D&O disclosure requirements are to:

- promote good corporate governance
- deter and assist in the monitoring of insider conduct and market manipulation, by ensuring that information is made available to the market about trading by persons who may have access to company information by virtue of their positions within a company.

The purposes of the SSH disclosure requirements are to:

- promote an informed market
- deter insider conduct, market manipulation, and secret dealings in potential takeover bids, by ensuring that information is made available to the market concerning the identity and trading activity of persons who may be in a position to control or influence the exercise of significant voting rights in a public issuer.

Timely, accurate disclosure is important to promote these purposes.

Relevant interest

Both the D&O and SSH disclosure requirements refer to 'relevant interest'. The meaning of 'relevant interest' is set out in sections 5 – 5B of the Act and includes registered ownership, beneficial ownership and the power to exercise control over a security.

Method of Disclosure

Both D&O and SSH disclosure notices must be provided to NZX for release to the market, by using MAP or by emailing NZX at announce@nzx.com. Announcements are published under the public issuer's listing code between 8.30am and 5.30 pm on trading days.

SSH disclosures must be sent to NZX in both PDF and Word format. Documents which are illegible, for example due to very small print, or cannot be published in a legible format, will not be released by NZX.

Standard template forms for disclosure can be downloaded from the MAP website, https://map.nzx.com/static/forms.

Penalties

The potential consequence of failing to comply with either the D&O or SSH disclosure obligations is a fine on summary conviction of up to $30,000, as well as civil remedies that can include forfeiture of shareholdings or removal of voting rights.

Directors' & Officers' Disclosure

Directors and officers of public issuers have statutory disclosure obligations when they hold or transact in securities of the public issuer of which they are a director or officer.

The basic D&O disclosure requirements are:

- directors and officers must disclose relevant interests and dealings in relevant interests, within five trading days of becoming a director or officer or transacting in securities
- a director or officer has up to 30 days to disclose an acquisition or disposal of a relevant interest that was provided under a share top-up plan, a dividend reinvestment scheme, or an employee share scheme
- disclosure must be made to NZX and recorded in the interests register of the issuer
- the obligation to disclose continues for six months after ceasing to be a director or officer.

Sections 19T – 19Y of the Act contain the full disclosure requirements and should be read in conjunction with:

- the Securities Markets (Disclosure of Relevant Interests by Directors and Officers) Regulations 2003 (the D&O Regulations) which provide the framework on how disclosures must be made
- the Securities Markets Act (Disclosure of Relevant Interests by Directors and Officers) Exemption Notice 2004, which provides for certain exemptions or variations from the regime, for example by allowing an extended period of time (30 days) in relation to the

  disclosure of relevant interests obtained via share top-up plans, dividend reinvestment schemes and employee share schemes.

Findings of FMA Review

Timeliness

Most D&O disclosures were made within the required timeframe. In instances where there were late disclosures, FMA questioned the director or officer as to the reason for the late disclosure. Enquiries revealed that directors and officers are not always aware of their disclosure obligations, or that the requirement to disclose can be overlooked at times.

It is permissible to report multiple transactions in one disclosure notice, provided that all transactions being disclosed have occurred within the mandated timeframe. Our review found examples of multiple transaction disclosures where certain of the transactions had occurred outside the timeframe and should have been disclosed at an earlier date. Administrative convenience is not a valid exception to the requirements of the Act.

Accuracy

Most D&O disclosures were compliant with the requirements of the Act and the D&O Regulations. However, we found various issues with regard to the accuracy of the information recorded, for example:

- incorrect 'date of last disclosure'
- incorrect classification of 'relevant interest'
- incorrect name of issuer
- use of a section 19T(1) form where a section 19T(2) form was required
- information being omitted.

The utility of the D&O disclosure regime is negatively impacted by inaccurate information in the disclosures. FMA reminds directors and officers of the need to take all due care in completing D&O disclosure forms.

FMA noted during its review that many public issuers take responsibility for filing D&O disclosure notices on behalf of their directors and officers. In this case, the individual responsible for filing should satisfy themselves as to the accuracy of the disclosures.

Other

There were instances where disclosure was made under the SSH disclosure requirements that was intended to also comply with the D&O disclosure requirements. This is permitted by the D&O Regulations. However, that fact must be specifically stated on the SSH disclosure and in some cases it was not.

Recommendation

FMA views effective compliance with this regime as a reflection of the special position of a public issuer. Full and accurate disclosure is in the interest of the public issuer.

We recommend that public issuers should ensure their directors and officers are made aware of their disclosure obligations upon becoming a director or officer and, in particular, are made aware of the need to disclose any existing security holdings at that time, within five trading days.

Whilst the obligation to disclose, and the responsibility for failure to do so, rests with the director or officer, we recommend that public issuers have policies and procedures in place to identify the occurrence of events requiring disclosure, and assist the director or officer to make the necessary disclosures.

Public issuers should seek legal advice if necessary, to ensure that they and their directors and officers understand the full extent of the D&O disclosure obligations.

Substantial Security Holder Disclosure

A person with a substantial holding in a public issuer has statutory disclosure obligations in relation to certain events concerning holding or transacting in the relevant security.

