



Securities Act (OM-IP Companies) Exemption Notice 2004

Pursuant to the Securities Act 1978, the Securities Commission gives the following notice (to which is appended a statement of reasons of the Securities Commission).

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Notice

- 1 **Title**
This notice is the Securities Act (OM-IP Companies) Exemption Notice 2004.

- 2 **Commencement**
This notice comes into force on 1 January 2005.

- 3 **Expiry**
This notice expires on the close of 31 December 2009.

- 4 **Interpretation**
(1) In this notice, unless the context otherwise requires,—
 Act means the Securities Act 1978
 Australian prospectus means a document—
 (a) that contains an offer of specified equity securities; and
 (b) that is a prospectus within the meaning of section 9 of the Corporations Act 2001; and

- (c) by means of which it is lawful under the laws of Australia to make an offer of specified equity securities to the public in Australia; and
- (d) that is applicable to the offer of the specified equity securities in New Zealand

Corporations Act 2001 means the Corporations Act 2001 of the Commonwealth of Australia

NZX means New Zealand Exchange Limited

OM-IP company means a company—

- (a) that is incorporated in the Cook Islands as an international company under the International Companies Act 1981-82; and
- (b) in respect of which the only registered holder of equity securities at the time the offer of specified equity securities is made is HSBC Trustee (Cook Islands) Limited (registration number 1080/91, registered at the Ministry of Justice—Companies Section (Domestic Companies)); and
- (c) in respect of which the ultimate beneficial owner of the equity securities is Man Financial Limited (company number 1600658, Registrar of Companies, England); and
- (d) that is registered in Australia, under the laws of Australia, as a foreign company under the Corporations Act 2001

Regulations means the Securities Regulations 1983

specified equity securities means redeemable shares in an OM-IP company.

- (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

- (1) Every OM-IP company and every person acting on its behalf is exempted from the following provisions in respect of any specified equity securities:
 - (a) section 37 of the Act; and
 - (b) section 38A of the Act and regulations 11 to 18 and 21 to 23 of the Regulations; and
 - (c) sections 51 to 54 of the Act.
- (2) Subclause (1)(b) applies in respect of an Australian prospectus only, and not to an investment statement or other advertisement.

- (3) Every OM-IP company and every person acting on its behalf is exempted from section 38(a) of the Act to the extent that that provision requires an Australian prospectus to refer to an investment statement.

6 Australian prospectus

The exemptions in clause 5(1)(a) and (b) are subject to the conditions that—

- (a) there must be an Australian prospectus relating to the specified equity securities at the time that offers of those securities are made or are open for acceptance in New Zealand in reliance on an exemption in clause 5; and
- (b) the Australian prospectus contains no statement referring to listing or intended listing of the specified equity securities on a market operated by NZX other than a statement that has been approved by NZX; and
- (c) it is a term of each offer of the specified equity securities made in New Zealand that the OM-IP company will, within 5 working days of receiving a request of an offeree for a copy of the Australian prospectus, without fee, send, or cause to be sent, to that offeree—
 - (i) a copy of the Australian prospectus; and
 - (ii) copies of any documents that, under the laws of Australia, must accompany a copy of the Australian prospectus sent to any person to whom an offer of the specified equity securities is made in Australia.

7 Documents to be received by Registrar of Companies

The exemptions in clause 5(1)(a) and (b) are subject to the further conditions that—

- (a) before an offer of specified equity securities is made or open for acceptance in New Zealand in reliance on an exemption in clause 5, a copy of each of the following documents has been received by the Registrar of Companies:
 - (i) the Australian prospectus relating to the specified equity securities;
 - (ii) a copy of any document, or part of a document, lodged, under the laws of Australia, with the Australian Securities and Investments Commission that is referred to in the Australian prospectus and is taken to be included in that prospectus under section 712 of the Corporations Act 2001:

- (iii) a copy of any exemption granted by the Australian Securities and Investments Commission that relates to the offer of the specified equity securities:
 - (iv) any certificate or other document evidencing lodgement or registration of the Australian prospectus:
 - (v) the certificate of incorporation of the OM-IP company:
 - (vi) the memorandum and articles of association or other documents, statutes, or instruments constituting or defining the constitution of the OM-IP company:
 - (vii) any documents that amend or supplement any of the documents referred to in subparagraphs (i) to (vi) in existence at the time that the offer of specified equity securities is made or open for acceptance in New Zealand in reliance on an exemption in clause 5; and
- (b) a copy of any document that amends, supplements, or replaces a document referred to in paragraphs (a)(i) to (vi) (other than a document in relation to which a copy must be received under paragraph (a)(vii)) has been received by the Registrar of Companies before any allotment of specified equity securities is made in New Zealand after the amendment, supplement, or replacement takes effect.

