

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

About this consultation

The Financial Markets Conduct Act 2013 (FMC Act) provides statutory exclusions from the standard requirements of the regulated offers regime. This includes an exclusion that enables offers of financial products of the same class as products quoted on a New Zealand licensed market to be made, without the disclosure normally required under Part 3 of the FMC Act ('same class offers exclusion').

We are considering using our exemption powers to facilitate offers of financial products of the same class as ASX-quoted financial products in cases where the issuer has a secondary listing with NZX (a 'ASX/NZX-listed issuer'). If granted, the exemptions and conditions will operate on the same basis as the requirements that apply to offers under the same class offers exclusion. There will be modifications to enable ASX/NZX-listed issuers to give cleansing notices to ASX and NZX.

NZX support this exemption proposal because if granted, the exemption is expected to help attract secondary listings to NZX.

We welcome your feedback on the exemption proposals discussed in this paper. Please use the feedback form to provide us with any comments. In addition to your general feedback, we have included specific questions in this paper.

Submissions close at 5pm on Wednesday 13 June 2018.

After this date, we will consider all submissions, finalise our policy proposals and work to get any exemption determined in place.

This consultation paper is for those who issue and offer listed financial products, investors, legal advisers, and other interested parties.

It seeks feedback on a proposed exemption for same class offers of ASX/NZX-quoted financial products.



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Document history

This version was issued in May 2018 and is based on legislation and regulations as at the date of issue.



Same class offers exclusion

Overview

The same class offers exclusion¹ enables offers of equity securities, debt securities, or managed investment products of the same class as quoted financial products to be made without the disclosure document normally required to be given to investors under Part 3 of the FMC Act. This means the offer is not a 'regulated offer' and the usual governance requirements for regulated products do not apply.

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 suspended for more than 5 trading days during the 3-month period.

The requirements in clauses [19-22](#) of Schedule 8 of the Financial Markets Conduct Regulations 2014 (Regulations) also apply to a person offering financial products under the same class offers exclusion. These include the issuer:

- being in compliance with its continuous disclosure and financial reporting obligations **and**
- providing 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.

Policy rationale of same class offers exclusion

The same class offers exclusion recognises that there is timely, accurate and understandable information publicly available to investors about financial products quoted on licensed markets that can be used by investors to make confident and informed decisions about offers of the same class as those quoted products.

This includes information disclosed under continuous disclosure requirements that apply to issuers listed on a licensed market. The purpose of these requirements is ensuring the timely release of information which may have an effect on a listed issuer's market price or value. Continuous disclosure is essential to maintaining the integrity of the market and:

- promotes equality of access to information so that investors can make informed investment decisions, and
- plays a critical role in promoting fair, efficient and transparent markets.

The 3-month quotation and 5 trading day requirements (outlined above) ensure the market is adequately informed through at least 3 months of continuous disclosure since the initial offering document² for the listing,

¹ See clause [19](#) of Schedule 1 of the FMC Act

² The initial offering document would have been a product disclosure statement ('PDS') if the offer was a regulated offer under Part 3 of the FMC Act, or a 'Profile' as required under NZX's Listing Rules. A Profile is required to contain: the information required in a PDS as if the offer was a regulated offer under Part 3 of the FMC Act (unless NZX determines otherwise); information required by the Listing Rules; and all other information NZX might reasonably require.



during which there has not been any significant suspension. Accordingly, it is envisaged that the quoted products are appropriately priced by the market at the time a same class offer is able to be made.

Listed issuers' financial reporting obligations also mean investors and other stakeholders can easily obtain sufficient meaningful information to enable investors to be well informed about the financial position and performance of the listed issuer.

Market reliance

In practice, the same class offers exclusion facilitates offers of equity securities, debt securities, or managed investment products that are of the same class as quoted products of NZX-listed issuers that are required to comply with the continuous disclosure requirements set out in NZX's Listing Rules.³ This includes offers of products of the same class as ASX-quoted products of 'dual-listed issuers'⁴ (as dual-listed issuers are required to comply with NZX's continuous disclosure requirements).

