

Securities Disclosure and Financial Advisers Amendment Bill

Government Bill

As reported from the Commerce Committee

Commentary

Recommendation

The Commerce Committee has examined the Securities Disclosure and Financial Advisers Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

The Securities Disclosure and Financial Advisers Amendment Bill responds to the current international financial crisis by removing unnecessary impediments to raising capital, 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 would, in connection with regulations to be made under existing regulation-making powers, allow stock exchange-listed issuers to offer certain debt and equity securities without duplicating information that they had already publicly disclosed under their continuous disclosure obligations.

Part 2 of the bill amends the Financial Advisers Act 2008 to correct an error in the assent version of the Act and to make a number of other minor amendments.

This commentary covers the key amendments we recommend to the bill. It does not cover minor or technical amendments.

Exemptions from disclosure requirements

The Securities Act 1978 provides exemptions from standard disclosure requirements for certain investors who, because of their experience, knowledge, wealth, or existing relationship with the issuer, are assumed not to require the standard level of protection the Act offers.

The appropriateness of these exemptions will be reviewed in the current full review of the Securities Act which forms part of the Review of Financial Products and Providers (RFPP).¹ In the meantime, however, this bill proposes some amendments which, by removing minor anomalies in the current law, would make it easier for businesses to raise capital. While the changes would apply to both listed and unlisted companies, they would particularly benefit private companies that tend to approach investors for capital directly, often in cases where an exemption applies, for example where the investor is well known to the issuer.

One of the amendments proposed by the bill relates to offers of further securities to investors who have previously made subscriptions of \$500,000 or more. We recommend the following two changes to this aspect of the bill.

Exemptions for subsequent offers

We recommend amending clause 5 to allow subsequent offers, after an initial subscription of \$500,000, to cover different types of security rather than limiting this to securities carrying identical rights, privileges, limitations, and conditions to the initial securities. We recommend amending clause 5 to allow offers subsequent to an initial \$500,000 to be made within 18 months of the first allotment, rather than 12 months as currently proposed.

¹ Ministry of Economic Development, *Review of Financial Products and Providers: Review of Securities Offerings*.

The bill as it currently stands allows incremental investments to be made by those who have invested \$500,000 in the past 12 months for further securities (where the rights, privileges, limitations, and conditions attached to the further securities are identical to those attached to the initial securities) without the protection of the Act.

We believe it is unnecessary to restrict the securities to those identical to the initial securities, as the proposed amendment recognises that an investor who has previously invested \$500,000 in one transaction prior to allotment does not need the protection of the Act. Thus having accepted this premise, limiting the securities to the original offer needlessly restricts a company's ability to use a range of investment vehicles to raise further capital from its initial investors, and an existing investor's ability to subscribe to them.

We consider it appropriate that the \$500,000 initial investment should be required to have been made within a reasonably small window, but do not consider that 12 months would allow the issuer enough time to complete a full annual reporting cycle and decide whether additional capital needed to be raised. The extension of time to 18 months would provide a more suitable balance.

Experienced investors

We recommend that clause 7 be amended by inserting new subclause (7), which would amend section 5(2CE)(c) of the Act to require that an experienced investor to whom an offer of a security had been made, additionally sign a written acknowledgement that they will not receive information usually provided by an issuer in respect of an offer of securities to the public, particularly an investment statement and a registered prospectus.

We propose this amendment as currently the investor would be required only to acknowledge that the independent financial services provider had not given the investor a prospectus and investment statement. As there is normally no obligation for an independent financial adviser to provide these documents (it is normally the obligation of the issuer), we feel it is important that the investor acknowledge that they are not to receive any of the information usually provided by an issuer offering securities to the public.

Wealthy Investors

Although not opposing the specific amendment, some of us are concerned that changes are being made to the Wealthy Investor exemption when that exemption may be repealed as part of the review of the Securities Act, noting that the relevant RFPP discussion document described it as “the least principled of all the exemptions”.

