

How the FMC Act will affect co-operative companies and industrial and provident societies that have issued, or intend to issue, co-operative shares

This information sheet outlines the options for co-operative companies and industrial and provident societies (IPs) (collectively referred to as co-operatives) offering and managing co-operative shares.

What's changed?

New Zealand's financial laws have recently been changed. As a result, new rules now apply to anyone who has raised money, or wants to raise money, from investors in New Zealand.

The new rules affect financial products (including co-operative shares) that you may have offered, or intend to offer, to investors.

Under the old rules of the Securities Act 1978 (Securities Act), anyone who wanted to offer shares had to prepare a registered prospectus and investment statement unless they could rely on a relevant exemption.

After 1 December 2016, the Securities Act, and any exemptions granted under the Securities Act (including exemptions for co-operatives), will no longer apply. Issuers that previously offered shares under the Securities Act or a Securities Act exemption, or intend to offer shares in the future, will need to comply with the new Financial Markets Conduct Act 2013 (FMC Act). This means co-operatives will need to be familiar with the rules of the FMC Act.

What are the new rules?

Under the FMC Act:

- There are different disclosure rules for offers of co-operative shares under the FMC Act, depending on how much money you want to raise, how you want to raise it, and what type of investors you intend to have. There are also different rules for ongoing disclosures. These rules for ongoing disclosures apply in relation to both co-operative shares previously offered under the Securities Act and new co-operative shares offered under the FMC Act.
- Co-operatives with existing co-operative shares (offered under the Securities Act) or new co-operative shares (offered under the FMC Act) will also be subject to the relevant FMC Act governance requirements.
- Further, if you have co-operative shares on issue (whether they were issued under the Securities Act or the FMC Act), your co-operative will very likely be an FMC reporting entity unless you have fewer than 50

shareholders, or fewer than 50 parcels of voting shares.¹ This means that the co-operative will likely have financial reporting and auditing obligations under the FMC Act.

What are the options?

Under the FMC Act, co-operatives making offers are exempted in some circumstances from the standard requirements outlined above for disclosure, governance, and financial reporting.

If you qualify for one of these exemptions, you may still have some obligations when you offer those shares. However, the offer is likely to involve lower compliance costs because there will be fewer requirements to be met. For example, you might not need to prepare a document called a product disclosure statement (PDS) or enter information on the Disclose Register.

These are the main exemptions that may be appropriate for co-operatives looking for a lower-cost option for offering and managing co-operative shares:

- the FMC Act exemption for small co-operatives²
- the Schedule 1 exclusion for offers to wholesale investors³
- the Schedule 1 exclusion for offers to close business associates⁴
- the Schedule 1 exclusion for small personal offers.⁵

Summarised below is an outline of these exemptions. Read the exemptions in full before relying on any of them.

Exemption for small co-operatives

From 23 December 2016, those who offer co-operative shares or have existing co-operative shares on issue may be exempted from some requirements of the FMC Act.

Where each shareholder invests less than \$5,000

Shares offered under the FMC Act

Where the maximum capital invested per shareholder is \$5,000 or less (across all offers), co-operatives making offers of co-operative shares (including any IPS redeemable shares) under the FMC Act will be exempted from the following:

- the disclosure requirements in Part 3; and

¹ Even if your co-operative does not qualify as an FMC reporting entity, it may still have disclosure and governance obligations related to those co-operative shares unless an exemption or exclusion applies.

² See the [exemption notice](#).

³ FMC Act, schedule 1, cl 3.

⁴ FMC Act, schedule 1, cl 4.

⁵ FMC Act, schedule 1, cl 12.

- the governance requirements in Part 4 of the FMC Act (but not the requirement to keep a register of interests).

Co-operatives relying on the exemption must provide investors with a more limited prescribed disclosure document as outlined in the exemption notice. They must also notify those investors in the form prescribed in the exemption notice that the FMC Act requirements will not apply.

Additionally, where the co-operative is an FMC reporting entity solely because it is an issuer of co-operative shares, the co-operative will also be exempted from the financial reporting and auditing requirements in Part 7 of the FMC Act. Co-operatives will, however, still need to comply with the financial reporting and auditing requirements of the Companies Act 1993, or the Industrial and Provident Society Act 1908, as applicable.

Shares previously issued under the Securities Act

Where the maximum capital invested per shareholder is \$5,000 or less (across all offers), co-operatives that have issued co-operative shares under the Securities Act (including any IPS redeemable shares) will be exempted from:

- the ongoing disclosure requirements in Subpart 4 of Part 3
- the ongoing governance requirements in Part 4 of the FMC Act (but not the requirement to keep a register of interests).

Additionally, where the co-operative is an FMC reporting entity solely because it is an issuer of co-operative shares, the co-operative will also be exempted from the financial reporting and auditing requirements in Part 7 of the FMC Act. Co-operatives will, however, still need to comply with the financial reporting and auditing requirements of the Companies Act 1993, or Industrial and Provident Society Act 1908, as applicable.

Co-operatives relying on the exemption will need to notify their existing investors, in the form prescribed in the [exemption notice](#), that the FMC Act requirements will not apply to the previously issued shares.

