

OVERSEAS ISSUERS - NEW ISSUES - PROPOSED

EXEMPTION NOTICE 1995

STATEMENT OF PROPOSALS BY THE SECURITIES COMMISSION

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Background

In November 1994 the Commission issued a Discussion Paper (the "Discussion Paper") setting out proposals for an exemption notice that would facilitate the offering of primary issues of equity securities by overseas issuers to the New Zealand public, and attaching a draft of that proposed exemption notice for public comment.

The proposals contained in the Discussion Paper had their origin in an application received by the Commission for such an exemption in relation to the English market.

The Commission has received 26 submissions in response to the invitation for comment on the various questions raised in the Discussion Paper. A list of those persons who made submissions is attached as Appendix A.

The Commission has reviewed the responses received from the public and proposes a number of amendments to the original draft notice. Given the potentially important impact of the proposed exemption notice on the New Zealand securities market the Commission is providing this statement of proposals to give interested persons the opportunity for further comment before the exemption is finalised. A copy of the amended draft notice (the "Draft Notice") is attached as Appendix B.

Public Responses to Issues Raised by the Commission

The Discussion Paper invited the public to respond specifically on three issues, namely:

1. Whether there should be an exemption of the type proposed;
2. Whether it should be a condition of exemption that the overseas issuer must be listed on the New Zealand Stock Exchange ("NZSE") as well as a recognised exchange (as listed in the First Schedule to the original draft notice); and
3. Whether there should be a condition of exemption that the overseas issuer submits to the jurisdiction of the New Zealand Courts.

A summary of the public responses to the issues raised in the Discussion Paper indicates:

General Policy

Respondents were overwhelmingly of the view that there should be an exemption of the type proposed in the Discussion Paper. The general purpose of the proposed exemption is to provide increased opportunity for New Zealand investors to take part in overseas issues while substantially lowering the compliance and transaction costs for overseas issuers. None of the submissions received were opposed to this general policy.

Should the Overseas Issuer be Listed on the NZSE and a Recognised Exchange?

The majority of respondents were of the view that it should not be a condition of exemption that the overseas issuer be listed on both the NZSE and a recognised exchange.

While most respondents acknowledged the advantages of dual listing in theory, it is clear from the responses that the overriding factor against such a condition would be the additional compliance costs to the overseas issuer. Most respondents believed that such additional costs would discourage overseas issuers from making offers in New Zealand. No respondent attempted to quantify this cost.

Should the Overseas Issuer Submit to the Jurisdiction of New Zealand Courts?

Of those respondents who commented on this issue the majority were against the inclusion of a condition that requires the overseas issuer to submit to the jurisdiction of the New Zealand Courts. The main reason appears to be that the overseas issuer would not want the law of a jurisdiction of which it knows little to apply to itself. It was argued that such a condition would, in most instances, dissuade overseas issuers from offering securities in New Zealand. Two respondents suggested that the law governing the overseas issuer should be sufficient to protect all investors, including New Zealand investors, given that the overseas issuer must be incorporated in a jurisdiction previously approved by the Commission.

Two respondents believed that the overseas issuer should submit to the jurisdiction of the New Zealand Courts. Both thought this would enable New Zealand investors to enforce their rights more cheaply than if there was no such condition.

Other Comments

Respondents also commented on the following matters:

- (a) Should the exemption be extended to apply to other securities?: It was suggested in several submissions that the exemption should be extended to apply to offers of debt and participatory securities made by overseas issuers. In particular, it was argued that there would be greater interest in the notice if it applied to managed funds, such as unit trusts;

- (b) Solicitors certificate: Some respondents considered that the requirement in clause 3(e)(v) of the original draft notice, which required a New Zealand solicitor to sign a certificate that all the terms and conditions of the notice have been complied with, was unreasonable because there were a number of aspects of compliance which a New Zealand solicitor acting for the overseas issuer would not be in a position to know with certainty. It was noted that the existing exemption for Australian issuers under the Securities Act (Australian Issuers) Exemption Notice 1994 was worded so that an Australian solicitor might sign the certificate. It was suggested that a similar approach should be taken in the present instance;
- (c) Agent for service: It was argued by a number of respondents that the requirement that the overseas issuer retain an agent for service in New Zealand while New Zealand investors hold securities will prove unduly onerous and costly, and in any event the New Zealand investor would be unlikely to succeed in having an action against the overseas issuer heard by the New Zealand Courts; and
- (d) Differences in accounting standards: Two respondents were of the view that the notice should require the overseas issuer to include, in the prominent statement required by clause 4(2)(d), a statement as to whether there were any material differences between the GAAP or other accounting standards used in preparation of the financial statements for the overseas prospectus and those that would be applicable if the same financial statements were prepared in accordance with New Zealand GAAP.

