

Financial Markets Conduct (Insider Trading - Fonterra Co-operative Group Limited) Exemption Notice 2020

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 (Insider Trading - Fonterra Co-operative Group Limited) Exemption Notice 2020.

2 Commencement

This notice comes into force on 1 December 2020.

3 Revocation

This notice is revoked on 30 November 2025.

4 Interpretation

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

Act means the Financial Markets Conduct Act 2013

compulsory acquisition powers means the rights of Fonterra to require a Shareholder to acquire further co-operative shares, pursuant to Fonterra's constitution

compulsory disposal powers means the rights of Fonterra to require a Shareholder to dispose of co-operative shares, pursuant to Fonterra's constitution

co-operative share has the meaning given in section 5(1) of the Dairy Industry Restructuring Act 2001

co-operative share equivalent means any instrument treated as the equivalent of a co-operative share for the purpose of complying with a requirement of Fonterra's constitution

exempt adviser means a person who holds inside information obtained in the person's capacity as a director, officer, or employee of Fonterra, or as a member of the Fonterra shareholders'

council (whether or not the person is in that position when the advice or encouragement is given)

exempt trader means a person who holds inside information obtained in the person's capacity as a director, officer, or employee of Fonterra or as a member of the Fonterra shareholders' council (whether or not the person is in that position when the trading is undertaken), and any other person (including any person acting jointly with the person holding that information) who would be considered to also hold that inside information solely by virtue of the first person holding the information

Fonterra means Fonterra Co-operative Group Limited

Fonterra fund security means a new co-op fund security (as referred to in section 109D(1)(b)(i) of the Dairy Industry Restructuring Act 2001)

Fonterra shareholders' council means the shareholders' council established by Fonterra's constitution

independent agent means any one or more independent investment broker or similar firm appointed by Fonterra pursuant to Fonterra's constitution.

- (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 Certain trading exempted from insider conduct prohibitions

- (1) An exempt trader who undertakes a trade described in clause 5(2) is exempt from —
- (a) section 241 of the Act; and
 - (b) section 240 of the Act to the extent that it applies in relation to section 241.
- (2) This exemption applies to trading in co-operative shares or Fonterra fund securities that —
- (a) is undertaken in connection with enabling the exempt trader to—
 - (i) comply with a requirement, imposed by or under Fonterra's constitution, to hold no more than a maximum or no less than a minimum number of co-operative shares (including co-operative share equivalents); or
 - (ii) increase the exempt trader's voting rights, or the price paid to the exempt trader for milk supply, under Fonterra's constitution (having regard to the relationship between milk supply and the number of co-operative shares held (including co-operative share equivalents)); and
 - (b) is not influenced by the inside information held by the exempt trader.
- (3) The exemptions described in clause 5(1) also applies to trading in co-operative shares or Fonterra fund securities that is undertaken by Fonterra or an independent agent pursuant to the compulsory acquisition powers or compulsory disposal powers and is not influenced by inside information held by Fonterra.

6 Certain advice and encouragement exempted from insider conduct prohibitions

- (1) An exempt adviser who gives advice or encouragement described in clause 6(2) is exempted from —
- (a) section 243 of the Act; and
 - (b) section 240 of the Act to the extent that it applies in relation to section 243.

- (2) This exemption applies to advice or encouragement to trade or hold co-operative shares or Fonterra fund securities that —
- (a) is given by an exempt adviser in connection with enabling any person to—
- (i) comply with a requirement, imposed by or under Fonterra's constitution, to hold no more than a maximum or no less than a minimum number of co-operative shares (including co-operative share equivalents); or
- (ii) increase the person's voting rights, or the price paid to the person for milk supply, under Fonterra's constitution (having regard to the relationship between milk supply and the number of co-operative shares held (including co-operative share equivalents)); and
- (b) is not influenced by the inside information held by the exempt adviser.

7 Existing notice revoked

The Financial Markets Conduct (Insider Trading - Fonterra Co-operative Group Limited) Exemption Notice 2019 is revoked on the commencement of this notice.

Dated at Auckland this 13th day of **November** 2020.



Nick Kynoch
General Counsel
Financial Markets Authority

Statement of reasons

This notice comes into force on 1 December 2020 and is revoked on 30 November 2025. The notice exempts certain persons from certain prohibitions imposed under sections 240, 241 and 243 of the Financial Markets Conduct Act 2013 (the **Act**). The notice replaces the Financial Markets Conduct (Insider Trading - Fonterra Co-operative Group Limited) Exemption Notice 2019, which will be revoked on 01 December 2020.

