

Securities Disclosure and Financial Advisers Amendment Bill

Government Bill

Explanatory note

General policy statement

The Securities Disclosure and Financial Advisers Amendment Bill responds to the current international financial crisis by removing unnecessary impediments to capital raising, while ensuring the timely disclosure of relevant information to prospective investors.

The Bill principally provides for the use and regulation of a simplified disclosure prospectus. This new type of prospectus will, in connection with regulations to be made under existing regulation-making powers, enable stock exchange listed issuers to offer certain debt and equity securities without the need to duplicate information that they have already publicly disclosed under their continuous disclosure obligations.

Part 1 of the Bill amends the Securities Act 1978. It provides for simplified disclosure prospectuses to be sent to investors instead of an investment statement, for all prospectus amendments to be sent to investors before subscription, and for additional Securities Commission powers to ensure these prospectuses are used only by appropriate issuers and that potential investors will have sufficient time to consider adverse information before subscribing.

Part 1 of the Bill also significantly improves the workability of rules for exempt persons and people deemed by the Securities Act 1978

not to be members of the public, for whom disclosure under the Act is not required.

Part 2 of the Bill amends the Financial Advisers Act 2008, which regulates people who provide financial advice on offers of securities, to correct an error in the assent version of that Act and to make a number of other minor, tidying-up, amendments.

Clause by clause analysis

Clause 1 is the Title clause. It is intended that this Bill be divided into the following 2 separate Bills at the committee of the whole House stage: a Securities (Disclosure) Amendment Bill and a Financial Advisers Amendment Bill.

Clause 2 is the commencement clause. This Bill comes into force on the day after the date on which it receives the Royal assent.

Part 1 Securities Act 1978

Clause 3 provides that *Part 1* amends the Securities Act 1978.

Clause 4 inserts new definitions for the terms disclosure obligation, extension order, offered in a simplified disclosure prospectus, prohibition order, and simplified disclosure prospectus. A simplified disclosure prospectus is a registered prospectus that may be used only if the issuer is subject to a disclosure obligation and if regulations made under section 70 of the Securities Act 1978 allow for this. The definitions of extension order and prohibition order relate to orders that the Securities Commission can make in order to control or restrict the use of a simplified disclosure prospectus.

Clause 5 amends section 3(2). The effect of this amendment is to provide that an offer of securities made only to persons who have previously paid a minimum subscription price of at least \$500,000 for securities in a single transaction is not an offer of securities to the public. However, there are some restrictions that must be met before this provision will apply to an offer. The proposed amendment is related to existing section 3(2)(a)(ia).

Clause 6 inserts *new section 3A*. This is a standard clause that is used in all Acts or Bills that contain an example in order to clarify the status of the example. *New section 44AD* contains an example.

Clause 7 makes 6 different amendments to section 5. First, it makes a minor change to the punctuation in section 5(1)(d).

Secondly, it makes a consequential amendment to subsection (2CA)(a)(ii) to reflect the fact that if securities are offered in a simplified disclosure prospectus, no investment statement is required.

Thirdly, it inserts a *new subsection (2CBA)* which mirrors subsection (2CB) but is expanded to include a person to whom an offer does not constitute an offer of securities to the public because of the application of section 3(2). This means that under section 5(2CB) an offer of securities can be made to persons who are wealthy, experienced in investing money, or experienced in the industry or business to which the securities relate (**eligible persons**). Under *new subsection (2CBA)*, a single offer can be made to eligible persons and to persons to whom an offer does not constitute an offer of securities to the public because of the application of section 3(2). Only the rules on prohibition of advertisements and criminal liability for misstatements in sections 38B and 58 will apply to either of those offers.

Fourthly, it makes a consequential amendment to section 5(2CC).

Fifthly, it changes the time frame specified in section 5(2CD) within which a chartered accountant may certify that a person is wealthy from 6 months before an offer is made to 12 months.

Finally, it clarifies that, for the purposes of section 5(2CC)(a) and (2CD), person includes the trustees of a trust acting jointly in their capacity as trustees of that trust and a sole trustee of a trust acting in his, her, or its capacity as trustee of that trust. In effect, this means that an offer of securities can be made to a trust that is wealthy (as defined in section 5(2CD)) and (because of the effect of section 5(2CB)) only the rules on prohibition of advertisements and criminal liability for misstatements in sections 38B and 58 will apply to that offer.

Clause 8 creates an exception to section 34(2)(a), which requires all registered prospectuses that refer to financial statements to be accompanied by a copy of those financial statements. This requirement does not apply to simplified disclosure prospectuses.

Section 37 sets out a number of requirements concerning the allotment of securities. Subsection (4) provides that an allotment that is made in contravention of this section is invalid and of no effect.

Clause 9 inserts a *new subsection (1A)* which provides that no allotment of a security that is offered in a simplified disclosure prospectus

may be made by a person who is subject to a prohibition order while that order is in force or in contravention of *new section 44AD(1)* (which concerns the effect of an extension order). If an allotment is made in contravention of this new subsection, subsection (4) will apply and the allotment will be invalid and of no effect. Section 60(2) will also apply, meaning that the contravention will also be an offence.

