

Financial Markets Conduct (Napier Port Holdings Limited) Exemption Notice 2019

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 the Act, gives the following notice.

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Notice

1 Title

This notice is the Financial Markets Conduct (Napier Port Holdings Limited) Exemption Notice 2019.

2 Commencement

This notice comes into force on 15 July 2019.

3 Revocation

This notice is revoked on the close of 14 January 2020.

4 Interpretation

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

acquisition means the acquisition by Napier Port of all of the issued shares of Port of Napier immediately prior to the settlement of the offer as described in the PDS and on the offer register

Act means the Financial Markets Conduct Act 2013

bookbuild process means the process under which Napier Port will determine the price and allocation of the shares under the offer

broker means each NZX broker through which an applicant has participated in the priority offer

NBK

eligible employee means any permanent employee of Port of Napier as at the date of the PDS

eligible iwi means Ngāti Kahungunu Iwi Incorporated, the four Taiwhenua of Ngāti Kahungunu Iwi Incorporated and each tāngata whenua appointer as defined in the Hawke's Bay Regional Planning Committee Act 2015

issuing group means Napier Port and all its subsidiaries as at the date of the PDS

issuing group relevant period means the period from the date of commencement of business of Napier Port and ending on a stated date that is not more than 4 months before the date of the PDS

local resident means any individual of any age who is ordinarily resident within the Wairoa, Ngaruroro, Napier, Hastings or Central Hawke's Bay constituencies which make up the Hawke's Bay Regional Council region

Napier Port means Napier Port Holdings Limited

non-resident ratepayer means any individual in New Zealand who is not ordinarily resident within the Wairoa, Ngaruroro, Napier, Hastings or Central Hawke's Bay constituencies which make up the Hawke's Bay Council region but who is liable to the Hawke's Bay Council to pay rates in respect of one or more properties located in one or more of those constituencies

offer means the offer of shares made by Napier Port

PDS means the product disclosure statement for the offer prepared by Napier Port under the Act

PDS event means section 79(4) of the Act applies in relation to the offer because—

- (a) Napier Port becomes aware of a circumstance that has arisen since the PDS was lodged with the Registrar that would have been required by the Act or the Regulations to be disclosed or otherwise contained in the PDS if it had arisen before the PDS was lodged, and the circumstance is not so disclosed or otherwise contained in the PDS; and
- (b) the matter referred to in paragraph (a) is materially adverse from the point of view of an investor

Port of Napier means Port of Napier Limited

Port of Napier relevant period—

- (a) means each of the accounting periods for Port of Napier ending 30 September 2016, 30 September 2017 and 30 September 2018; and
- (b) includes the interim accounting periods for Port of Napier ending 31 March 2018 and 31 March 2019

priority offer means, in relation to the offer, the offer of shares made by Napier Port before the commencement of the bookbuild process to local residents, non-resident ratepayers, eligible iwi and eligible employees

register entry means the entry for the offer in the offer register

register entry event means section 79(5) of the Act applies in relation to the offer because—

- (a) Napier Port becomes aware of a circumstance that has arisen since the PDS was lodged with the Registrar that would have been required by the Act or the Regulations to be disclosed or otherwise contained in the register entry if it had arisen before the PDS was lodged, and the circumstance is not so disclosed or otherwise contained in the register entry; and

- (b) the matter referred to in paragraph (a) is materially adverse from the point of view of an investor

Regulations means the Financial Markets Conduct Regulations 2014

relevant date means,—

- (a) in the case of a PDS event, the date the replacement PDS or supplementary document is lodged with the Registrar pursuant to clause 7(b):
- (b) in the case of a register entry event, the date that the register entry is amended pursuant to clause 7(d)

replacement PDS means, in relation to a PDS event, a replacement PDS prepared by Napier Port that corrects the deficiency and complies with section 73 of the Act

selected financial information means the information referred to in clause 35(1)(a) to (i) of Schedule 3 to the Regulations

shares means the ordinary shares in Napier Port offered under the offer

supplementary document means, in relation to a PDS event, a supplementary document prepared by Napier Port that corrects the deficiency and complies with section 72 of the Act

table 1 means the table in the PDS relating to selected financial information prepared under clause 35 of Schedule 3 to the Regulations

website means an Internet site maintained by or on behalf of Napier Port containing information about the offer

withdrawal period means the period commencing on the date of publication of the advertisements pursuant to clause 7(g) and ending on the close of the date that is 7 working days after that date

working day has the same meaning as in section 29 of the Interpretation Act 1999.

