

Version
as at 5 February 2022



Financial Markets Conduct (Wholesale Investor Exclusion—\$750,000 Minimum Investment) Exemption Notice 2017

(LI 2017/3)

Financial Markets Conduct (Wholesale Investor Exclusion—\$750,000 Minimum Investment) Exemption Notice 2017: revoked, on the close of 4 February 2022, by clause 3.

Pursuant to section 556 of the Financial Markets Conduct Act 2013, the Financial Markets Authority, being satisfied of the matters set out in section 557 of that Act, gives the following notice.

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Notice

1 Title

This notice is the Financial Markets Conduct (Wholesale Investor Exclusion—\$750,000 Minimum Investment) Exemption Notice 2017.

Note

The Parliamentary Counsel Office has made editorial and format changes to this version using the powers under subpart 2 of Part 3 of the Legislation Act 2019.

Note 4 at the end of this version provides a list of the amendments included in it.

This notice is administered by the Financial Markets Authority.

2 Commencement

This notice comes into force on 5 February 2017.

3 Revocation

This notice is revoked on the close of 4 February 2022.

4 Interpretation

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

Act means the Financial Markets Conduct Act 2013

application, in relation to an investor (**B**), means an application for the financial products that is made by B

Bloomberg means the product information page or pages for debt securities made available by electronic means on the Bloomberg Professional service that is provided (directly or indirectly) by Bloomberg Finance L.P. (a limited partnership incorporated in the United States of America)

Kauri bond means an unsubordinated debt security that—

- (a) is denominated in New Zealand dollars and recorded in a financial products register kept in New Zealand; and
- (b) is issued by an issuer that is incorporated, formed, or established outside New Zealand

principal terms sheet, in relation to debt securities, means a document that—

- (a) contains the key terms of the offer to issue the debt securities; and
- (b) is the principal means by which the terms of that offer are communicated to investors; and
- (c) is prepared by or on behalf of the issuer of the debt securities

Regulations means the Financial Markets Conduct Regulations 2014

unsubordinated debt security means a debt security that is not, under its terms, subordinated to any of the issuer's other debts to unsecured creditors.

- (2) Any term or expression that is defined in the Act or the Regulations and used, but not defined, in this notice has the same meaning as in the Act or the Regulations.
- (3) Regulation 9 of the Regulations applies, with all necessary modifications, to a warning statement required to be provided by this notice.

5 Application

This notice applies to a person (**A**) who offers debt securities to another person (**B**) in reliance upon clause 3 of Schedule 1 of the Act on the basis that B is a wholesale investor under clause 3(3)(b)(i) or (ii) of that schedule.

6 Exemption for Kauri bonds

A is exempted from clauses 4 and 5 of Schedule 8 of the Regulations in respect of an offer of Kauri bonds to B.

7 Exemption for other unsubordinated debt securities

- (1) A is exempted from clauses 4 and 5 of Schedule 8 of the Regulations in respect of an offer of unsubordinated debt securities to B.
- (2) Nothing in this clause or clause 8 or 9 applies to Kauri bonds.

8 Condition of exemption in clause 7 for offers by way of issue

- (1) The exemption in clause 7 is subject to the condition that A does not accept an application, or issue the financial products to B, unless—
 - (a) the principal terms sheet includes at the front (in a prominent position) a warning statement in the form required by subclause (2); and
 - (b) the principal terms sheet is provided to B in accordance with subclause (3) before the application is made.
- (2) The warning statement must be in the following form:

“Warning

The law normally requires people who offer financial products to give information to investors before they invest. This requires those offering financial products to have disclosed information that is important for investors to make an informed decision.

The usual rules do not apply to this offer because there is an exclusion for offers where the amount invested upfront by the investor (plus any other investments the investor has already made in the financial products) is \$750,000 or more. As a result of this exclusion, you may not receive a complete and balanced set of information. You will also have fewer other legal protections for this investment.

Investments of this kind are not suitable for retail investors.

Ask questions, read all documents carefully, and seek independent financial advice before committing yourself.”

- (3) The principal terms sheet must be provided by giving it to B or delivering or sending it to B’s address.
- (4) The warning statement need not be at the front of the principal terms sheet, despite subclause (1)(a), if—
 - (a) the offer is also made in 1 or more overseas jurisdictions; and
 - (b) the issuer reasonably considers that having the statement in that position would not be reasonably practicable because having the statement in that position would—

- (i) be inconsistent with market practice in 1 or more of those jurisdictions; or
 - (ii) contravene the laws of 1 or more of those jurisdictions; or
 - (iii) contravene the listing rules of a financial product market on which the products will be traded in 1 or more of those jurisdictions; and
 - (c) the warning statement is included in a prominent position in the principal terms sheet.
- (5) This clause does not apply to an offer of financial products by way of sale.

9 Condition of exemption in clause 7 for secondary sales

- (1) This clause applies to an offer of financial products by way of sale.
- (2) The exemption in clause 7 is subject to the condition that A does not accept an application, or transfer the financial products to B, unless—
- (a) both of the following requirements are met:
 - (i) the entry for the financial products on Bloomberg contains a link to the principal terms sheet, which includes at the front (or in a prominent position) a warning statement in the form required by subclause (3); and
 - (ii) the principal terms sheet provided to B (if any) includes at the front (or in a prominent position) a warning statement in the form required by subclause (3); or
 - (b) both of the following requirements are met:
 - (i) the principal terms sheet includes at the front (or in a prominent position) a warning statement in the form required by subclause (3); and
 - (ii) the principal terms sheet is provided to B in accordance with subclause (4) before the application is made.
- (3) The warning statement must be in the following form:

“Warning

The law normally requires people who offer financial products to give information to investors before they invest. This requires those offering financial products to have disclosed information that is important for investors to make an informed decision.

