

**Reprint
as at 1 December 2016**



**Securities Act (Employee Share Purchase Schemes—
Unlisted Companies) Exemption Notice 2011
(SR 2011/58)**

Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Notice 2011:
revoked, on 1 December 2016, pursuant to Schedule 1 clause 26 of the Financial Markets Conduct
Regulations 2014 (LI 2014/326).

Pursuant to the Securities Act 1978, the Securities Commission gives the following
notice (to which is appended a statement of reasons of the Securities Commission).

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Note

Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this official reprint.
Note 4 at the end of this reprint provides a list of the amendments incorporated.

This notice is administered by the Financial Markets Authority.

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Notice

1 Title

This notice is the Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Notice 2011.

2 Commencement

This notice comes into force on the day after the date of its notification in the *Gazette*.

3 Expiry

This notice expires on the close of 30 September 2017.

Clause 3: amended, on 28 September 2012, by clause 3 of the Securities Act (Extension of Term, Amendment, and Transitional Provision) Exemption Notice 2012 (SR 2012/294).

4 Interpretation

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

Act means the Securities Act 1978

eligible person means, in relation to an unlisted company,—

- (a) an employee or a director of that company or of any of its subsidiaries; or
- (b) a person who provides personal services (other than as an employee) principally to that company or any of its subsidiaries; or
- (c) a relative of a person described in paragraph (a) or (b); or
- (d) a trustee of a trust of which a person described in paragraph (a), (b), or (c) is a beneficiary; or
- (e) a company that is controlled by a person described in paragraph (a), (b), (c), or (d) (within the meaning of subclause (2))

employee share purchase scheme means a scheme established by an unlisted company under which eligible persons may acquire specified equity securities issued by the unlisted company

Regulations means the Securities Regulations 2009

specified equity security means an ordinary share in an unlisted company, or any interest in or right to an ordinary share in an unlisted company, that is offered under the unlisted company's employee share purchase scheme

unlisted company means a company incorporated in New Zealand that is not a party to a listing agreement with NZX Limited.

- (2) For the purposes of paragraph (e) of the definition of eligible person, a company is **controlled** by a person if—
- (a) the person has the power, directly or indirectly, to exercise, or control the exercise of, the rights to vote attached to more than 50% of the voting securities of the company; or
 - (b) the person controls the composition of the board of the company (within the meaning of section 7 of the Companies Act 1993, which, for this purpose, is applied with all necessary modifications).
- (3) 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.

5 Exemptions

Every unlisted company, every subsidiary of an unlisted company, every trustee of an unlisted company's employee share purchase scheme, and every person acting on behalf of any or all of them are exempted from the following provisions in respect of specified equity securities:

- (a) section 37A(1)(c) of the Act; and
- (b) clauses 4 to 20, 22 to 24, and 26 to 28 of Schedule 1 of the Regulations; and
- (c) clause 21 of Schedule 1 of the Regulations, to the extent that it requires the registered prospectus to contain the dates, time periods, and price terms relevant to the particular offer under the employee share purchase scheme and information personal to a person to whom the offer is made; and
- (d) clause 5(1)(c) of Schedule 13 of the Regulations; and
- (e) regulation 30 of the Regulations, in relation to advertisements containing information personal to a person to whom the advertisement is distributed.

6 Condition that equity securities allotted only to eligible persons

The exemptions in clause 5 are subject to the condition that the specified equity securities are allotted only to the following persons:

- (a) persons who are eligible persons at the time of allotment of the specified equity securities;
- (b) in the case of specified equity securities that are allotted on the exercise of rights or options to acquire shares, persons who are eligible persons at the time of allotment of those rights or options.

