

Scrip offers in takeovers

This is a consultation on a proposal not to grant a class exemption under the Financial Markets Conduct Act for offers of financial products made in takeovers.

About this consultation:

This consultation is for:
businesses and their advisers.

It aims to: seek views on a proposal not to grant a class exemption from disclosure requirements for offers of financial products made in takeovers.

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Securities Act (Takeovers) Exemption Notice

1. Under the Securities Act 1978, a person who offered securities to the public as part of a 'scrip bid' in a takeover was required to register a prospectus and provide investors with an investment statement. A 'scrip bid' is a takeover bid where securities are offered wholly or partly in place of cash.
2. A recent example of a scrip bid in the New Zealand market is the takeover offer made by Briscoe Group Limited in July for the shares in Kathmandu Limited that it does not already own. This offer (which remains open) is made up of both shares in Briscoe Group Limited and cash.
3. It was unnecessary or problematic for issuers to comply with all the disclosure content requirements under the Securities Regulations in the context of a takeover bid. The FMA granted relief from those requirements under the Securities Act (Takeovers) Exemption Notice (Takeovers Exemption).
4. The Takeovers Exemption addressed three primary areas of concern:
 - a. **Duplication of information:** there was some duplication between disclosures required by the Securities Regulations and those required for a takeover notice. It was unnecessary to have both sets of documents provided.
 - b. **Utility of Information:** due to the nature of a takeover offer, alternative information (for example, information about the proposed terms of the exchange of securities, rather than the amount paid by the investor) was more useful for potential investors than certain disclosures required by the Securities Regulations.
 - c. **Target company information:** the issuer, who did not have control over the target company, was not always able to provide sufficient information on the target company (including financial information) to satisfy the Securities Regulations. The Takeovers Exemption allowed the issuer to limit the information they provided on the target company to what they knew, possessed or controlled. Reduced disclosures were justified given the investors would already have a degree of familiarity with the target's securities given they were existing holders.
5. Originally there were exemptions for scrip offers of quoted and unquoted securities. However, the exemption for quoted securities was removed in 2013. This decision was driven by market practice as listed issuers often chose to prepare a simplified disclosure prospectus rather than comply with the Takeovers Exemption.
6. We are not aware of any unlisted issuers who have relied on the Takeovers Exemption. In our view, most unquoted securities are not likely to be attractive to investors. This is due to concerns about liquidity, a lack of transparency regarding market value, and mandate restrictions placed on the offerees.



Transition

7. The Securities Act was revoked on 1 December 2014. Issuers will only be able to make scrip offers under the Securities Act, relying on the Takeovers Exemption up until the end of the relevant transitional period.
8. 1 December 2015 is the last date for offering securities under the Takeovers Exemption where those securities are not continuously issued. Issuers making a scrip offer after 1 December 2015 will need to comply with the Financial Markets Conduct Act 2013 (FMC Act).
9. Under the FMC Act, issuers making a scrip offer will need to prepare a PDS if they can't rely on one or more of the Schedule 1 exclusions.
10. Given the timeline above, we are currently considering whether there is a need for class exemption relief from the PDS requirements for scrip offers under the FMC Act. Our aim is to have any exemption in place by 31 October 2015.

