

# Financial Markets Conduct (Silverwood Land 2015 Limited Partnership) 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.

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## Notice

### 1 Title

This notice is the Financial Markets Conduct (Silverwood Land 2015 Limited Partnership) Exemption Notice 2021.

### 2 Commencement

This notice comes into force on 21 May 2021.

### 3 Revocation

This notice is revoked on the close of 31 March 2024.

### 4 Interpretation

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

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

**general partner** means Silverwood Corporation Limited or any successor general partner appointed by the scheme participants

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

**relevant date**, in respect of a custodian, has the same meaning as in regulation 87(4) of the Regulations

**relevant person**, in respect of a custodian, has the same meaning as in regulation 87(4) of the Regulations

**scheme** means the Silverwood Land 2015 Limited Partnership which was registered as a limited partnership under the Limited Partnerships Act on 20 February 2015

**scheme participants** means any person admitted to the scheme and registered as a limited partner for so long as they remain a limited partner of the scheme.

- (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 Exemptions from independent custody requirements for real property assets

- (1) The manager of the scheme is exempted, in relation to the scheme, from—
- (a) section 127(1)(f) of the Act to the extent that it requires the scheme's real property to be held by the supervisor or another person who meets the external custodianship requirements in section 156 of the Act; and
  - (b) section 133(a) of the Act to the extent that it relates to the requirement referred to in subclause (1)(a).
- (2) The supervisor of the scheme is exempted from section 156(1) of the Act to the extent that section requires the supervisor to hold the scheme's real property or, if authorised by the governing document, contract the holding of that scheme property to another person who meets the external custodianship requirements in that section.

## 6 Conditions of exemptions in clause 5

The exemptions in clause 5 are subject to the conditions that-

- (a) the scheme's real property must be held by the general partner on trust for the scheme participants; and
- (b) the real property referred to in paragraph (a) is subject to an encumbrance in favour of the supervisor that is registered against the title to the scheme's real property and the following requirements are met:
  - (i) the encumbrance secures all present and future obligations of the general partner that are owed, under the governing document for the scheme, to the supervisor and the scheme participants:
  - (ii) the encumbrance or the scheme's governing document contains a prohibition on the general partner doing any of the following, otherwise than with the prior written consent of the supervisor:
    - A leasing all or any part of the real property except in the ordinary course of business of the scheme and in accordance with the scheme's governing document:
    - B selling, transferring, or otherwise disposing of the scheme's real property or any interest in it:
    - C creating, or permitting the continuation of, any mortgage charge or other security interest over the scheme's real property:

D creating, or permitting the continuation of, any right or interest in or over the scheme's real property, or any right to use any of the scheme's real property, except in the ordinary course of business of the scheme and in accordance with the scheme's governing document:

E agreeing to do any of the things referred to in sub-subparagraphs (A) to (D):

(iii) the encumbrance is otherwise in a form and on terms approved in writing by the supervisor of the scheme.

## **7 Exemption from annual assurance engagement**

A custodian of the scheme's property is exempted from regulation 87(1) of the Regulations to the extent that it requires an annual assurance engagement to be obtained that covers custody of the scheme's property.

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

(1) The exemption in clause 7 is subject to the conditions that, if this subclause applies,-

(a) the custodian must, within 4 months after the relevant date, obtain an assurance engagement with a qualified auditor for the most recently completed relevant period (done in accordance with applicable auditing and assurance standards) that-

(i) covers custody of the scheme's property held by that custodian; and

(ii) complies with the requirements in regulation 88 of the Regulations; and

(b) The custodian must, within 20 working days after obtaining an assurance report required by subclause 1(a), provide a copy of the assurance report to each of the relevant persons as if it were a report required by regulation 87(1) of the Regulations.

(2) The conditions in subclause (1) apply if, before the relevant date, the supervisor, acting in its capacity as the licensed independent supervisor of the scheme, reasonably determines that it would be desirable to obtain an assurance engagement for the relevant period ending on that relevant date to provide reasonable assurance in respect of the matters provided for in regulation 88 of the Regulations, after the supervisor has had regard to-

(a) the nature and value of the scheme property; and

(b) whether there are any circumstances that are likely to increase or mitigate risks in relation to custody of the scheme property.