Clause 10 amends section 37AD(1)(b) by adding a *new subparagraph (vii)* that requires an issuer, before obtaining the consent of a person to a relief order, to send to that person a notice that contains or has attached to it a copy of the simplified disclosure prospectus if the security in question is offered in a simplified disclosure prospectus.

Clause 10 also creates an exception to section 37AD(1)(b)(v) through the insertion of a *new subsection (1A)*. The effect of this exception is that if a security is offered in a simplified disclosure prospectus, the notice that the issuer has to send to the person does not have to contain, or have attached to it, a statement to the effect that there is a registered prospectus in relation to the security and that, at the request of the person and on payment of any prescribed fee, the issuer will send the registered prospectus to the person.

Clause 10 also makes a consequential amendment to section 37AD(1)(b)(iv).

Section 37A sets out a number of requirements concerning the allotment of securities. Subsection (3) provides that an allotment that is made in contravention of this section may be cancelled by the subscriber. *Clause 11* inserts a *new paragraph (ab)* in subsection (1), which provides that no allotment of a security that is offered in a simplified disclosure prospectus may be made if the subscriber did not receive, before subscribing for the security, a copy of that simplified disclosure prospectus and all registered amendments to that prospectus. Further, no allotment of a security that is offered in a simplified disclosure prospectus may be made if the subscriber subscribes for the security before the Securities Commission makes an extension order in relation to that prospectus. If an allotment is made in contravention of this subsection, subsection (3) will apply and the allotment may be cancelled. Section 59 will also apply, meaning that the contravention will also be an offence.

An allotment of a security to which *new section 37A(1)(ab)(ii)* applies may be made if the subscriber resubscribes for that security after the date on which the extension order was made. In effect, this cancels the original subscription, meaning that it no longer may be cancelled by the subscriber under section 37A(3). This accords with the decision of Justice Henry in *Re AIC Merchant Finance Limited (in rec); Watson & Anor v National Mutual Life Nominees Limited (No 2)* (1988) 4 NZCLC 64,403 in which the implications of section 37A were considered.

Clause 11 also amends section 37A by inserting a *new subsection (1AA)*, which provides an exception to the requirement in section 37A(1)(a) that no allotment of a security may be made if the subscriber did not receive an investment statement relating to the security before subscribing for the security. The new exception means that subscribers do not have to receive an investment statement before the allotment of a security if that security is offered in a simplified disclosure prospectus.

Clause 11 also makes a minor consequential amendment to, and corrects an error in, section 37A(3).

Clause 12 inserts a new heading and *new sections 44A to 44AG*, all of which concern extension orders and prohibition orders that may be made by the Securities Commission in relation to simplified disclosure prospectuses.

New section 44A authorises the Securities Commission to make an extension order in 3 specified circumstances, 2 of which concern an issuer disclosing information that may have an adverse effect on the issuer and is material to the offer of a security that is offered in a simplified disclosure prospectus. The final circumstance concerns the issuer failing to comply with the issuer's disclosure obligations. If any of these circumstances apply, the Commission may make an extension order extending the date of allotment of a security that is offered in a simplified disclosure prospectus for various, specified periods of time. The Commission may make an extension order on the terms and conditions that it thinks fit. It may also vary an extension order, or revoke an extension order if it is satisfied that the order should not continue in force.

New section 44AB sets out the notice requirements that must be followed by the Securities Commission before it makes an extension

order, and when it makes, or subsequently varies or revokes, an extension order.

New section 44AC provides that the notice requirements in *new section 44AB* do not apply if the Securities Commission thinks it necessary or desirable in the public interest for an extension order to be made more urgently than *new section 44AB* permits. *New section 44AC* sets out the shorter notice periods and other requirements that apply in these circumstances.

New section 44AD sets out the effect of an extension order. *New section 44AD(1)* provides that if an extension order is made, no allotment of a security that is offered in a simplified disclosure prospectus to which the extension order applies may be made in contravention of the terms or conditions of the extension order, if a term or condition of the order remains unfulfilled, or until after the extension order has expired or has been revoked. *New subsection (2)* states that the consequences of contravening *new subsection (1)* are set out in *section 37(1A)(b)* and (4) to (7), which provide that an allotment of a security that is offered in a simplified disclosure prospectus in contravention of *new subsection (1)* is invalid and of no effect. It will also be an offence under sections 59(1) and 60(2).

New section 44AD(3) makes it clear that *section 37A(1)(ab)(ii)* and (3) to (8) apply if a subscriber has subscribed for a security that is offered in a simplified disclosure prospectus before the Commission makes an extension order relating to that prospectus. Depending upon the course of action that is taken in these circumstances, an allotment of securities may be voidable and may also be an offence under section 59(1). An example is included in order to clarify the effect of *new subsection (3)* and set out some of the options that are available to the issuer and the subscriber, and the consequences if those options are exercised.

