

JUNE 2023

Consultation: Renewal of class exemption for same class offers ASX/NZX-quoted financial products

About this consultation

The Financial Markets Authority – Te Mana Tātai Hokohoko (the FMA) is reviewing whether to renew an existing class exemption notice applying to ASX-listed issuers with a secondary listing on the NZX (defined in the NZX listing rules as NZX Foreign Exempt Issuers) for a further five years. The exemption facilitates offers of financial products of the same class as ASX-quoted financial products on an equivalent basis to the same class exclusion in Schedule 1 of the Financial Markets Conduct Act 2013.

We invite your feedback to support our review of this exemption notice. Please use the feedback form provided.

Submissions close at 5pm on 30 June 2023

Next steps

After considering submissions, we will finalise our policy proposals and aim to have any exemption in place prior to the expiry of the existing notice.

If you have any questions, please email questions@fma.govt.nz or call us on 0800 434 566.

This consultation is for ASX-listed issuers who have or who may consider a secondary listing on the NZX, and other interested stakeholders.

It asks for feedback on whether the current exemption notice should be renewed and, if so, what changes (if any) should be made.

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Review timing and process

We plan to complete our review of the [Financial Markets Conduct \(Same Class Offers ASX/NZX-Quoted Financial Products\) Exemption Notice 2018](#) and have any replacement notice in place before the existing exemption expires on 16 December 2023.

An indicative timetable is noted below. This is subject to change.

Date	Step
30 June 2023	Consultation period closes.
September 2023	Decision whether to renew the exemption notice made.
October – December 2023	If the decision is made to renew the exemption notice, during this period we will draft a replacement notice to give effect to the policy decision. We will aim to have this in place in advance of the expiry of the existing notice.
On or before 17 December 2023	Replacement notice (if granted) comes into effect.

FMA's power to grant class exemptions

We have powers to exempt persons from compliance with requirements in the Financial Markets Conduct Act 2013 (FMC Act) and associated regulations.

Before we do so, we must be satisfied that the exemption is not broader than is reasonably necessary to address the matters that gave rise to it. We must also be satisfied that the exemption is necessary or desirable to promote one or more of the following purposes of the FMC Act regime:

- to promote the confident and informed participation of businesses, investors, and consumers in financial markets
- to promote and facilitate the development of fair, efficient, and transparent financial markets
- to provide for timely, accurate, and understandable information to assist investment decisions
- to ensure appropriate governance arrangements apply to financial products and services, and allow for effective monitoring and reduce governance risks
- to avoid unnecessary compliance costs
- to promote innovation and flexibility in the financial markets.

We can only grant exemptions (including renewing existing exemptions) where we are satisfied that the statutory requirements are met. We need information from you to support our decision-making, so we encourage you to provide feedback.

Overview of class exemption

Background

The same class offers exclusion¹ enables offers of equity securities, debt securities, and managed investment products (as well as options and options underlying) of the same class as financial products quoted on a licensed market to be made without the disclosure normally required to be given to investors under Part 3 of the FMC Act. This means these offers do not require a Product Disclosure Statement (PDS), or have to be entered on the Disclose register.

Before a same class offer can be made under the exclusion, the financial products must:

- have been quoted on a licensed market for at least 3 months before the offer is made, **and**
- not have been suspended for more than 5 trading days during the 3-month period.

This is subject to requirements set out in clauses 19-22 of Schedule 8 of the FMC Regulations 2014 (the Regulations), including that the issuer must:

- be in compliance with its financial reporting obligations, and its continuous disclosure obligations to the licensed market operator (NZX); **and**
- provide a notice (commonly referred to as a 'cleansing notice') to the market operator, before the offer is made, setting out certain information about the offer to be notified to the market.

The exclusion means the offer is not a 'regulated offer'² and the usual governance requirements in Part 4 of the FMC Act for regulated products do not apply.

