

Securities (Disclosure) Amendment Bill

Government Bill

As reported from the committee of the whole
House

This bill was formerly part of the Securities Disclosure and Financial Advisers Amendment Bill as reported from the Commerce Committee. The committee of the whole House has further amended the bill and has divided it into the following bills:

- This bill comprising Part 1
 - Financial Advisers Amendment Bill comprising Part 2
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Securities (Disclosure) Amendment Bill

Key to symbols used in reprinted bill

**As reported from the committee of the whole
House**

text inserted

Hon Simon Power

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Securities (Disclosure) Amendment Act **2009**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

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3 Principal Act amended

This Part amends the Securities Act 1978.

4 Interpretation

Section 2(1) is amended by inserting the following definitions in their appropriate alphabetical order:

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“**delayed allotment order** means an order made by the Commission under **section 44A(2) or (3)** that delays the date of allotment of a security that is offered in a simplified disclosure prospectus

“**disclosure obligation** means—

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“(a) the requirements of the continuous disclosure provisions as defined in section 19D of the Securities Markets Act 1988; and

“(b) any obligation that—

“(i) requires ongoing disclosure of information to the public or to a person who has a role in monitoring the person who disclosed the information; and

“(ii) is imposed by an enactment; and

“(iii) is specified in the regulations 5

“**offered in a simplified disclosure prospectus** means an offer of securities to the public for subscription that is made—

“(a) by or on behalf of an issuer; and

“(b) in, or accompanied by, a simplified disclosure prospectus 10

“**prohibition order** means an order made by the Commission under **section 44AE(1)** that prohibits a person from using a simplified disclosure prospectus

“**simplified disclosure prospectus** means a registered prospectus that may be used only if— 15

“(a) the issuer is subject to a disclosure obligation; and

“(b) the regulations provide for the use of a simplified disclosure prospectus by a person who is subject to that type of disclosure obligation”.

5 Construction of references to offering securities to the public 20

(1) Section 3(2)(a) is amended by inserting the following subparagraph after subparagraph (ia):

“(iib) persons who have each previously paid a minimum subscription price of at least \$500,000 for securities (the **initial securities**) in a single transaction before the allotment of the initial securities, provided that— 25

“(A) the offer of the securities is made by the issuer of the initial securities; and 30

“(B) the offer of the securities is made within 18 months of the date of the first allotment of the initial securities:”.

(2) Section 3(8) is amended by inserting “or **(iib)**” after “subsection (2)(a)(ia)”. 35

(3) Section 3(9) is amended by adding “or **(iib)**”.

6 New section 3A inserted

The following section is inserted after section 3:

“3A Status of examples

- “(1) An example used in this Act is only illustrative of the provisions to which it relates. It does not limit those provisions. 5
- “(2) If an example and a provision to which it relates are inconsistent, the provision prevails.”

7 Exemptions from this Act

- (1) Section 5(1)(d) is amended by omitting “1952:” and substituting “1952); or”. 10
- (2) Section 5(2CA)(a)(ii) is amended by inserting “or, if the securities are to be offered in a simplified disclosure prospectus, a copy of that prospectus” after “investment statement”.
- (2A) Section 5(2CB)(a) is amended by inserting “in New Zealand” after “the only persons”. 15
- (3) Section 5 is amended by inserting the following subsection after subsection (2CB):
- “(2CBA) Nothing in Part 2 (except sections 38B and 58) or the regulations applies in respect of a security if—
- “(a) the only persons in New Zealand who are able, under the terms of the offer of the security, to subscribe for the security are— 20
- “(i) eligible persons; and
- “(ii) persons who fall within 1 or more of the categories set out in subparagraphs (i) to (iii) of section 3(2)(a); and 25
- “(b) the subscriber is either—
- “(i) an eligible person; or
- “(ii) a person who falls within 1 or more of the categories set out in subparagraphs (i) to (iii) of section 3(2)(a).” 30
- (4) Section 5(2CC) is amended by omitting “subsection (2CB)” and substituting “subsections (2CB) and **(2CBA)**”.
- (5) Section 5(2CD) is amended by omitting “6 months” and substituting “12 months”. 35
- (6) Section 5 is amended by inserting the following subsection after subsection (2CD):