The Commission's View of the Issues Raised in the Discussion Paper

Having considered the public responses to the Discussion Paper the Commission has reached the following views:

- (a) *That it should not be a condition of exemption that the overseas issuer be listed on both the NZSE and a recognised exchange:*

The Commission considers that compliance with the requirements of a recognised exchange is sufficient, particularly given that the Commission must have previously approved of that exchange and the particular jurisdiction.

The Commission proposes that clause 4(2)(d) of the Draft Notice, the "health warnings" clause, include reference in the prominent statement to the fact that the overseas issuer is not required to be listed in New Zealand and that New Zealand investors may not always have ready access to information concerning that overseas issuer if the overseas issuer is not listed on the NZSE (see clause 4(2)(d)(viii) of the Draft Notice).

- (b) It should not be a condition of exemption that the overseas issuer submit to the jurisdiction of the New Zealand Courts.***

The Commission is of the view that the overseas issuer should not have to submit to the jurisdiction of the New Zealand Courts on the basis that the advantage to New Zealand investors will, at best, be modest and the complexity and costs involved with such an undertaking may dissuade overseas issuers from making offers in New Zealand.

Again the Commission has preferred the addition of a new "health warning" in clause 4(2)(d) of the Draft Notice to the effect that the overseas issuer may not be subject to New Zealand law (see clause 4(2)(d)(iv) of the Draft Notice).

- (c) The exemptions granted should apply to offers of debt and participatory securities made by overseas issuers.***

Given the general policy behind the Draft Notice, and in recognition of the large number of New Zealand investors that invest in securities other than equities, the Commission is of the opinion that the exemptions granted by the Draft Notice should apply to offers of securities of an overseas issuer that are "quoted securities", as defined in section 2(1) of the Draft Notice, be they offers of equity, debt or participatory securities. The fact of quotation on a recognised exchange is considered to be sufficient and necessarily implies that the overseas issuer is listed on that exchange. The use of the term "quoted" in reference to securities is consistent with the NZSE Listing Rules and amendments approved recently to the Securities Act (Overseas Companies) Exemption Notice 1995.

Notwithstanding the above, the Commission is of the view that the exemptions granted should only apply to offers of quoted securities which are in the nature of rights, options, convertible securities, warrants and the like when the overseas issuer is also the issuer of the underlying security. For this reason we have added clause 5 to the Draft Notice. This clause has the effect of excluding offers of quoted securities from the ambit of the exemptions granted where the overseas issuer is not also the issuer of the underlying security.

- (d) The certificate required by clause 3(e)(v) of the Draft Notice should be signed by the lawyer to the overseas issuer.***

Consistent with the approach taken in the Securities Act (Australian Issuers) Exemption Notice 1994 the Commission has decided that the lawyer's certificate required by clause 3(e)(v) of the Draft Notice should be signed by the lawyer to the Overseas Issuer, not a New Zealand solicitor.

- (e) It should be a condition of exemption that the overseas issuer appoint an agent in New Zealand.***

Notwithstanding the arguments raised by respondents against such a condition the Commission has decided to retain this requirement.

- (f) There should be a health warning regarding the potential differences in accounting standards.*

In the opinion of the Commission it is not practical to include a specific requirement that an overseas issuer identify and note any material differences between the accounting standards used in preparation of the financial statements included in the overseas prospectus and those that would be applicable if the financial statements were prepared in accordance with New Zealand GAAP. A general "warning" statement is likely to be a sufficient warning to prospective investors. The Draft Notice has been amended to include such a warning (see clause 4(2)(d)(iii)).

Other Amendments to the Draft Notice

In the course of its review the Commission has also made the following decisions:

- (a) The Draft Notice should apply only to jurisdictions and stock exchanges which have applied to the Commission for inclusion.*

The Commission proposes that any person in any other jurisdiction may apply, with the sponsorship of the relevant stock exchange, to the Commission for the inclusion of that jurisdiction and stock exchange in the Schedules to the Draft Notice. No jurisdiction should receive special treatment. Accordingly, at this stage there are no jurisdictions or stock exchanges listed in the Schedules to the Draft Notice. In considering any application the Commission will have regard to the law of the jurisdiction, the rules of the relevant stock exchange and the resources and procedures utilised in their enforcement.

