Version
as at 18 November 2021

Financial Markets Conduct (Forestry Schemes) Exemption Notice 2016

(LI 2016/265)

Financial Markets Conduct (Forestry Schemes) Exemption Notice 2016: revoked, on the close of 17 November 2021, by clause 3.

Pursuant to section 556 of the Financial Markets Conduct Act 2013, the Financial Markets Authority, being satisfied of the matters set out in section 557 of that Act, gives the following notice.

Contents

Note

The Parliamentary Counsel Office has made editorial and format changes to this version using the powers under subpart 2 of Part 3 of the Legislation Act 2019.

Note 4 at the end of this version provides a list of the amendments included in it.

This notice is administered by the Financial Markets Authority.

Notice

1 Title

This notice is the Financial Markets Conduct (Forestry Schemes) Exemption Notice 2016.

2 Commencement

This notice comes into force on 18 November 2016.

3 Revocation

This notice is revoked on the close of 17 November 2021.

4 Interpretation

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

Act means the Financial Markets Conduct Act 2013

closed, in relation to a forestry scheme, means that the scheme does not offer or issue further managed investment products in the scheme

effective date has the same meaning as in clause 16(1) of Schedule 4 of the Act

emissions units means New Zealand units as defined in section 4(1) of the Climate Change Response Act 2002

existing forestry scheme means a forestry scheme that is treated as being a registered scheme on and after the effective date under clause 22 of Schedule 4 of the Act

forestry right has the same meaning as in section 2 of the Forestry Rights Registration Act 1983

forestry scheme means a managed investment scheme to which both of the following apply:

(a) the principal investment policy and objectives of the scheme are to invest, in the ordinary course of business, in real property and other assets in order to establish or manage a forest with the intention of earning a return on the investment through harvesting the trees, selling forestry rights, or selling land used in forestry activity; and

(b) the scheme is not a managed fund

personal property securities register means the register of personal property security interests established under section 139 of the Personal Property Securities Act 1999

Regulations means the Financial Markets Conduct Regulations 2014

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

relevant period, in relation to a custodian, has the same meaning as in regulation 88(4) of the Regulations.

(2) Any term or expression that is defined in the Act or the Regulations and used, but not defined, in this notice has the same meaning as in the Act or the Regulations.

Exemptions from governing document and licensing requirements

5 Application of exemptions from governing document and licensing requirements

The exemptions in clauses 6 and 7 apply to a manager in respect of a forestry scheme if all of the following requirements are met:

(a) the scheme is an existing forestry scheme that is closed; and

(b) the total gross value of assets under management by the manager in respect of forestry schemes that are registered schemes is less than $40 million (calculated in accordance with generally accepted accounting practice); and

(c) since the date of commencement of this notice, the total gross value of assets under management by the manager in respect of forestry schemes that are registered schemes has never been $40 million or more (calculated in accordance with generally accepted accounting practice).

6 Exemptions from governing document requirements

Every manager of a forestry scheme to which the exemptions in this clause apply is exempted in relation to that forestry scheme from—

(a) section 135(1) and (3) of the Act; and

(b) section 127(1)(b) of the Act to the extent that it requires the governing document to comply with sections 135(1) and (3) and 136 of the Act; and

(c) section 133(a) of the Act to the extent that it relates to sections 135(1) and (3) and 136 of the Act; and

(d) clause 22(1)(b) of Schedule 4 of the Act to the extent that it requires the copy of the governing document lodged with the Registrar to comply with sections 135(1) and (3) and 136 of the Act.

7 Exemptions from licensing requirements

(1) Every manager of a forestry scheme to which the exemptions in this clause apply is exempted in relation to that forestry scheme from section 127(1)(c) of the Act to the extent that it requires the scheme to have a licensed manager designated or appointed under the governing document (or the Act) whose licence covers management of the scheme.

(2) Every manager of a forestry scheme to which the exemptions in this clause apply is exempted from section 133(a) of the Act to the extent that it relates to the requirement referred to in subclause (1).

(3) Every manager of a forestry scheme to which the exemptions in this clause apply is exempted from section 388(a) of the Act in relation to that scheme.