New section 44AD applies despite anything in the terms of the offer, and *new subsections (1) and (2)* override *new subsection (3)*.

New section 44AE provides that if the Securities Commission is satisfied that a person (**person A**) who is subject to a disclosure obligation has failed to comply with that obligation at any time during the previous 12 months, the Commission may, if it considers that it is desirable in the public interest, make an order prohibiting person A from using a simplified disclosure prospectus for a period not exceeding 24 months. The Commission may make a prohibition order on the

terms and conditions that it thinks fit. It may also vary a prohibition order, or revoke or suspend a prohibition order if it is satisfied that the order should not continue in force.

New section 44AF sets out the notice requirements that must be followed by the Securities Commission before it makes a prohibition order, and when it makes, or subsequently varies, revokes, or suspends, a prohibition order.

New section 44AG sets out the effect of a prohibition order. A person who is subject to a prohibition order must not, while the prohibition order is in force, offer securities to the public in, or accompanied by, a simplified disclosure prospectus, distribute a simplified disclosure prospectus, or allot securities offered in a simplified disclosure prospectus. It also makes it clear that *section 37(1A)(a)* and (4) to (7) apply in these circumstances, meaning that any allotment of securities made in contravention of the prohibition order is invalid and of no effect and may also be an offence under section 60(2). It may also be an offence under section 59.

Clause 13 amends section 46(3) by removing the words “under his or her hand” as this phrase is no longer used in the Securities Act 1978, having previously been removed from all other sections where it was used.

Clause 14 makes 2 minor changes to the punctuation in section 63.

Clause 15 amends the regulation-making powers in section 70 by providing that regulations can be made in order to specify obligations that are disclosure obligations for the purposes of the Act.

Part 2

Financial Advisers Act 2008

Clause 16 provides that *Part 2* amends the Financial Advisers Act 2008.

Clause 17 makes a minor amendment to section 88(3) by removing an incorrect reference to a subsection and replacing it with the correct reference to a section.

Clause 18 makes a minor amendment to the punctuation in section 138(1)(a)(ii).

Clause 19 amends section 157, which relates to the territorial scope of the Act, by omitting 6 superfluous words. These words were agreed

to be omitted from the Financial Advisers Bill following a Supplementary Order Paper at the committee of the whole House stage of the Bill, but were inadvertently left in the Act when it was enacted.

Clause 20 repeals section 164(6) because the amendment purported to be made by that subsection is already carried out by the repeal of section 42T(2)(b) in section 164(5).

Regulatory impact statement

Executive summary

The world is currently in the midst of the worst financial crisis for many decades. The most immediate and pressing financial sector issue has been the breakdown in credit markets. The preferred option is to provide for a simplified disclosure prospectus that may be used by listed issuers who are subject to continuous disclosure requirements and to amend the existing definitions for exemptions from standard disclosure requirements. These changes should remove unnecessary impediments to capital raising while still securing the timely disclosure of relevant information to prospective investors.

Adequacy statement

The Ministry of Economic Development (**MED**) has reviewed this regulatory impact statement and considers it to be adequate according to the adequacy criteria.

Status quo and problem

In November 2008 the Capital Market Development Taskforce, an industry-led group of private and public sector participants established in July 2008 to produce a plan to develop New Zealand's capital market, released a report in response to the financial crisis focused primarily on increasing the availability of capital for New Zealand firms and reducing the costs of raising capital. The report contained several recommendations for urgent government action to amend some of the disclosure requirements for securities offerings in the Securities Act 1978.

The objective of the Securities Act 1978 is to facilitate capital raising by securing the timely disclosure of relevant information to prospective investors. However, there are some aspects of the disclosure regime that result in the duplication of information provided to

investors. Specifically, there is duplication in the information provided to investors under continuous disclosure and in the context of a securities offering by a listed company.

In addition, there is scope for making the exemptions for categories of persons who are exempt from the disclosure requirements for offers of securities under the Securities Act 1978 work more efficiently.

Alternative options

Option 1: status quo

The status quo does not adequately meet the objective of facilitating capital raising by securing the timely disclosure of relevant information to prospective investors because it does not reduce the duplication of information provided to investors or ensure that the disclosure requirement exemption framework works as efficiently as possible.

Proposals could be addressed as part of the anticipated fundamental review of the Securities Act 1978 during 2009, to assess the overall appropriateness, efficiency, and effectiveness of the existing regulatory regime.

The main advantage of this approach would be to provide the opportunity to consider how any proposed changes to the disclosure regime would interact with a wider set of potential changes to the Securities Act 1978. However, the need to urgently respond to the current credit crisis makes it inadvisable to wait to give effect to these proposals as part of that review.

Option 2: listed issuers may offer securities with only an investment statement

For listed issuers, one option is to require only an investment statement and not a full prospectus. This is the approach used in the Securities (Local Authority Exemption) Amendment Act 2008.

