

## Financial Markets Conduct (66 The Square Proportionate Ownership Scheme) Exemption Notice 2016

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 (66 The Square Proportionate Ownership Scheme) Exemption Notice 2016.

#### 2 Commencement

This notice comes into force on 1 December 2016.

#### 3 Revocation

This notice is revoked on the close of 31 March 2018.

#### 4 Interpretation

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

**Act** means the Financial Markets Conduct Act 2013

**effective date** has the same meaning as in clause 16 of schedule 4 of the Act

**scheme** means the 66 The Square Proportionate Ownership Scheme in relation to the land and buildings comprising 66–68 The Square and 9–15 Fitzherbert Avenue, Palmerston North as more fully described in Certificate of Title 313/148 (Wellington Registry) being section 671 Town of Palmerston North and established in accordance with the Securities Act (Real Property Proportionate Ownership Schemes) Exemption Notice 2002

**scheme participants** means the holder of one or more units in the scheme

**Regulations** means the Financial Markets Conduct Regulations 2014

**winding up plan** means a written plan for the winding up of the scheme which includes the steps required to be taken to wind up the scheme, any matters for which scheme participants' approval is required, proposed timeframes and any other material information relating to the wind up.

- (2) Any term 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 from registration and updating of governing documents**

The manager of the scheme is exempted, in relation to the scheme, from—

- (a) sections 135 and 137 of the Act;
- (b) section 127(1)(b) of the Act to the extent that it requires the scheme's governing document to comply with sections 135 and 137 of the Act;
- (c) section 133(a) of the Act to the extent that it relates to the requirements in sections 135 and 137 of the Act; and
- (d) clause 22(1)(b) of schedule 4 of the Act to the extent that it requires the copy of the scheme's governing document lodged with the Registrar to comply with sections 135 and 137 of the Act.

## **6 Exemptions from requirement to have a licensed manager**

The manager of the scheme is exempted, in relation to the scheme, from—

- (a) section 127(1)(c) of the Act, to the extent that it requires the scheme to have a licensed manager designated or appointed under the governing document (or the Act) whose licence covers management of the scheme;
- (b) section 133(a) of the Act to the extent that it relates to the requirement referred to in subclause (a); and
- (c) section 388(a) of the Act.

## **7 Exemptions from requirement to have a licensed supervisor and consequential obligations relating to the supervisor**

The manager of the scheme is exempted, in relation to the scheme, from—

- (a) section 127(1)(d) of the Act, to the extent that it requires the scheme to have a licensed supervisor designated or appointed under the governing document (or the Financial Markets Supervisors Act 2011) whose license covers the supervision of the scheme;
- (b) section 133(a) of the Act to the extent that it relates to the requirement referred to in subclause (a);

- (c) clause 22(1)(c)(ii) of schedule 4 of the Act to the extent that it requires the manager to supply to the Registrar and the FMA the name and address of the person who, on the effective date, will be the licensed supervisor;
- (d) clauses 15(e)(ii) and (h) of schedule 1 of the Regulations;
- (e) section 147 of the Act;
- (f) section 149 of the Act; and
- (g) section 162 of the Act.

## **8 Conditions of exemptions in clause 7**

The exemptions in clause 7 are subject to the condition that the person who was the manager of the scheme immediately before the scheme was wound up must—

- (a) within 4 months after the date on which the winding up of the scheme takes effect, ensure that final financial statements of the scheme, showing the financial position of the scheme as at the date on which the winding up takes effect, are prepared in accordance with generally accepted accounting practice and audited;
- (b) within 20 working days after the final financial statements for the scheme have been audited, ensure that:—
  - (i) a copy of those financial statements is sent to the FMA and to every person who was a scheme participant immediately before the scheme was wound up; and
  - (ii) the FMA and scheme participants are advised in writing as to the manner in which the remaining assets (if any) of the scheme are to be distributed; and
  - (iii) must inform the FMA of the date on which the distribution of the assets is completed.