Issues raised by submitters

Further issues were raised by submitters about streamlining the disclosure regime. Although we are not proposing any amendments, we consider it worth commenting on this aspect of the bill in the light of the submissions we received.

The cornerstone of the disclosure regime for listed issuers is the obligation of continuous disclosure imposed by the Securities Markets Act 1988, in combination with stock exchange listing rules. This will remain so after the amendments proposed by this bill. However, listed entities who wish to issue debt or equity securities to raise further capital will be able to save time and costs by producing a single disclosure document (the simplified disclosure prospectus) rather than both a full prospectus, and an investment statement. The simplified disclosure prospectus will refer investors to information made available through continuous disclosure, and supplement this material with information specific to the new issue.

Investors will not be disadvantaged by this change as listed entities will still have to comply with existing rules of continuous disclosure. The bill will not reduce the amount of information available to investors but will reduce the duplication of information between two forms of disclosure.

In response to submissions, we considered carefully whether the test for provision of information under a simplified disclosure prospectus should be the same as that set out in section 3 of the Securities Markets Act. However, there is an important distinction between the primary and secondary markets. An offer made on the primary market is made by the issuer, who is in possession of any adverse information. It is, therefore, entirely reasonable to expect directors, when seeking new funds, to ensure that all relevant information is disclosed.

With secondary market trades, on the other hand, neither party is presumed to have any special knowledge about the issuer; both must rely on information released under continuous disclosure. It would be unreasonable to require directors to undertake due inquiry at all times to support trades on the secondary market.

Prior to a new issue, such due inquiry is appropriate but need not be onerous if there are effective processes in place for continuous disclosure.

We also gave weight to the potential for a gap between all information that is material to new securities being issued, and that which is “material information”. Information that may be material to the securities being issued, but not to the securities already listed, could include information about the terms of the new securities (such as interest rates, conversion rights, reset rates and mechanisms, and pricing). There may also be information that is specific to the new issue, and in particular any specific project for which the funds are being raised (especially if the intended project is contingent on the funds being raised), that has not been disclosed on the basis that it was not material to the price of the existing listed securities.

The extent of the enquiries needed to ensure that all information material to the new issue has been disclosed would be reduced if the issuer had good systems for continuous disclosure.

One submitter went further and proposed that the test should simply require disclosure of the information that has actually been disclosed under the continuous disclosure requirements of the New Zealand Exchange Listing Rules. Such an approach would increase the gap in information, as it would extend to all information withheld under the “safe harbour” exceptions in the Listing Rules. This would include information that is material to the securities already listed (such as ongoing negotiations concerning bank funding or new business contracts) but legitimately withheld during normal trading.

We believe it is appropriate in the case of a new issue that directors be required to make due inquiry to ascertain whether all adverse information has been properly referred to in the simplified disclosure regime on the basis of the information provided to them. Directors are entitled to rely on the information they receive as a result of due enquiry unless they have reason to believe the information is incorrect (section 2B of the Securities Act 1978). In this case they do not have to undertake investigations into the underlying position. Dir-

ectors also have the benefit of a defence to legal liability where they have a reasonable belief that the information they were given was true under section 56 of the Act.

In particular, we note that there would be no legal consequences for any adverse information that was downplayed in, or omitted from, a simplified disclosure prospectus, even with the knowledge of directors, if it did not fall within the definition of “material information”.

We are therefore satisfied that the proposed approach with a simplified disclosure prospectus is appropriate.

Other issues

We considered a number of other issues raised by submitters; these were, however, either outside the scope of this bill or better dealt with in the more fundamental review of the Securities Act that is under way.

Amendments to Financial Advisers Act 2008

Part 2 of the bill seeks to correct several errors in the Financial Advisers Act 2008. These are all of a minor, technical nature and we have no difficulty with them. In addition, we recommend further amendments designed to remedy errors that have come to light since the bill was introduced. These issues are also of a minor technical nature, but as they are new amendments proposed to the Act it is appropriate that they be covered here.