The usual rules do not apply to this offer because there is an exclusion for offers where the amount invested upfront by the investor (plus any other investments the investor has already made in the financial products) is \$750,000 or more. As a result of this exclusion, you may not receive a complete and balanced set of information. You will also have fewer other legal protections for this investment.

Investments of this kind are not suitable for retail investors.

Ask questions, read all documents carefully, and seek independent financial advice before committing yourself.”

- (4) If this subclause applies, the principal terms sheet must be provided by giving it to B or delivering or sending it to B’s address.

Dated at Auckland this 19th day of January 2017.

Nick Kynoch,
General Counsel.

Statement of reasons

This notice comes into force on 5 February 2017 and is revoked on the close of 4 February 2022. The notice applies to offers of certain debt securities made in reliance on the \$750,000 minimum investment wholesale investor exclusion in clause 3 of Schedule 1 of the Financial Markets Conduct Act 2013 (the **Act**). Generally, offerors relying on this exclusion must include a warning statement in every offer document and obtain an acknowledgement of the warning from investors (*see* clauses 3 to 5 of Schedule 8 of the Financial Markets Conduct Regulations 2014). The effect of the notice is that—

- offerors of Kauri bonds are exempted from the warning and investor acknowledgement requirements (without conditions);
- offerors on the issue of other unsubordinated debt securities must include a warning statement only in the principal terms sheet (which must be given to the investor) and are exempted from the investor acknowledgement requirement;
- warnings for secondary sales of unsubordinated debt securities must be given in any principal terms sheet provided to the investor. However, it is only mandatory to give the principal terms sheet to the investor if the Bloomberg page does not contain a link to the principal terms sheet (which includes a warning statement). Offerors on the secondary sale of unsubordinated debt securities are exempted from the investor acknowledgement requirement.

The Financial Markets Authority (the **FMA**), after satisfying itself as to the matters set out in section 557 of the Act, considers it appropriate to grant the exemptions because,—

- in relation to Kauri bond offers, there is a real risk that the cost and complexities of the usual warning and investor acknowledgement requirements would discourage overseas issuers from making those offers into New Zealand altogether considering the relative size of New Zealand’s debt capital market. This would have a significant effect on investment opportunities for New Zealand businesses given the importance of Kauri bond issuances. The FMA therefore

considers that the exemption for Kauri bonds promotes the confident and informed participation of businesses, investors, and consumers in the financial markets:

- in relation to offers of other unsubordinated debt securities, the usual warning and investor acknowledgement requirements will have a disproportionate effect on those offers in comparison to offers of other financial products. Wholesale markets for those products are highly fluid, market conditions may change rapidly, and offers must be quickly concluded while market conditions are favourable. The time and monitoring processes required with the usual warning and investor acknowledgement requirements would limit the ability of the market to operate efficiently. This is particularly the case for sales in the secondary market:
- for offers of other unsubordinated debt securities, the interests of investors can be appropriately addressed, and unnecessary compliance costs avoided, by a prominent warning in the principal terms sheet (rather than in every offer document) for initial offers under the \$750,000 wholesale investor exclusion and by warnings for secondary offers under this exclusion being included in the principal terms sheet that is given to investors or made available through a link on Bloomberg:
- the FMA reviewed the operation of the exemptions under the predecessor notice (the Financial Markets Conduct (Wholesale Investor Exclusion—\$750,000 Minimum Investment) Exemption Notice 2016) and found no evidence of inappropriate use of those exemptions. The FMA therefore considers that it is appropriate to grant exemptions on the same basis and conditions as the exemptions in the predecessor notice for a further 5 years. The FMA will monitor use of the exemptions and schedule a review when the exemptions have been in operation for 2 years:
- for these reasons, the exemptions are desirable to promote the purposes of the Act, specifically the confident and informed participation of businesses, investors, and consumers in the financial markets, the development of fair, efficient, and transparent financial markets, and the avoidance of unnecessary compliance costs:
- the exemptions are not broader than is reasonably necessary to address the matters that gave rise to the exemptions because they are limited to specific types of debt offerings where the workability issues are particularly difficult.

Notes

1 *General*

This is a consolidation of the Financial Markets Conduct (Wholesale Investor Exclusion—\$750,000 Minimum Investment) Exemption Notice 2017 that incorporates the amendments made to the legislation so that it shows the law as at its stated date.

2 *Legal status*

A consolidation is taken to correctly state, as at its stated date, the law enacted or made by the legislation consolidated and by the amendments. This presumption applies unless the contrary is shown.

Section 78 of the Legislation Act 2019 provides that this consolidation, published as an electronic version, is an official version. A printed version of legislation that is produced directly from this official electronic version is also an official version.

3 *Editorial and format changes*

The Parliamentary Counsel Office makes editorial and format changes to consolidations using the powers under subpart 2 of Part 3 of the Legislation Act 2019. See also PCO editorial conventions for consolidations.

4 *Amendments incorporated in this consolidation*

Financial Markets Conduct (Wholesale Investor Exclusion—\$750,000 Minimum Investment) Exemption Notice 2017 (LI 2017/3): clause 3