8 Conditions of exemptions in clauses 6 and 7

The exemptions in clauses 6 and 7 are subject to the conditions that—

(a) the manager is not the manager of any forestry scheme that is a registered scheme other than an existing forestry scheme that is closed; and

(b) the manager has, before or within 3 months after the effective date, sent scheme participants a written notice notifying them that the manager is relying on 1 or more of the governing document and licensing exemptions in clauses 6 and 7 and giving a brief explanation of the nature and effect of the exemptions relied on and the condition in paragraph (a).

Exemptions from independent custody requirements for real property assets and emissions units

9 Application of exemptions from independent custody requirements

The exemptions in clause 10 apply to a manager and a supervisor of a forestry scheme that meets both of the following requirements:

(a) the scheme is an existing forestry scheme that is closed; and

(b) the manager is not exempt in respect of the scheme from the requirement to have a licensed supervisor under an exemption granted under Part 9 of the Act.

10 Exemptions from independent custody requirements

(1) Every manager of a forestry scheme to which the exemptions in this clause apply is exempted from section 127(1)(f) of the Act to the extent that it requires the scheme's real property and emissions units to be held by the supervisor or another person who meets the external custodianship requirements in section 156 of the Act (to the extent that the property is not held directly by scheme participants).

(2) Every manager of a forestry scheme to which the exemptions in this clause apply is exempted from section 133(a) of the Act to the extent that it relates to the requirement referred to in subclause (1).

(3) Every supervisor of a forestry scheme to which the exemptions in this clause apply is exempted from section 156(1) of the Act to the extent that that section requires the supervisor to hold the scheme's real property and emissions units or, if authorised by the governing document, contract the holding of that scheme property to another person who meets the external custodianship requirements in that section (to the extent that the property is not held directly by scheme participants).

11 Conditions of exemptions in clause 10

The exemptions in clause 10 are subject to the conditions that—

(a) real property and emissions units that are not held by the supervisor or another person who meets the external custodianship requirements in section 156 of the Act, or held directly by scheme participants, must be held—

  (i) by a custodian on trust for the scheme (but that custodian does not need to meet the external custodianship requirements in section 156); or

  (ii) if the scheme is a limited partnership, by the limited partnership; and

(b) the real property referred to in paragraph (a) is subject to an encumbrance in favour of the supervisor that is registered against the title to the property and the following requirements are met:

(i) the encumbrance secures all present and future obligations of the custodian or limited partnership that are owed, under the governing document for the scheme, to the supervisor or the scheme participants; and

(ii) the encumbrance or the scheme's governing document contains a prohibition on the custodian or limited partnership doing any of the following, except with the prior written consent of the supervisor:

(A) leasing all or any part of the real property except in the ordinary course of business of the scheme and in accordance with the scheme's governing document:

(B) selling, transferring, or otherwise disposing of the real property or any interest in it:

(C) creating, or permitting the continuation of, any mortgage, charge, or other security interest over the real property:

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

(E) agreeing to do any of the things referred to in subsubparagraphs (A) to (D); and

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

(c) the emissions units referred to in paragraph (a) are subject to a security agreement that creates a security interest over the emissions units in favour of the supervisor of the scheme and the following requirements are met:

(i) the security interest secures all present and future obligations of the custodian or limited partnership that are owed under the governing document for the scheme to the supervisor or the scheme participants; and

(ii) the security agreement or the scheme's governing document contains a prohibition on the custodian or limited partnership doing any of the following, except with the prior written consent of the supervisor:

(A) selling, transferring, or otherwise disposing of the emissions units or any interest in them:

(B) creating, or permitting the continuation of, any right or interest in or over the emissions units except in the ordinary course of business of the scheme and in accordance with the scheme's governing document:

(C) creating, or permitting the continuation of, any mortgage, charge, or other security interest over the emissions units:

(D) agreeing to do any of the things referred to in subsubparagraphs (A) to (C); and

(iii) a financing statement has been registered in respect of the security interest on the personal property securities register; and