A person is considered to have a substantial holding in a public issuer if that person has a relevant interest in listed voting securities that comprises five per cent or more of a class of listed voting securities of the public issuer.

The basic SSH disclosure requirements are:

- a security holder must disclose if they begin to have a substantial holding
- an SSH must disclose if there is a movement of one per cent or more in the holding as a result of a change in the number of securities held[1]
- an SSH must disclose if there is a change in the nature of any relevant interest in the substantial holding
- a security holder must disclose if they cease to have a substantial holding
- in each case, disclosure must be given 'as soon as the person knows, or ought to know' that the relevant event has occurred
- disclosure must be made to the public issuer, to NZX, and to any other registered exchange by which the securities are issued.

Sections 22 – 33 of the Act contain the full disclosure requirements, including details of certain exemptions. These sections should be read in conjunction with the Securities Markets (Substantial Security Holders) Regulations 2007 (the SSH Regulations).

In certain situations, relevant agreement documents need to be disclosed with the SSH disclosure form, for example a trust deed under which a relevant interest arises. These requirements are set out in the SSH Regulations.

Findings of FMA Review

Timeliness

The timeliness of SSH filings over the review period was significantly worse than with D&O disclosures. Approximately 21 per cent of SSH disclosures were not made within a timeframe that FMA considered acceptable in the particular circumstances. Approximately 12 per cent of SSH disclosures made in the review period were made more than one week following the relevant event.

Under the Act, an SSH disclosure notice must be filed 'as soon as the person knows or ought to know' of a relevant event. This means immediately. Frequently, relevant events are actually known of in advance of being effected, for example where a purchase or sale agreement is negotiated off-market. There is rarely any justification for delayed filing of SSH disclosure notices following such

[1] There is no obligation to disclose if the percentage of securities held changes only as a result of a change in the total number of securities in that class of security, for example following a share issue

events, in particular when any of the parties involved is an existing SSH and should be aware of their obligations.

Where a transaction gives rise to an SSH disclosure requirement, whether that transaction is completed on- or off-market, the requirement to provide SSH disclosure to the market arises when the transaction is **agreed**, not when the transaction is **settled**, even if the transaction implies future or conditional control of the securities in question.

Where future or conditional provisions apply to a transaction, disclosure is required both at the time the transaction is agreed, when the fact of the substantial holding, or change or cessation of substantial holding, is first known (under section 22, 23 or 25 of the Act); and again at the time the transaction is effected, when the nature of the relevant interest changes (under section 24 of the Act). The nature of the relevant interest in each case should be detailed on the disclosure form, as required by the SSH Regulations.

Immediate disclosure is particularly important in the case of a takeover or a stand in the market, where delayed filing of SSH disclosure may result in material information being withheld from the market.

In the interests of an informed market, anyone who is aware of the obligation of others to file SSH disclosure notices – for example an NZX Participant, an investment bank, or an existing SSH selling a holding of more than 5 per cent to another party – should take all reasonable steps to see that an SSH disclosure notice is filed.

Listed companies also have powers under the Act to require security holders to disclose information about their holdings to the company. FMA encourages listed companies to use these powers where appropriate, to ensure that the market is kept informed of changes in ownership of its securities.

SSH disclosure by fund managers

Fund management companies trade frequently, acquiring and disposing of the same security for different underlying clients. As such, events requiring SSH disclosure can be the result of numerous transactions carried out across a period of time, and sometimes across numerous accounts.

FMA's expectation is that fund managers should ensure that reconciliation of total holdings is carried out with sufficient frequency, to enable identification and disclosure of movements in substantial holdings requiring disclosure immediately that those movements occur.

FMA recommends that fund managers should review their reconciliation procedures and confirm that those procedures are sufficient to ensure any events requiring disclosure are identified and disclosed immediately.

Accuracy

The majority of SSH disclosures during the period were completed accurately. There were, however, occasional errors, such as the 'date of last disclosure' being incorrect. FMA reminds market participants of the need to take all due care in completing SSH disclosure forms.

Summary

FMA's review found that the quality of D&O and SSH disclosures was generally good. However, as set out above, there are some issues with timeliness and accuracy.

It is the obligation of all directors, officers and substantial security holders of public issuers to ensure that they are fully aware of their disclosure obligations, and make timely, accurate disclosure to the market, via NZX, as required. It is also in the interest of public issuers to assist their directors and officers with their obligations.

We expect that public issuers, directors, officers and substantial security holders will reacquaint themselves with the statutory disclosure obligations and review their procedures, in order to improve the quality and timeliness of disclosure to the market.

FMA will continue to monitor D&O and SSH disclosures closely and we will take appropriate, proportionate enforcement action in situations where the disclosure obligations have been breached.

Full details of the precise content required to be disclosed, and the format it should take, can be found in the D&O Regulations and the SSH Regulations. All New Zealand legislation can be found at the website http://www.legislation.govt.nz .

FMA notes that it would be willing to consider issuing guidance in this area, if there are points of concern to financial market participants that would benefit from clarification.