



Securities Act (Employer Superannuation Schemes) 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 (Employer Superannuation Schemes) Exemption Notice 2004.

2 Commencement

This notice comes into force on 23 July 2004.

3 Expiry

This notice expires on the close of 23 July 2009 (except that clauses 10(2)(b) and 12 expire on the close of 23 October 2004).

4 Interpretation

(1) In this notice, unless the context otherwise requires,—

Act means the Securities Act 1978

custodian does not include a bare trustee

de facto partner has the same meaning as in the Property (Relationships) Act 1976

employer superannuation scheme means a registered superannuation scheme (within the meaning of section 2(1) of the Superannuation Schemes Act 1989) that is promoted by 1 employer only or 1 employer and 1 or more associated persons of that employer

manager means an administration manager or an investment manager (as those terms are defined in section 2(1) of the Superannuation Schemes Act 1989)

Regulations means the Securities Regulations 1983

small employer superannuation scheme means a registered superannuation scheme (within the meaning of section 2(1) of the Superannuation Schemes Act 1989)—

- (a) that is promoted by 1 or more employers or associated persons of 1 or more employers; and
- (b) that was in existence on 1 October 1997; and
- (c) the total assets of which (measured in accordance with generally accepted accounting practice) were less than \$5 million at the end of the financial year to which the most recent annual financial statements for the scheme relate

specified date means, in relation to an annual report for a financial year, the date on which the financial year ends

spouse has the same meaning as in the Property (Relationships) Act 1976.

(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 Exemption from section 37(1) of Act for employer superannuation schemes

Every superannuation trustee of an employer superannuation scheme, and every person acting on the trustee's behalf, is

exempted from section 37(1) of the Act in respect of any interests in that scheme that are offered only to—

- (a) employees of a person promoting the scheme; or
- (b) employees of any associated person of a promoting person; or
- (c) relatives, spouses, de facto partners, or dependants of those employees.

6 Exemption from section 37(1) of Act for small employer superannuation schemes

Every superannuation trustee of a small employer superannuation scheme, and every person acting on the trustee's behalf, is exempted from section 37(1) of the Act in respect of any interests in that scheme that are offered only to—

- (a) employees of a person or persons promoting the scheme; or
- (b) employees of any associated person of a promoting person; or
- (c) relatives, spouses, de facto partners, or dependants of those employees.

7 Condition relating to employer funding of shortfall

- (1) The exemptions in clauses 5 and 6 are subject to the condition that it is a term of the offer that, if there is a shortfall for a financial year, 1 or more specified persons will incur costs (by way of contributions, expense payments, or both), in respect of that year, at least equal to the amount of the shortfall.
- (2) To determine whether there is a **shortfall** for a financial year,—
 - (a) determine the costs of administering the scheme for the year (these are the **administrative costs**); and
 - (b) then determine how much (if any) of the surplus has been applied to meet contribution liabilities, expense payments (which may include administrative costs), or both, for that year (this is the **applied surplus**); and
 - (c) then deduct the applied surplus from the administrative costs (and the remaining amount of administrative costs, if any, is the **shortfall**).
- (3) In this clause—

administrative costs do not include costs that are directly attributable to the management of the investments of the scheme

specified person means the person promoting the scheme or any associated person of that person

surplus means the excess in the value of the scheme's assets over the value of the members' accrued benefits.

8 Condition relating to annual report

The exemptions in clauses 5 and 6 are subject to the condition that it is a term of the offer that each annual report prepared under section 14 of the Superannuation Schemes Act 1989 for a financial year during which the superannuation trustees of the scheme relied on that exemption must include the following statements and information:

- (a) if any superannuation trustee, promoter, or manager of the scheme, or any director of that superannuation trustee, promoter, or manager, has, during the 5 years preceding the specified date, been adjudged bankrupt or insolvent, convicted of any crime involving dishonesty (within the meaning of section 2(1) of the Crimes Act 1961), prohibited from acting as a director of a company, or placed in statutory management or receivership, a statement to that effect including the name and any alternative or former name or names of the superannuation trustee, promoter, manager, or director concerned;
- (b) if more than 10% of the value of the scheme's assets (calculated in accordance with generally accepted accounting practice) was, at any time during the year preceding the specified date, represented directly or indirectly by any securities that were issued by a superannuation trustee, manager, or custodian of the scheme (or any associated person of any of them), a description of those securities;
- (c) a brief description of any legal proceedings or arbitrations that are pending at the specified date and that may have a material adverse effect on the scheme;
- (d) a statement by the superannuation trustees of the scheme (or, if a superannuation trustee is a body corporate or unincorporate, by the directors of that body) as

to whether, in their opinion, after due enquiry by them, either or both of the following have materially and adversely changed since the specified date:

- (i) the value of the scheme's assets relative to its liabilities (including contingent liabilities):
 - (ii) the ability of the scheme to pay its debts as they become due in the normal course of business:
- (e) a statement as to whether a person was required (under the terms of the offer required by clause 7) to incur costs for that financial year and, if so, a statement that those costs have been incurred.

9 Condition relating to requests for investment objectives and policy of scheme

The exemptions in clauses 5 and 6 are subject to the condition that it is a term of the offer that—

- (a) the superannuation trustees of the scheme must send, or cause to be sent, to any member who requests it a description of the investment objectives and policy for the scheme or of the means by which changes can be made to those objectives and that policy (except to the extent that those matters have been disclosed in the investment statement); and
- (b) they must do so within 5 working days of receiving the member's request and without fee.

10 Condition relating to investment statements

- (1) The exemption in clause 5 (which relates to employer superannuation schemes) is subject to the condition that a statement in the following form is included at the end of the statement required by clause 1(1) of Schedule 3D of the Regulations in the investment statement for the scheme:

“WARNING—RESTRICTED DISCLOSURE

The law requires that persons considering whether to join a superannuation scheme must be supplied on request with a prospectus about that scheme.

However, this employer superannuation scheme has been exempted from this requirement under the Securities Act

(Employer Superannuation Schemes) Exemption Notice 2004.

You should be aware that in choosing to become a member of this superannuation scheme you may be doing so on the basis of more limited information than is generally available to investors making important decisions about investments. However, every prospective member of this scheme has a right, under the Superannuation Schemes Act 1989, to request to receive certain information about the scheme (including a copy of the trust deed).”

- (2) The exemption in clause 6 (which relates to small employer superannuation schemes) is subject to the condition that one of the following statements is included at the end of the statement required by clause 1(1) of Schedule 3D of the Regulations in the investment statement for the scheme:
 - (a) a statement in the form set out in subclause (1); or
 - (b) a statement in the form set out in clause 1(2) of Schedule 3D of the Regulations as in force immediately before 15 April 2004 (which is the date on which the Securities Amendment Act 2004 came into force).
- (3) Subclause (2)(b) expires on the close of 23 October 2004.
- (4) The exemptions in clauses 5 and 6 are subject to the further condition that the terms of the offer referred to in clauses 7(1), 8, and 9 are stated in the investment statement for the scheme.
- (5) Subclause (4) applies to small employer superannuation schemes only from the close of 23 October 2004.

11 Most of exemption notice does not apply to employer superannuation schemes exempted by section 5A of Act
Nothing in this notice (except clause 12) applies to an offer of an interest in a superannuation scheme that is exempted under section 5A of the Act (which relates to employer superannuation schemes).

12 Transitional exemption for small employer superannuation schemes previously exempted by Regulations

- (1) This clause applies to a small employer superannuation scheme as defined in regulation 2C of the Regulations as in force immediately before 15 April 2004 (which is the date on

which the Securities Amendment Act 2004 came into force) that is exempt under section 5A of the Act.

- (2) Every superannuation trustee of a small employer superannuation scheme, and every person acting on the trustee's behalf, is exempted from clause 1(2) of Schedule 3D of the Regulations.
- (3) This exemption is subject to the condition that the investment statement for the scheme includes, at the end of the statement required by clause 1(1) of Schedule 3D of the Regulations, a statement in the form set out in clause 1(2) of Schedule 3D of the Regulations as in force immediately before 15 April 2004.
- (4) This clause expires on the close of 23 October 2004.

Dated at Wellington this 20th day of July 2004.

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

[L.S.]