(iv) the supervisor has taken possession of the emissions units in accordance with section 18(1A) of the Personal Property Securities Act 1999; and

(v) the security agreement is otherwise in a form and on terms approved in writing by the supervisor of the scheme; and

(d) the manager has, before or within 3 months after the effective date, sent scheme participants a written notice—

(i) notifying them that the scheme is relying on the exemptions in clause 10 from the usual legal requirement that the scheme's real property and emissions units must be held by the independent licensed supervisor or an independent custodian (to the extent that the property is not held directly by scheme participants); and

(ii) giving a brief explanation of the nature and effect of that exemption and the conditions that apply under this clause.

Exemption from daily cash reconciliation requirement

12 Exemption from daily cash reconciliation requirement

Every custodian of a forestry scheme, other than a scheme in respect of which the manager is exempt from the requirement to have a licensed supervisor under an exemption granted under Part 9 of the Act, is exempted from regulation 86(3) of the Regulations in respect of that scheme.

13 Condition of exemption in clause 12

(1) The exemption in clause 12 is subject to the condition that the custodian must reconcile all records of money for the scheme with a frequency that the custodian reasonably determines, in accordance with regulation 86(2) of the Regulations and subclause (2), to be appropriate for the purpose of ensuring that the custodian's records accurately state the scheme's money and all transactions relating to that money.

(2) For the purposes of determining the appropriate frequency for reconciling records of money for the scheme, the custodian must—

(a) consider the frequency, value, and volume of the transactions in respect of the scheme property; and

(b) consider, whenever there is a material change in the frequency, value, or volume of cash transactions and in any case not less than annually, whether reconciliations are being carried out with appropriate frequency; and

(c) consult the manager of the scheme (and the supervisor, if the supervisor is not the custodian); and

(d) act to the standard of a prudent and professional custodian.

Exemption from annual assurance engagement requirement

14 Application of exemption from annual assurance engagement requirement

The exemption in clause 15 applies to a custodian of a forestry scheme other than a scheme in respect of which the manager is exempt from the requirement to have a licensed supervisor under an exemption granted under Part 9 of the Act.

15 Exemption from annual assurance engagement requirement

Every custodian of a forestry scheme to which the exemption in this clause applies is exempted, in respect of that scheme, from regulation 87(1) of the Regulations in respect of the most recently completed relevant period.

16 Conditions of exemption in clause 15

(1) The exemption in clause 15 is subject to the conditions that, if this subclause applies,—

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

(i) covers custody of scheme property held by that custodian and scheme property held by any sub-custodian appointed by the custodian; and

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

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

(2) The conditions in subclause (1) apply if, before the relevant date, the supervisor, acting in its capacity as the licensed independent supervisor of the scheme, reasonably determines that it would be desirable to obtain an assur-

ance engagement for the relevant period ending on that relevant date to provide reasonable assurance in respect of the matters provided for in regulation 88 of the Regulations, after the supervisor has had regard to—

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

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

(3) The conditions in subclause (1) do not apply to a sub-custodian (**A**) if the custodian that appointed A has complied with that condition in respect of the scheme property held by A.

Exemption from quarterly limit break reporting requirement

17 Exemption from quarterly limit break reporting requirement

(1) Every manager of a forestry scheme is exempted from regulation 95(1) of the Regulations in respect of any quarter that is within the period specified in subclause (2) if there were no limit breaks in that quarter to which section 167 of the Act applies.

(2) The period starts when all planting, pruning, and thinning work on the scheme's forests is completed and finishes when any substantial work on harvest of any of the scheme's forests begins.

Exemptions from corporate general partner disclosure and reporting requirements

18 Application of exemptions from disclosure and reporting requirements

(1) The exemptions in clause 19 apply to a general partner in a limited partnership where all of the following requirements are met:

(a) the limited partnership is a forestry scheme; and

(b) scheme participants invest in the scheme by becoming limited partners; and

(c) the general partner is a limited liability company incorporated for no purpose other than to be the general partner for that particular limited partnership; and

(d) the general partner is the sole general partner of the limited partnership; and

(e) the limited partners in the partnership hold or will hold all of the shares in the general partner; and

(f) the shares in the general partner give scheme participants rights to participate in decisions about the scheme through control of the general partner; and

(g) the scheme is managed by a licensed manager (which is not the general partner) designated or appointed under the governing document whose licence covers management of the forestry scheme.