The policy basis for the same class exclusion is that for existing financial products quoted on licensed markets there is already timely, accurate and understandable information publicly available to investors, including information relating to price and trading history. The market can use this information to effectively price products of the same class, in lieu of an investor reading a product disclosure statement. This results in lowered costs for issuers.

Existing exemption notice

Offers of financial products of the same class as those quoted on ASX cannot be made under the same class exclusion. This is because the requirements relate to quotation on, and providing continuous disclosure and cleansing notices to, a 'licensed market' (as defined in the FMC Act) and ASX is not licensed under the FMC Act.

The current exemption notice provides relief equivalent to the exclusion to offers of financial products of the same class as products quoted on ASX. The notice:

¹ See clause 19 of Schedule 1 of the FMC Act

² Section 41 of the FMC Act defines a 'regulated offer' as one which requires disclosure under Part 3 to at least one investor.

- Applies to issuers that are on ASX's Official List and have a secondary listing with NZX (**ASX/NZX-listed issuer**). ASX/NZX-listed issuers are categorised as NZX Foreign Exempt Issuers under NZX's listing rules.³ ASX is the Home Exchange and the issuer is subject to ASX's listing rules.
- Provides an exemption for offers of financial products of the same class as ASX-quoted products (or options and options underlying), from Part 3 (Disclosure) and Part 4 (Governance) of the FMC Act, and is accompanied by a term stating that offers made in reliance on the exemptions will not be regulated offers.⁴

Reliance on notice

Q1	Are you (or your clients) currently an ASX/NZX-listed issuer (NZX Foreign Exempt Issuer, with the ASX as the Home Exchange), and are you likely to, or currently planning to, rely on the exemption? If yes, please provide an indication of the expected number, frequency, or value of offers that would likely be made. If you are not likely to rely on the exemption, please explain why not.
Q2	If you are an ASX/NZX-listed issuer, have market conditions and factors such as COVID-19 prevented you from relying on the exemption since it was first granted in 2018?
Q3	If you are an ASX-listed issuer, would this exemption encourage you to seek a secondary listing on NZX? Please explain why, or why not.

Policy rationale

The policy reasons for granting the exemption can be summarised as follows:

- The exemption may help attract new secondary listings to NZX, facilitating additional opportunities for New Zealand investors to access investment opportunities in companies listed on ASX and NZX which might otherwise not be accessible due to cost of compliance. This may lower the cost of capital for New Zealand's businesses by generally broadening and deepening New Zealand's capital markets. It may also increase liquidity on the secondary market for ASX-quoted products, benefiting holders of ASX-quoted products, including New Zealand holders.
- The exemption complements the FMC Act's trans-Tasman mutual recognition scheme, recognising the general equivalence of the regulation of financial products offered in Australia and listed on ASX, which includes robust financial reporting and continuous disclosure obligations. It acknowledges the arrangements for co-operation and information-sharing between the FMA and ASIC (the Australian Securities and Investments Commission), meaning that the FMA will be able to obtain co-operation from ASIC if any compliance concerns arise in relation to the issuer.

We seek your feedback on whether the policy reasons for granting the exemption remain relevant and valid, which would support the renewal of the notice.

³ NZX Limited's [Listing Rules](#) (1 April 2023)

⁴ See section 561(2) of the FMC Act

Support for renewal

Q4	Do you support the renewal of the notice? What are the reasons for your view?
Q5	Do you think the original policy reasons for granting the exemption remain relevant and valid? Are you aware of anything that has changed during the period since the notice was granted that would affect or alter these reasons? Are there any additional policy reasons that would support granting or not granting the exemption?
Q6	What impact would renewal of the notice have on those who issue and offer financial products, compared to non-renewal? We are particularly interested in any benefits, risks, cost savings, costs imposed, or practical difficulties this group may face in relation to the exemption (for example, difficulties making offers in New Zealand).
Q7	What impact would renewal of the notice have on investors, compared to non-renewal? We are particularly interested in any benefits, risks, cost savings, costs imposed, or practical difficulties investors may face relating to the exemption (for example difficulties for investors and their advisers obtaining and understanding Australian offer information, continuous disclosure, or financial reporting information)?