The same class offers exclusion is an innovation which has been relied on significantly since it came into effect with the FMC Act on 1 April 2014. In August 2017, the same class offers exclusion was extended to cover offers of options and options underlying.⁵

Issue

Offers of products of an ASX/NZX-listed issuer of the same class as those quoted on ASX cannot be made under the same class offers exclusion. This is because ASX/NZX-listed issuers are not required to comply with NZX's continuous disclosure requirements, but instead the NZX Listing Rules enable these issuers (defined as a 'overseas-listed issuer' under NZX's Listing Rules) to comply with the continuous disclosure requirements of the recognised stock exchange in their home jurisdiction (i.e. ASX in this case).

In these circumstances, the requirements of the same class offers exclusion, particularly those in clause 20 of Schedule 8 of the Regulations, cannot be met. This is because the requirements generally 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.

³ NZX Limited's [Main Board/ Debt Market Listing Rules](#) (1 October 2017)

⁴ Section 1.6 of NZX's Listing Rules define dual-listed issuer as an issuer incorporated in Australia which is admitted and not removed from the ASX's Official List and which is also listed on the NZX, otherwise than as an 'overseas-listed issuer' and in respect of which both NZX and ASX are 'home exchanges'.

⁵ See clause 19(1A) of Schedule 1 of the FMC Act



The FMA's discretion to exempt

To grant an exemption under the FMC Act, the Financial Markets Authority (FMA) must be satisfied that it is necessary or desirable in order to promote the purposes of the FMC Act. The extent of the exemption cannot be broader than is reasonably necessary to address the matters that gave rise to the exemption.

The purposes of the FMC Act include⁶:

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

Proposed exemptions

We propose an exemption to facilitate same class offers of ASX-quoted financial products of ASX/NZX-listed issuers on an equivalent basis as the same class offers exclusion. The details of this proposed exemption are:

- An exemption from Part 3 (Disclosure) and Part 4 (Governance) of the FMC Act accompanied by a term stating that offers made in reliance on the exemptions will not be regulated offers.⁷
- It will apply to ASX-quoted products of 'exempt issuers' that are on ASX's Official List and have a secondary listing with NZX. This will include overseas-listed issuers (as currently defined in NZX's Listing Rules) and 'foreign exempt issuers' (as defined in NZX's [Listing Rules Exposure Draft](#)⁸).
- Otherwise, it is proposed that the exemption will apply in the same way as the same class offers exclusion currently does, including:

⁶ See sections 3 and 4 of the FMC Act

⁷ See section 561(2) of the FMC Act

⁸ NZX's proposed foreign exempt issuer category is intended to replace both the dual-listed issuers and overseas-listed issuers regime in NZX's Listing Rules. See [NZX's Listing Rule consultation](#) for more information.



- o covering offers of equity securities, debt securities, or managed investment products, and offers of options and options underlying that are equity securities, debt securities, or managed investment products;
- o the 3-month minimum quotation requirement with no more than a total of 5 trading day suspension during the 3-month period before the offer; and
- o the requirements around the product (or options underlying) remaining quoted after the issue or sale.⁹

Circumstances where proposed exemption will not apply

To ensure consistency with the same class offers exclusion, we propose that the exemption will 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 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.¹⁰ This covers listings often referred to as a backdoor or reverse listings. Excluding offers made in these circumstances is appropriate given the principle of requiring at least 3 months of continuous disclosure since the listing to allow the market to adequately price the products before a same class offer can be made (as is the case under the same class offers exclusion).
- If the Australian Securities and Investment Commission (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. (ASIC can make these orders when the issuer is not in compliance with its continuous disclosure and financial reporting obligations.¹¹ ASIC's determination power is equivalent to the FMA's power to order that the same class offers exclusion does not apply in respect of an issuer's products if there is non-compliance with continuous disclosure and financial reporting obligations in the 12 months before the offer.¹²)
- If the FMA has made a direction order prohibiting the issuer from relying on the proposed exemption in cases where the issuer has contravened, or is likely to contravene, a term or condition of the exemption.¹³

