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Insider trading: Where non-public information relating to a listed issuer (A) comprises material information in relation to another listed issuer (B)

This information sheet outlines the view of the Financial Markets Authority – Te Mana Tātai Hokohoko (FMA) – on how the statutory prohibitions against insider trading under the Financial Markets Conduct Act 2013 may apply to situations where a person trades in a listed issuer (B) while in possession of non-public information relating to another listed issuer (A).¹

Background

This information sheet replaces a previous report dated August 2025 titled *Shadow Insider Trading: Regulatory expectations and emerging conduct risk*, following the consideration of industry feedback.

Our views are informed by inquiries made by the FMA into the trading conduct of two institutional investors. We decided to take an educative rather than intervention approach in relation to this conduct, to clarify for industry how the insider trading prohibitions may apply in these types of circumstances.

This information sheet is therefore intended to educate market participants about the FMA's view of the application of the law and provide suggestions for how market participants may manage any potential risk.

We are publishing this information sheet in line with our statutory functions, which include promoting confident and informed participation in New Zealand's financial markets by businesses, investors and consumers. It is important we continue to provide education about insider trading, as it is an activity that erodes trust and confidence in public markets.

Insider trading as prohibited by the FMC Act

The prohibition on insider trading is set out in Part 5 of the Financial Markets Conduct Act 2013 (FMC Act).

Section 240(1) of the FMC Act prohibits a person from engaging in any of the conduct set out in sections 241(1), 242(1), and 243(1) if the person is an 'information insider' of the listed issuer.

Section 234(1) of the FMC Act defines an 'information insider' as a person who:

¹ The concept has been referred to by some commentators as "shadow insider trading". However, given the potential confusion as to the breadth or meaning of that term and the development of the concept in other jurisdictions, we have opted to no longer use it.

1. Has material information relating to the listed issuer that is not generally available to the market; and
2. Knows or ought reasonably to know that the information is material information; and
3. Knows or ought reasonably to know that the information is not generally available to the market.

Definitions

Section 231(1) of the FMC Act defines 'material information' as:

- (a) Information that a reasonable person would expect to have a material effect on the price of a listed issuer's quoted financial products if it were generally available; and
- (b) Information that relates to particular financial products, a particular listed issuer, or particular listed issuers, rather than to financial products generally, or listed issuers generally.

Section 232(1) of the FMC Act defines information as 'generally available to the market':

- (a) If –
 - i. it is information that has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in relevant financial products; and
 - ii. Since the information was made known, a reasonable period for it to be disseminated among those persons has expired; or
- (b) If it is likely that persons who commonly invest in relevant financial products can readily obtain the information (whether by observation, use of expertise, purchase from other persons, or any other means); or
- (c) If it is information that consists of deductions, conclusions, or inferences made or drawn from either or both of the kinds of information referred to in 1 and 2.

Information notified to the market under a continuous disclosure obligation is deemed to be generally available to the market immediately on it being made available to market participants (without limiting how quickly the reasonable period of dissemination in section 232(1)(a)(ii) of the FMC Act may be satisfied in other cases).

Application where material non-public information did not originate with the issuer

The FMA's view is that non-public information that relates to a listed issuer (A), is capable in some cases of constituting 'material information' about another listed issuer (B) pursuant to s 231(1) of the FMC Act due to the relationship, degree of connection or similarity between issuers A and B. We note this will always be subject to the "reasonable person" test for materiality at s 231(1)(a), which is discussed below. While the FMA acknowledges this application of s 231(1) is yet to be tested in the courts, we consider it to be consistent with the existing scope of the law, rather than a new or expanded view.

Section 231(1)(b) of the FMC Act limits the meaning of material information by providing that the information cannot be so general that it relates to financial products generally or listed issuers generally and must be narrow enough to relate to particular financial products, a particular listed issuer, or particular listed issuers.

Materiality

To constitute insider trading in issuer B where a person is in possession of non-public information about issuer A, the non-public information must be such that a reasonable person would expect it to have a material effect on the price of quoted financial products of issuer B, if it were generally available to the market.

The time at which the materiality of the information is to be assessed is the time at which it is held, not later with the benefit of hindsight.

The “reasonable person” is considered in New Zealand case law to be a person who commonly invests in shares and holds them for a period of time based on their view of the inherent value of those shares.²

Civil liability for insider conduct requires it to be established that the information insider either knew or ought reasonably to have known that the information was material information about issuer B. Criminal liability for insider conduct requires proof beyond reasonable doubt that the information insider actually *knew* the information was material information about issuer B.

Considerations in assessing materiality

In practice, we anticipate instances where non-public information about one issuer A will comprise material information in respect of another issuer B will be rare. This may occur in circumstances where a reasonable person would expect a material effect on the price of issuer B’s quoted financial products to arise because there is a significant relationship, degree of connection or similarity between the two issuers.