Note: if we cannot obtain evidence and data that supports the continued need for the exemption and confirms that the statutory test for granting the exemption is met, then we may not be able to renew the notice. Your feedback is appreciated.

Circumstances in which the exemption does not apply

For consistency with the same class exclusion, the exemption does not apply in the following circumstances:

- If the offer is within 3 months of (or in connection with enabling) a change to the essential nature of the issuer's business, or of a transaction for which the issuer has provided (or will be required to provide) disclosure to ASX as if it were listing on that market.⁵ This is for consistency with the principle of requiring at least 3 months of continuous disclosure since the listing to allow the market to adequately price the products.
- If ASIC has made a determination about the issuer (that is in force at the time of the offer) that a Corporations Act statutory disclosure exemption for rights issues (i.e. an offer to existing holders) or on-sales without disclosure cannot be relied on.⁶ ASIC can make these orders when the issuer is not in compliance with its continuous disclosure and financial reporting obligations, and ASIC's determination power is equivalent to the FMA's power to order that the same class exclusion does not apply if there is non-compliance with continuous disclosure and financial reporting obligations in the 12 months before the offer.⁷

⁵ See clause 46 of Schedule 8 of the Regulations

⁶ See sections 708AA(3), 708A(2), 1012DAA(3), and 1012DA(2) of the Corporations Act 2001

⁷ See sections 468 and 469(c) of the FMC Act

- When the issuer is covered by certain exemptions under the Corporations Act that relate to Australian continuous disclosure obligations and Australian financial reporting obligations⁸ (disregarding ASIC technical relief, as this technical relief does not detract from the level of information available to the market).⁹

If the decision is made to renew the notice, our initial view is that these circumstances remain appropriate. We seek your feedback on this.

Circumstances in which the exemption does not apply

Q8	Do you support the circumstances in which the current exemption does not apply, and are there any modifications you would like to see should the exemption be renewed? Please give reasons for your view.
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Exemption conditions

The existing exemption is subject to conditions, which closely replicate the requirements which apply to the same class offer exclusion in clauses 19 – 22 of Schedule 8 of the FMC regulations. An offer of financial products may only be made in reliance on the exemption if the following conditions are met:

- The ASX/NZX-listed issuer:
 - gives ASX and NZX a cleansing notice in the 24-hour period before the offer is made (unless ASX or NZX require it earlier), and
 - at the date of the notice, is in compliance with:
 - the Australian continuous disclosure obligations that apply to it in relation to the ASX-quoted financial products; and
 - its Australian financial reporting obligations
- The offeror must provide ASX and NZX a notice setting out information necessary to correct defects it becomes aware of in the issuer's cleansing notice.
- In the case of debt securities, offerors must also give investors a statement containing certain information, including information about how investors can obtain information about quoted debt securities that are of the same class as those being offered.

The conditions use FMC Act formulations of terms, such as 'material information' and 'excluded information' for the purpose of determining the content of the cleansing notice, rather than Australian formulations for similar cleansing notices under the Corporations Act.

If the decision is made to renew the notice, our initial view is that these conditions remain appropriate. We seek your feedback on this.

⁸ Specifically, exemptions under sections 340, 341, 111AS or 111AT of the Corporations Act 2001

⁹ See ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73

Amendments needed

Q9 Do you think any amendments are needed to the notice if it is renewed? If so, please specify the amendments you propose, the reasons for these, and the impact of the amendments on issuers, investors and the market.

Q10 Do you agree with our approach in using the FMC Act formulations of 'material information' and 'excluded information' for the content of the cleansing notice (rather than the Australian formulations for similar cleansing notices under the Corporations Act)?

Q11 Have you identified any practical difficulties that may prevent or discourage reliance on the exemption? If so, please explain any solutions that you would propose to address the difficulties.

Other

Q12 Do you have any other comments?