- “(2CDA) To avoid doubt, for the purposes of subsections (2CC)(a) and (2CD), **person** includes—
- “(a) the trustees of a trust acting jointly in their capacity as trustees of that trust; and
 - “(b) the sole trustee of a trust acting in his, her, or its capacity as trustee of that trust.”
- (7) Section 5(2CE) is amended by repealing paragraph (c) and substituting the following paragraph:
- “(c) the person to whom the offer is made signs a written acknowledgment, before the security is allotted to the person, that—
 - “(i) the financial service provider has given the person neither an investment statement nor a registered prospectus relating to the security; and
 - “(ii) the person understands that he, she, or it will not receive information usually provided by an issuer in respect of an offer of securities to the public including (in particular) an investment statement and a registered prospectus.”
- 8 Restrictions on distribution of prospectuses** 20
- Section 34 is amended by adding the following subsection:
- “(3) However, subsection (2)(a) does not apply to a simplified disclosure prospectus.”
- 9 Void irregular allotments** 25
- Section 37 is amended by inserting the following subsection after subsection (1):
- “(1A) No allotment of a security that is offered in a simplified disclosure prospectus may be made—
- “(a) by a person who is subject to a prohibition order while that order is in force; or
 - “(b) in contravention of **section 44AD(1)**.”
- 10 Consent for purposes of section 37AC(1)(c) or (d)**
- (1) Section 37AD(1)(b) is amended by adding the following subparagraph:

“(vii) if the security is offered in a simplified disclosure prospectus, a copy of that simplified disclosure prospectus.”

- (2) Section 37AD is amended by inserting the following subsection after subsection (1): 5

“(1A) However, subsection (1)(b)(iv) and (v) do not apply to securities that are offered in a simplified disclosure prospectus.”

11 Voidable irregular allotments

- (1) Section 37A(1) is amended by inserting the following paragraph after paragraph (a): 10

“(ab) in the case of a security that is offered in a simplified disclosure prospectus,—

“(i) the subscriber did not receive, before subscribing for the security, a copy of—

“(A) that simplified disclosure prospectus; and 15

“(B) every memorandum of amendments to that prospectus that is registered by the Registrar under section 43 before the time of allotment; or

“(ii) the Commission made a delayed allotment order in relation to that simplified disclosure prospectus and the subscriber subscribed for the security before the delayed allotment order was made; or” 20

- (2) Section 37A is amended by inserting the following subsection after subsection (1): 25

“(1AA) However, subsection (1)(a) does not apply to securities that are offered in a simplified disclosure prospectus.”

- (3) Section 37A(3) is amended by omitting “shall (whether or not the issuer is being in liquidation) be” and substituting “is 30 (whether or not the issuer is in liquidation)”.

12 New heading and sections 44A to 44AG inserted

The following heading and sections are inserted after section 44:

*“Delayed allotment orders and prohibition
orders concerning simplified disclosure
prospectuses*

“44A Commission may make delayed allotment orders

- “**(1)** This section applies if the Commission is of the opinion that the issuer of a security that is offered in a simplified disclosure prospectus—
- “**(a)** has disclosed information in the prospectus that has not previously been publicly disclosed under the issuer’s disclosure obligations, and that information is adverse to the issuer or the scheme and is material to the offer of the security; or
- “**(b)** has disclosed information under the issuer’s disclosure obligations between the date of the prospectus and the allotment date, and that information is adverse to the issuer or the scheme and is material to the offer of the security; or
- “**(c)** has failed to comply with the issuer’s disclosure obligations at any time during the previous 12 months.
- “**(2)** If either **subsection (1)(a) or (b)** applies, the Commission may, if it considers that it is desirable in the public interest, make an order delaying the date of allotment for the securities that are offered in a simplified disclosure prospectus for a period not exceeding 14 days from the date of allotment stated in the terms of the offer.
- “**(3)** If **subsection (1)(c)** applies, the Commission may, if it considers that it is desirable in the public interest, make an order delaying the date of allotment for the securities that are offered in a simplified disclosure prospectus until a date not exceeding the later of—
- “**(a)** 14 days after the date of allotment stated in the terms of the offer; or
- “**(b)** 14 days after the date on which the issuer’s failure to comply with the issuer’s disclosure obligations is remedied.
- “**(4)** The Commission may make a delayed allotment order on the terms and conditions that the Commission thinks fit (which may include a condition that the issuer disclose or give public

notice of specified information in any manner that the Commission thinks fit in the circumstances).

- “(5) The Commission may vary a delayed allotment order in the same way as it may make the order.
- “(6) The Commission may revoke a delayed allotment order, on the terms and conditions it thinks fit, if it is satisfied that it should not continue in force. 5
- “(7) In this section, **issuer’s disclosure obligations** means the disclosure obligations that an issuer is subject to and that the issuer has relied on in order to permit the issuer to use a simplified disclosure prospectus in accordance with the regulations and the definition of simplified disclosure prospectus. 10

