Financial Markets Conduct (Foodstuffs Provident Fund) Exemption Notice 2021

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.

Contents

Notice

1 Title

This notice is the Financial Markets Conduct (Foodstuffs Provident Fund) Exemption Notice 2021.

2 Commencement

This notice comes into force on 1 July 2021.

3 Revocation

This notice is revoked on the close of 30 June 2026.

4 Interpretation

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

Act means the Financial Markets Conduct Act 2013

effective date means the date that this exemption notice comes into force

Foodstuffs means Foodstuffs North Island Limited

Fund means the Foodstuffs Provident Fund

permitted in-house asset means land leased to shareholders of Foodstuffs.

(2) Any term or expression that is defined in the Act and used, but not defined, in this notice has the same meaning as in the Act.

5 Exemption

The manager of the Fund is exempted, in respect of the Fund and permitted in-house assets, from section 176 of the Act.

6 Conditions

The exemption in clause 5 is subject to the following conditions—

(a) the statement of investment policy and objectives for the Fund must include—

(i) the rationale for the focus of the Fund on investment in permitted in-house assets, and the considerations the manager must take into account to monitor and manage the governance risks that presents, including steps to be taken to ensure that transactions are on arms'-length terms and at fair value; and

(ii) a minimum limit, as a percentage interest, that Foodstuffs or one of its land owning subsidiaries must hold in each permitted in-house asset which the Fund has an ownership interest in; and

(iii) a maximum limit on the Fund's investment in permitted in-house assets as a percentage by value of Foodstuffs' total land portfolio; and

(iv) a maximum limit on the proportion of the Fund's assets invested in permitted in-house assets; and

(b) the manager of the Fund must send existing scheme participants in the Fund a written notice within one month after the effective date informing them—

(i) that the Fund is relying on this exemption notice; and

(ii) that under this exemption notice, in respect of the Fund and permitted in-house assets, the manager of the Fund continues to be exempted from the usual legal requirement that prohibits the acquisition of any new in-house asset if, as a result of the acquisition, the restricted scheme would have, or increase, an in-house assets ratio of 5% or more in relation to any related party or scheme participant; and

(iii) of the risks associated with investing retirement savings through the Fund in permitted in-house assets; and

(c) the manager of the Fund must provide prospective investors in the Fund with a written notice before they invest in the Fund informing them—

(i) that the Fund is relying on this exemption notice; and

(ii) that under this exemption notice, in respect of the Fund and permitted in-house assets, the manager of the Fund is exempted from the usual legal requirement that prohibits the acquisition of any new in-house asset if, as a result of the acquisition, the restricted scheme would have, or increase, an in-house assets ratio of 5% or more in relation to any related party or scheme participant; and

(iii) of the risks associated with investing retirement savings through the Fund in the permitted in-house assets.

Dated at Wellington this 28th day of June 2021.

Liam Mason
General Counsel
Financial Markets Authority

Statement of reasons

This notice, which comes into force on 1 July 2021 and expires on 30 June 2026, exempts the manager of the Foodstuffs Provident Fund (**Fund**), in relation to land leased to shareholders of the investors' employer (**permitted in-house assets**), from compliance with section 176 of the Financial Markets Conduct Act 2013 (**Act**) which prohibits the acquisition of any new in-house asset where the result of the acquisition would be that the Fund would have, or increase, an in-house assets ratio of not more than 5%.

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

- the Fund is long established and has been operated for a long time as a superannuation scheme that has as its core focus the investment in land leased back to shareholders of the investors' employer, Foodstuffs North Island Limited (**Foodstuffs**). Foodstuffs is a cooperative, with its shareholders owning and operating supermarkets. The Fund is unique in that it has been set up to provide for employees' retirement benefits by expressly investing into in-house assets of the particular kind, designed to provide employees with an interest in the underlying businesses of the cooperative shareholders on the same terms as the cooperative itself:
- the permitted in-house assets are not directly or solely related to the overall fortunes of Foodstuffs – the key drivers of value are the value of the particular land leased to shareholders, the value of the leases, and the fortunes of the shareholder lessees (in contrast to, for example, an investment in an employer's equity). The Fund also has an interest in a small percentage of the Foodstuffs' total land portfolio. As such there is only limited alignment of employment risk and risk to investors' retirement savings:
- appropriate governance arrangements are in place that provide for effective monitoring and to reduce governance risks (including through the proper performance of the manager's role and duties under the Act, combined with policies and limits in the Fund's statement of investment policy and objectives that are required under conditions to the exemption):
- conditions require appropriate disclosure about the exemption and related risks to be made to current and prospective investors:
- the Fund is likely to be wound up if relief is not provided. If it continued without relief, the necessary changes to the Fund's investment strategy will make it unsustainable, as it would have to become a fundamentally different investment. In that context, granting the exemption (subject to conditions) allows the continued informed participation of both Foodstuffs in providing the Fund in its current form and investors investing into the Fund.

The FMA is therefore satisfied that granting the exemption is necessary or desirable in order to promote one or more of the main or additional purposes of the Act.

In particular, the continuation of the Fund pursuant to the exemption promotes—

- the confident and informed participation of Foodstuffs, the manager of the Fund, and investors in the financial markets; and
- flexibility in the financial markets.

Furthermore, the conditions to the exemption—

- ensure that appropriate governance arrangements apply to the Fund that allow for effective monitoring and reduce governance risks; and
- provide for timely, accurate, and understandable information to be provided to existing and prospective investors in the Fund to assist them to make decisions relating to the Fund.

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The FMA is further satisfied that the exemption is not broader than is reasonably necessary to address the matters that give rise to the exemption because it only applies in relation to land leased to shareholders of Foodstuffs rather than in relation to in-house assets more generally.