Background –

- The Dairy Industry Restructuring Act 2001 was amended in 2012 to provide for (among other things) the establishment of a new share trading system: Trading Among Farmers (**TAF**). Key components of TAF are:
 - a new fund (the **Fonterra fund**) holds co-operative shares and issues securities (**Fonterra fund securities**) that are traded on a registered market:
 - a new market for trading, by farmers, of shares in the Fonterra Co-operative Group Limited (**co-operative shares**);
- the new market (the **Fonterra Shareholders' Market**) was granted market registration on

30 August 2012 under the *Securities Markets Act (Fonterra Shareholders' Market) Notice of Market Registration*;

- 2012. Pursuant to clause 42 of Schedule 4 of the Act, NZX Limited is deemed to hold, under the Act, a financial product market licence to operate the Fonterra Shareholders' Market;
- farmers are able to trade co-operative shares freely on the Fonterra Shareholders' Market. If permitted by Fonterra, farmers are also able to sell the rights derived from their co-operative shares to the Fonterra fund but retain a voucher that may be treated as the equivalent of a co-operative share for the purposes of complying with a requirement of Fonterra's constitution.

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

- if a farmer is a current or former director, officer, or employee of Fonterra, or a current or former member of the Fonterra shareholders' council (**Fonterra insider**), he or she may hold inside information obtained while he or she was an information insider. A person (or persons acting jointly) may also be considered to hold the inside information held by the director, employee, or current or former member of Fonterra shareholders' council solely by virtue of the director, employee or member holding the information (for example, in circumstances where the co-operative shares or Fonterra fund securities are held by the director, employee or member jointly with another person, in a trust or company, etc.);
- these directors, employees, members and other persons would ordinarily be prevented from trading or giving advice by sections 240, 241 and 243 of the Act . Despite having inside information, there are some circumstances in which it may be necessary or desirable for these directors, employees, members and other persons who are both a farmer and a Fonterra insider to trade co-operative shares or Fonterra fund securities—
 - the person may hold less than the minimum number, or more than the maximum number, of co-operative shares (or their equivalent) permitted by or under Fonterra's constitution;
 - the person may hold more co-operative shares (or their equivalent) than the minimum number required but less than the number that would be proportionate with the person's milk supply. Under Fonterra's constitution, the person would be entitled to, but unable to access, additional voting rights and a better price for milk supply;
- shareholders must comply with the shareholding requirements imposed by or under Fonterra's constitution which is applicable to them. If they do not, Fonterra may enforce compliance including by appointing an independent agent to acquire or dispose of co-operative shares on that shareholder's behalf;
- clause 5 of this exemption notice exempts a Fonterra insider from prohibitions imposed under the Act on trading undertaken in these circumstances, provided that the trading is not influenced by the inside information and is undertaken in connection with enabling the person to comply with requirements imposed by or under Fonterra's constitution;
- a Fonterra insider may also have a responsibility to advise or encourage another person to acquire or dispose of co-operative shares in the circumstances described above. Clause 6 exempts a Fonterra insider from prohibitions imposed under the Act, provided that the advice or encouragement is not influenced by the inside information and is given in connection with enabling the person to comply with requirements imposed by or under Fonterra's constitution;
- in the absence of this exemption notice, farmers who are potential Fonterra insiders, and who are required to trade in accordance with Fonterra's constitution, would not be able to. That would frustrate the purpose of the Dairy Industry Restructuring Act 2001 and restrict innovation

and flexibility in the financial markets;

- any person relying on this notice will be subject to a number of conditions and limitations, in particular, that the person cannot rely on the exemption if the trading is influenced by any inside information held by them. The FMA considers that the limitations uphold the policy and intent in Part 5 of the Act to prohibit insider conduct;

As such, the FMA is satisfied that –

- the exemptions promote the confident and informed participation of farmers in, and Fonterra in relation to, the TAF market by resolving inconsistencies between farmers' obligations under the Fonterra constitution and the insider trading prohibitions. Resolving those inconsistencies means that farmers and Fonterra can confidently participate in and in relation to the TAF market. Without the exemptions there would be significant uncertainty about potential liability arising from participation;
- the exemptions, and the equivalent exemptions in the predecessor notices, promote innovation and flexibility in the financial markets by facilitating the establishment and continued operation of the TAF trading system;
- the exemptions, and the equivalent exemptions in the predecessor notices, also avoid unnecessary compliance costs. Without the exemptions, the insider trading prohibitions in the Act would inhibit the establishment and continued operation of the TAF trading system which represents a cost. However, that cost can in the FMA's view be avoided through the exemptions with appropriate conditions, without compromising the policy and intent of the Act or its other purposes. As such, the FMA considers that compliance cost to be unnecessary;
- the exemptions, in the context of the associated conditions, are not broader than is reasonably necessary to address the matters that gave rise to the exemptions. The exemptions address technicalities that are specific to the co-operative structure and the conditions assist in facilitating such a structure to work within the policy and intent of the Act, including with regard to the general prohibition for insider trading. The conditions address the mischief of utilising inside information, as the exemption is not available where the trading is influenced by the inside information held by the person.