

THE SECURITIES ACT 1978 -  
REFORM OF THE LAW ABOUT  
PUBLIC OFFERS OF SECURITIES

1. Introduction

This is a status report for the information of interested parties and their professional advisers on progress with the reform of the law about offers of new securities to the public.

On 4 July 1983 the Securities Regulations 1983 (SR 1983/121) were enacted along with the Securities Act Commencement Order 1983 (SR 1983/119) which will bring into force the sections of the Securities Act 1978 not yet in force. Both the Regulations and the Order commence on 1 September 1983. In the meantime, the Securities Commission is making use of its power to give exemptions to persons and classes of persons from compliance with provisions of the Act and regulations so that exemptions will also take effect from 1 September 1983.

2. Main Features of the New Regime

The provisions of the Securities Act and Regulations governing the means by which offers of securities may be made to the public replace the corresponding provisions of the Companies Act 1955, the Syndicates Act 1973, and the Protection of Depositors Act 1968.

The main features of the new rules are as follows:-

(a) Security

The term "security" is widely defined, and is subdivided

into three categories - equity securities (ordinary shares), debt securities (borrowings) and participatory securities (the remainder). With certain exceptions, securities may only be offered to the public (again widely defined) pursuant to a registered prospectus. In addition, in the case of a debt security, there must be a trustee and trust deed, and, in the case of a participatory security, a statutory supervisor and deed of participation.

(b) Prospectus

The requirements for the contents of a prospectus for each category of securities are set out in the Schedules to the Securities Regulations. They aim for full disclosure supported by audited accounts prepared in accordance with current accounting practice. (The prospectus accounting requirements are lengthy, but it is expected that many issuers will be able to comply with only minor modification to their existing accounting information.) Provision is made for a "short form prospectus" omitting repetitious financial data in cases, such as rights issues to existing shareholders, where the offerees already have had the accounts. The Commission has power to suspend or cancel the registration of a prospectus which it considers to be, or to have become, false or misleading. The Act requires that prospectuses be registered with the Registrar of Companies.

(c) Restrictions on Allotment of Securities

As a general rule, an allotment of a security that was

offered to the public is invalid and of no effect if there was no registered prospectus. Before allotment, the issuer must hold a completed application form which was distributed in or with a registered prospectus. The date of allotment must not be more than nine months after the date of the latest balance sheet set out in the prospectus.

(d) Trust Deeds and Deeds of Participation

The Regulations contain a limited number of requirements relating to the content of trust deeds and deeds of participation. Trustees and statutory supervisors must be either trustee corporations or persons approved for the purpose by the Commission.

(e) Other Obligations of Issuer

Issuers must keep registers of securities, proper accounting records and, within one month of an allotment, issue certificates evidencing the securities to subscribers.

(f) Advertising

The restrictions against advertising in the Companies Act 1955 are replaced by a regime under which issuers are free to advertise in any manner that is not likely to mislead, deceive or confuse, is not inconsistent with the registered prospectus and complies with the Regulations. Advertising consisting of more than the information specified in the Regulations (r.17(3)) must be supported by a certificate to the effect that the advertisement has been seen by two directors, and that it conforms with the Act and Regulations.

The Act gives the term "advertising" a wide meaning - it can cover virtually any form of publication "that contains or refers to" an offer of securities or that is "reasonably likely to induce persons to subscribe for securities". The term is not limited to advertisements for which payment is made or accepted.

The Securities Commission is empowered to prohibit the distribution of an advertisement if it considers that the advertisement contravenes these rules.

### 3. Transitional Provisions

There is a lead time of 2 months from enactment to commencement of the regulations which should enable all those who will be affected to take steps to comply with them, or, where appropriate, to apply to the Commission for exemption. The regulations contain special provisions regarding offers of securities under the Companies Act 1955, the Protection of Depositors Act 1968, and the Syndicates Act 1973, that are "in the pipeline" when the regulations come into force. These allow prospectuses to be registered under the old rules for up to one month after the commencement date of the Securities Regulations, and to remain in force up to 31 March 1984.

### 4. Exemptions

Section 5(5) of the Act authorises the Commission to issue to any person or class of persons revocable exemptions from compliance with any of the provisions of Part II of the Act or of the regulations on such terms and conditions as it thinks

fit. This power enables the Commission to vary the application of the Act and Regulations where appropriate.