## **9 Exemption from the independent custody requirements**

The manager of the scheme is exempted until 1 April 2017, in relation to the scheme, from—

- (a) section 127(1)(f) of the Act to the extent it requires the scheme property to be held by the supervisor or another person who meets the external custodianship requirements in section 156 of the Act (to the extent that it is not held directly by scheme participants);
- (b) section 133(a) of the Act to the extent that it relates to the requirement referred to in subclause (a); and
- (c) section 156(2)(b) to the extent that it requires that the scheme property must be held by a person who meets the external custodianship requirements in that section (to the extent that the property is not held directly by scheme participants).

## **10 Exemption from requirement to have a statement of investment policy and objectives**

The manager of the scheme is exempted, in relation to the scheme, from—

- (a) section 164 of the Act; and
- (b) clause 15(k) of schedule 1 to the Regulations.

**11 Exemption from requirement to audit or review registers**

The manager of the scheme is exempted from section 218 of the Act in relation to the scheme.

**12 Exemption from annual assurance engagement**

The custodian of the scheme property is exempted from regulation 87(1) of the Regulations in relation to the scheme.

**13 Exemption from daily cash reconciliation**

The custodian of the scheme property is exempted from regulation 86(3) of the Regulations in relation to the scheme.

**14 Conditions of exemption in clause 13**

- (1) The exemption in clause 13 is subject to the condition that the custodian must reconcile all records of money for the scheme at a frequency that the custodian reasonably determines, in accordance with regulation 86(2) of the Regulations and subclause (b), to be appropriate for the purpose of ensuring that the custodian's records accurately state the scheme's money and all transactions relating to that money.
- (2) For the purposes of determining the appropriate frequency for reconciling records of money for the scheme under subclause (a) the custodian must—
  - (a) consider the frequency and volume of the transactions in respect of the scheme's property;
  - (b) consider, whether there is a material change in the frequency or volume of cash transactions and in any case not less than annually, whether reconciliations are being carried out at an appropriate frequency;
  - (c) consult with the manager of the scheme; and
  - (d) act to the standard of a prudent and professional custodian.

**15 Conditions of exemptions in clauses 5, 6, 7, 9, 10, 11, 12 and 13**

The exemptions in clauses 5, 6, 7, 9, 10, 11, 12 and 13 are subject to the condition that the manager of the scheme must—

- (a) not issue any new managed investment products in the scheme;
- (b) not sell, transfer or otherwise dispose of, or agree to sell, transfer or otherwise dispose of, the real property assets of the scheme or any interest in them until the scheme property is held by a person who meets the external custodianship requirements in section 156 of the Act (to the extent that it is not held directly by scheme participants);
- (c) on or before 31 January 2017, prepare a winding up plan and send a copy of the winding up plan to scheme participants with a written notice that includes—
  - (i) a statement that the scheme is being wound up and the date by which it is anticipated winding up of the scheme will be completed (as detailed in the winding up plan);
  - (ii) a statement that the scheme is relying on an exemption which has been granted to enable it to close down in a timely manner while not imposing additional compliance costs that would arise if full compliance with the Act was required;
  - (iii) a statement that some of the usual governance requirements of the Act will not

- apply to the scheme while it is being wound up and details of the requirements that will not apply by reason of the exemption;
- (iv) an explanation of the nature and practical effect of the exemptions relied on (including that there will be no independent oversight of the winding up of the scheme) and a description of the alternative governance requirements that the conditions to the exemption impose; and
- (d) report to scheme participants in writing not less than once every three months on the progress of the winding up of the scheme as against the winding up plan.
- (e) notify scheme participants in writing within 10 working days of becoming aware of any material change to or deviation from the winding up plan.

Dated at Auckland this 28<sup>th</sup> day of November 2016.

  
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Nick Kynoch  
General Counsel  
Financial Markets Authority

### Statement of reasons

This notice comes into force on 1 December 2016 and is revoked on 31 March 2018.