The strength of this proposal is that listed issuers would only need to prepare 1 disclosure document instead of both an investment statement and a full prospectus. This option is not considered appropriate for the market more generally because local authorities are supported by their rating base and are therefore comparatively lower risk. This option would therefore not sufficiently meet the needs of potential investors in the market more generally because the protections (such as registration) and liability for misleading statements that apply to

prospectuses do not apply to an investment statement, and an investment statement does not deliver the same level of assurance that all information material to the offer will be disclosed.

Option 3: listed issuers may use a term sheet for debt offerings

For listed issuers, the Capital Market Development Taskforce proposed a term sheet as an alternative to a full prospectus and investment statement when issuing debt securities. The term sheet would contain—

- a statement from the directors of the issuer that due inquiry had been made into the information material to the issuance; and
- directions to the firm’s continuous disclosure documentation.

While this change would assist listed issuers of debt securities, benefits would increase if the reduced disclosure requirements applied to a wider range of securities offerings.

Preferred option

The preferred option is to provide for a new prospectus that may be used by listed issuers of designated debt or equity securities who are subject to continuous disclosure requirements, and to amend the provisions for exemptions from standard disclosure requirements.

Simplified disclosure prospectus for listed issuers of designated debt and equity offerings

The simplified disclosure prospectus would rely on the information released through the continuous disclosure obligations of listed issuers, reducing duplication between continuous disclosure and disclosure for a securities offering. The simplified disclosure prospectus should also include any additional information material to the offering.

As a result, listed issuers could produce 1 disclosure document for a securities offering (instead of producing both a full prospectus and an investment statement) and could reference any relevant material already released under continuous disclosure (instead of reproducing material that is already available to the public). The obvious advantage for listed issuers would be the reduction in time and pecuniary

costs of complying with the full disclosure regime, making it easier for listed issuers to seek to raise capital. Listed firms would only have the option of using the simplified disclosure prospectus to issue securities of equal or higher rank than those securities already issued by the firm.

It is possible that investors might perceive the regime as requiring the disclosure of less information, insufficient for them to invest in the securities offered under a simplified disclosure prospectus. However, the simplified disclosure prospectus would not reduce the amount of information provided to investors; it would simply reduce duplication between forms of disclosure.

Any relevant announcements made through continuous disclosure will need to be referenced in the simplified disclosure prospectus and freely available to investors, eg, the issuer's Internet site. Liability, penalties, and remedies for the disclosure of false or misleading information will apply to a simplified disclosure prospectus as they do to a full prospectus.

Amend categories of exemption from the full disclosure requirements

The preferred option for exemptions is to amend the existing definitions for exemptions from standard disclosure requirements in order to—

- allow a single offer of securities to both categories of person who are exempt from disclosure requirements without requiring the issuer to prepare a full prospectus. This corrects an anomaly where issuers are presently only able to take advantage of reduced disclosure requirements for an offer to 1 category of exempt person, not both categories together; and
- allow incremental offers to be made by those who have invested \$500,000 in the past 12 months without requiring the issuer to prepare a full prospectus. At present, the exemption from full disclosure only applies to an initial offering to those who are required to pay a minimum of \$500,000, and full disclosure requirements apply for any incremental offers; and
- clarify that a family trust is a person for the purpose of applying the eligible person criteria (and so eligible for disclosure exemptions). Although this is already the stated interpretation

of the Securities Commission, some market participants are wary and seek certainty by way of an explicit amendment to the Securities Act 1978; and

- allow certification that a person is wealthy (and so eligible for disclosure exemptions) every 12 rather than 6 months. This change will make it less onerous for a wealthy person to qualify for an exemption from full disclosure requirements.

The changes apply to both listed and unlisted companies and will particularly benefit private companies who tend to approach investors for capital directly, often in cases where an exemption applies, eg, where the investor is well known to the issuer. Investors will not be disadvantaged by these amendments since the exemptions from disclosure requirements only apply to investors who are assumed to already possess the information necessary to make an assessment of the offer, or who are capable of obtaining the necessary information, or who have sufficient experience in the market not to need the standard level of disclosure, eg, sophisticated or habitual investors or investors who have an existing relationship with the issuer.

Implementation and review

The detail and content of the simplified disclosure prospectus will be contained in regulations to be promulgated under the regulation-making authority of section 70 of the Securities Act 1978. However, the Securities Disclosure and Financial Advisers Amendment Bill contains amendments to the Securities Act 1978 that are necessary to enable the use of a simplified disclosure prospectus, eg, an exemption from the requirement to provide an investment statement for every securities offering. The regulations and Bill will need to commence simultaneously to give effect to the policy.

The amended categories of exemption from full disclosure requirements can only be implemented through an amendment to the Securities Act 1978, and the Securities Disclosure and Financial Advisers Amendment Bill is the preferred vehicle for change.