As at 21 July 1983, the Commission had approved 13 draft exemptions which have been developed in conjunction with interested parties. The terms of the exemptions will be published in the GAZETTE on 1 September 1983. On publication in the GAZETTE, the exemption notices become part of the law along with the Act and Regulations. Copies of the current draft of the exemption notices are attached and are briefly summarised as follows:-

- (1) Charitable Trust Boards - Trust Boards incorporated under the provisions of the Charitable Trusts Act 1957 will be exempted from the prospectus provisions in relation to their borrowings (issues of debt securities) and the requirement to obtain a director's certificate for advertisements (Regulation 17). The exemption also provides that a trust board may have its audit conducted by any member of the New Zealand Society of Accountants, rather than requiring a report by a "qualified auditor" as provided for in the Act.
- (2) Religious Organisations - Religious organisations named in the notice will have the same exemption as that granted for trust boards in relation to debt securities issued by them.
- (3) Charitable and Other Purposes - Issuers of debt securities (other than natural persons) which operate exclusively for

charitable, educational, religious or recreational purposes or as a chamber of commerce or trade or professional union or association will have a two part exemption. The first part relates to offers and allotments of debt securities and provides an exemption similar to that granted to charitable trust boards, except that there is a monetary limit. The exemption is available only where the sums raised in any 12 month period aggregate not more than \$200,000 and the outstanding amount due on all debt securities allotted by the organisation does not exceed \$1 million. The second part relates to offers of membership and exempts those organisations from the prospectus requirements, director's certificates for advertisements, and the appointment of a statutory supervisor in connection with those offers. (In the terms of the Act, memberships are participatory securities, and would otherwise incur the prospectus and related requirements.) This exemption is available only if members' rights are limited to use of the organisation's property (as is the case with many sporting and recreational facilities) and their liabilities are limited to the payment of such fees or subscriptions as may be approved by members. This exemption should remove the fund-raising activities of most sporting and recreational clubs from the application of the Securities Act prospectus requirements.

(4) Commercial Bill and Money Market Dealers - An exemption is

available to approved dealers to facilitate operations in commercial bills and in the wholesale money markets. An exemption will be available to named dealers in commercial bills of exchange and other types of "two-party" instruments for not less than \$20,000 where the dealer undertakes liability for payment. The effect of the exemption will be to dispense with the need for a trust deed in respect of those instruments and to exempt other parties to the instruments from compliance with the prospectus requirements of the Act. The dealer will be required to have a current prospectus relating to his affairs available to all persons on request.

Further terms of exemption relating to deposit-taking activities and promissory notes depend on the corporate structure of the issuer. For those specialists who confine their activities to dealing with sophisticated investors, the Commission will consider applications for an exemption from having to provide a prospectus and application form for each transaction, or to state in the registered prospectus all of the terms of the offer, on the understanding that the exemption will not be used for issues to the general public. There is no exemption in this case from the requirement to have a trustee and a trust deed. The dealer/merchant bank is required to have a current prospectus available upon request. These conditions apply to deposits without limitation as to the amount involved and to the issue of promissory notes made

by the dealer of not less than \$20,000. For those financial companies who operate both as merchant banks and in the traditional finance company role of making issues to the general public, a similar exemption will be available except that it will apply only to deposits and promissory notes in denominations in excess of \$50,000 to ensure that issues are not made under these more relaxed conditions to the general public.

(5) Continuous Issuers - Issuers of debt securities to persons who already hold debt securities of the same class will be exempted from the requirement that allotments can only be made on receipt of a form of application distributed or contained in a registered prospectus so long as the investor is the holder of a security of the same class and a current prospectus was previously provided to him. This means, for example, that operators of passbook savings schemes and other continuous issuers will not need to provide a prospectus with every deposit so long as the conditions of the exemption are met. In addition, issuers who regularly take deposits from members of the public will be exempt from the requirement that they send certificates evidencing each transaction so long as depositors receive monthly statements.