- (2) Any term or expression 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 Exemption from section 80(1) of the Act

Napier Port is exempted, in respect of the priority offer, from section 80(1) of the Act to the extent that that clause applies to the priority offer as a result of—

- (a) a PDS event; or
- (b) a register entry event.

6 Application of exemption in clause 5

The exemption in clause 5 only applies if the PDS event or register entry event occurs prior to the commencement of the bookbuild process.

7 Conditions of exemption in clause 5 relating to notification of PDS event or register entry event and right of withdrawal

The exemption in clause 5 is subject to conditions that—

- (a) the PDS must contain,—
- (i) in section 1 under a heading 'Applicant withdrawal rights'—

- (A) a statement to the effect that if a PDS event or register entry event occurs prior to the commencement of the bookbuild process, applicants for shares will have the right to withdraw their application within a certain time period and have their application money refunded; and
 - (B) a reference to where further information about the matters referred to in paragraph (a)(i)(A) can be found in section 5 of the PDS; and
- (ii) in section 5 of the PDS under a heading 'Priority Offer – Applicant withdrawal rights'—
 - (A) a statement to the effect that pursuant to this notice, if a PDS event or register entry event occurs prior to the commencement of the bookbuild process, Napier Port will not be required to deal under section 80(1) of the Act with any applications for shares that have not resulted in the issue of the shares; and
 - (B) a description of the process that will apply if a PDS event or register entry event occurs; and
 - (C) a description of the withdrawal rights that applicants will have if a PDS event or register entry event occurs; and
 - (D) a description of how, and within what timeframe, applicants will be able to withdraw; and
 - (E) a description of the timeframe within which applicants will receive a refund of their application money if they exercise their right to withdraw; and
- (b) in the case of a PDS event, Napier Port must as soon as practicable lodge a replacement PDS or supplementary document with the Registrar; and
- (c) any replacement PDS or supplementary document lodged pursuant to paragraph (b) must—
 - (i) describe the circumstances in which applicants have a right to withdraw their applications pursuant to clause 8; and
 - (ii) explain how, and within what timeframe, applicants can withdraw their application; and
 - (iii) contain a clear and concise description of the issues raised by the PDS event including the effect of the event, to the extent that the event can be assessed, or where the effect of the event cannot be assessed, a statement to that effect; and
 - (iv) if the PDS event is likely to have a material adverse effect on the value of the shares, contain a statement to that effect; and
 - (v) contain a statement quantifying the effect of the PDS event on the value of the shares if it can be quantified or, where the effect of the event cannot be quantified, a statement to that effect; and
- (d) in the case of a register entry event, Napier Port must as soon as practicable amend the register entry to correct the deficiency; and
- (e) Napier Port must prepare a written notice that complies with the following requirements:
 - (i) the notice must state that a supplementary document or replacement PDS has been lodged with the Registrar or the register entry has been amended (as the case may be):

- (ii) the notice must describe the circumstances in which applicants have a right to withdraw their applications pursuant to clause 8:
 - (iii) the notice must explain how, and within what timeframe, applicants can withdraw their application:
 - (iv) the notice must state that, if the applicant does not validly withdraw an application before the end of the withdrawal period and the offer is not cancelled, subject to any other rights of withdrawal the applicant may have, Napier Port will be entitled to accept the application:
 - (v) the notice must contain a clear and concise description of the issues raised by the PDS event or register entry event (as the case may be) including the effect of the event, to the extent that the event can be assessed, or where the effect of the event cannot be assessed, a statement to that effect:
 - (vi) if the PDS event or register entry event (as the case may be) is likely to have a material adverse effect on the value of the shares, the notice must contain a statement to that effect:
 - (vii) the notice must contain a statement quantifying the effect of the PDS event or register entry event (as the case may be) on the value of the shares if it can be quantified or, where the effect of the event cannot be quantified, a statement to that effect:
 - (viii) if a replacement PDS has been lodged with the Registrar pursuant to paragraph (b), the notice must state how the replacement PDS is materially different from the PDS that it replaces:
 - (ix) if a replacement PDS or supplementary document has been lodged pursuant to paragraph (b), the notice must include a statement explaining that a copy of the replacement PDS or supplementary document is available on the website, on request by contacting Napier Port on the telephone number specified in the notice or by contacting the applicant's broker:
 - (x) if the register entry has been amended pursuant to paragraph (d), the notice must state how the register entry has been amended:
 - (xi) the notice must contain a statement that the notice is published by Napier Port; and
- (f) prior to lodgement of the replacement PDS or supplementary document pursuant to paragraph (b) or amendment of the register entry pursuant to paragraph (d), Napier Port must provide a copy of the notice referred to in paragraph (e) to NZX Limited for the purpose of that notice being publicly released on NZX Limited's market announcement platform; and
- (g) on the day immediately following the relevant date, an advertisement must be prominently published, in at least A4 size, on the same day in The New Zealand Herald, the Dominion Post, The Press, the Otago Daily Times and the Hawke's Bay Today (or the equivalent weekend editions of these newspapers), containing—
- (i) a clear and concise summary of the material issues raised by the PDS event or register entry event (as the case may be); and
 - (ii) a statement that further information about the PDS event or register entry event (as the case may be) is available on the website; and