Provisional FMA view

11. For issuers of quoted products, our view is there is no need for an exemption. This is because under the FMC Act they should be able to rely on the same class offer exclusion under clause 19 of Schedule 1. Under the same class exclusion, issuers are not required to prepare a PDS provided a 'cleansing notice' is sent to NZX confirming the issuer is complying with their financial reporting and continuous disclosure obligations.
12. The same class exclusion will not apply to a scrip offer made by:
 - a. issuers of unquoted products
 - b. issuers of quoted products who cannot rely on the same class offer exclusion because of one of the restrictions in the FMC Act or the Financial Markets Conduct Regulations (for example, where the scrip offer is made as part of a change in the basic nature of the issuer's business, or where the products have been listed within the last three months).
13. We think the policy rationale behind the Takeovers Exemption will still apply to scrip offers made by issuers who are unable to rely on the same class exclusion. The three areas of concern that the Takeovers Exemption sought to address are still relevant. Some form of exemption is likely to improve the clarity and conciseness of the information provided as part of a scrip offer.
14. However, we understand that scrip offers of unquoted products are not common in the New Zealand market. In addition, no unlisted issuer has recently relied on the existing Takeovers Exemption.
15. In view of this, we consider it unlikely that a class exemption under the FMC Act would materially assist the market.
16. While we do not propose to grant class relief we would consider providing individual exemptions from certain PDS requirements when a scrip offer cannot use the same class exclusion under the FMC Act. In line with the existing Takeovers Exemption, our general policy would be to offer relief from disclosure of information that is already available to investors (for example, historical financial information of the target company, or information already provided in the takeover notice).



17. We are aware that scrip offers of unquoted products are more common in other jurisdictions (for example, where they are issued as stub equity as part of a take-private transaction). We do not want to discourage scrip offers in New Zealand. We would like feedback from market participants on how the approach outlined above will affect the two classes of issuer identified above who are unable to rely on the same class exclusion.
18. This consultation paper seeks feedback from interested persons. **Submissions close on Friday 25 September 2015.** The form at the back provides more details.

Questions

1. The FMA is not aware of any recent reliance on the Takeovers Exemption. As a result, we do not see sufficient need for class exemption relief under the FMC Act. Do you agree with this position? If not, on what basis do you consider an FMC class exemption to be justified?
2. We are considering providing individual exemption relief when a scrip offer cannot use the same class exclusion under the FMC Act. Would individual exemption relief be an effective substitute for class relief in such circumstances? If not, why?
3. If a class exemption was to be developed under the FMC Act, the FMA proposes to do so in a manner analagous to the current Takeovers Exemption, rather than providing broader relief from Part 3 disclosure. Do you consider this is appropriate, or does the shift into the FMC Act regime justify a different form of relief? If you think we should extend the relief available to issuers, please tell us what policy grounds support this view?



Additional feedback sought by the FMA

19. While we are not proposing to offer relief to issuers making scrip offers under the same class exclusion, we are interested in any difficulties you anticipate if the exclusion is used in a takeover situation. We welcome any feedback on the nature of any difficulties, as well as proposals for a workable and appropriate solution.
20. We are aware that offers made under the same class exclusion cannot rely on trans-Tasman mutual recognition, as an FMC Act disclosure document is not required. This issue may also affect takeover offers made into other jurisdictions. This may affect the ability of issuers to make scrip offers on the same terms to all shareholders of the target company. We welcome any feedback on any difficulties you anticipate in relation to this.

The next step

How do I make a submission?

Please use the form on the next page which has details of what you need to do. Forms must be submitted electronically in both PDF and MS Word formats. Email the submission to consultation@fma.govt.nz. In the subject line, please put 'Feedback: Scrip offers in takeovers'

Submissions close on Friday 25 September 2015.

Where can I get more information?

You'll find more information on our website www.fma.govt.nz

If you have questions about the consultation process, please call 0800 434 567.

Feedback: Scrip offers in takeovers

Please submit this feedback form electronically in both PDF and MS Word formats by emailing us at consultation@fma.govt.nz with 'Feedback: Scrip offers in takeovers' in the subject line. Thank you. **Submissions close on Friday 25 September 2015.**

Date:

Number of pages:

Name of submitter:

Company or entity:

Organisation type:

Contact name (if different):

Contact email and Phone:

Paragraph or Question Number	Comment	Recommendation
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You don't need to quote from the consultation document if you use part & paragraph numbers.

You may attach extra pages - please label each page with your name & organisation.

Feedback summary – *if you wish to highlight anything in particular*

Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

Thank you for your feedback – we appreciate your time and input.

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