J. Diplock,
Chairperson.

Statement of reasons

This notice, which comes into force on 23 July 2004 and expires on 23 July 2009, exempts 2 types of employer superannuation schemes from the registered prospectus requirements of the Securities Act 1978 (the Act).

The notice exempts superannuation schemes promoted by an employer (or associated persons) and offered to its employees or employees of associated persons (or to relatives, spouses, de facto partners, or dependants of those employees). This exemption applies to schemes that would have come within the exemption for employer superannuation schemes in section 5A of the Act except for any or all of the following reasons:

- the offer is only made to employees, etc, but it is not a term of the trust deed itself that only these persons may be admitted to membership of the scheme so membership is not strictly conditional on being an employee, etc:

- it is a term of the offer, but it is not a term of the trust deed itself (so is not a legal requirement for the scheme), that the employer will incur costs to cover any shortfall in the administrative costs of the scheme:
- those employer costs are incurred by an associated person of the employer, rather than the employer itself:
- those employer costs are incurred in respect of the year in which there is a shortfall, but not in that year itself:
- the employer (or associated person) does not incur costs equal to the full administrative costs of the scheme, but the surplus of the scheme is applied to meet contribution liabilities, expense payments (including administrative costs), or both, and the employer incurs costs at least equal to the difference between that applied surplus and the administration costs.

The notice also exempts small employer superannuation schemes. The key differences from the other employer superannuation schemes are that these schemes may have more than 1 unassociated participating employer, but must have total assets of less than \$5 million and have been in existence on 1 October 1997. This exemption is similar to that previously contained in regulation 2C of the Securities Regulations 1983 (the **Regulations**) before they were amended by the Securities Amendment Act 2004. These schemes would have come within the exemption in section 5A of the Act except for the reasons (set out above) applying to the other employer superannuation schemes or because they have more than 1 unassociated participating employer.

Both exemptions are subject to conditions similar to those applying to employer superannuation schemes exempted under section 5A of the Act. The main differences (other than those relating to the employer costs requirement, which are covered above) are that—

- the annual report must state whether the employer was required to incur costs to fund any shortfall; and
- the employer costs requirement (in clause 7), the requirement as to the annual report (in clause 8), and the requirement to respond to requests for the investment objectives and policy of the scheme (in clause 9) must be included, as terms of the offer, in the investment statement (except there is a transitional period of 3 months during which this condition does not apply to small employer superannuation schemes, to allow

them to continue using their existing investment statements);
and

- for a transitional period of 3 months, small employer superannuation schemes may continue to use the statement warning of restricted disclosure in the form previously required by the Regulations.

These exemptions do not apply to employer superannuation schemes that are in fact exempt under section 5A of the Act (which means that it is clear which exemption and related conditions apply in each case).

However, there is an additional transitional exemption for small employer superannuation schemes (as previously defined in regulation 2C of the Regulations) that were previously exempt under section 5(2E) of the Act but are exempt now under section 5A of the Act. As with small employer superannuation schemes relying on this notice, for 3 months these schemes may continue to use the statement warning of restricted disclosure in the form previously required by the Regulations.

The Securities Commission (the **Commission**) considers that it is appropriate to grant the exemptions because—

- the Commission considers that the purpose of section 5A of the Act is to grant an exemption from the requirement to have a registered prospectus to employer superannuation schemes where the costs of the scheme are met by the employer. Some schemes meet this policy purpose, but are unable to comply with the terms of the statutory exemption for various technical reasons. The Commission considers that it is consistent with the purpose of the Act to grant an exemption to extend the effect of the exemption in section 5A of the Act to these schemes, and to schemes that previously enjoyed the benefit of the section 5(2E) exemption for small employer superannuation schemes before the Securities Amendment Act 2004 came into force:
- the Commission is of the view that it is appropriate to have a transitional period in which issuers of schemes that previously enjoyed the benefit of the exemption in the Regulations for small employer superannuation schemes can rely on the exemption from the requirement to have a registered prospectus while using their existing investment statements. The

content of those existing investment statements is sufficiently similar to the content required under the new exemptions that the benefit of immediately preparing new investment statements is outweighed by the cost of doing so.

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

Date of notification in *Gazette*: 22 July 2004.

This notice is administered by the Securities Commission.