Retirement villages disclosure statements

We recommend the insertion of new clause 16A clarifying that the disclosure statement which operators of retirement villages must make under the Retirement Villages Act 2003 does not constitute financial advice for the purposes of the Financial Advisers Act. We accept that such documents are not intended to be taken as financial advice in themselves, and their omission from the list of similar documents from the Financial Advisers Act was an oversight.

Additional minor drafting errors

We recommend inserting new clauses 16B and 16C to fix two very minor errors. Clause 16B corrects a typographical error in section

17(1) of the Financial Advisers Act. Clause 16C changes section 18(1) to reflect that an agent is “engaged” rather than “employed”.

Advice by employees of qualifying financial entities

We recommend new clauses 16D and 16E clarifying the liability and disclosure obligations that would apply to an employee of a qualifying financial entity when they provide advice about products issued by that entity.

These amendments correct an oversight in the final stages of consideration of the Financial Advisers Bill, when a late change was not carried over into other provisions of that Act. The amendment would align the liability and disclosure obligations that apply to an employee of a qualifying financial entity when advising on different financial products.

We also recommend that these new clauses confirm that disclosure and conduct obligations of authorised financial advisers apply whether or not they are employed by or are agents of a qualifying financial entity. This amendment would preserve the purposes of the Financial Advisers Act, which is to hold advisers authorised by the Securities Commission to a high standard of competency.

We also recommend the addition of new clause 17A which clarifies (to avoid doubt) that employees and agents of qualifying financial entities operating under the exception from registration under the Financial Advisers Act would not be committing the offence of performing a financial adviser service without being registered.

Alignment with Financial Service Providers (Registration and Dispute Resolution) Act 2008

We recommend new clause 19A be inserted to remove an unintended conflict between the registration requirements under the Financial Advisers Act and the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

The Financial Service Providers (Registration and Dispute Resolution) Act states that it does not apply to employees of financial service providers when operating in their capacity as employees. However, the Financial Advisers Act generally requires individuals who perform a financial adviser service to be registered in their own right on the register of Financial Service Providers. As financial

advisers will often be employees of financial service providers, these requirements conflict.

The result of the amendment proposed is that employees of financial service providers (when operating in their capacity as employees) would not be required to register and belong to a dispute resolution scheme unless the individual were required to register under the Financial Advisers Act. The proposed amendment preserves the status quo and aligns the two Acts.

Appendix

Committee process

The Securities Disclosure and Financial Advisers Amendment Bill was referred to the committee on 3 March 2009. The closing date for submissions was 20 March 2009. We received and considered 19 submissions from interested groups and individuals. We heard six submissions.

We received advice from the Ministry of Economic Development, with the assistance of the Securities Commission.

Committee membership

Hon Lianne Dalziel (Chairperson)

John Boscawen

Charles Chauvel

Clare Curran

Te Ururoa Flavell

Jo Goodhew

Melissa Lee

Peseta Sam Lotu-Iiga

Katrina Shanks

**Securities Disclosure and Financial
Advisers Amendment Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

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

This Part amends the Securities Act 1978.

4 Interpretation

5

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

“**extension delayed allotment order** means an order made by the Commission under **section 44A(2) or (3)** that ~~extends~~ delays the date of allotment of a security that is offered in a simplified disclosure prospectus 10

“**disclosure obligation** means—

“(a) the requirements of the continuous disclosure provisions as defined in section 19D of the Securities Markets Act 1988; and 15

“(b) any obligation that—

“(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 20

“(iii) is specified in the regulations

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

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

“(b) in, or accompanied by, a simplified disclosure prospectus 25

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

“**simplified disclosure prospectus** means a registered 30 prospectus that may be used only if—

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

“(b) the regulations provide for the use of a simplified disclosure prospectus by a person who is subject to that type of disclosure obligation”. 35

5 Construction of references to offering securities to the public

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—
- “(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
 - “(iii) the offer of the further securities is made within 12 months of the date of the first allotment of the initial securities.”

