



Takeovers Code (Professional Underwriters) Exemption Notice 2004

Pursuant to section 45 of the Takeovers Act 1993, the Takeovers Panel gives the following notice (to which is appended a statement of reasons of the Takeovers Panel).

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Notice

1 Title

This notice is the Takeovers Code (Professional Underwriters) Exemption Notice 2004.

2 Commencement

This notice comes into force on its notification in the *Gazette*.

3 Interpretation

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

Act means the Takeovers Act 1993

additional voting rights, in relation to any person who has increased voting control, means the portion of the voting rights in a code company held or controlled by the person that corresponds to the person's increase in voting control

Code means the Takeovers Code approved by the Takeovers Code Approval Order 2000 (SR 2000/210)

control percentage means the percentage of voting rights in a code company that a person holds or controls

professional underwriter means a person whose ordinary business includes entering into bona fide underwriting or subunderwriting contracts with respect to offers of securities
upstream party, in relation to a person, means any other person who directly or indirectly has effective control over the person.

- (2) Any term or expression that is defined in the Act or the Code and used, but not defined, in this notice has the same meaning as in the Act or the Code.

4 Exemption from rule 6(1) of Code

Every person who is, or is an upstream party of, a professional underwriter is exempted from rule 6(1) of the Code in respect of any increase in the person's voting control.

5 Condition of exemption

The exemption in clause 4 is subject to the condition that—

- (a) the increase in the person's voting control results only from the allotment or transfer to the professional underwriter of voting securities in a code company under a bona fide underwriting or subunderwriting contract entered into in the professional underwriter's ordinary course of business; and
- (b) the purpose of the professional underwriter's entry into the underwriting or subunderwriting contract is to earn fees, commission, or similar remuneration; and
- (c) neither the professional underwriter nor any upstream party of the professional underwriter had a collateral purpose or intention, in respect of the professional underwriter's entry into the underwriting or subunderwriting contract, of enabling any or all of the following persons to increase their control percentage:
 - (i) the professional underwriter;
 - (ii) the upstream parties of the professional underwriter;
 - (iii) the associates of the professional underwriter; and
- (d) immediately before the professional underwriter's entry into the underwriting or subunderwriting contract, the

- aggregate of the control percentages of the person and the person's associates did not exceed 5%; and
- (e) the control percentage of the person is decreased within 6 months after the increase in the person's voting control so that the person and the person's associates hold or control in total not more than 20% of the voting rights in the code company; and
 - (f) the additional voting rights of the person are not exercised before the decrease of the person's control percentage required by paragraph (e).

6 Takeovers Code (Class Exemptions) Notice (No 2) 2001 amended

The Takeovers Code (Class Exemptions) Notice (No 2) 2001 (SR 2001/170) is amended by revoking—

- (a) the definition of **underwriter** in clause 3(1); and
- (b) clause 19.

Dated at Wellington this 20th day of May 2004.

The Common Seal of the Takeovers Panel was affixed in the presence of:

[L.S.]

J. C. King,
Chairperson.

Statement of reasons

Clause 19 of the Takeovers Code (Class Exemptions) Notice (No 2) 2001 exempted underwriters from the fundamental rule, rule 6(1) of the Takeovers Code (the **Code**), because professional underwriting agreements can inadvertently lead to a breach of the fundamental rule.

The Takeovers Panel became aware that there may be some uncertainty regarding whether the exemption in clause 19 of the Takeovers Code (Class Exemptions) Notice (No 2) 2001 applies to corporate investors who seek to use underwriting agreements as a means of increasing control in code companies. The Panel did not

intend the class exemption to apply in such circumstances. In these circumstances, where appropriate, a specific exemption may be sought from the Panel. Alternatively, shareholder approval under rule 7(d) of the Code could be sought, provided that an appropriate exemption from rule 16(b) of the Code is first obtained.

The Panel decided to amend the exemption for underwriters from rule 6(1) of the Code to make it clear that it does not apply if an underwriter has a collateral intention in respect of the underwriting agreement of enabling any person to increase that person's voting control in a code company. Also, the exemption will not apply where the underwriter and its associates already hold more than 5% of the voting control of the code company.

The Panel considers that it is appropriate to grant an exemption to professional underwriters, and upstream parties of professional underwriters, from rule 6(1) of the Code because—

- underwriting arrangements are an accepted means of assisting companies to raise capital in New Zealand, which should be facilitated by the Panel; and
- the allotments pursuant to the underwriting agreements to which the exemption applies would not change the effective control of the code company.

The Panel considers that the exemption is consistent with the objectives of the Code because—

- it is a condition of the exemption that any increase in voting control is eliminated within 6 months and the additional voting rights are not exercised before that elimination; and
- it maintains a proper relation between the costs of compliance with the Code and the benefits resulting from it.

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

Date of notification in *Gazette*: 27 May 2004.

This notice is administered by the Takeovers Panel.