## **9 Exemption from daily cash reconciliation**

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

## **10 Condition of exemption in clause 9**

(1) The exemption in clause 9 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 (2), 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 (1) the custodian must---



- (a) consider the frequency and volume of the transactions in respect of the scheme's property; and
- (b) consider, whenever there is a material change in the frequency, value, or volume of cash transactions and in any case not less than annually, whether reconciliations are being carried out with appropriate frequency; and
- (c) consult the manager of the scheme (and the supervisor, if the supervisor is not the custodian); and
- (d) act to the standard of a prudent and professional custodian.

**11 Exemption from statement of investment policy and objectives (SIPO) limit break quarterly reporting**

The manager of the scheme is exempted from regulation 95(1) of the Regulations if there were no limit breaks in that quarter to which section 167 of the Act applies.

**12 Exemptions from governing documents requirements**

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

- (a) section 135 of the Act; and
- (b) section 127(1)(b) of the Act to the extent that it requires governing documents to comply with sections 135 and 136 of the Act;
- (c) section 133(a) of the Act to the extent that it relates to sections 135 and 136 of the Act; and
- (d) clause 22(1)(b) of Schedule 4 of the Act to the extent that it requires a copy of the governing document lodged with the Registrar to comply with sections 135 and 136 of the Act.

**13 Exemptions from licensing requirements**

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 license covers management of the scheme; and
- (b) section 133(a) of the Act to the extent that it relates to the requirement in subclause (a); and
- (c) section 388(a) of the Act.

**14 Conditions of exemptions in clauses 12 and 13**

The exemptions in clause 12 and 13 are subject to the conditions that the manager of the scheme must-

- (a) within 3 months after the commencement date of this notice, give the supervisor a wind up plan that—
  - (i) provides for the scheme to be wound up by 31 March 2024; and
  - (ii) describes the key steps and anticipated timetable for realisation of scheme property, repayments of scheme liabilities and distribution of the proceeds to the scheme participants; and

- (iii) provides that the proceeds from the realisation of scheme property are to be distributed to scheme participants in a timely manner, except and only to the extent that funds are reasonably required to facilitate the realisation of scheme property or withheld to meet reasonably anticipated scheme liabilities; and
- (iv) includes information that is material to the wind up plan; and
- (a) within 3 months after the commencement date of this notice, inform scheme participants by written notice—
  - (i) of the wind up plan including providing scheme participants with a summary of the wind up plan; and
  - (ii) that the scheme is relying on the exemptions in this notice along with an explanation of the nature and practical effect of the exemptions relied on and a description of the alternative governance and custodian requirements that the conditions to the exemption impose; and
- (b) report to the supervisor of the scheme every six months from the commencement date of this notice, on progress of the winding up of the scheme against the winding up plan; and
- (c) notify the supervisor in writing within 10 working days of becoming aware of any material change to or deviation from the wind up plan.

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

The exemptions in clauses 5, 7, 9, 11, 12 and 13 are subject to the further condition that the manager of the scheme does not offer or issue further managed investment products in the scheme.

Signed at Wellington this 21<sup>st</sup> day of May 2021



Liam Mason  
General Counsel  
Financial Markets Authority

**Statement of reasons**

This notice comes into force on 21 May 2021 and is revoked on the close of 31 March 2024.

This notice effectively extends the exemptions granted to the Silverwood Land 2015 Limited Partnership (**scheme**) by the Financial Markets Conduct (Silverwood Land 2015 Limited) Exemption Notice 2016, subject to certain changes, to reflect that due to circumstances outside the manager's control, it has not been feasible to wind up the scheme by 31 March 2021. As a result, a new time frame for winding up of the scheme has been estimated, namely 31 March 2024. The exemptions, granted subject to certain conditions, relate to the following licensing, governance and reporting requirements under the Financial Markets Conduct Act 2013 (**Act**) and the Financial Markets Conduct Regulations 2014 (**Regulations**):

- exemptions from sections 127(1)(c), 133(a) and 388(a) of the Act (requirement to have a licensed manager):
- exemptions from sections 135, 127(1)(b), 133(3) and clause 22(1)(b) of schedule 4 of the Act (requirement for the scheme's governing document to be updated to comply with the content

requirements in the Act), subject to the condition that the manager prepares a wind up plan, provides it to the supervisor and scheme participants and regularly reports to the supervisor on progress against the plan:

- exemptions from sections 127(1)(f), 133(a) and 156(1) of the Act (requirement for the scheme's real property assets to be held by the supervisor or an independent custodian), subject to the condition that a registered encumbrance is registered against the title of the real property assets in favour of the supervisor:
- exemption from regulation 87(1) of the Regulations (requirement for the custodian of the scheme's property to obtain an annual assurance engagement) subject to a condition that such an engagement will be obtained if the supervisor determines it is desirable in the circumstances:
- exemption from regulation 86(3) of the Regulations (requirement for daily reconciliation of all money held by the custodian of the scheme), subject to the condition that such reconciliation takes place at a frequency determined by the custodian that is appropriate in the circumstances:
- exemption from regulation 95(1) of the Regulations (requirement to report on statement of investment policy and objective (SIPO) limit breaks if no break occurs).

The scheme was established in September 1990 as a special partnership under Part II of the Partnership Act 1908 and investment in the scheme was structured as a participatory security under the Securities Act 1978. The original investment objective of the scheme was to invest in both forestry rights and a forested land block. Subsequently the forestry rights were sold and the forest harvested. The scheme is currently in wind up with its primary activity to dispose of its remaining land assets.

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:—

- there have not been any material changes to the relevant requirements under the Act and Regulations that would warrant a departure from the position put in place by the 2016 Notice. Rather, not granting the exemptions sought now would likely lead the scheme to decide to wind up prematurely and sell its remaining assets at a fire sale, which in turn could cause loss to the scheme participants;
- the exemptions will reduce compliance costs for the scheme by relieving the manager and supervisor of certain obligations that are of no or little benefit to scheme participants in view of the scheme's winding down and of the exemptions being subject to conditions that allow for effective monitoring and reduction of governance risks;
- important protections for scheme participants 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;
- the costs of updating the scheme's governing documents to comply with the Act are unnecessary as the scheme is closed to new scheme participants and is winding up. The conditions of the notice put in place alternative governance and reporting arrangements to ensure effective monitoring of the scheme;
- the costs of having a licensed manager are of little benefit to scheme participants as the scheme will experience a low level of manager activity during the remainder of its life and only a limited number of assets will be under management;

- requirements for the scheme's assets to be held by a supervisor or an independent custodian are not necessary to ensure effective monitoring or to reduce governance risks as the real property of the scheme is held by the manager on trust and there is a registered encumbrance on each title in favour of the supervisor to protect scheme participants' interests;
- the requirement for the scheme to reconcile cash records daily is unnecessary to ensure accurate record keeping as the scheme has a low volume and frequency of transactions. Scheme participants will be adequately protected by the condition that the custodian must reconcile all records of money for the scheme at a frequency the custodian determines to be appropriate, in accordance with specific criteria set out in the notice;
- an annual assurance engagement is unnecessary as the custodian's processes, procedures and controls are less complex than those of other managed investment schemes, particularly as the scheme only has real property assets. An annual audit of the scheme's financial statements will provide regular and appropriate independent verification of the scheme's property. Scheme participants will also be protected by the condition that the supervisor may determine that there are increased risks for custody of the property and obtain an assurance engagement. The supervisor must comply with its statutory duties to act in the best interests of the scheme participants and to exercise professional standard of care. It must also be licensed and remain independent. The supervisor is therefore well-placed to determine when an assurance engagement will benefit scheme participants. Accordingly, the value to scheme participants of an assurance engagement outweighs the associated costs;
- Quarterly limit break reports when no limit break occurred are unnecessary due to the low volume and frequency of activity in the period leading up to the completion of the wind up of the scheme. It is unlikely that limit breaks will occur during this period. The exemption will not affect the scheme's obligation to provide such reports where a limit break does occur.

Therefore, the FMA is satisfied that:

- granting the exemptions is necessary or desirable in order to promote the purpose of the Act. In particular, the exemptions will allow the scheme to avoid unnecessary compliance costs by allowing the scheme to continue to operate until it can complete winding up. The exemptions will also promote innovation and flexibility in the financial markets by allowing the scheme to continue to operate largely in accordance with its current governance structure (with alternative disclosure and reporting requirements) during its wind up; 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 which has a finite life and special characteristics due to the nature and location of its investment.