- (iii) if a replacement PDS or supplementary document has been lodged with the Registrar pursuant to paragraph (b), a statement explaining that a replacement PDS or supplementary document containing further information about the PDS event is available on the website, on request by contacting Napier Port on the telephone number specified in the advertisement or by contacting the applicant's broker; and
 - (iv) a statement that the information is published by Napier Port; and
 - (v) a statement describing the circumstances in which applicants have a right to withdraw their applications pursuant to clause 8; and
 - (vi) a statement explaining how, and within what timeframe, applicants can withdraw their application; and
- (h) commencing on the relevant date and on an on-going basis until the issue of the shares under the offer or cancellation of the offer, the website must include on its homepage in a prominent place—
 - (i) a clear and concise summary of the material issues raised by the PDS event or register entry event (as the case may be); and
 - (ii) a statement explaining that further information about the PDS event or register entry event (as the case may be) is available at an attached link, followed by a link to the notice referred to in paragraph (e); and
 - (iii) if a supplementary document has been lodged with the Registrar pursuant to paragraph (b), a statement explaining that further information about the PDS event is available at an attached link, followed by a link to a copy of the supplementary document and the PDS in that order, preceded by a statement that the documents should be read together; and
 - (iv) if a replacement PDS has been lodged with the Registrar pursuant to paragraph (b), a statement explaining that further information about the PDS event is available at an attached link, followed by a link to a copy of the replacement PDS; and
 - (v) if a replacement PDS or supplementary document has been lodged with the Registrar pursuant to paragraph (b), a statement explaining that a copy of the replacement PDS or supplementary document containing further information about the PDS event is available on request by contacting Napier Port on the telephone number specified on the website or by contacting the applicants broker; and
 - (vi) a statement that the information is published by Napier Port; and
- (i) commencing on the relevant date and on an on-going basis until the close of the withdrawal period, the website must include on its homepage in a prominent place—
 - (i) a statement describing the circumstances in which applicants have a right to withdraw their application pursuant to clause 8; and
 - (ii) a statement explaining how, and within what timeframe, applicants can withdraw their application; and
- (j) commencing on the close of the withdrawal period and on an on-going basis until the issue of the shares under the offer or cancellation of the offer, the website must include on its homepage in a prominent place a statement to the effect that there was an application withdrawal period, which has now closed; and
- (k) before 5.00pm on the relevant date, Napier Port must instruct each broker through which

an applicant has applied for shares to—

- (i) promptly contact those applicants to advise each applicant—
 - (A) that a PDS event or register entry event (as the case may be) has occurred that is material to the offer of shares; and
 - (B) that the applicant has a right to withdraw their application by an advised date; and
 - (C) if a replacement PDS or supplementary document has been lodged with the Registrar pursuant to paragraph (b), that a disclosure document containing further information about the PDS event is available; and
 - (D) if the register entry has been amended pursuant to paragraph (d), that the register entry has been so amended; and
 - (E) that further information is available on the website; and
 - (ii) send a copy of the notice referred to in paragraph (e) to each of those applicants; and
- (l) before 5.00pm on the relevant date, Napier Port must instruct Port of Napier to—
- (i) promptly inform all eligible employees by way of e-mail or staff announcement—
 - (A) that a PDS event or register entry event (as the case may be) has occurred that is material to the offer of shares; and
 - (B) that employees who have already applied for shares have a right to withdraw their application by an advised date; and
 - (C) if a replacement PDS or supplementary document has been lodged with the Registrar pursuant to paragraph (b), that a disclosure document containing further information about the PDS event is available; and
 - (D) if the register entry has been amended pursuant to paragraph (d), that the register entry has been so amended; and
 - (E) that further information is available on the website; and
 - (ii) send a copy of the notice referred to in paragraph (e) to each of those employees; and
- (m) before 5.00pm on the relevant date, Napier Port must send an email to those applicants who have applied for shares through the website to—
- (i) advise each of those applicants—
 - (A) that a PDS event or registry entry event (as the case may be) has occurred that is material to the offer of shares; and
 - (B) that the applicant has a right to withdraw their application by an advised date; and
 - (C) if a replacement PDS or supplementary document has been lodged with the Registrar pursuant to paragraph (b), that a disclosure document containing further information about the PDS event is available; and
 - (D) if the register entry has been amended pursuant to paragraph (d), that the register entry has been so amended; and
 - (E) that further information is available on the website; and