The Securities Commission will assume additional powers in order to monitor and enforce compliance with the new requirements. These powers are consistent with the Commission's current role and functions, and their existing responsibilities in relation to the Securities Act 1978.

Officials will review the Securities Disclosure and Financial Advisers Amendment Bill as a part of the wider review of the Securities Act 1978.

Consultation

As part of the 2006 consultation on the Review of Financial Products and Providers, MED sought submissions on whether issuers who are subject to a continuous disclosure regime and who want to issue new securities of a class already listed should be able to use a transaction-specific document. The vast majority of respondents were in favour of such a proposal.

The Capital Market Development Taskforce provided a catalyst for government action to reduce disclosure requirements for listed issuers and amend the exemptions from disclosure requirements under the Securities Act 1978. The Taskforce is an industry-led group that includes numerous representatives of the finance industry.

Due to the urgency attached to this reform, MED consulted with a targeted group of industry experts in order to agree technical details to give proper effect to the policy. MED has worked closely with the Securities Commission in the development of this policy. Treasury was also consulted during policy development, on the draft Cabinet paper, and on the regulatory impact statement. The Department of the Prime Minister and Cabinet was informed of these policy proposals. The Reserve Bank was consulted on the draft Cabinet paper. Officials also met with the Legislation Design Committee for technical review prior to finalising the drafting instructions for the proposed amendments to the Securities Act 1978, and will continue to work with them in the design of the regulations. Officials have also notified Australian authorities of these proposals in the context of the Agreement Between the Government of Australia and the Government of New Zealand in relation to Mutual Recognition of Securities Offerings.

Hon Simon Power

Securities Disclosure and Financial Advisers Amendment Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title
This Act is the Securities Disclosure and Financial Advisers Amendment Act **2009**.

2 Commencement 5
This Act comes into force on the day after the date on which it receives the Royal assent.

**Part 1
Securities Act 1978**

3 Principal Act amended 10
This Part amends the Securities Act 1978.

4 Interpretation
Section 2(1) is amended by inserting the following definitions in their appropriate alphabetical order:

“**disclosure obligation** means—

“(a) the requirements of the continuous disclosure provisions as defined in section 19D of the Securities Markets Act 1988; and

“(b) any obligation that— 5

“(i) requires ongoing disclosure of information to the public or to a person who has a role in monitoring the person who disclosed the information; and

“(ii) is imposed by an enactment; and

“(iii) is specified in the regulations 10

“**extension order** means an order made by the Commission under **section 44A(2) or (3)** that extends the date of allotment of a security that is offered in a simplified disclosure prospectus

“**offered in a simplified disclosure prospectus** means an offer of securities to the public for subscription that is made— 15

“(a) by or on behalf of an issuer; and

“(b) in, or accompanied by, a simplified disclosure prospectus

“**prohibition order** means an order made by the Commission under **section 44AE(1)** that prohibits a person from using a simplified disclosure prospectus 20

“**simplified disclosure prospectus** means a registered prospectus that may be used only if—

“(a) the issuer is subject to a disclosure obligation; and 25

“(b) the regulations provide for the use of a simplified disclosure prospectus by a person who is subject to that type of disclosure obligation”.

5 Construction of references to offering securities to the public 30

Section 3(2) is amended by adding the following paragraph:

“(c) an offer of securities (the **further securities**) made only to persons who have previously paid a minimum subscription price of at least \$500,000 for securities (the **initial securities**) in a single transaction before the allotment of the initial securities, provided that— 35

- “(i) the rights, privileges, limitations, and conditions attached to the further securities are identical to those attached to the initial securities; and
- “(ii) the offer of the further securities is made by the issuer of the initial securities; and 5
- “(iii) the offer of the further securities is made within 12 months of the date of the first allotment of the initial securities.”
- 6 New section 3A inserted**
- The following section is inserted after section 3: 10
- “3A Status of examples**
- “(1) An example used in this Act is only illustrative of the provisions to which it relates. It does not limit those provisions.
- “(2) If an example and a provision to which it relates are inconsistent, the provision prevails.” 15
- 7 Exemptions from this Act**
- (1) Section 5(1)(d) is amended by omitting “1952):” and substituting “1952); or”.
- (2) Section 5(2CA)(a)(ii) is amended by inserting “or, if the securities are to be offered in a simplified disclosure prospectus, a copy of that prospectus” after “investment statement”. 20
- (3) Section 5 is amended by inserting the following subsection after subsection (2CB):
- “(2CBA) Nothing in Part 2 (except sections 38B and 58) or the regulations applies in respect of a security if— 25
- “(a) the only persons who are able, under the terms of the offer of the security, to subscribe for the security are—
- “(i) eligible persons; and
- “(ii) persons to whom an offer does not constitute an offer of securities to the public because of the application of section 3(2); and 30
- “(b) the subscriber is either—
- “(i) an eligible person; or
- “(ii) a person to whom an offer does not constitute an offer of securities to the public because of the application of section 3(2).” 35