7 Condition that information sent to subscribers

- (1) The exemptions in clause 5 are subject to the condition that, before a person subscribes for specified equity securities, the unlisted company provides that person with the following:
- (a) a copy of the relevant financial statements; and
 - (b) if the specified equity securities are allotted more than 9 months after the date of the relevant financial statements that are provided under paragraph (a), a copy of the following statements for the group:
 - (i) an interim statement of financial position;
 - (ii) an interim statement of financial performance;
 - (iii) an interim statement of cash flows;
 - (iv) a statement as to all material changes (if any) in matters contained in the interim financial statements from the matters contained in the relevant financial statements that are provided under paragraph (a);
 - (v) a statement as to all transactions (if any) that are material related party transactions under generally accepted accounting practice and were entered into or were being performed in the period of the interim financial statements; and
 - (c) the unlisted company's most recent annual report, which includes or is accompanied by a statement setting out the following matters:
 - (i) particulars of entries in the interests register concerning directors of the company made during the accounting period to which the report relates;
 - (ii) the date of, names of the parties to, and general nature of any material contract (excluding a contract entered into in the ordinary course of business) entered into by a member of the issuing group at any time in the 2 years preceding the relevant date;
 - (iii) a brief description of any legal proceedings or arbitrations concerning the issuing group that are pending at the relevant date and that might have a material adverse effect on the issuing group;
 - (iv) a statement by the directors of the company as to whether, in their opinion, after due enquiry by them, any of the following has materially and adversely changed during the period between the date of the latest statement of financial position attached to, or contained in, the annual report and the relevant date:
 - (A) the trading or profitability of the issuing group;
 - (B) the value of the assets of the issuing group;
 - (C) the ability of the issuing group to pay its liabilities due within the next 12 months.

- (2) The interim financial statements referred to in subclause (1)(b) must be prepared—
- (a) in accordance with NZ IAS 34 (but need not be audited); and
 - (b) for the period from the date of the relevant financial statements provided under subclause (1)(a) and ending on a stated date that is no more than 9 months after the date of those financial statements.

- (3) In this clause,—

issuing group, in relation to an offer of specified equity securities, means the unlisted company that is the issuer of the securities and all subsidiaries of the unlisted company at the relevant date

relevant date, in relation to a statement that is included in, or accompanies, an annual report under subclause (1)(c), means a date specified in the statement, being a date that is not more than 20 working days before the date on which either—

- (a) a copy of the annual report is sent under section 209 of the Companies Act 1993; or
- (b) a notice is sent under that section in respect of the annual report

relevant financial statements means—

- (a) the latest financial statements for the group that comply with, and have been registered under, the Financial Reporting Act 1993; or
- (b) if no financial statements for the group have been registered under the Financial Reporting Act 1993, financial statements for the group prepared and audited as if they were to be registered under that Act for—
 - (i) the most recently completed accounting period in respect of which the financial statements have been prepared; or
 - (ii) if the unlisted company has not completed its first accounting period, the period from the date of commencement of business and ending on a stated date that is not more than 4 months before the specified date.

8 Condition about sale arrangements

The exemptions in clause 5 are subject to the condition that the investment statement relating to the specified equity securities must contain a description of the arrangements under which persons who hold specified equity securities can sell those securities (before and after they cease to be eligible persons).

9 Condition that there is either established market or repurchase offer by unlisted company

The exemptions in clause 5 are subject to the condition that it is a term of the offer that either—

- (a) there is an established market for the specified equity securities; or

- (b) the unlisted company will offer to repurchase the specified equity securities under the Companies Act 1993 from eligible persons when they cease to be eligible persons (so long as at that time the company satisfies the solvency test set out in section 4 of the Companies Act 1993).

10 Condition that terms of employee share purchase scheme available

The exemptions in clause 5 are subject to the condition that the investment statement relating to the specified equity securities contains, or is accompanied by,—

- (a) a brief description of the terms of the employee share purchase scheme; and
- (b) a description of how a person who is able to acquire securities under the employee share purchase scheme may, free of charge, inspect, or obtain a copy of, the terms of the employee share purchase scheme.