(2) The exemption in clause 19(1)(c) applies to the following accounting periods of a general partner:

(a) an accounting period of the general partner that commences before the exemption is granted (including an accounting period that ends before the exemption is granted) if the exemption is granted before the financial statements or group financial statements for that period would, but for the exemption contained in clause 19(1)(c), be required to be delivered to the Registrar for lodgement under section 461H of the Act; and

(b) subsequent accounting periods.

(3) The exemption in clause 19(1)(c) does not apply to a general partner in respect of an accounting period if the general partner is an FMC reporting entity at any time in that accounting period for any reason other than because shares issued by the general partner are regulated products.

19 Exemptions from disclosure and reporting requirements

(1) A general partner to which the exemptions in this clause apply is exempted from—

(a) Parts 3 and 4 of the Act in respect of an offer of shares in the general partner; and

(b) subpart 4 of Part 3, Part 4, and clause 30(1)(a) of Schedule 4 of the Act in respect of shares in the general partner to which Part 2 of Schedule 4 of the Act applies; and

(c) Part 7 of the Act.

(2) An offer of shares in the general partner made in reliance on the exemption in subclause (1)(a) is not a regulated offer.

20 Conditions of exemptions in clause 19

(1) The exemptions in clause 19(1)(a) are subject to the conditions that—

(a) any PDS relating to an offer of managed investment products in the forestry scheme must briefly explain—

(i) the rights and powers of scheme participants as shareholders of the general partner; and

(ii) the respective roles of the general partner and the manager relating to management and control of the scheme; and

(b) the manager must briefly explain the matters in paragraph (a)(i) and (ii) in the annual report for the scheme required under regulation 62 of the Regulations.

(2) The exemptions in clause 19(1)(b) are subject to the condition that the general partner must—

(a) before or within 3 months after the effective date, send a written notice as prescribed by clause 30(1) of Schedule 4 of the Act to the security holder at the holder's last known address; and

(b) include the following information in that notice:

(i) the effective date:

(ii) a statement to the effect that—

(A) the standard regime of the Act relating to disclosure, governance, financial reporting, and auditing will not apply to the shares in the general partner; and

(B) the general partner will instead be subject to financial reporting and audit requirements under the Companies Act 1993.

Time frame extended because of outbreak of COVID-19

Heading: inserted, on 29 April 2020, by clause 27 of the Financial Markets Conduct (Financial Reporting and Other Relief—COVID-19) Exemption Notice 2020 (LI 2020/71).

21 Time frame extended because of outbreak of COVID-19

(1) This clause applies if a custodian that is exempted under clause 15 believes, on reasonable grounds, that it is not reasonably practicable for it to comply with clause 16(1)(a) within 4 months after the relevant date because of the outbreak of COVID-19.

(2) The period for compliance in clause 16(1)(a) is extended to 6 months after the relevant date if the custodian gives to the FMA, within 4 months after the relevant date, a written notice that states that the custodian is relying on this clause.

(3) If subclause (2) would otherwise require the notice to be given to the FMA on or before 30 April 2020, the notice must instead be given on or before 15 May 2020.

(4) This clause applies in relation to relevant periods that end on or after 31 December 2019 but before 1 August 2020.

Clause 21: inserted, on 29 April 2020, by clause 27 of the Financial Markets Conduct (Financial Reporting and Other Relief—COVID-19) Exemption Notice 2020 (LI 2020/71).

Dated at Auckland this 16th day of November 2016.

Nick Kynoch,
General Counsel.