5 Construction of references to offering securities to the public

- (1) Section 3(2)(a) is amended by inserting the following subparagraph after subparagraph (ia):

- “(iib) persons who have each 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—
- “(A) the offer of the securities is made by the issuer of the initial securities; and
 - “(B) the offer of the securities is made within 18 months of the date of the first allotment of the initial securities:”

- (2) Section 3(8) is amended by inserting “or (iib)” after “subsection (2)(a)(ia)”.

- (3) Section 3(9) is amended by adding “or (iib)”.

6 New section 3A inserted

The following section is inserted after section 3: 35

“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.” 5

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”.
- (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— 15

“(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~~ 20

“(ii) persons who fall within 1 or more of the categories set out in subparagraphs (i) to (iii) of section 3(2)(a); and

“(b) the subscriber is either— 25

“(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).~~

“(ii) a person who falls within 1 or more of the categories set out in subparagraphs (i) to (iii) of section 3(2)(a).” 30

(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”. 35

(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.”

(7) Section 5(2CE) is amended by repealing paragraph (c) and substituting the following paragraph:

“(c) the person to whom the offer is made signs a written acknowledgment, before the security is allotted to the person, that—

“(i) the financial service provider has given the person neither an investment statement nor a registered prospectus relating to the security; and

“(ii) the person understands that he, she, or it will not receive information usually provided by an issuer in respect of an offer of securities to the public including (in particular) an investment statement and a registered prospectus.”

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”.

- (1) 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.” 5
- (2) Section 37AD is amended by inserting the following subsection after subsection (1):
 “(1A) However, ~~subsection (1)(b)(v)~~ does subsection (1)(b)(iv) and (v) do not apply to securities that are offered in a simplified disclosure prospectus.” 10

11 Voidable irregular allotments

- (1) Section 37A(1) is amended by inserting the following paragraph after paragraph (a):
 “(ab) in the case of a security that is offered in a simplified disclosure prospectus,— 15
 “(i) the subscriber did not receive, before subscribing for the security, a copy of—
 “(A) that simplified disclosure prospectus; and
 “(B) every memorandum of amendments to that prospectus that is registered by the Registrar under section 43 before the time of allotment; or 20
 “(ii) ~~the subscriber subscribes for the security before the Commission makes an extension order made a delayed allotment order~~ in relation to that simplified disclosure prospectus and the subscriber subscribed for the security before the delayed allotment order was made; or” 25
- (2) Section 37A is amended by inserting the following subsection after subsection (1): 30
 “(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)”. 35

12 New heading and sections 44A to 44AG inserted

The following heading and sections are inserted after section 44:

“~~Extension~~ Delayed allotment orders and prohibition orders concerning simplified disclosure prospectuses” 5

“44A Commission may make extension delayed allotment 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— 10

“(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; 15
or

“(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 20

“(c) has failed to comply with the issuer’s disclosure obligations at any time during the previous 12 months.

“(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 delaying 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. 25

“(3) If **subsection (1)(c)** applies, the Commission may, if it considers that it is desirable in the public interest, make an order extending delaying the date of allotment for the securities that are offered in a simplified disclosure prospectus until a date not exceeding the later of— 30

“(a) 14 days after the date of allotment stated in the terms of the offer; or 35

“(b) 14 days after the date on which the issuer’s failure to comply with the issuer’s disclosure obligations is remedied.