- (4) Section 5(2CC) is amended by omitting “subsection (2CB)” and substituting “subsections (2CB) and **(2CBA)**”.
- (5) Section 5(2CD) is amended by omitting “6 months” and substituting “12 months”.
- (6) Section 5 is amended by inserting the following subsection after subsection (2CD):
- “(2CDA) To avoid doubt, for the purposes of subsections (2CC)(a) and (2CD), **person** includes—
- “(a) the trustees of a trust acting jointly in their capacity as trustees of that trust; and
- “(b) the sole trustee of a trust acting in his, her, or its capacity as trustee of that trust.”
- 8 Restrictions on distribution of prospectuses**
- Section 34 is amended by adding the following subsection:
- “(3) However, subsection (2)(a) does not apply to a simplified disclosure prospectus.”
- 9 Void irregular allotments**
- Section 37 is amended by inserting the following subsection after subsection (1):
- “(1A) No allotment of a security that is offered in a simplified disclosure prospectus may be made—
- “(a) by a person who is subject to a prohibition order while that order is in force; or
- “(b) in contravention of **section 44AD(1)**.”
- 10 Consent for purposes of section 37AC(1)(c) or (d)**
- (1) Section 37AD(1)(b)(iv) is amended by inserting “or **37A(1AA)**” after “section 5”.
- (2) Section 37AD(1)(b) is amended by adding the following subparagraph:
- “(vii) if the security is offered in a simplified disclosure prospectus, a copy of that simplified disclosure prospectus.”
- (3) Section 37AD is amended by inserting the following subsection after subsection (1):

“(1A) However, subsection (1)(b)(v) does not apply to securities that are offered in a simplified disclosure prospectus.”

11 Voidable irregular allotments

(1) Section 37A(1) is amended by inserting the following paragraph after paragraph (a): 5

“(ab) in the case of a security that is offered in a simplified disclosure prospectus,—

“(i) the subscriber did not receive, before subscribing for the security, a copy of—

“(A) that simplified disclosure prospectus; and 10

“(B) every memorandum of amendments to that prospectus that is registered by the Registrar under section 43 before the time of allotment; or

“(ii) the subscriber subscribes for the security before the Commission makes an extension order in relation to that simplified disclosure prospectus; or” 15

(2) Section 37A is amended by inserting the following subsection after subsection (1): 20

“(1AA) However, subsection (1)(a) does not apply to securities that are offered in a simplified disclosure prospectus.”

(3) Section 37A(3) is amended by omitting “this section shall (whether or not the issuer is being in liquidation) be” and substituting “subsection (1) or (1A) is (whether or not the issuer is in liquidation)” 25

12 New heading and sections 44A to 44AG inserted

The following heading and sections are inserted after section 44:

*“Extension orders and prohibition orders
concerning simplified disclosure prospectuses”* 30

“44A Commission may make extension orders

“(1) This section applies if the Commission is of the opinion that the issuer of a security that is offered in a simplified disclosure prospectus— 35

- “(a) has disclosed information in the prospectus that has not previously been publicly disclosed under the issuer’s disclosure obligations, and that information is adverse to the issuer and is material to the offer of the security; or 5
- “(b) has disclosed information under the issuer’s disclosure obligations between the date of the prospectus and the allotment date, and that information is adverse to the issuer and is material to the offer of the security; or
- “(c) has failed to comply with the issuer’s disclosure obligations at any time during the previous 12 months. 10
- “(2) If either **subsection (1)(a) or (b)** applies, the Commission may, if it considers that it is desirable in the public interest, make an order extending the date of allotment for the securities that are offered in a simplified disclosure prospectus for a period not exceeding 14 days from the date of allotment stated in the terms of the offer. 15
- “(3) If **subsection (1)(c)** applies, the Commission may, if it considers that it is desirable in the public interest, make an order extending the date of allotment for the securities that are offered in a simplified disclosure prospectus until the later of— 20
- “(a) 14 days after the date of allotment stated in the terms of the offer; or
- “(b) 14 days after the date on which the issuer’s failure to comply with the issuer’s disclosure obligations is remedied. 25
- “(4) The Commission may make an extension order on the terms and conditions that the Commission thinks fit (which may include a condition that the issuer disclose or give public notice of specified information in any manner that the Commission thinks fit in the circumstances). 30
- “(5) The Commission may vary an extension order in the same way as it may make the order.
- “(6) The Commission may revoke an extension order, on the terms and conditions it thinks fit, if it is satisfied that it should not continue in force. 35
- “(7) In this section, **issuer’s disclosure obligations** means the disclosure obligations that an issuer is subject to and that the is-

suer has relied on in order to permit the issuer to use a simplified disclosure prospectus in accordance with the regulations and the definition of simplified disclosure prospectus.