8 Investment statements

- (1) The exemptions in clause 5(1)(a) and (b) are subject to the further condition that any investment statement that relates to the specified equity securities concerned—
- (a) includes, to the extent appropriate, statements to the following effect:
 - (i) that allotments of the specified equity securities will be made in the manner specified in the Australian prospectus that relates to those securities and in the manner prescribed under the laws of Australia; and
 - (ii) that investors should satisfy themselves as to the tax implications of investing in the specified equity securities; and

- (iii) that investing in the specified equity securities of the OM-IP company may carry with it a currency exchange risk; and
 - (iv) that the financial reporting requirements applying in New Zealand and those applying to the OM-IP company may be different and the financial statements of the OM-IP company may not be compatible in all respects with financial statements prepared in accordance with New Zealand law; and
 - (v) that the OM-IP company may not be subject in all respects to New Zealand law; and
 - (vi) that the incorporation of the OM-IP company in the Cook Islands may materially affect the availability of information about the company and its directors; and
 - (vii) that although a copy of the Australian prospectus and other documents have been received by the Registrar of Companies, the Australian prospectus has not been registered in New Zealand under New Zealand law and may not contain all the information that a New Zealand registered prospectus is required to contain; and
 - (viii) the general nature and effect of any exemption, order, or declaration that may have been granted by the Australian Securities and Investments Commission in respect of the offer of the specified equity securities; and
 - (ix) that it is not a condition of this notice that the OM-IP company be listed on a market operated by NZX and that, if the OM-IP company is not listed on a market operated by NZX, New Zealand resident investors may not have access to information concerning the OM-IP company in the same way as investors have in relation to an issuer listed on a market operated by NZX; and
- (b) includes information or statements to the following effect, under the heading “Agreement as to Jurisdiction”:
- (i) that, in respect of a dispute concerning the contract for the specified equity securities, the OM-IP company—
 - (A) agrees to submit to the non-exclusive jurisdiction of the New Zealand courts; and

- (B) has instructed the New Zealand agent for service referred to in subparagraph (iii) to accept service on the OM-IP company's behalf; and
 - (C) agrees that this statement is an agreement with each investor for the purposes of section 389(1)(e) of the Companies Act 1993; and
 - (ii) that, despite the statements referred to in subparagraph (i), the contract in respect of the securities may not always be enforceable in New Zealand courts; and
 - (iii) the name and address of a person in New Zealand who has been appointed by the OM-IP company to accept service in New Zealand of any document on its behalf; and
 - (c) contains no statement referring to listing or intended listing of the specified equity securities on a market operated by NZX other than a statement that has been approved by NZX or a statement to the effect that listing of the securities is not being sought; and
 - (d) refers to the Australian prospectus relating to the specified equity securities wherever the Act or Regulations require an investment statement to refer to a registered prospectus.
- (2) The conditions in subclause (1) are not breached if there are differences between the information required to be in the investment statement under that subclause and the information presented in that investment statement, but the differences are immaterial.

9 Offers to be made in Australia at same time

The exemptions in clause 5(1)(a) and (b) are subject to the further condition that, at the same time as offers of the specified equity securities are made or are open for acceptance in New Zealand, offers of the specified equity securities are also made or are open for acceptance in Australia in accordance with the laws of Australia.