- (ii) attach a copy of the notice referred to in paragraph (e) to the email sent to each of those applicants; and
- (n) in the case of a PDS event, Napier Port must send free of charge a copy of the replacement PDS or supplementary document on request to any person that has applied for shares if that request is received by it from such a person during the period commencing on the relevant date and ending on the date of the issue of the shares under the offer or cancellation of the offer; and
- (o) the PDS must contain a statement that a copy of this notice is available on the offer register; and
- (p) if a supplementary document has been lodged with the Registrar pursuant to paragraph (b), any PDS printed but not distributed to any person by Napier Port, or by any person acting on behalf of Napier Port, prior to the lodgement of any supplementary disclosure document must have a copy of the supplementary document attached immediately behind the front cover of the PDS prior to its distribution.

8 Conditions of exemption in clause 5 relating to withdrawal and refund rights

The exemption in clause 5 is subject to the further conditions that—

- (a) in addition to any other rights of withdrawal that an applicant may have, if an applicant's application is dated on or before the date of publication of the advertisements pursuant to clause 7(g), an applicant may withdraw their application for shares by:
 - (i) completing a notice of withdrawal on the website; or
 - (ii) informing the broker through whom the applicant applied for shares that they wish to withdraw; or
 - (iii) in the case of Port of Napier employees, informing a person identified for that purpose by Port of Napier that they wish to withdraw,in each case, before the end of the withdrawal period; and
- (b) Napier Port must refund to every withdrawing applicant her or his application money (without any interest on that money) within 5 working days after the earlier of:
 - (i) the end of the withdrawal period; or
 - (ii) the cancellation of the offer.

9 Exemption from clause 35(1) of Schedule 3 to the Regulations

Napier Port is exempted, in respect of the offer, from clause 35(1) of Schedule 3 to the Regulations to the extent that that clause requires table 1 to contain selected financial information for the issuing group for the issuing group relevant period.

10 Conditions of exemption in clause 9

The exemption in clause 9 above is subject to the conditions that—

- (a) table 1 must contain selected financial information for Port of Napier for each of the Port of Napier relevant periods; and
- (b) the register entry must include a summary explanation of the acquisition; and

- (c) the PDS must include a statement to the effect that a summary explanation of the acquisition is available on the offer register; and
- (d) section 7 of the PDS must include the following statements:
- (i) a statement to the effect that Napier Port will acquire Port of Napier prior to settlement of the offer:
 - (ii) a statement to the effect that table 1 does not contain the usually required selected financial information for Napier Port for the issuing group relevant period, but that information is included in the selected financial information for the issuing group for P+1:
 - (iii) a statement setting out the reasons why the directors of Napier Port consider that including the selected financial information for Port of Napier for each of the Port of Napier relevant periods in table 1 will be more useful to prospective investors in assessing the merit of the offer:
 - (iv) a statement to the effect that the selected financial information for Port of Napier for each of the Port of Napier relevant periods contained in table 1 (excluding any financial information in the selected financial information table that is identified as being pro forma financial information) is extracted from the financial statements for Port of Napier, and that the financial statements, together with any auditor's report on those statements, are contained on the offer register.

Dated at Wellington this 11th day of July 2019.



Nick Kynoch
General Counsel
Financial Markets Authority

Statement of reasons

This notice comes into force on 15 July 2019, and is revoked on the close of 14 January 2020.

The notice exempts Napier Port Holdings Limited (**Napier Port Holdings**), in respect of the offer of ordinary shares in Napier Port Holdings (**Offer**), from—

- section 80(1) of the Financial Markets Conduct Act 2013 (**FMC Act**) where Napier Port Holdings becomes aware of a circumstance that has arisen since the product disclosure statement (**PDS**) for the Offer was lodged that would have been required by the FMC Act or Financial Markets Conduct Regulations 2014 (**FMC Regulations**) to be disclosed or otherwise contained in the PDS or the register entry for the Offer (**Register Entry**) if it had arisen before the PDS was lodged, and the circumstance is not disclosed or otherwise contained in the PDS or Register Entry and the circumstance is materially adverse from the point of view of an investor (**Significant Event**) (**Significant Event Exemption**); and
- the requirement under clause 35(1) of Schedule 3 to the FMC Regulations that the selected financial information table (**Table 1**) in the PDS contains financial information for Napier Port Holdings for the period (**Specified Period**) from the date of commencement of business of

Napier Port Holdings and ending on a date that is not more than 4 months before the date of the PDS (**Financial Information Exemption**).