11 Condition of cap on specified equity securities

- (1) The exemptions in clause 5 are subject to the condition that—
 - (a) the number of specified equity securities allotted in any 12-month period must not exceed 5% of the ordinary shares of the unlisted company as at the start of the 12-month period; and
 - (b) the total number of specified equity securities held by eligible persons or persons referred to in clause 6(b) must not exceed 15% of the ordinary shares of the company at any time.
- (2) Calculations of the number of specified equity securities allotted in a period for the purposes of subclause (1)(a) must exclude the specified equity securities allotted to any excluded person.
- (3) Calculations of the number of specified equity securities held by eligible persons or persons referred to in clause 6(b) for the purposes of subclause (1)(b) must exclude the specified equity securities held by or on behalf of any excluded person.
- (4) In subclauses (2) and (3), **excluded person** means any of the following:
 - (a) a director of the unlisted company;
 - (b) a person who is, at the commencement of any year, a wealthy or experienced person as defined in section 5(2CC) to (2CE) of the Act;
 - (c) a person who would not be regarded under the Act as being a member of the public.

12 Conditions of exemption from clause 21 of Schedule 1 of Regulations

- (1) The exemption in clause 5(c) is subject to the further condition that, before a person subscribes for specified equity securities, the unlisted company provides the person with a document containing the information that would, but for this

exemption, be required by clause 21 of Schedule 1 of the Regulations to be contained in the registered prospectus.

- (2) Subclause (1) does not require the document provided to a person under subclause (1) to contain information personal to any other person.

13 Condition of exemption from clause 5(1)(c) of Schedule 13 of Regulations

The exemption in clause 5(d) is subject to the further condition that, before a person subscribes for specified equity securities, the unlisted company provides the person with a document containing the information required by clause 5(1)(c) of Schedule 13 of the Regulations.

14 Condition of exemption from regulation 30 of Regulations

The exemption in clause 5(e) is subject to the further condition that the unlisted company has complied with regulation 30 of the Regulations in relation to another advertisement and the only difference between the 2 advertisements is information personal to a person to whom the advertisement is distributed.

15 Revocation of Securities Act (Employee Share Purchase Schemes— Unlisted Companies) Exemption Notice 2005

The Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Notice 2005 (SR 2005/276) is revoked on the close of 31 March 2011.

16 Transitional provisions

- (1) The exemption in clause 5(a) from section 37A(1)(c) of the Act does not apply to a prospectus that was registered before the commencement of this notice.
- (2) If, before 1 July 2010, an unlisted company offered specified equity securities in reliance on the Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Notice 2005 under a prospectus that was registered before that date, the unlisted company may continue to rely on that notice in respect of securities offered under that prospectus (as if that notice continued in force after 31 March 2011).
- (3) If, on or before 31 March 2011, an unlisted company offered specified equity securities in reliance on the Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Notice 2005 and the Securities Act (Transition to Securities Regulations 2009) Exemption Notice 2010 under a prospectus that is registered on or before that date, the unlisted company may continue to rely on those notices in respect of securities offered under that prospectus (as if both of those notices continued in force after 31 March 2011).
- (4) However, subclauses (2) and (3) cease to apply to a prospectus on an amendment being made to the prospectus for the purpose of preventing it from being false or misleading in a material particular by reason of failing to refer, or give proper emphasis, to adverse circumstances.

**17 Amendments to Securities Act (Employee Share Purchase Schemes—
Listed Companies) Exemption Notice 2011**

- (1) This clause amends the Securities Act (Employee Share Purchase Schemes—Listed Companies) Exemption Notice 2011.
- (2) Clause 14(2) is amended by omitting “to offer and allot” and substituting “in respect of”.
- (3) Clause 14(3) is amended by omitting “to offer and allot” and substituting “in respect of”.
- (4) Clause 14(4)(c) is amended by omitting “to a prospectus after 30 June 2011” and substituting “after 31 October 2011 to a prospectus”.

Dated at Wellington this 22nd day of March 2011.

The Common Seal of the Securities Commission was affixed in the presence of:

[Seal]

J Diplock,
Chairperson.