10 Further conditions

The exemptions in clause 5 are subject to the further conditions that—

- (a) the Australian prospectus and every investment statement that contains an offer of specified equity securities

by an OM-IP company or a document that accompanies each of them and is referred to in them contains a statement that the OM-IP company will make available or provide to the company's shareholders in New Zealand—

- (i) every annual report of the company, containing audited annual accounts and any quarterly reports provided to the company's shareholders in Australia; and
- (ii) copies of every material contract entered into by the company in each 12-month period; and
- (iii) all the information required under Australian law to be disclosed in Australia to the company's shareholders; and
- (iv) the annual guarantee notices, stating the current amount of the guarantee provided by the guarantor of the obligations of the OM-IP company in respect of the offer of specified equity securities by the OM-IP company; and
- (v) a statement of the incorporation details of the guarantor referred to in subparagraph (iv); and
- (vi) a statement of the registration details of the guarantor referred to in subparagraph (iv) as—
 - (A) a bank that is licensed or otherwise authorised by the central banking authority of a country, state, or territory other than New Zealand to carry on the business of banking in that country, state, or territory; or
 - (B) a registered bank (within the meaning of section 2(1) of the Reserve Bank of New Zealand Act 1989); and
- (vii) all other documents required under Australian law to be lodged with the Australian Securities and Investments Commission and made available to Australian shareholders by companies registered in Australia, under the laws of Australia, as overseas companies; and
- (viii) monthly information regarding the net asset value of the specified equity securities; and
- (ix) a facility enabling shareholders to obtain information regarding the net asset value of the specified equity securities and the funds investment strategy of the company; and

- (x) access to a copy of a register of shareholders of each OM-IP company for inspection during normal office hours; and
- (b) the Australian prospectus within which an offer of the specified equity securities is made in New Zealand contains, or is accompanied by a document that contains—
 - (i) the incorporation details of the OM-IP company; and
 - (ii) a report containing a summary of the implications under New Zealand tax law of investing in the specified equity securities; and
 - (iii) the address of the office in New Zealand at which a copy of the share register of the company may be inspected; and
- (c) the following have been received by the Registrar of Companies before an offer of specified equity securities is made or open for acceptance in New Zealand in reliance on an exemption in clause 5:
 - (i) a copy of the memorandum of appointment of the Australian agent of the OM-IP company in existence at the time that the offer of specified equity securities is made or open for acceptance in New Zealand; and
 - (ii) information about every person who is a director or an officer of the OM-IP company at the time that the offer of specified equity securities is made or open for acceptance in New Zealand, including that person's name and address.

Dated at Wellington this 21st day of December 2004.

The Common Seal of the Securities Commission was affixed in the presence of:

[L.S.]

C. A. N. Beyer,
Member.

Statement of reasons

This notice, which comes into force on 1 January 2005 and expires on 31 December 2009, replaces the Securities Act (OM-IP Companies) Exemption Notice 1999 (SR 1999/426) (the **1999 notice**).

This notice continues to exempt, subject to conditions, offers of specified equity securities in certain companies incorporated in the Cook Islands and registered in Australia as overseas companies from sections 37, 38(a), 38A, and 51 to 54 of the Securities Act 1978 and regulations 11 to 18 and 21 to 23 of the Securities Regulations 1983. The overall effect of these exemptions is that offers of the specified equity securities can be made in New Zealand in a prospectus that complies with Australian law.

This notice differs from the 1999 notice because this notice reflects changes that have been made to the Securities Commission's class exemptions for Australian offers made since 1999. In particular, significant changes have been made to the conditions concerning the provision of documents to the Registrar of Companies and the information that must be contained in an investment statement that relates to specified equity securities.

The Securities Commission considers that it is appropriate to grant the exemptions in this notice for the following reasons:

- the OM-IP companies are incorporated outside Australia, but intend to offer securities in compliance with the laws of Australia. On this basis an exemption similar to the class exemption for offers of equity securities made by Australian companies will provide New Zealand investors with information to assist them to make their investment decisions. The additional conditions require the issuer to provide New Zealand investors with additional periodic information so that those investors will continue to be informed about their investments, and to require a copy of the share register to be maintained in New Zealand so that this can be accessed;
- changes to the 1999 notice have been made to reflect the changes made to the Securities Commission's class exemptions for Australian offers made since 1999.

Issued under the authority of the Acts and Regulations Publication Act 1989.

Date of notification in *Gazette*: 23 December 2004.

This notice is administered by the Securities Commission.
