



Takeovers Code (Trustee Corporations) Exemption Notice 2001

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 (Trustee Corporations) Exemption Notice 2001.

2 Commencement

This notice comes into force on 15 December 2001.

3 Interpretation

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

Act means the Takeovers Act 1993

aggregate capacity means a trustee capacity in which the trustee corporation is acting as a trustee of a unit trust, group investment fund, or superannuation scheme; but does not include a trustee capacity if—

- (a) a person (other than the trustee corporation or any of its related companies) is acting as manager of that trust; or
- (b) the trust is a passive index fund

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

excluded associate, in relation to a trustee corporation, means a person who is an associate of the trustee corporation solely by virtue of the trustee corporation acting in 1 or more trustee capacities (other than any aggregate capacity)

manager, in relation to a trust, means a manager, an investment manager, or an administration manager of the trust, or a person acting in any similar capacity in relation to the trust, if that manager, investment manager, administration manager, or person in effect makes any determination as to how voting rights held or controlled by the trustee corporation in respect of the trust are exercised

non-associate, in relation to a person, means any person who is not an associate of the person

passive index fund means a trust that—

- (a) holds securities as near as practically possible to the securities' proportions in an index; and
- (b) is the subject of a ruling from the Inland Revenue Department—
 - (i) to the effect that gains realised from the sale of securities by the trust in order to match the composition and weighting of the index will not be taxable under provisions of the Income Tax Act 1994; and
 - (ii) that is subject to a condition that the trust will not exercise voting rights on the trust's securities

personal capacity means any capacity in which a person is acting other than in a trustee capacity

related capacity, in relation to a trustee capacity (the **first capacity**), means—

- (a) any other trustee capacity (the **second capacity**) if—
 - (i) the trusts relating to the first capacity and the second capacity have substantially the same beneficiaries, members, principals, or purposes, and neither trust is a passive index fund; or
 - (ii) the trustee corporation is operating the trusts relating to the first capacity and the second capacity jointly or in concert in relation to the holding

- or control of voting rights in a code company (except in respect of custodial arrangements); or
- (iii) each of the trusts relating to the first capacity and the second capacity has a person (other than the trustee corporation or any of its related companies) acting as a manager, the managers are the same person or related companies, and neither trust is a passive index fund; or
- (iv) the first capacity and the second capacity are both aggregate capacities; and
- (b) any personal capacity if—
 - (i) the first capacity is an aggregate capacity; or
 - (ii) the trustee corporation is operating in that personal capacity and in the first capacity jointly or in concert in relation to the holding or control of voting rights in a code company (except in respect of custodial arrangements)

trust means any arrangement in which a trustee corporation is acting in a trustee capacity

trustee capacity, in relation to a person, means a capacity in which the person is acting in its ordinary course of business as—

- (a) a trustee of a unit trust, group investment fund, superannuation scheme, or charitable trust; or
- (b) a trustee, agent, or nominee for any person, estate of a deceased person, or purpose; or
- (c) an executor or administrator of an estate of a deceased person

trustee corporation means—

- (a) a trustee company within the meaning of section 2 of the Trustee Companies Act 1967; or
- (b) the Public Trustee or the Public Trust Office constituted by the Public Trust Office Act 1957

unrelated capacity, in relation to a trustee capacity, means any capacity that is not a related capacity.

- (2) In this notice, a reference to a person increasing voting control is a reference to the person becoming the holder or controller of an increased percentage of the voting rights in a code company.