Statement of reasons

Note: The following statement of reasons should be read in conjunction with the statement(s) of reasons appended to the:

- **Securities Act (Extension of Term, Amendment, and Transitional Provision) Exemption Notice 2012**

This notice, which comes into force on the day after its notification in the *Gazette* and expires on 30 September 2012, replaces the Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Notice 2005 (the **2005 notice**).

This notice is on substantially the same terms as the 2005 notice. However, the notice relates to the Securities Regulations 2009 (rather than the Securities Regulations 1983).

This notice exempts unlisted companies (subject to conditions) in respect of equity securities issued by those companies that are offered under employee share purchase schemes from section 37A(1)(c) of the Securities Act 1978 (the **Act**) and from various prospectus content requirements in Schedule 1 of the Securities Regulations 2009

(the **2009 regulations**). The effect is to allow unlisted companies to use an evergreen short form prospectus.

Consequential changes are made to clause 14 of the Securities Act (Employee Share Purchase Schemes—Listed Companies) Exemption Notice 2011 (which relates to transitional matters) to ensure that it is consistent with this notice and other class notices that have been reviewed in light of the 2009 regulations.

The Securities Commission considers it appropriate to grant the exemptions because—

- the Commission recognises the desirability of encouraging employee participation in a company that an employee works for through share ownership. The compliance costs involved in registering a full prospectus every year could be prohibitive for an unlisted company operating an ongoing employee share purchase scheme. The exemptions in this notice strike a balance between lowering compliance costs for companies offering securities under employee share purchase schemes and providing sufficient information for employees to make informed decisions about participation in these schemes:
- the same basic level of disclosure is required as for listed companies, but there are conditions particularly relevant to unlisted companies such as the provision of a repurchase facility where there is no other established market for the securities. Compliance costs are reduced because some disclosures can be made in the financial statements and by additional information in the annual report. This saves the need to prepare a new disclosure document, but provides investors with relevant information:
- the exemptions granted are not intended to allow employee share purchase schemes to be used as avenues for significant capital raising by companies on the basis of limited disclosure. For this reason the number of shares that can be allotted is limited:
- issuers may provide eligible persons with personalised offer documents. This recognises that the details of the offers may differ from one employee to the next, particularly in respect of schemes which provide performance based incentives:
- the transitional provisions reduce the compliance costs resulting from the regulatory changes for issuers that have previously relied on the 2005 notice. These issuers may continue to rely on the 2005 notice in respect of securities offered under an existing registered prospectus unless the prospectus needs to be amended to prevent it from being false or misleading in a material particular (*see* section 37A(1)(b) of the Act).

Note: The preceding statement of reasons should be read in conjunction with the statement(s) of reasons appended to the:

- **Securities Act (Extension of Term, Amendment, and Transitional Provision) Exemption Notice 2012**

Issued under the authority of the Legislation Act 2012.
Date of notification in *Gazette*: 24 March 2011.

Reprints notes

1 *General*

This is a reprint of the Securities Act (Employee Share Purchase Schemes—Unlisted Companies) Exemption Notice 2011 that incorporates all the amendments to that notice as at the date of the last amendment to it.

2 *Legal status*

Reprints are presumed to correctly state, as at the date of the reprint, the law enacted by the principal enactment and by any amendments to that enactment. Section 18 of the Legislation Act 2012 provides that this reprint, published in electronic form, has the status of an official version under section 17 of that Act. A printed version of the reprint produced directly from this official electronic version also has official status.

3 *Editorial and format changes*

Editorial and format changes to reprints are made using the powers under sections 24 to 26 of the Legislation Act 2012. See also <http://www.pco.parliament.govt.nz/editorial-conventions/>.

4 *Amendments incorporated in this reprint*

Financial Markets Conduct Regulations 2014 (LI 2014/326): Schedule 1 clause 26

Securities Act (Extension of Term, Amendment, and Transitional Provision) Exemption Notice 2012 (SR 2012/294): clause 3