- “(4) The Commission may make ~~an extension~~ a delayed allotment 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). 5
- “(5) The Commission may vary ~~an extension~~ a delayed allotment order in the same way as it may make the order.
- “(6) The Commission may revoke ~~an extension~~ a delayed allotment order, on the terms and conditions it thinks fit, if it is satisfied that it should not continue in force. 10
- “(7) In this section, **issuer’s disclosure obligations** means the disclosure obligations that an issuer is subject to and that the issuer 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. 15

“**44AB Notices and submissions concerning ~~extension~~ delayed allotment orders**

- “(1) The Commission may make ~~an extension~~ a delayed allotment order only if—
- “(a) the Commission gives the issuer at least 3 days’ written notice of the following matters before the Commission makes the ~~extension~~ delayed allotment order: 20
- “(i) the paragraph of **section 44A(1)** that is alleged to apply to the issuer; and
- “(ii) the proposed terms and conditions of the ~~extension~~ delayed allotment order; and 25
- “(iii) the reasons for the proposed ~~extension~~ delayed allotment order; and
- “(b) the Commission gives the issuer an opportunity to make a written submission within that notice period; and 30
- “(c) the Commission has regard to any written submissions made to it within that notice period.
- “(2) If the Commission makes ~~an extension~~ a delayed allotment order,—
- “(a) it must, ~~as soon as practicable~~ immediately after the making of the order, notify the issuer of— 35
- “(i) the terms and conditions of the order; and
- “(ii) the reasons for the order; and

- “(b) it must, ~~as soon as practicable~~ immediately 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 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
 - “(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)**.
- “(3) If the Commission varies or revokes ~~an extension~~ a delayed allotment order under **section 44A(5) or (6)**,—
- “(a) it must; ~~as soon as practicable~~; immediately 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
 - “(c) it may notify any other person of those matters.
- “**44AC Limited notice and submissions for urgent extension delayed allotment orders**
- If the Commission thinks it necessary or desirable in the public interest for ~~an extension~~ a delayed allotment order to be made more urgently than **section 44AB** permits,—
- “(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
 - “(b) it must include in that notice the reasons for acting urgently and must otherwise comply with that section.

“44AD Effect of ~~extension~~ delayed allotment orders

- “(1) No allotment of a security that is offered in a simplified disclosure prospectus to which ~~an extension~~ a delayed allotment order applies may be made—
- “(a) in contravention of the terms or conditions of the ~~extension~~ delayed allotment order or of its revocation; or
 - “(b) if a term or condition of the ~~extension~~ delayed allotment order remains unfulfilled; or
 - “(c) until after the ~~extension~~ delayed allotment 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).
- “(3) ~~If a subscriber subscribes~~ If the Commission makes a delayed allotment order and a subscriber has subscribed for a security that is offered in a simplified disclosure prospectus to which ~~an extension~~ that delayed allotment order applies before the Commission made the ~~extension~~ delayed allotment order, **section 37A(1)(ab)(ii)** and (3) to (8) apply (which provide that an allotment of a security in those circumstances is voidable at the instance of the subscriber by notice in writing).

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~~ a delayed allotment order that applies to the simplified disclosure prospectus. **Section 37A(1)(ab)(ii)** and (3) to (8) apply.

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~~ delayed allotment order was made. Issuer A may then allot those securities to Tom (once the ~~extension~~ delayed allotment order has expired or has been revoked) without contravening **section 37A(1)(ab)(ii)**; or

Example—*continued*

“(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 5

“(c) Issuer A could allot the securities to Tom (once the ~~extension~~ delayed allotment 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)). 10

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~~ delayed allotment order has expired or has been revoked) without contravening **section 37A(1)(ab)(ii)**; or 15

“(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 20

“(c) Tom may decide to take no action at all. In this case, if Issuer A allots the securities to Tom (once the ~~extension~~ delayed allotment 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 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). 25 30

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~~ delayed allotment 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)). 35

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

“(5) This section applies despite anything in the terms of the offer. 40

“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. 5
- “(2) The Commission may make a prohibition order on the terms and conditions that the Commission thinks fit. 10
- “(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. 15