“44AB Notices and submissions concerning extension orders

- “(1) The Commission may make an extension order only if— 5
- “(a) the Commission gives the issuer at least 3 days’ written notice of the following matters before the Commission makes the extension order:
- “(i) the paragraph of **section 44A(1)** that is alleged to apply to the issuer; and 10
- “(ii) the proposed terms and conditions of the extension order; and
- “(iii) the reasons for the proposed extension order; and
- “(b) the Commission gives the issuer an opportunity to make a written submission within that notice period; and 15
- “(c) the Commission has regard to any written submissions made to it within that notice period.
- “(2) If the Commission makes an extension order,—
- “(a) it must, as soon as practicable after the making of the order, notify the issuer of— 20
- “(i) the terms and conditions of the order; and
- “(ii) the reasons for the order; and
- “(b) it must, as soon as practicable after the making of the order, give notice on its Internet site of—
- “(i) the terms and conditions of the order; and 25
- “(ii) the reasons for the order; and
- “(iii) the information that is adverse to the issuer and is material to the offer of the security, or the nature of the issuer’s failure to comply with the issuer’s disclosure obligations; and 30
- “(iv) any other information the Commission thinks relevant in the circumstances; and
- “(c) it may give public notice by any other means of the matters in **paragraph (b)**; and
- “(d) it may notify any other person of the matters in **paragraph (b)**. 35
- “(3) If the Commission varies or revokes an extension order under **section 44A(5) or (6)**,—

- “(a) it must, as soon as practicable, notify the issuer of—
 - “(i) the terms and conditions of the variation or revocation; and
 - “(ii) the reasons for the variation or revocation; and
- “(b) it may give notice on its Internet site or give public notice by any other means of those matters; and 5
- “(c) it may notify any other person of those matters.

“**44AC Limited notice and submissions for urgent extension orders**

If the Commission thinks it necessary or desirable in the public interest for an extension order to be made more urgently than **section 44AB** permits,— 10

- “(a) it may give less than 3 days’ notice before it makes the order, and the notice and submissions may be oral, not written; but 15
- “(b) it must include in that notice the reasons for acting urgently and must otherwise comply with that section.

“**44AD Effect of extension orders**

- “(1) No allotment of a security that is offered in a simplified disclosure prospectus to which an extension order applies may be made— 20
 - “(a) in contravention of the terms or conditions of the extension order or of its revocation; or
 - “(b) if a term or condition of the extension order remains unfulfilled; or 25
 - “(c) until after the extension order expires or is revoked.
- “(2) If a person contravenes **subsection (1)**, **section 37(1A)(b)** and (4) to (7) apply (which provide that an allotment of a security that is offered in a simplified disclosure prospectus in contravention of **subsection (1)** is invalid and of no effect). 30
- “(3) If a subscriber subscribes for a security that is offered in a simplified disclosure prospectus to which an extension order applies before the Commission made the extension order, **section 37A(1)(ab)(ii)** and (3) to (8) apply.

Example

Issuer A makes an offer of securities to the public for subscription in a simplified disclosure prospectus. Tom subscribes for some of those securities. After Tom has subscribed for the securities, the Commission makes an extension order that applies to the simplified disclosure prospectus. **Section 37A(1)(ab)(ii)** and (3) to (8) apply. 5

In these circumstances, Issuer A's options may include the following:

- “(a) Issuer A may ask Tom if he wants to resubscribe for the securities. In this case, Issuer A could obtain Tom's permission to use the money that Tom paid Issuer A when he originally subscribed for the securities (**Tom's subscription money**) to resubscribe for those securities after the date on which the extension order was made. Issuer A may then allot those securities to Tom (once the extension order has expired or has been revoked) without contravening **section 37A(1)(ab)(ii)**; or 10 15
- “(b) Issuer A could withdraw the offer or take some other similar course of action. If Issuer A withdraws the offer it must pay Tom's subscription money back to him. Tom's subscription money must be held in trust for him until it is repaid (see section 36A); or 20
- “(c) Issuer A could allot the securities to Tom (once the extension order has expired or has been revoked) without Tom having resubscribed for the securities. In this case, the allotment would be valid (see section 37A(5)), but it is voidable at the instance of Tom (see section 37A(3)) and Issuer A has committed an offence (see **sections 37A(1)(ab)(ii)** and 59(1)). 25 30

Tom's options include the following:

- “(a) Tom may decide to leave Tom's subscription money with Issuer A and use that money to resubscribe for the securities. If Issuer A agrees to this, Issuer A may allot those securities to Tom (once the extension order has expired or has been revoked) without contravening **section 37A(1)(ab)(ii)**; or 35
- “(b) Tom may require Issuer A to pay Tom's subscription money back to him. Tom's subscription money must be held in trust for him until it is repaid (see section 36A); or 40
- “(c) Tom may decide to take no action at all. In this case, if Issuer A allots the securities to Tom (once the extension order has expired or has been revoked), the allotment would be valid (see section 37A(5)), but it is voidable at the instance of Tom (see section 37A(3)) and Issuer A has 45

Example—*continued*

committed an offence (see **sections 37A(1)(ab)(ii)** and 59(1)). If Issuer A does not allot the securities to Tom, Issuer A must pay Tom’s subscription money back to him (see section 36A).