We also consider the proposed exemption should not apply when the issuer is covered by certain exemptions under the Corporations Act that relate to Australian continuous disclosure obligations and Australian financial reporting obligations.¹⁴ The Corporations Act statutory disclosure exemptions for rights issues and on-sales in Australia (which are the closest equivalent to New Zealand's same class offers exclusion) are not generally able to be relied on in cases where an issuer is covered by such exemptions.¹⁵ As part of considering these Australian exemptions, we propose to disregard ASIC technical relief in the same way that ASIC does.¹⁶ This technical relief

⁹ See clause 19(1)(d), (e) and 19(1A)(d) of Schedule 1 of the FMC Act

¹⁰ See clause 46 of Schedule 8 of the Regulations

¹¹ See sections 708AA(3), 708A(2), 1012DAA(3), and 1012DA(2) of the Corporations Act 2001

¹² See section 474 and clause 19(2) of Schedule 1 of the FMC Act

¹³ See sections 468 and 469(c) of the FMC Act

¹⁴ Specifically, exemptions under sections 340, 341, 111AS or 111AT of the Corporations Act 2001

¹⁵ See sections 708AA(2)(d) and (e), 708A(5)(c) and (d), 1012DAA(2)(d) and (e), and 1012DA(5)(c) and (d) of the Corporations Act 2001

¹⁶ See ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73



does not detract from the level of information available to the market, and therefore reliance on certain technical exemptions should also be disregarded for the purposes of the proposed exemption.

Sales exemptions

To align the proposed class exemption with the same class offers exclusion, we also propose exemptions from clauses [31](#) and [34](#) of Schedule 1 of the FMC Act. These clauses are anti-avoidance provisions which set out circumstances where disclosure is required under Part 3 of the FMC Act for certain sales of financial products within 12 months of issue.

Financial reporting

ASX/NZX-listed issuers that rely on the proposed exemption will be FMC reporting entities as they are listed issuers.¹⁷ These issuers will be able to benefit from relief in the [Financial Markets Conduct \(Overseas FMC Reporting Entities\) Exemption Notice 2016](#).

Under this notice, FMC reporting entities that have a primary listing on a financial product market regulated by the laws of certain recognised jurisdictions (including Australia) are exempt from the financial statement preparation and auditing obligations in Part 7 of the FMC Act.

These exemptions are subject to conditions that require the exempt entities to prepare financial statements that comply with the regulatory requirements of a recognised jurisdiction and lodge them in New Zealand. The FMA was satisfied when it granted this exemption that the financial reporting required or permitted in the recognised jurisdictions, and the nature and extent of regulatory oversight for those entities and their auditors, are of high quality and broadly equivalent to those that apply in New Zealand.

As this is the case, no further financial reporting exemptions are considered necessary.

Proposed conditions

We propose that the exemption for same class offers will have the same conditions that apply to offers under the same class offers exclusion (i.e. the requirements in clauses 19-22 of Schedule 8 of the Regulations), modified to enable ASX-listed issuers operating under Australian regulatory requirements to comply.

In summary this means that offers of financial products in reliance on the proposed exemption may only be made if:

- 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

¹⁷ See section 451 of the FMC Act



- its Australian financial reporting obligations
- The offeror must provide ASX and NZX a notice setting out information to correct a defect in a cleansing notice, if it becomes aware of certain defects.
- 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.

Content of cleansing notice

We are proposing that the cleansing notice must:

- state the offer is being made to investors in reliance upon the exemption
- state that the issuer is in compliance with:
 - its Australian continuous disclosure obligations
 - its Australian financial reporting obligations
- set out any information which has not been disclosed to ASX under a continuous disclosure obligation as a result of an exclusion or waiver in the ASX Listing Rules (with this information being defined as ‘excluded information’)
- in the case of equity securities, describe the potential effect, and consequences, that the offer will have on the control of the issuer
- in the case of debt securities with a different redemption date or interest rate from the ASX-quoted financial products, include information that would be (if the quoted products had the same redemption date or interest rate):
 - required to be disclosed under a continuous disclosure obligation; or
 - excluded information.

Material information and excluded information

We propose that the cleansing notice must contain information, including any excluded information, that is ‘material information’ within the meaning of that term in section 59 of the FMC Act (as is the case with cleansing notices under the same class offers exclusion¹⁸). We propose to use the FMC Act concepts of ‘material information’ and ‘excluded information’ for this purpose of determining the content of the cleansing notice, rather than Australian formulations for similar cleansing notices under the Corporations Act.¹⁹ We are interested in feedback on this approach and whether it might create any difficulties for preparing and giving notices to ASX. Please give your feedback in question six, below.