This notice exempts the manager of the 66 The Square Proportionate Ownership Scheme (**scheme**), subject to certain conditions, from the following licensing and governance requirements of the Financial Markets Conduct Act 2013 (the **Act**) and Financial Markets Conduct Regulations 2014 (the **Regulations**) —

- The requirement to update the scheme's governing document to comply with the content requirements of the Act:
- The requirement to have a licensed manager designated or appointed under the Act or the scheme's governing document whose licence governs management of the scheme:
- The requirement to have a licensed supervisor designated or appointed under the governing document (or the Financial Markets Supervisors Act 2011) whose licence covers supervision of the scheme and reporting requirements by the manager to the supervisor:
- The requirement to have an independent custodian until 1 April 2017:
- The requirement to have a statement of investment policy and objectives (**SIPO**):
- The requirement to have the register of regulated products audited or reviewed by a qualified auditor.

This notice also exempts the custodian of scheme property from the requirements to perform daily cash reconciliations and obtain an annual assurance engagement.

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

- In general, the exemptions will reduce compliance costs for the scheme by relieving it of certain obligations that are not required, in view of the fact that the scheme is in wind up, to

ensure that appropriate governance arrangements are in place to allow for effective monitoring and reduce governance risks:

- In addition, important protections for investors will continue to apply under the Act. These include that the manager remains subject to the general duties in the Act that apply in the exercise of its functions, including the obligation to act honestly and in the best interests of scheme participants, and to exercise the care, diligence and skill of a prudent person. Further, the manager is also subject to the prohibition in the Act against entering into a transaction that provides for a related party benefit to be given:
- In relation to the exemptions from the requirement to update governing documents and the licensing requirements:—
  - The costs of updating governing documents are unnecessary when the scheme is closed to new investors and is in wind up with an expected completion date of 31 March 2018:
  - The costs of licensing are not commensurate with the benefits for investors in the scheme in circumstances where the manager and supervisor have a relatively limited role in the winding up process and other important protections for investors will continue to apply under the Act. The conditions of the exemption require the manager to notify investors of the exemption from the licensing requirements and its practical consequences and to periodically report to investors on progress with the winding up plan:
- In relation to the exemption from the independent custody requirements, this is limited to a period of four months so that the necessary requirements for the appointment of an independent custodian can be met. The existing custodian is required to hold the scheme property separately and on trust and to keep records of the scheme property until then. Furthermore, the manager cannot sell, transfer or otherwise dispose of the scheme's real property assets (or agree to do so) while the scheme does not have an independent custodian:
- In relation to the exemption from the requirement to have a SIPO, the costs of preparing a SIPO are unnecessary when the scheme is in wind up and the winding up plan will provide investors with all relevant information that would otherwise be given to them in the SIPO:
- In relation to the exemption from the requirement to have the register of regulated products audited, the scheme is closed to new investors and no further units will be issued. In these circumstances, there will be no significant benefit to scheme participants in requiring the manager to have the register audited, particularly when scheme participants will already know the number of units they hold and the corresponding amount they ought to receive from the winding up (assessed with reference to the final audited set of accounts that the manager is required to send to the FMA and scheme participants):
- In relation to the exemption from the daily cash reconciliation requirement, the scheme typically has a low volume and frequency of transactions, and daily reconciliation of records of money for the scheme by the custodian is unlikely to be required to ensure that the records accurately state the scheme's money and all transactions relating to that money:
- In relation to the exemption from the annual assurance engagement requirement, the custodian's processes, procedures and controls are less complex than other managed investment schemes, in view of the fact that the scheme's assets consist primarily of real property, and the risks in relation to custody of those assets are likely to be reduced. In these circumstances, the annual audit of scheme financial statements provides regular and appropriate independent verification in relation to the scheme's property without requiring an annual assurance engagement.

Therefore, the FMA is satisfied that—

- Granting the exemptions is necessary or desirable in order to promote the purposes of the Act. Specifically the exemptions will:—
  - avoid unnecessary compliance costs; and
  - promote innovation and flexibility in the financial markets; and
- The exemptions are not broader than is reasonably necessary to address the matters that gave rise to the exemptions because the exemptions are restricted to the scheme and limited to the period it is in wind up.