Regardless of which option is taken by Issuer A or Tom, if Issuer A allots securities to Tom in contravention of **section 44AD(1)** (for example, by allotting the securities to Tom before the extension order has expired or has been revoked), that allotment is invalid and of no effect (see **sections 44AD(1), (2), and (4)** and **37(1A)(b)** and (4) to (7)) and Issuer A has committed offences (see sections 59(1) and 60(2)).

“(4) **Subsections (1) and (2)** override **subsection (3)**.

“(5) This section applies despite anything in the terms of the offer.

“**44AE Commission may make prohibition orders**

“(1) If the Commission is satisfied that a person (**person A**) who is subject to a disclosure obligation has failed to comply with that obligation at any time during the previous 12 months, the Commission may, if it considers that it is desirable in the public interest, make an order prohibiting person A from using a simplified disclosure prospectus for a period not exceeding 24 months.

“(2) The Commission may make a prohibition order on the terms and conditions that the Commission thinks fit.

“(3) The Commission may vary a prohibition order in the same way as it may make the order.

“(4) The Commission may, either of its own volition or on the application of the person concerned, revoke or suspend a prohibition order, on the terms and conditions it thinks fit, if it is satisfied that it should not continue in force.

“**44AF Notices and submissions concerning prohibition orders**

“(1) The Commission may make a prohibition order only if—
“(a) the Commission gives the person concerned (**person A**) at least 14 days’ written notice of the following matters before the Commission makes the prohibition order:

- “(i) the nature of person A’s failure to comply with his, her, or its disclosure obligations; and
- “(ii) the proposed terms and conditions of the prohibition order; and
- “(iii) the reasons for the proposed prohibition order; and 5
- “(b) the Commission gives person A an opportunity to make a written submission within that notice period; and
- “(c) the Commission has regard to any written submissions made to it within that notice period. 10
- “(2) If the Commission makes a prohibition order,—
- “(a) it must, as soon as practicable after the making of the order, notify person A of—
- “(i) the terms and conditions of the order; and
- “(ii) the reasons for the order; and 15
- “(b) it must, as soon as practicable after the making of the order, give notice on its Internet site of—
- “(i) the terms and conditions of the order; and
- “(ii) the reasons for the order; and
- “(iii) the nature of person A’s failure to comply with his, her, or its disclosure obligations; and 20
- “(iv) any other information the Commission thinks relevant in the circumstances; and
- “(c) it may give public notice by any other means of the matters in **paragraph (b)**; and 25
- “(d) it may notify any other person of the matters in **paragraph (b)**.
- “(3) If the Commission varies, revokes, or suspends a prohibition order under **section 44AE(3) or (4)**,—
- “(a) it must, as soon as practicable, notify person A of— 30
- “(i) the terms and conditions of the variation, revocation, or suspension; and
- “(ii) the reasons for the variation, revocation, or suspension; and
- “(b) it may give notice on its Internet site or give public notice by any other means of those matters; and 35
- “(c) it may notify any other person of those matters.

“44AG Effect of prohibition orders

If the Commission makes a prohibition order,—

“(a) a person who is prohibited by that order from using a simplified disclosure prospectus must not, while the prohibition order is in force,— 5

“(i) make an offer of securities to the public in, or accompanied by, a simplified disclosure prospectus; or

“(ii) distribute a simplified disclosure prospectus that relates to a security; or 10

“(iii) allot securities offered in a simplified disclosure prospectus; and

“(b) **section 37(1A)(a)** and (4) to (7) apply (which provide that an allotment of a security that is offered in a simplified disclosure prospectus by a person who is subject to a prohibition order while that order is in force is invalid and of no effect).” 15

13 Registration of trust deeds and deeds of participation

Section 46(3) is amended by omitting “under his or her hand”.

14 Power of Court to grant relief in certain cases 20

(1) Section 63(1)(a) is amended by omitting “securities;” and substituting “securities; or”.

(2) Section 63(1)(b) is amended by omitting “advertisement;” and substituting “advertisement; or”.

15 Regulations and Orders in Council 25

Section 70(1) is amended by inserting the following paragraph after paragraph (ca):

“(d) specifying obligations that are disclosure obligations for the purposes of this Act.”

Part 2 30

Financial Advisers Act 2008

16 Principal Act amended

This Part amends the Financial Advisers Act 2008.

- 17 Commissioner’s approval of draft code**
Section 88(3) is amended by omitting “subsection” and substituting “section”.
- 18 Right of appeal**
Section 138(1)(a)(ii) is amended by omitting “67(4): or” and substituting “67(4); or”.
- 19 Territorial scope**
Section 157 is amended by omitting “by a person in New Zealand,”.
- 20 Securities Markets Act 1988 amended** 10
Section 164(6) is repealed.
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