The Commission intends that Australian issuers will also be able to take advantage of the extension of the exemptions to securities other than equities. The Commission intends to retain the current exemptions available to Australian issuers in respect of offers of equity securities, as contained in the Securities Act (Australian Issuers) Exemption Notice 1994 (with any necessary consequential amendment). For this reason the definition of "quoted securities" in the Draft Notice excludes offers of equity securities made by Australian issuers. We also intend to retain the Securities Act (Australian Unit Trusts) Exemption Notice 1993 in respect of Australian unit trusts. Issuers of interests in unit trusts which are quoted on the Australian Stock Exchange will have the option of using either the Australian unit trusts exemption or the Draft Notice should they wish to market those unit trusts in New Zealand. However we would expect the existing notice to apply almost exclusively in future to unlisted trusts.

- (b) Any advertisement issued by an overseas issuer should state that the offer contained in that advertisement is authorised or instigated by or on behalf of the overseas issuer or prepared with the co-operation of, or by arrangement with, the overseas issuer.*

In relation to advertising material distributed in New Zealand, the existing requirements of the Securities Act 1978 and Securities Regulations 1983 will continue to apply to an overseas issuer.

The Commission has been concerned that there might be a practical problem in enforcing these rules against an overseas issuer who does not have an office in New Zealand. For this reason the Commission proposes the inclusion of a requirement that the overseas issuer must have been involved in the release of the advertisement in New Zealand (see clause 4(2)(b)(iv) of the Draft Notice). The words used come directly from the definition of "advertisement" in section 2(1) of the Securities Act 1978.

(c) An overseas prospectus (as defined in the Draft Notice) should not be treated as an advertisement for the purposes of the Draft Notice.

The Commission proposes to grant overseas issuers an exemption from the need to comply with section 38A of the Securities Act 1978 and regulations 11 to 19, 21 and 22 of the Securities Regulations 1983 (in addition to regulation 23), but only where the offer of quoted securities is made in an overseas prospectus. That is, an overseas prospectus is not treated as an advertisement for the purposes of the Draft Notice. The reason for this is that an overseas prospectus, although an "advertisement" under the Securities Regulations 1983, may, under the law of the relevant jurisdiction, be required or permitted to include information of the kind excluded by these provisions. If such an exemption is not granted this may frustrate the policy of the Draft Notice.

Minor Drafting Amendments

Submissions received also suggested a number of other minor drafting amendments. The Commission has made a number of drafting changes to the Draft Notice.

Invitation

The Commission invites submissions from interested persons on the proposals set out in this paper.

All submissions should be in writing and should be forwarded to the Commission at the following address by 9.00 a.m. on Monday 12 June 1995-

Ms Victoria March
Securities Commission
P.O.Box 1179
Wellington
Facsimile: (64 4) 472-8076

APPENDIX A

Association of Investment Advisors and Financial Planners Inc
Bank of New Zealand
Bell Gully Buddle Weir (Wgtn)
Bell Gully Buddle Weir (Auck)
Brent Wheeler & Co Limited
Chapman Tripp Sheffield Young (Wgtn)
Coopers & Lybrand (Auck)
Deloitte Touche Tohmatsu (Auck)
Department of Justice
Institute of Directors of New Zealand (Incorporated)
Kirkland & Ellis (New York)
Legal & Professional Investment Services Limited
Life Office Association of New Zealand
Morrison Morpeth (Wgtn)
National Mutual
New Zealand Law Society
New Zealand Stock Exchange
Office of the Banking Ombudsman
Ontario Securities Commission
Porter Wigglesworth & Grayburn
Price Waterhouse (Auck)
Reserve Bank of New Zealand
Rudd Watts & Stone
Russell McVeagh McKenzie Bartleet & Co (Auck)
Southpac Corporation Limited
Trustee Corporations Association of New Zealand

APPENDIX B

The Securities Act (Overseas Issuers) Exemption Notice 1995

Latest Draft (10 May 1995)

PURSUANT to the Securities Act 1978 the Commission gives the following notice.

Notice

1. **Title and commencement** - (1) This notice may be cited as the Securities Act (Overseas Issuers) Exemption Notice 1995.
(2) This notice shall come into force on the day after the date of its notification in the Gazette.

