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25 June 2009

Mr Liam Mason
General Counsel
Securities Commission
PO Box 1179
Wellington

APPLICATION FOR RENEWAL (WITH AMENDMENTS) OF SECURITIES ACT (EMPLOYER SUPERANNUATION SCHEMES) EXEMPTION NOTICE 2004

As the original applicant in 2004, on behalf of employer superannuation schemes, ASFONZ wishes to apply for the renewal (with amendments) of the critically important Securities Act (Employer Superannuation Schemes) Exemption Notice 2004 which expires on 23 July 2009. We **attach** our formal renewal application.

ASFONZ is a national, not-for-profit, apolitical membership organisation that represents the interests of employers who offer workplace superannuation, their trustees and members, as well as superannuation industry service providers and professional advisers.

Our membership embraces all types of workplace superannuation schemes (KiwiSaver, public and corporate, union-sponsored and industry-based), as well as employers and service providers to the workplace superannuation industry. Current membership comprises around 100 major workplace superannuation schemes and around 50 organisations and individuals representing the various product and service providers for workplace superannuation. Together, our members support the retirement savings of over one million New Zealanders, and look after more than 90% of total funds under management through workplace superannuation schemes and KiwiSaver.

The **mission** of ASFONZ is to be the Voice of Workplace Savings, advancing the sustainable, effective, and efficient delivery of workplace savings outcomes for all involved.

ASFONZ seeks to achieve that mission through:

- Promoting ASFONZ as the "Voice of Workplace Savings"
- Working with the Government to develop policies that achieve improved workplace savings and KiwiSaver outcomes
- Identifying and promoting initiatives and reforms that will provide efficiencies and enhancements to minimise the extent to which regulatory factors impede delivery of effective and efficient workplace savings outcomes, and those that will encourage sustainable participation in workplace savings

- Supporting employers, trustees and providers in their delivery of optimal workplace savings outcomes
- Improving public confidence in workplace savings by consistently reinforcing integrity, accountability, and professionalism within the workplace savings industry
- Serving ASFONZ members, and its supporters, by providing a range of services to meet their needs and deliver value for their participation.

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We look forward to the Commission's response.

Yours sincerely



David Ireland
Chairman



Bruce Kerr
Executive Director

ASFONZ

(The Association of Superannuation Funds of New Zealand)

Application to the

Securities Commission

for the renewal (with amendments) of the

**Securities Act (Employer Superannuation Schemes) Exemption
Notice 2004**

25 June 2009

OUR SUBMISSION

ASFONZ applies for renewal of the Securities Act (Employer Superannuation Schemes) Exemption Notice 2004 (*the Exemption Notice*).

ASFONZ also seeks to extend the application of the Exemption Notice to a small group of employer-based stand-alone schemes which, solely because they have certain employers which are not *associated persons* of the promoters (and which do not meet the "successor in business" test), currently cannot invoke the Exemption Notice. ASFONZ considers that those schemes should also, in principle, be given a prospectus exemption facility.

Usage of the ESS Exemption Notice

As far as ASFONZ is aware:

- (a) almost all employer-based stand-alone superannuation schemes which are open to new member admissions, and are *employer superannuation schemes* as defined in clause 4(1) of the Exemption Notice, utilise the exemption (and have done so since it came into force in July 2004); and
- (b) no employer-based superannuation schemes utilise (or have ever utilised) the statutory prospectus exemption facility in sections 5A to 5C of the Securities Act 1978 (*the Act*).

The ASFONZ view is that the statutory prospectus exemption is unworkable in a practical sense, in that it is unrealistic to expect that any schemes still in existence would be prepared to make the changes necessary to allow compliance with that exemption.

We asked five scheme administration managers how many of their client employer-based schemes which remain open to new members and qualify to invoke the Exemption Notice have done so. We received the following three replies:

Administration manager	ESS clients	Invoke exemption	Do not invoke exemption
Aon	54	54	-
Jacques Martin	2	2	-
Mercer	16	16	-

ASFONZ estimates that overall there are at least 80 schemes invoking the Exemption Notice.

Necessity for Exemption Notice

The Exemption Notice was put in place on 23 July 2004 following a formal exemption application from ASFONZ. Its purpose was to overcome difficulties with the (then)

very recently enacted statutory prospectus exemption facility for employer superannuation schemes in sections 5A to 5C of the Act.

That statutory exemption was and is considered, for drafting reasons, to be entirely unworkable.

The question of the necessity for the Exemption Notice is therefore best addressed by reference to the ongoing unworkability of the statutory exemption.

(i) Amending requirements

In legal advisers' view, when the statutory exemption (**attached** as Appendix 1) was closely considered, the effect of the expressions "*conditional on*" and "*required to incur*" in (respectively) paragraph (a) and paragraph (b) of the *employer superannuation scheme* definition in section 5C was that, in order to comply, their client schemes' trust deeds would require very carefully prescriptive amendments.

Those amendments were considered necessary in order to ensure that trust deeds expressed the relevant conditions regarding:

- (a) the classes of persons eligible for admission as members; and
- (b) the express minimum employer funding requirement.