“44AB Notices and submissions concerning delayed allotment orders

- “(1) The Commission may make a delayed allotment order only if— 15
- “(a) the Commission gives the issuer at least 3 days’ written notice of the following matters before the Commission makes the delayed allotment order:
- “(i) the paragraph of **section 44A(1)** that is alleged to apply to the issuer; and 20
- “(ii) the proposed terms and conditions of the delayed allotment order; and
- “(iii) the reasons for the proposed delayed allotment order; and 25
- “(b) the Commission gives the issuer an opportunity to make a written submission within that notice period; and
- “(c) the Commission has regard to any written submissions made to it within that notice period.
- “(2) If the Commission makes a delayed allotment order,— 30
- “(a) it must, immediately after the making of the order, notify the issuer of—
- “(i) the terms and conditions of the order; and
- “(ii) the reasons for the order; and
- “(b) it must, immediately after the making of the order, give notice on its Internet site of— 35
- “(i) the terms and conditions of the order; and
- “(ii) the reasons for the order; and

- “(iii) the information that is adverse to the issuer or the scheme and is material to the offer of the security, or the nature of the issuer’s failure to comply with the issuer’s disclosure obligations; and
- “(iv) any other information the Commission thinks relevant in the circumstances; and 5
- “(c) it may give public notice by any other means of the matters in **paragraph (b)**; and
- “(d) it may notify any other person of the matters in **paragraph (b)**. 10
- “(3) If the Commission varies or revokes a delayed allotment order under **section 44A(5) or (6)**,—
- “(a) it must immediately notify the issuer of—
- “(i) the terms and conditions of the variation or revocation; and 15
- “(ii) the reasons for the variation or revocation; and
- “(b) it may give notice on its Internet site or give public notice by any other means of those matters; and
- “(c) it may notify any other person of those matters.
- “44AC Limited notice and submissions for urgent delayed allotment orders 20**
- If the Commission thinks it necessary or desirable in the public interest for a delayed allotment order to be made more urgently than **section 44AB** permits,—
- “(a) it may give less than 3 days’ notice before it makes the order, and the notice and submissions may be oral, not written; but 25
- “(b) it must include in that notice the reasons for acting urgently and must otherwise comply with that section.
- “44AD Effect of delayed allotment orders 30**
- “(1) No allotment of a security that is offered in a simplified disclosure prospectus to which a delayed allotment order applies may be made—
- “(a) in contravention of the terms or conditions of the delayed allotment order or of its revocation; or 35
- “(b) if a term or condition of the delayed allotment order remains unfulfilled; or

- “(c) until after the delayed allotment order expires or is revoked.
- “(2) If a person contravenes **subsection (1), section 37(1A)(b)** and (4) to (7) apply (which provide that an allotment of a security that is offered in a simplified disclosure prospectus in contravention of **subsection (1)** is invalid and of no effect). 5
- “(3) If the Commission makes a delayed allotment order and a subscriber has subscribed for a security that is offered in a simplified disclosure prospectus to which that delayed allotment order applies before the Commission made the delayed allotment order, **section 37A(1)(ab)(ii)** and (3) to (8) apply (which provide that an allotment of a security in those circumstances is voidable at the instance of the subscriber by notice in writing). 10

Example 15

Issuer A makes an offer of securities to the public for subscription in a simplified disclosure prospectus. Tom subscribes for some of those securities. After Tom has subscribed for the securities, the Commission makes a delayed allotment order that applies to the simplified disclosure prospectus. **Section 37A(1)(ab)(ii)** and (3) to (8) apply. 20

In these circumstances, Issuer A's options may include the following:

- (a) Issuer A may ask Tom if he wants to resubscribe for the securities. In this case, Issuer A could obtain Tom's permission to use the money that Tom paid Issuer A when he originally subscribed for the securities (**Tom's subscription money**) to resubscribe for those securities after the date on which the delayed allotment order was made. Issuer A may then allot those securities to Tom (once the delayed allotment order has expired or has been revoked) without contravening **section 37A(1)(ab)(ii)**; or 25
- (b) Issuer A could withdraw the offer or take some other similar course of action. If Issuer A withdraws the offer it must pay Tom's subscription money back to him. Tom's subscription money must be held in trust for him until it is repaid (see section 36A); or 30
- (c) Issuer A could allot the securities to Tom (once the delayed allotment order has expired or has been revoked) without Tom having resubscribed for the securities. In this case, the allotment would be valid (see section 37A(5)), but it is voidable at the instance of Tom (see section 37A(3)) 40

Example—*continued*

and Issuer A has committed an offence (see **sections 37A(1)(ab)(ii)** and 59(1)).