The risk may be heightened in sectors where there are few listed issuers and the prices of their quoted financial products are closely correlated.

However, the assessment is naturally fact-specific and depends on the nature of the information and its probable impacts. Consequently, the FMA cannot and does not prescriptively define the type of circumstances in which this may arise.

In each case when participants come into possession of non-public information, they should consider whether a reasonable person would expect that information to have a material effect on the price of any quoted financial products they intend to trade while in possession of that information.

When industry participants are considering whether non-public information may be material to a particular issuer, we consider it may be relevant to take into account:

- the size of each listed issuer, size of the sector and, where relevant, the extent of correlation between the price of quoted financial products of issuers;
- in circumstances where the information relates to a future transaction, the impact of the transaction on other listed issuers and the price of their quoted financial products;
- the relevance of the information to other issuers’ operations, valuation, price, customer base and competitive positioning; and
- whether the information may impact the entire market (to the extent that it might be described as information that relates to listed issuers *generally* under ss 231(1)(b) and 231(2)(b)).

² *Huljich v R* [2025] NZCA 155 at [57].

Case study

Fact scenario

- An institutional investor (Investor X) received non-public information from the underwriter regarding Issuer A's upcoming capital raise, which was substantial in size.
- Within 30 minutes of receiving that information, Investor X placed an order to sell a significant volume of shares in Issuer B. Issuer A and Issuer B operated in the same sector, which comprised few listed issuers and was dominated by those two issuers by market capitalisation.
- Two days later, Issuer A announced its capital raise. Investor X then repurchased a larger volume of Issuer B shares than what it previously sold at a lower price on the same day as the announcement.
- On FMA enquiry, Investor X was unable to produce contemporaneous documentation supporting their rationale for the trades, or other persuasive rationales for the trading.

FMA considerations in relation to case study

We considered that in this case:

1. trading occurred in issuer B;
2. Investor X had information that was not generally available to the market; and
3. the information related to a particular listed issuer (issuer A) rather than financial products generally or listed issuers generally.

While we determined not to take an intervention approach in respect to this fact scenario, whether a reasonable person would expect the information concerning Issuer A to have a material effect on the price of issuer B at the time of the trading might have turned on various factors, including the size of the capital raise, the concentration in the sector, the significance of Issuer A and Issuer B in that sector, and a close correlation between the share prices of Issuer A and Issuer B (which may be evidenced by prior trading history).

We were not satisfied that the investor had adequately managed the risk of potential insider conduct in this situation. There was a lack of contemporaneous records to support the trading strategy and inconsistent trading rationales provided. The timing of the sell order and the subsequent repurchase were potential aggravating factors.

Risk management considerations and strategies

As noted in this information sheet, each situation should be considered on its own facts and in light of the materiality of the relevant information in context. There are, however, strategies that may assist market participants to better manage the risk of potential insider trading, including the following:

- If the investor decides to amend or change its trading strategy or rationale after coming into possession of non-public information that may be material information in relation to one or more listed issuers (for example in a 'market sounding' process), there should be a process in place that encourages staff to pause to consider whether the information they hold may be non-public information that is material to any of the issuers for which their strategy or trading rationale has changed. This will include considering the factors described above in relation to materiality.
- In some cases, information barriers between different functions within an investor can help ensure that trading activity in one area remains independent when another area is in possession of material non-

public information. Effective information barriers may give rise to a defence pursuant to s 261 of the FMC Act.

- In some situations, where an investor has a sector-specific fund, it may be helpful to be able to demonstrate that trading has been carried out in a manner that spreads impact over the sector and in a way that minimises price impact.
- Where practical, Lead Managers may assist in risk management by truncating deal windows in order to reduce the time over which investors need to manage their risk.

We recommend entities maintain contemporaneous records, documenting their overall trading strategy and rationale for trading, especially when in possession of material non-public information. This includes setting out the reasons why the entity does not consider the information upon which a trading decision is made to be material information relating to the issuer in which the products are traded. We will consider good processes, record keeping and documentation of these rationales as mitigating factors when determining an appropriate regulatory response.

The FMA's response will be guided by our Regulatory Response Guidelines, Enforcement Policy and Prosecution Policy. Criteria affecting whether we might bring enforcement action, including in relation to suspected insider conduct, are set out within those documents. Ahead of bringing any civil or criminal proceedings alleging insider conduct, we would typically obtain an opinion on the materiality of the information from an independent expert.

Market participants are encouraged to engage with us, and/or seek legal or compliance advice for further clarification of the contents of this information sheet. By doing so, entities can support fair, efficient, and transparent markets that are aligned with the long-term interests of investors and New Zealand's financial system as a whole.