The Financial Markets Authority (**FMA**), being satisfied of the matters set out in section 557 of the FMC Act, considers it appropriate to grant the exemptions because—

- in relation to the Significant Event Exemption,—
 - without an exemption, in the case of a Significant Event, applicants would either have to be repaid their application money or be given one month to confirm whether or not they still want to acquire the shares. This would require Napier Port Holdings to hold the Offer open for an extended period of time, which is likely to create uncertainty and therefore jeopardise the ability of Napier Port Holdings to secure the participation of international institutional investors in the bookbuild process in which they bid as major purchasers of the shares and the share price is determined:
 - the exemption only applies if a Significant Event occurs. This means that there is no exemption from the PDS or Register Entry being required to contain all relevant and material information relating to the Offer:
 - additionally, the exemption only applies if the Significant Event occurs during the period prior to the commencement of the bookbuild process, during which the Offer is only open to applications from Hawke's Bay residents, non-resident Hawke's Bay ratepayers, eligible Port of Napier Limited (**Port of Napier**) employees and local iwi (**Priority Offer**). The bookbuild process is used to establish the demand for the shares and to determine an appropriate price for the shares in considering that demand. This means that the impact of a Significant Event on the value of the shares will be considered in setting the price of the shares:
 - conditions of the exemption require a supplementary document or replacement PDS to be lodged with the Registrar or the Register Entry to be amended (as applicable) and that any supplementary disclosure must include a clear and concise description of the issues raised by the Significant Event including the effect on the shares:
 - the high profile nature of the Offer means that there would be wide publicity surrounding any Significant Event. Applicants under the Priority Offer are persons who have a connection with the Hawke's Bay region and are therefore more likely to be aware of any Significant Event that occurs. In addition to that publicity, conditions of the exemption will require that notice be given to applicants and to the public of any Significant Event and applicants' withdrawal and refund rights. Further conditions require that the PDS outlines the process that would apply, and the rights that applicants would have, if a Significant Event occurs prior to the bookbuild process. This means that applicants should be aware that this process may occur, and that if a Significant Event does occur, there would be high public awareness of it:
- in relation to the Financial Information Exemption,—
 - Napier Port Holdings was incorporated on 12 June 2019 and will acquire 100% of Port of Napier immediately prior to the settlement of the Offer. This means that the underlying assets and business of the issuing group after the acquisition will effectively be the underlying assets and business of Port of Napier. The most useful financial information to assist investors to make informed decisions relating to the Offer will be the historical financial information for Port of Napier and the prospective financial information for the issuing group, and presenting this information together in Table 1 will make the information more easily comparable:

- requiring disclosure in Table 1 of financial information for Napier Port Holdings for the short Specified Period, in addition to the historical information for Port of Napier, would not be useful for investors and would not be comparable to the other financial information contained in Table 1. That information will be included in the prospective financial information for the issuing group for the period ending 30 September 2019:
- conditions of the exemption require Table 1 to contain selected financial information for Port of Napier for each of the historical accounting periods ending 30 September 2016, 30 September 2017 and 30 September 2018 and interim accounting periods ending 31 March 2018 and 31 March 2019:
- conditions of the exemption also require the PDS to include various statements, including a statement that Table 1 does not include the usually required financial information for the Napier Port for the Specified Period and a statement setting out the reasons why the directors of Napier Port consider including the selected financial information for Port of Napier in Table 1 will be more useful to investors in assessing the merits of the Offer.

Therefore, the FMA is satisfied that—

- granting the exemption is necessary or desirable in order to promote the purposes of the FMC Act. Specifically, the exemptions will—
 - promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and
 - ensure the provision of timely, accurate and understandable information to be provided to persons to enable those persons to make decisions relating to financial products.
- the exemptions are not broader than reasonably necessary to address the matters that gave rise to the exemptions because—
 - the Significant Event Exemption is limited to circumstances where a Significant Event occurs prior to commencement of the bookbuild process, and is subject to conditions that mean applicants should be aware of the withdrawal and refund process if a Significant Event occurs, and that if a Significant Event does occur, there would be high public awareness of it; and
 - the key effect of the Financial Information Exemption is that Table 1 is only required to contain the most useful and comparable financial information for the Offer to assist decision making by investors.