“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: 20
- “(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 25
- “(iii) the reasons for the proposed prohibition order; and
- “(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. 30
- “(2) If the Commission makes a prohibition order,—
- “(a) it must, ~~as soon as practicable~~ immediately after the making of the order, notify person A of—
- “(i) the terms and conditions of the order; and 35
- “(ii) the reasons for the order; and
- “(b) it must, ~~as soon as practicable~~ immediately 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
“(iv) any other information the Commission thinks relevant in the circumstances; and 5
“(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)**. 10
“(3) If the Commission varies, revokes, or suspends a prohibition order under **section 44AE(3) or (4)**,—
“(a) it must, ~~as soon as practicable,~~ immediately notify person A of—
“(i) the terms and conditions of the variation, revocation, or suspension; and 15
“(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 20
“(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,— 25
“(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 30
“(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).” 35

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

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

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

15 Regulations and Orders in Council

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

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

Part 2

Financial Advisers Act 2008

16 Principal Act amended

15

This Part amends the Financial Advisers Act 2008.

16A Meaning of financial advice clarified

Section 13(1) is amended by adding “; or” and also by adding the following paragraph:

“(g) a disclosure statement for the purposes of the Retirement Villages Act 2003.”

20

16B Individual who is QFE employee or agent

Section 17(1) is amended by omitting “qualified financial entity (the QFE)” and substituting “QFE”.

16C Employer or principal of financial adviser must be registered

25

Section 18(1) is amended by inserting “or engages” after “employs”.

16D Disclosure by qualifying financial entity

Section 26 is amended by repealing subsection (1) and substituting the following subsections:

- “(1) This section applies—**
- “(a) if a financial adviser (A)—** 5
- “(i) is not an authorised financial adviser; and**
- “(ii) is an employee or agent of a QFE; and**
- “(iii) performs a financial adviser service in relation to a category 2 product in the course of the QFE’s business; or** 10
- “(b) if a financial adviser (A)—**
- “(i) is not an authorised financial adviser; and**
- “(ii) is an employee of a QFE; and**
- “(iii) performs a financial adviser service in relation to a category 1 product of which the QFE is the issuer in the course of the QFE’s business.** 15
- “(1A) In this section, the financial adviser service means a financial adviser service referred to in—**
- “(a) subsection (1)(a)(iii); or**
- “(b) subsection (1)(b)(iii).”** 20

16E New section 75 substituted

Section 75 is repealed and the following section substituted:

- “75 Exemption from liability for employee or agent of QFE**
- “(1) This section applies to—**
- “(a) a financial adviser who—** 25
- “(i) is not an authorised financial adviser; and**
- “(ii) is an employee or agent of a QFE; and**
- “(iii) performs a financial adviser service in relation to a category 2 product in the course of the QFE’s business; and** 30
- “(b) a financial adviser who—**
- “(i) is not an authorised financial adviser; and**
- “(ii) is an employee of a QFE; and**
- “(iii) performs a financial adviser service in relation to a category 1 product of which the QFE is the issuer in the course of the QFE’s business.** 35

“(2) A financial adviser to whom this section applies is exempt from liability under this Act for contravention of a financial adviser obligation.”

17 Commissioner’s approval of draft code

Section 88(3) is amended by omitting “subsection” and substituting “section”. 5

17A Offence of performing financial adviser service without being registered

Section 114(1) is amended by omitting “performs a financial adviser service without being registered” and substituting “, without being registered, performs a financial adviser service that under this Act only a registered financial adviser may perform”. 10

18 Right of appeal

Section 138(1)(a)(ii) is amended by omitting “67(4): or” and substituting “67(4); or”. 15

19 Territorial scope

Section 157 is amended by omitting “by a person in New Zealand,”.

19A New section 161A inserted

The following section is inserted immediately before section 162: 20

“161A Financial Service Providers (Registration and Dispute Resolution) Act 2008 amended

“(1) This section amends the Financial Service Providers (Registration and Dispute Resolution) Act 2008. 25

“(2) Section 7(2)(m) is amended by adding ‘, except to the extent that an individual may be required to be registered in order to perform a financial adviser service under the Financial Advisers Act 2008’.” 30

20 Securities Markets Act 1988 amended
Section 164(6) is repealed.

Legislative history

18 February 2009
3 March 2009

Introduction (Bill 13-1)
First reading and referral to Commerce Committee