Statement of reasons

Note: the following statement of reasons should be read in conjunction with the statement(s) of reasons appended to:

- **Financial Markets Conduct (Financial Reporting and Other Relief—COVID-19) Exemption Notice 2020**

This notice comes into force on 18 November 2016 and is revoked on 17 November 2021. The notice applies to managed investment schemes that meet the following 2 criteria:

- the principal investment policy and objectives of the scheme are to invest, in the ordinary course of business, in real property and other assets in order to establish or manage a forest with the intention of earning a return on the investment through harvesting the trees, selling forestry rights, or selling land used for forestry activity; and
- the scheme is not a managed fund.

This notice exempts managers, supervisors, custodians, and certain others, on conditions, from certain requirements under the Financial Markets Conduct Act 2013 (the **FMC Act**) and the Financial Markets Conduct Regulations 2014.

The main effects of the notice are that—

- exemptions from updating governing documents and licensing requirements will apply for managers of existing closed forestry schemes (provided the manager has less than $40 million of assets under management in respect of registered forestry schemes):
- existing forestry schemes that are closed to new investment and that transition to the FMC Act will continue to be required to have a licensed supervisor but will not be required to have real property assets or carbon credits held by the scheme's supervisor, or other independent person, provided that those assets are subject to a registered security interest in favour of the supervisor:
- custodians of forestry schemes will not be required to reconcile scheme cash records daily, provided those records are reconciled with a frequency suited to the level of transactions for the scheme:
- where a custodian holds the scheme property, the custodian will not need to have an annual assurance engagement with a qualified auditor of their processes, procedures, and controls, provided they obtain an assurance engagement when the supervisor considers that this is desirable to provide reasonable assurance in relation to custody of the scheme property:
- managers of forestry schemes will not be required to make a quarterly report on limit breaks for periods when minimal work is being done in the forest if no limit break occurs in that quarter:
- corporate general partners of some schemes that are limited partnerships will be exempt from disclosure, governance, and financial reporting requirements in

relation to shares in the general partner held by or offered to scheme participants.

The Financial Markets Authority (the **FMA**), after satisfying itself as to the matters set out in section 557 of the FMC Act, considers it appropriate to grant the exemptions because,—

- in general, the exemptions will reduce transitional and ongoing compliance costs for forestry schemes in relation to their custody and other governance arrangements by relieving them of certain obligations that are not required, in view of the particular characteristics of these schemes, to ensure that appropriate governance arrangements are in place to allow for effective monitoring and reduce governance risks:
- in relation to the exemptions from updating governing documents and licensing,—
  - the costs of updating governing documents are unnecessary when existing forestry schemes have deeds of participation that are broadly comparable to requirements under the FMC Act and where schemes are closed to new investors and have a finite life:
  - the costs of licensing are not commensurate with the benefits for existing closed schemes in circumstances where there is a low level of manager activity and the manager has a limited amount of assets under management:
- in relation to the exemptions from independent custody requirements,—
  - real property is generally purchased and held for a considerable time by forestry schemes and real property can be transferred, or other dealings made against the property, only through registration of an instrument under the Land Transfer Act 1952. In view of this, requirements for independent custody of real property may not be needed to ensure effective monitoring and to reduce governance risks, provided that the real property is held on trust and there is a registered encumbrance over the property in favour of the supervisor to protect scheme participants' interests. Consequential relief is appropriate, on the same basis, for a scheme's carbon credits where the credits must be held by the owner of the scheme's real property under applicable legislation:
  - relief from independent custody for real property and carbon credits will allow transitioning property schemes to retain their current custody arrangements for these assets and address concerns from supervisors about possible liability that may arise if they are the registered owner of a scheme's land and standing trees:
- in relation to the exemption from the daily cash reconciliation requirement, forestry schemes typically have a low volume and frequency of transactions, and daily reconciliations of records of money for the scheme by the custodian are unlikely to be required to ensure the records accurately state the scheme's

money and all transactions relating to that money. Adequate protection will be provided for scheme participants if those records are reconciled with a frequency suited to the level of transactions for the scheme:

- in relation to the exemption from the annual assurance engagement requirement, a custodian's processes, procedures, and controls are likely to be less complex for a forestry scheme in view of its investments, and risks in relation to custody of the scheme's assets are likely to be reduced. In these circumstances, and where the annual audit of the scheme's financial statements provides regular independent verification in relation to the scheme property, an annual assurance engagement may not be required. Adequate protection will be provided for scheme participants in relation to custody of the scheme's assets if an assurance engagement is obtained when the supervisor determines that circumstances have resulted in increased risks for custody of scheme property and therefore the value to investors of an assurance engagement outweighs costs. Supervisors are well placed to decide when an assurance engagement is needed, given their independence, licensed status, and statutory duties to act in the best interests of scheme participants and to carry out their functions and duties to a professional standard of care:
- in relation to the exemption from the quarterly limit break reporting requirement, the low volume and frequency of activity in the period from when planting, pruning, and thinning work is completed and before harvest begins means it is unlikely limit breaks will occur in this period. In periods where there are no limit breaks, routine quarterly limit break reports are of no value:
- in relation to the corporate general partner disclosure and reporting requirements exemptions, some forestry schemes that are limited partnerships are structured so that scheme participants hold all the shares in the corporate general partner. Where scheme participants will receive the benefit of disclosure and financial reporting in relation to their investment in managed investment products in the scheme, they are unlikely to gain any benefit from also receiving disclosure and financial reporting in relation to the shares in the general partner, provided information about those shares is included in the disclosures for the scheme and the corporate general partner is not carrying on any independent activity.

Therefore, the FMA is satisfied that—

- granting the exemptions is necessary or desirable in order to promote the purposes of the FMC Act. Specifically, the exemptions will—
    - promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and
    - avoid unnecessary compliance costs; and
    - promote innovation and flexibility in the financial markets; and

    - ensure that appropriate governance arrangements apply to financial products that allow for effective monitoring and reduce governance risks; and
- the exemptions are not broader than is reasonably necessary to address the matters that gave rise to the exemptions because—
    - the exemptions are restricted to forestry schemes, which have special characteristics due to the nature of their investments; and
    - the exemptions from updating governing documents and licensing requirements apply only to existing closed schemes where the manager is not large (ie, does not have more than $40 million total forestry scheme assets under management) and there is a low level of manager activity; and
    - the exemptions from independent custody apply only to custody of real property and carbon credits for existing closed forestry schemes where there is a registered security interest over that property in favour of the supervisor; and
    - alternative requirements apply for custodians relying on the exemptions from daily cash reconciliations and annual assurance engagements; and
    - the quarterly limit break reporting exemption is limited to periods of low activity and the manager will still report on limit breaks that do occur in this period; and
    - the corporate general partner disclosure and financial reporting exemptions apply only to schemes that are limited partnerships where scheme participants hold all the shares in the general partner and sufficient information will be provided to scheme participants through disclosure and financial reporting for managed investment products in the scheme.

Note: the preceding statement of reasons should be read in conjunction with the statement(s) of reasons appended to:

- **Financial Markets Conduct (Financial Reporting and Other Relief—COVID-19) Exemption Notice 2020**

Issued under the authority of the Legislation Act 2019.
Date of notification in *Gazette*: 17 November 2016.

Notes

1 General

This is a consolidation of the Financial Markets Conduct (Forestry Schemes) Exemption Notice 2016 that incorporates the amendments made to the legislation so that it shows the law as at its stated date.

2 Legal status

A consolidation is taken to correctly state, as at its stated date, the law enacted or made by the legislation consolidated and by the amendments. This presumption applies unless the contrary is shown.

Section 78 of the Legislation Act 2019 provides that this consolidation, published as an electronic version, is an official version. A printed version of legislation that is produced directly from this official electronic version is also an official version.

3 Editorial and format changes

The Parliamentary Counsel Office makes editorial and format changes to consolidations using the powers under subpart 2 of Part 3 of the Legislation Act 2019. See also PCO editorial conventions for consolidations.

4 Amendments incorporated in this consolidation

Financial Markets Conduct (Financial Reporting and Other Relief—COVID-19) Exemption Notice 2020 (LI 2020/71): clause 27

Financial Markets Conduct (Forestry Schemes) Exemption Notice 2016 (LI 2016/265): clause 3

Wellington, New Zealand:

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