¹⁸ See clause 20(3) of Schedule 8 of the Regulations

¹⁹ See, for example, sections 708AA(7)(d), (8) and (9), and 708A(6)(e), (7) and (8) of the Corporations Act 2001



Condition to correct defective cleansing notice

The proposed exemption will be subject to a condition that requires offerors to provide a notice to ASX and NZX setting out information necessary to correct defects it becomes aware of in an issuer's cleansing notice. We propose this condition will replicate the requirements in clause 21 of Schedule 8 of the Regulations.

Further condition for offers of debt securities

We also propose a condition requiring investors to be given a statement containing certain information about quoted debt securities that are of the same class as those being offered, including about how investors can obtain information (to replicate the statement required under clause 22 of Schedule 8 of the Regulations).

Policy rationale

In our view, the proposed exemption is consistent with the policy of the same class offers exclusion and promotes the same purposes. It recognises the special and unique economic relationship between New Zealand and Australia. Many businesses have commercial activities and shareholders on both sides of the Tasman and our financial markets are interconnected.

The proposed exemption also complements the FMC Act's trans-Tasman mutual recognition scheme²⁰ for the reasons set out below.

- Both the scheme and the proposed exemption have similar aims including to promote investment between Australia and New Zealand by removing unnecessary regulatory barriers to trans-Tasman financial product offerings and reducing the cost of capital raising in both Australia and New Zealand while maintaining investor protections.
- The proposed exemption recognises the regulatory framework around an ASX/NZX-listed issuer's disclosure obligations to ASX and ASX's market oversight. These fulfil the investor protection purposes that are performed through the scheme's recognised offer disclosure documents, notifications, and other ongoing requirements.
- The proposed exemption is also consistent with ASIC individual relief commonly granted to New Zealand companies dual-listed on ASX that aren't subject to ASX continuous disclosure obligations (so they cannot prepare an Australian cleansing notice). ASIC generally allows these issuers to make rights issue offers and on-sales in Australia without needing to prepare a formal Australian disclosure document in cases where ASIC considers Australian investors have an equivalent level of protection and information.²¹

²⁰ See subpart 6 of Part 9 of the FMC Act. This scheme allows an issuer in Australia or New Zealand to offer certain financial products in both countries using one disclosure document prepared under regulation in its home country, and to then comply with minimal entry and ongoing requirements agreed to between the two countries and prescribed in each country's law.

²¹ Given the generally narrower scope of the Australian statutory exemptions for rights issues and on-sales compared to the same class offers exclusion (and therefore also the proposed class exemption), it is possible that offers of ASX/NZX-listed issuers products could be made under the proposed class exemption in New Zealand that may not be able to be made in Australia without AISC individual relief (or at all).



We consider the proposed exemption maintains investor protection through appropriate disclosure to investors and market oversight for the reasons outlined below.

- ASX’s continuous disclosure regime is robust and broadly equivalent to NZX’s continuous disclosure regime.
- Australian financial reporting obligations are broadly comparable to New Zealand.
- Conditions requiring notification through giving cleaning notices to ASX and NZX prior to the offer will enable the market operators to work with the FMA. If necessary, the FMA can make a direction order to prevent or delay the offer if there are concerns about non-compliance with a term or condition of the exemption.²²
- The FMA and ASIC have arrangements in place for co-operation and the exchange of information. This means that the FMA will be able to work with ASIC to share information if any concerns arise in relation to an issuer and take appropriate action if necessary.
- NZX retains discretion (under NZX’s Listing Rules) to apply certain NZX Listing Rules to an ASX/NZX-listed issuer.

Market impact

Anticipated benefits to financial markets of the proposed exemption include:

- creating additional opportunities for New Zealand investors to access investment opportunities in companies listed on ASX and NZX
- helping to attract new secondary listings to NZX
- lowering the cost of capital for New Zealand’s businesses by generally broadening and deepening New Zealand’s capital markets
- increasing liquidity on the secondary market for ASX-quoted products, benefiting holders of ASX-quoted products, including New Zealand holders.