Tom's options include the following:

- (a) Tom may decide to leave Tom's subscription money with Issuer A and use that money to resubscribe for the securities. If Issuer A agrees to this, Issuer A may allot those securities to Tom (once the delayed allotment order has expired or has been revoked) without contravening **section 37A(1)(ab)(ii)**; or 5
- (b) Tom may require Issuer A to pay Tom's subscription money back to him. Tom's subscription money must be held in trust for him until it is repaid (see section 36A); or 10
- (c) Tom may decide to take no action at all. In this case, if Issuer A allots the securities to Tom (once the delayed allotment order has expired or has been revoked), the allotment would be valid (see section 37A(5)), but it is voidable at the instance of Tom (see section 37A(3)) and Issuer A has committed an offence (see **sections 37A(1)(ab)(ii)** and 59(1)). If Issuer A does not allot the securities to Tom, Issuer A must pay Tom's subscription money back to him (see section 36A). 15 20

Regardless of which option is taken by Issuer A or Tom, if Issuer A allots securities to Tom in contravention of **section 44AD(1)** (for example, by allotting the securities to Tom before the delayed allotment order has expired or has been revoked), that allotment is invalid and of no effect (see **sections 44AD(1), (2), and (4)** and **37(1A)(b)** and (4) to (7)) and Issuer A has committed offences (see sections 59(1) and 60(2)). 25

“(4) **Subsections (1) and (2)** override **subsection (3)**.

“(5) This section applies despite anything in the terms of the offer. 30

“44AE Commission may make prohibition orders

“(1) If the Commission is satisfied that a person (**person A**) who is subject to a disclosure obligation has failed to comply with that obligation at any time during the previous 12 months, the Commission may, if it considers that it is desirable in the public interest, make an order prohibiting person A from using a simplified disclosure prospectus for a period not exceeding 24 months. 35

“(2) The Commission may make a prohibition order on the terms and conditions that the Commission thinks fit. 40

- “(3) The Commission may vary a prohibition order in the same way as it may make the order.
- “(4) The Commission may, either of its own volition or on the application of the person concerned, revoke or suspend a prohibition order, on the terms and conditions it thinks fit, if it is satisfied that it should not continue in force. 5

“44AF Notices and submissions concerning prohibition orders

- “(1) The Commission may make a prohibition order only if—
- “(a) the Commission gives the person concerned (**person A**) at least 14 days’ written notice of the following matters before the Commission makes the prohibition order: 10
- “(i) the nature of person A’s failure to comply with his, her, or its disclosure obligations; and
- “(ii) the proposed terms and conditions of the prohibition order; and 15
- “(iii) the reasons for the proposed prohibition order; and
- “(b) the Commission gives person A an opportunity to make a written submission within that notice period; and
- “(c) the Commission has regard to any written submissions made to it within that notice period. 20
- “(2) If the Commission makes a prohibition order,—
- “(a) it must, immediately after the making of the order, notify person A of—
- “(i) the terms and conditions of the order; and 25
- “(ii) the reasons for the order; and
- “(b) it must, immediately after the making of the order, give notice on its Internet site of—
- “(i) the terms and conditions of the order; and
- “(ii) the reasons for the order; and 30
- “(iii) the nature of person A’s failure to comply with his, her, or its disclosure obligations; and
- “(iv) any other information the Commission thinks relevant in the circumstances; and
- “(c) it may give public notice by any other means of the matters in **paragraph (b)**; and 35
- “(d) it may notify any other person of the matters in **paragraph (b)**.

- “(3) If the Commission varies, revokes, or suspends a prohibition order under **section 44AE(3) or (4)**,—
- “(a) it must immediately notify person A of—
- “(i) the terms and conditions of the variation, revocation, or suspension; and 5
- “(ii) the reasons for the variation, revocation, or suspension; and
- “(b) it may give notice on its Internet site or give public notice by any other means of those matters; and
- “(c) it may notify any other person of those matters. 10

“44AG Effect of prohibition orders

If the Commission makes a prohibition order,—

- “(a) a person who is prohibited by that order from using a simplified disclosure prospectus must not, while the prohibition order is in force,— 15
- “(i) make an offer of securities to the public in, or accompanied by, a simplified disclosure prospectus; or
- “(ii) distribute a simplified disclosure prospectus that relates to a security; or 20
- “(iii) allot securities offered in a simplified disclosure prospectus; and
- “(b) **section 37(1A)(a)** and (4) to (7) apply (which provide that an allotment of a security that is offered in a simplified disclosure prospectus by a person who is subject to 25 a prohibition order while that order is in force is invalid and of no effect).”

13 Registration of trust deeds and deeds of participation

Section 46(3) is amended by omitting “under his or her hand”.

14 Power of Court to grant relief in certain cases 30

- (1) Section 63(1)(a) is amended by omitting “securities;” and substituting “securities; or”.
- (2) Section 63(1)(b) is amended by omitting “advertisement;” and substituting “advertisement; or”.

15 Regulations and Orders in Council

Section 70(1) is amended by inserting the following paragraph after paragraph (ca):

“(d) specifying obligations that are disclosure obligations for the purposes of this Act.”.

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Legislative history

21 July 2009

Divided from Securities Disclosure and Financial Advisers Amendment Bill (Bill 13–2) by committee of the whole House as Bill 13–3A