2. **Interpretation** - (1) In this notice, unless the context otherwise requires -

"The Act" means the Securities Act 1978:

"Competent authority" means a statutory or regulatory authority, or governing body of any recognised exchange, as may be authorised under the law of a specified country or the law of any state, territory or province of a specified country to accept overseas prospectuses for lodgement or registration:

"Lodged" means lodged under the law of a specified country or the laws of any state, territory or province of a specified country; and "lodgment" has a corresponding meaning:

"Overseas issuer" means a company incorporated under the laws of a specified country, or the laws of any state, territory or province of a specified country:

"Quoted securities" in relation to an overseas issuer means securities of which that overseas issuer is the original allotter:

- (a) which are quoted or which have been approved for quotation on the principal official list of a recognised exchange; or
- (b) in respect of which application has been made to a recognised exchange for quotation on that exchange's principal official list and all requirements of the recognised exchange relating to the application that can be complied with by the overseas issuer on or before the date of the offer have been duly complied with,

but, where the overseas issuer is a company incorporated in a state, territory or province of the Commonwealth of Australia, does not include equity securities:

Recognised exchange" means a stock exchange listed in the First Schedule:

"Registered" means registered under the law of a specified country or the laws of any state, territory or province of a specified country; and "registration" has a corresponding meaning:

"Specified country" means a country listed in the Second Schedule:

"The Regulations" means the Securities Regulations 1983.

(2) Any term or expression that is not defined in this notice, but that is defined in the Act or the Regulations, has the meaning given to it by the Act or the Regulations.

3. **Meaning of "overseas prospectus"** - For the purposes of this notice, the term "overseas prospectus", in relation to an overseas issuer, means a document -
- (a) that contains an offer of quoted securities in, or by, that overseas issuer; and
 - (b) that, with the exception of those statements that are included pursuant to clauses 4(2)(c) and (d) of this notice, is identical to a document that is lodged or registered under the law of a specified country or any state, territory or province of a specified country and which is signed by such persons (if any) as are required by such law to sign that document; and
 - (c) by means of which it is lawful under the law of that specified country or any state, territory or province of that specified country to make an offer of those quoted securities to the public; and
 - (d) that contains no statement referring to a listing or intended listing on the New Zealand Stock Exchange other than a statement that has been approved by the New Zealand Stock Exchange; and
 - (e) a copy of which has been deposited with the Registrar of Companies at Wellington together with a copy of -
 - (i) the certificate of incorporation of the overseas issuer;
 - (ii) the memorandum and articles of association or other documents, statutes or instruments constituting or defining the constitution of the overseas issuer;
 - (iii) every document to which Clause 4(2)(c)(i) to (iii) applies;

- (iv) any certificate or other document evidencing lodgment or registration of the document with the relevant competent authority; and
- (v) a certificate signed by a person authorised by the law of the specified country to carry on the business of giving legal advice to the public that all the terms and conditions of this notice have been complied with.

4. **Overseas issuers exempt from compliance with certain provisions of the Securities Act 1978 and the Securities Regulations 1983** - (1) Subject to sub-clauses (2), (3) and (4) of this clause, every overseas issuer and every person acting on its behalf is exempted from compliance with the provisions of section 33 of the Act and regulation 23 of the Regulations in respect of any offer of quoted securities of which it is the issuer.

(2) The exemption granted by sub-clause (1) of this clause is subject to the conditions that -

- (a) the offer is made in, or accompanied by, an overseas prospectus; or
- (b) the offer is made in an advertisement that -
 - (i) refers to an overseas prospectus that relates to all the securities referred to in the advertisement and states the date and place of lodgment or registration of the overseas prospectus; and
 - (ii) states that allotments of the securities shall be made in the manner specified in the overseas prospectus and in the manner prescribed under the law of the jurisdiction in which the overseas prospectus is lodged or registered; and