- (3) 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 Exemptions for trustee corporations

- (1) Every trustee corporation is exempted from rule 6(1) of the Code in respect of any increase in that trustee corporation's voting control.
- (2) The exemption is subject to the conditions that,—
- (a) if the increase arises in the course of the trustee corporation acting in a personal capacity, the increase would comply with rule 6(1) of the Code if the voting rights held or controlled as follows were held and controlled solely by a non-associate of the trustee corporation:
- (i) by the trustee corporation acting in a trustee capacity other than an aggregate capacity:
 - (ii) by excluded associates:
 - (iii) by the trustee corporation's related companies who hold or control voting rights in a trustee capacity, except to the extent that those voting rights are held or controlled for the trustee corporation in a personal capacity or any of its other related companies in a personal capacity; and
- (b) if the increase arises in the course of the trustee corporation acting in a trustee capacity, the increase would comply with rule 6(1) of the Code if the voting rights held or controlled as follows were held and controlled solely by a non-associate of the trustee corporation:
- (i) by the trustee corporation acting in any unrelated capacity:
 - (ii) by associates of the trustee corporation (other than the related voting rights specified in sub-clause (3)); and
- (c) each of the trustee corporation, its related companies, and (to the best of the trustee corporation's knowledge) any person who is an associate of the trustee corporation in respect of the capacity in which the trustee corporation increases its voting control does not have a purpose of defeating, or enabling any other person to defeat, the objectives of the Code as a result of the increase.

- (3) For the purposes of subclause (2)(b)(ii), the related voting rights are voting rights held or controlled by an associate of the trustee corporation if the trustee corporation and the associate are associates in respect of the capacity in which the trustee corporation increases its voting control or a related capacity.

5 Exemption for non-excluded associates of trustee corporations

- (1) Every person who is an associate of a trustee corporation (other than an excluded associate) is exempted from rule 6(1) of the Code in respect of any increase in that person's voting control.
- (2) The exemption is subject to the condition that the increase would comply with rule 6(1)(a) of the Code if the voting rights held or controlled by the trustee corporation acting in a trustee capacity, other than the voting rights held or controlled acting as follows, were held solely by a non-associate of the person:
 - (a) in a trustee capacity for the person or an associate of the person:
 - (b) in a trustee capacity in respect of which the trustee corporation and the person are associates or in any related capacity:
 - (c) in an aggregate capacity.

6 Exemption for excluded associates of trustee corporations

- (1) Every person who is an excluded associate is exempted from rule 6(1) of the Code in respect of any increase in that person's voting control.
- (2) The exemption is subject to the condition that the increase would comply with rule 6(1)(a) of the Code if the voting rights held or controlled by the trustee corporation acting as follows were held and controlled solely by a non-associate of the person:

- (a) in any capacity other than the capacity in respect of which the trustee corporation and the person are associates:
- (b) in respect of a passive index fund.

Dated at Wellington this 11th day of December 2001.

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

[L.S.]

John King,
Chairperson.

Statement of reasons of Takeovers Panel

The Takeovers Panel has granted exemptions for trustee corporations and their associates from compliance (in certain circumstances) with rule 6(1) of the Takeovers Code. These exemptions, which are set out in this notice, come into force on 15 December 2001. The exemptions are designed to ensure that the underlying purpose and intent of the Code is fulfilled in a manner that recognises the unique position of trustee corporations and their associates.

The exemption in *clause 4* is appropriate because it enables trustee corporations to treat separately (for the purposes of the Code) voting rights held or controlled by them in separate and distinct capacities. The exemption is consistent with the objectives of the Code because—

- it reduces the costs to and potential difficulties for trustee corporations that could arise from their various unrelated capacities being aggregated for the purposes of the Code, while ensuring that related capacities are not treated separately; and
- it does not apply if there is a purpose of defeating the objectives of the Code.

The exemptions in *clauses 5 and 6* are appropriate because they ensure that the associates of trustee corporations that they apply to need not consider, for the purposes of rule 6(1) of the Code, voting

rights held or controlled by trustee corporations in capacities that should be regarded as unrelated to those associates. The exemptions are consistent with the objectives of the Code because they reduce the costs to and difficulties for those associates that could arise from having to take into account for the purposes of the Code trustee corporations' various unrelated capacities, while ensuring that capacities of trustee corporations which should be considered related to those associates are not treated separately.

Issued under the authority of the Acts and Regulations Publication Act 1989.
Date of notification in *Gazette*: 13 December 2001.
This notice is administered by the Takeovers Panel.