Relevant FMC Act purposes

For the policy rationale and market impact reasons set out above, we think a number of purposes of the of the FMC Act (outlined in the section above on ‘FMA’s discretion to exempt’) are likely to be promoted by the proposed exemption including:

- promoting the confident and informed participation of businesses, investors and consumers in the financial markets
- promoting and facilitating the development of fair, efficient and transparent financial markets
- promoting innovation and flexibility in the financial markets; and
- avoiding unnecessary compliance costs.

²² FMA and NZX currently have arrangements in place for NZX to notify FMA about offers under the same class offers exclusions. If necessary, FMA can order that the exclusion does not apply if there is non-compliance with continuous disclosure or financial reporting obligations in the 12 months before the offer.



Draft notice

For those that are interested we have prepared a [draft notice](#) to illustrate how we see the proposed exemptions and conditions could work. We have done this on this occasion because the general policy of the proposed exemption is to mimic the requirements that apply to the same class offers exclusion, modified to enable ASX/NZX-listed issuers to give cleansing notices to ASX and NZX.

Therefore, we are seeking comments on how effectively our policy proposals outlined above are reflected in the draft exemption notice, including whether there may be any unintended consequences or practical difficulties from the proposed drafting.

Please note that the exemption notice is not in effect and policy decisions are yet to be made.



Questions

Exemption proposal

1. Do you support the proposed exemption to enable same class offers of ASX-quoted financial products of ASX/NZX-listed issuers on the same basis as the same class offers exclusion? Please give reasons for your view.
2. Do you support the proposed circumstances where the exemption will not apply? Please give reasons for your view, including any modifications that you would like to see.
3. What impact on those who issue and offer financial products would this exemption have, if granted? We are particularly interested in any benefits, risks, cost savings or costs imposed, or practical difficulties this group may face if the exemption is granted (for example, difficulties making offers in New Zealand).
4. We would like to understand and quantify the potential impact of the proposed exemption. Would you (or your clients) be likely to rely on the proposed exemption? If possible, please provide an indication of the expected numbers, frequency, or value of offers that would be likely to be made, or whether you (or your clients) would seek a secondary listing on NZX.
5. What impact on investors would this exemption have, if granted? We are particularly interested in any benefits, risks, cost savings or costs imposed, or practical difficulties investors may face if the exemption is granted (for example difficulties for investors and their advisers obtaining and understanding Australian offer information, continuous disclosure or financial reporting information)?
6. Do you support the proposed exemption from clauses 31 and 34 of Schedule 1 of the FMC Act to enable certain sales within 12 months if the financial products have previously been offered for issue or sale under the proposed exemption for same class offers of ASX-quoted financial products? Please give reasons for your view.

Conditions


7. Do you agree with our proposed conditions that recognise ASX/NZX-listed issuers' Australian continuous disclosure and Australian financial reporting to enable offers of financial products of the same class as ASX-quoted products to be made in New Zealand? If you have identified practical difficulties, please explain any solutions that you would propose to address the difficulties.
8. 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)? If you have identified practical difficulties, please explain any solutions that you would propose to address the difficulties.
9. Are there any other conditions you think should apply? Please give your reasons.

Draft notice

10. Do you have any comments on the draft exemption notice?

Other

11. Do you have any additional information or issues not already covered in this consultation paper that you believe are relevant to us in considering this exemption? Do you have any other comments on our proposals?



Feedback form: Proposed exemption for same class offers of ASX/NZX-quoted financial products

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Proposed exemption for same class offers of ASX/NZX-quoted financial products [your organisation's name]' in the subject line.

Submissions close at 5pm on Wednesday 13 June 2018.

Date: _____ Number of pages: _____

Name of submitter: _____

Company or entity: _____

Organisation type: _____

Contact name (if different): _____

Contact email and phone: _____

Question number	Response
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You don't need to quote from the consultation document if you note the question number.

Q1	
Q2	
Q3	
Q4	
Q5	
Q6	
Q7	
Q8	
Q9	
Q10	
Q11	

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.