- (iii) specifies the place or places at which an overseas prospectus may be obtained, or contains a coupon or coupons to be completed by any person who wishes to be sent an overseas prospectus, or both; and
 - (iv) states that the offer contained in the advertisement is authorised or instigated by or on behalf of the overseas issuer, or prepared with the co-operation of, or by arrangement with, the overseas issuer; and
 - (v) complies with the provisions of the Act and the Regulations relating to advertisements, as if references in those provisions to a registered prospectus are references to an overseas prospectus, this paragraph (v) not to apply in respect of any provisions compliance with which is exempted pursuant to this notice; and
 - (vi) contains no statement referring to a listing or intended listing on the New Zealand Stock Exchange other than a statement that has been approved by the New Zealand Stock Exchange; and
- (c) the overseas prospectus contains, or is accompanied by a document which contains, a statement that -
- (i) a copy of any material contract referred to in the overseas prospectus, as required by the law of the specified country or the competent authority ;
 - (ii) if any such material contract is not in writing, a copy of any memorandum containing particulars of the contract; and

- (iii) if an exemption, order or declaration has been granted by any competent authority in respect of that offer of quoted securities a copy of that exemption, order or declaration,

may be inspected at the office of the Registrar of Companies at Wellington;and

- (d) the overseas prospectus contains, or is accompanied by a document which contains, a prominent statement that -

- (i) investors should satisfy themselves as to the tax implications of investing in the quoted securities of the overseas issuer;
- (ii) investing in the securities of overseas issuers carries with it a currency exchange risk;
- (iii) the financial reporting standards of New Zealand and those applying to the overseas issuer may be different and the financial statements of the overseas issuer may not be compatible in all respects with financial statements prepared in accordance with the Securities Act 1978 and the Financial Reporting Act 1993;
- (iv) the offer and allotment of the quoted securities will be governed by the overseas prospectus and the law of the jurisdiction in which the overseas prospectus has been registered or lodged, or by which the offer of quoted securities pursuant to the overseas prospectus is expressed to be governed, and the overseas issuer may not be subject to New Zealand law;
- (v) the contract in respect of the quoted security may not be enforceable in New Zealand courts;

- (vi) the overseas prospectus has not been registered in New Zealand under and in accordance with New Zealand law and may not contain all the information which a New Zealand registered prospectus is required to contain;
- (vii) describes the general nature and effect of any exemption, order or declaration which may have been granted by any competent authority in respect of that offer of quoted securities;
- (viii) the overseas issuer is not required to be listed on the New Zealand Stock Exchange and New Zealand investors may not have access to information concerning the overseas issuer in the same way as investors in an issuer listed on the New Zealand Stock Exchange; and
- (ix) the overseas issuer undertakes to ensure that, at all times while New Zealand resident persons hold such quoted securities, it has an agent in New Zealand for the purpose of receiving documents as described in clause 4(4) of this notice and states who that person is at the time of the offer.

(3) The exemption granted by sub-clause (1) of this clause is subject to the further condition that at the same time as offers of the quoted securities are made in New Zealand offers of the quoted securities are also made in the particular specified country by means of the overseas prospectus.

(4) The exemption granted by sub-clause (1) of this clause is subject to the further condition that before the overseas issuer or other person acting on its behalf as the case may be offers quoted securities in New Zealand, the overseas issuer or person acting on its behalf appoints, and at all times while New Zealand resident persons hold such quoted securities has, an agent in New Zealand for the purpose of receiving

documents in the manner prescribed by sections 389 and 390 of the Companies Act 1993 as if the agent had been named as being authorised to accept service in New Zealand on behalf of the overseas issuer.

(5) Every overseas issuer, and every person acting on its behalf, is exempted from compliance with the provisions of sections 37 and 37A of the Act in respect of any offer of quoted securities of which it is the issuer made in an overseas prospectus.

(6) (a) Every overseas issuer, and every person acting on its behalf, is exempted from compliance with the provisions of section 38A of the Act and regulations 11 to 19, 21 and 22 of the Regulations in respect of any offer of quoted securities of which it is the issuer made in an overseas prospectus.

(b) The exemptions granted by paragraph (a) of this sub-clause shall not apply in respect of any offer of quoted securities which is made in an advertisement other than an overseas prospectus.

(7) Every overseas issuer that is a company incorporated under the law of a specified country or any corresponding previous law, and every person acting on its behalf, is exempted from compliance with the provisions of sections 51 to 54 of the Act in respect of any quoted securities of which it is the issuer offered to the public for subscription by means of an overseas prospectus.

5. Application to convertible securities- Nothing in this notice applies in respect of any offer of a quoted security that:

- (a) will or may be converted into, or exchanged for, another security; or
- (b) confers a present or future right to subscribe for another security,

if the issuer of that other security will not be the issuer of the quoted security.

First Schedule

Second Schedule