(6) Arrangements and Reconstructions - Issuers of securities allotted pursuant to a compromise or arrangement sanctioned by the Court under s.205 of the Companies Act 1955 -



- (a) Where the requisite meeting is held on or before 1 September 1983, will be exempted from the prospectus and advertising requirements;
- (b) Where the meeting takes place after 1 September 1983, will be exempted only from the requirement that allotments must be made on a form of application attached to or contained in a registered prospectus.
- (7) Renewals and Variations - The Act provides that a renewal or variation of the terms of an existing security is itself a security. Where the proposed variation of a security (such as an amendment to a company's Articles of Association) does not have the effect of extending the time for payment of money, then the issuer will be exempted from the prospectus requirements of the Act but must send written statements to all security holders, describing the variation and its general purpose and effect. In other cases, issuers will be exempt only from the requirement that allotments must be made on a form of application that was attached to or contained in a registered prospectus.
- (8) Trustee Companies - Trustee companies which offer shares or units in their own Group Investment Funds will be exempted from the requirement to appoint a statutory supervisor.

- (9) Overseas Companies - Overseas companies whose securities are listed on specified foreign stock exchanges will be exempted from compliance with the Act and the Regulations in respect of offers and allotments of those listed securities to persons in New Zealand provided that the offer is made only to persons who already hold securities of that company.
- (10) Credit Unions - Credit Unions will be exempted from certain provisions of the Act where those provisions differ from the requirements imposed by the Friendly Societies and Credit Unions Act 1982. The relevant provisions relate to the obligation to: (a) maintain a share register; (b) open the register for inspection; (c) appoint a certified public accountant as an auditor; and (d) issue share certificates.
- (11) Options and Convertible Securities - The Act applies to the offer and allotment of options, share warrants, convertible notes and convertible preference shares. This exemption will make it clear that issuers are exempted from compliance with the Act in respect of the securities that will be allotted upon exercise of the option or conversion rights.
- (12) Consumers Co-operative Society (Manawatu) Ltd. - The Consumers Co-operative Society (Manawatu) Ltd. will be granted an exemption from the requirements of the Act relating to the appointment of a statutory supervisor and

the need to have a prospectus in respect of the offer and allotment of memberships. In addition, the exemption allows the Society to offer and allot debt securities to its members without requiring that the allotment be based on an application form attached to the registered prospectus provided the member has previously received a current registered prospectus.

- (13) Existing Issues - - Whilst the regulations contain transitional provisions for companies and other issuers with an existing prospectus requirement, there are no such provisions for issuers who will incur a statutory prospectus requirement for the first time. The Commission will consider any special problems which arise for this group of issuers in relation to issues opening before 1 September 1983.

5. Applications for Exemption

It will not be necessary to apply for those exemptions which are to be issued as class exemptions relating to all issuers of securities defined in the notices of exemption. Copies of the draft notices are attached, and further copies are available from the Commission. Applications are required for the exemptions mentioned in paragraphs 4(2) (Religious Organisations), 4(4) (Bills of Exchange), and 4(13) (Existing Issues) - and are being received by the Commission.

Applicants who wish to ask for particular consideration should write to the Executive Director, Securities Commission, P.O. Box 1179, Wellington, giving the following information:-

- (a) The name of the applicant, postal address and telephone number.
- (b) If the application is made on behalf of a group of issuers, particulars, including names, of the members of the group.
- (c) A brief description of the activities of the applicant and of the securities which it issues or intends to issue. Current financial statements and samples of relevant documents are usually required.
- (d) A list of the specific provisions of the Act and the draft regulations from which the applicant seeks to be exempted and a brief statement as to the reasons why the applicant considers an exemption should be granted from those provisions.

6. Contributory Mortgages

The Securities Regulations 1983 do not include the Commission's proposals on contributory mortgages. The first draft of these was published in December 1981, submissions have been received from interested parties and the Commission's second draft was sent to them in September 1982. Consultations are continuing. When these have been completed, a separate recommendation for regulations will be made.

7. Code of Advertising Practice

The Commission has decided that many points of detail which might be included in regulations about financial

advertising are appropriately dealt with in the Code of Advertising Practice. This is a voluntary code administered by the Committee of Advertising Practice. The Committee has been in existence for many years as part of the self-regulatory mechanism within the media and advertising industries. The Committee, in consultation with the Commission, has completed a revision of the section of the code that deals with financial advertising. Advisers to issuers will need to be familiar with the Code as well as with the Act and Regulations.