Where the issuer has less than \$2 million in revenue

Where the co-operative is an FMC reporting entity solely because it is an issuer of co-operative shares and has revenue of \$2 million or less in a particular accounting period, the co-operative will be exempted from the financial reporting and audit requirements in Part 7 of the FMC Act for that period.

Co-operatives relying on the exemption will, however, still need to comply with the financial reporting and auditing requirements of the Companies Act 1993, or Industrial and Provident Society Act 1908, as applicable. Further, when providing financial statements to investors, co-operatives will need to notify investors, in the form prescribed in the [exemption notice](#), that the FMC Act will not apply to the financial reporting for that period.

Schedule 1 exclusion for offers to wholesale investors

Those who make offers of co-operative shares under the FMC Act may also be able to rely on an exclusion in Schedule 1 of the FMC Act for offers to wholesale investors.

Who counts as a wholesale investor?

The following people are considered wholesale investors:

- local authorities and Crown entities
- investment businesses (those who habitually invest money in financial products as the main part of their business)
- 'large' investors (with net assets or consolidated turnover of more than \$5 million in each of the past two years)
- 'active' investors (with financial portfolios worth at least \$1 million over the past two years).

The following people may also be wholesale investors where requirements are met for specific offers:

- 'eligible' investors (who certify themselves as knowledgeable and experienced investors)
- investors who will invest at least \$750,000 in the offer (or whose combined investments with you of the same class of financial products add up to at least \$750,000).

What are the rules for wholesale investors?

Offers of financial products to wholesale investors are excluded from the standard disclosure rules. If the offer is not also made to other investors where standard disclosure is required, it will not be a 'regulated offer' and therefore also excluded from the governance and financial reporting rules. This makes these offers a lower-cost option for raising funds. However, some rules will still apply.

Eligible investor — The investor must first certify that they have experience with financial products that allows them to assess the merits of the offer, their information needs, and the adequacy of the information they receive. The certificate must show the grounds for the certification, and must be signed by an authorised financial adviser, accountant or lawyer. The certification is valid for two years.

\$750,000 minimum investment — You must include a prescribed warning statement in every document provided to investors that contains the key terms of the offer. If, however, a document containing the key terms of the offer is not provided to investors, you must provide that warning statement to investors before they make an application. The investor must also acknowledge this in writing, in a prescribed form, before or at the same time they make an application.

'Safe harbour' certificate — Investment businesses, active investors, large investors and government agencies can give you a 'safe harbour' certificate stating which category they fall into. This certificate can be used as evidence that the

investor is a wholesale investor. Otherwise, you must ensure you have sufficient alternative evidence to show the investor meets the wholesale investor criteria. A safe harbour certificate must include a prescribed warning statement and is valid for two years.

Schedule 1 exclusions for offers to retail investors

Those who make offers of co-operative shares under the FMC Act to retail investors may also be able to rely on certain exclusions in Schedule 1 of the FMC Act. Retail investors are investors who are not wholesale investors. The two main exclusions for offers to retail investors are the:

- close business associates exclusion, and
- small personal offers exclusion.

Offers of financial products to close business associates and small personal offers are excluded from the standard disclosure rules. If the offer is not also made to other investors where standard disclosure is required, it will not be a 'regulated offer' and therefore also excluded from the governance and financial reporting rules. This makes these offers a lower-cost option for raising money from retail investors.

Schedule 1 exclusions for offers to close business associates

'Close business associates' include directors or senior managers, substantial shareholders, related companies and partners of the offeror and any person who has a close professional or business relationship with:

- the offeror, or
- a director or senior manager of the offer, and
- that, as a result of the relationship, can assess the merits of the offer or get information to assess the merits of the offer.

Schedule 1 exclusion for small personal offers

Under the Schedule 1 exclusion for small personal offers of shares, you can issue shares to a maximum of 20 investors over a 12-month period as long as you do not raise more than \$2 million during that period. It must be a personal offer to someone who is likely to be interested in the offer and must be to:

- someone with whom you have a professional or other connection or
- someone with whom you have had previous contact or
- someone who has indicated interest in such offers.

Small personal offers can also be made to someone with a gross annual income of at least \$200,000 in each of the past two most-recent years.

These investors must be given a warning statement and the offer must not be publicly advertised. You must notify us of the details of any small personal offers.

Mix and match some options

You are not limited to a single option in how you make your offers. You can combine use of some Schedule 1 options, and in some instances, may combine one or more of those exclusions with the exemption for small co-operatives. If you intend to combine Schedule 1 options with the exemption for small co-operatives, however, you need to ensure that all of the criteria of both the exemption and the exclusion(s) are met.

What if none of these exemptions apply?

If the exemptions described above do not apply, then your offer is likely to be a regulated offer, and the standard rules will apply.

This means information about the financial products you are offering must be disclosed in a PDS. You must also provide additional information on the Disclose Register run by the Companies Office. All information about the offer must be complete, up to date, accurate, and understandable.

Please get legal advice

You should get legal advice from a specialist in financial markets law before making an offer of shares.

If you are considering making a novel or complex offer to retail investors, we also encourage you to get in touch with us to discuss the best way of explaining it to investors.

To get in touch, please phone 0800 434-567 or email compliance@fma.govt.nz