In many cases (for reasons detailed in ASFONZ's 19 May 2004 exemption application) the requisite trust deed amendments were considered entirely unpalatable to trustees and sponsoring employers from an administrative, cost and design perspective.

ASFONZ also noted in subsequent correspondence with the Commission that:

- (a) Any Trust Deed amendment involves a degree of legal process including drafting the amendment, obtaining the approval of employer and trustees, arranging execution, arranging filing and arranging the updating of disclosure documents. In some cases there is an obligation to notify members in advance, hold member meetings etc. The process of amendment is inevitably time-consuming and costly for the Trustees.
- (b) Especially in relation to the minimum contribution obligation, the amendment would require very careful drafting so that it interrelated with the current contribution obligations. In some cases this would certainly involve the employer needing to make contributions over and above those currently required under the Trust Deed.
- (c) We believe that the cost of making the required amendments could easily amount to \$5 to \$10k per scheme. This would significantly erode the value of the Prospectus exemption.
- (d) Although we have not conducted any kind of empirical survey, it would not surprise us if more than 100 schemes would be affected by this matter. If this is the case, and assuming an average cost of amendment at \$7,500 per scheme, the process would amount of a cost in the order of \$750,000 across all schemes. This is a very significant impost in the context of

an exemption designed to reduce the compliance costs associated with Employer Superannuation Schemes.

- (e) We also believe that such a requirement would exacerbate the current reluctance amongst employers to maintain sponsored superannuation schemes. This is on the basis that they have developed an understanding that they will have the benefit of a prospectus exemption and will be very disappointed to learn that they must incur additional cost and inconvenience in order to rely on that exemption.

The Commission accepted ASFONZ's reasoning that it was more sensible in principle for there to be an exemption which focussed, in the relevant respects (i.e. as to membership eligibility criteria and minimum employer funding), on schemes' *operation in practice* rather than on their theoretical potential operation under template-based trust deeds. Putting this another way, the Commission accepted that it would be sufficient if schemes achieved in practice what the Act said they must be required to express in their trust deeds.

In this sense, the Exemption Notice was considered consistent with the purpose of the statutory exemption. It simply provided mechanical relief by not requiring the qualifying characteristics to be prescribed in trust deeds. As an aside, those qualifying characteristics are real and substantial - since 2004, many workplace superannuation schemes have closed, in a number of cases due to an inability to comply with the Exemption Notice.

(ii) Minimum employer funding requirement

The Commission also accepted ASFONZ's submission that there were, in relation to the minimum funding requirement, some even more fundamental impediments to invoking the exemption under the Act. These would have included, for example, a defined benefit scheme having to amend away the employers' existing entitlements to take contributions holidays in particular years whether or not those schemes were in actuarial surplus.

Additionally, it was noted that due to imprecise statute drafting:

- (a) if a scheme had an excess of assets over the value of members' accrued benefits, and this was being used to fund employer contributions (ultimately at an economic cost to the employer); but
- (b) any administration costs were not *also* being met from those surplus assets;

then paragraph (b) of the *employer superannuation scheme* definition in section 5C would disqualify the scheme from invoking the exemption.

The *Statement of Reasons* issued by the Commission when granting the Exemption Notice (which is **attached** as Appendix 2) expressly acknowledged several other technical concerns with the wording of the minimum employer funding requirement.

These technical concerns were resolved satisfactorily by way of the inclusion, in the Exemption Notice, of the “shortfall funding” condition in clause 7. While it used slightly curious terminology from the schemes’ perspective, this condition was reliably workable in practice.

(iii) Void allotments concern

One concern with the wording of the statutory exemption was (and still is) felt to be insurmountable on any analysis, even if trust deeds were amended to enable schemes to qualify as *employer superannuation schemes* for section 5A purposes.

Section 5B prescribes that the prospectus exemption for an employer superannuation scheme is “*subject to the conditions*” that:

- (a) each annual report prepared for the scheme for a financial year during which the exemption is invoked “*must include*” all the applicable statements and information set out in paragraph (a) - creating (notably under items (i) and (ii), where they relate to third party managers and their directors and other associated persons) a material risk of loss of the exemption through inadvertent non-disclosure; and
- (b) if a copy of the scheme’s statement of investment policies and objectives (and a description of how those may be altered) is sought by a member then under paragraph (b) the trustees “*must, within 5 working days*” send the relevant information or cause it to be sent to the member – a requirement carrying with it a self-evidently material risk of breach, and consequent loss of the exemption, through mere inadvertence or clerical error.

Because continuous compliance with paragraphs (a) and (b) of section 5B is expressly a condition of retention of the statutory exemption, the consequence of any breach — however minor — would be void allotments. That is a consequence which in practice simply cannot be risked.

The Exemption Notice overcomes this consequence by requiring that the listed annual reporting and request disclosure requirements each be expressly *a term of the offer*. This means that (provided schemes’ investment statements set out those offer terms in full) any operational non-compliance results only in the breach of an offer term, rather than void allotments.

Our view, in summary, is that the Exemption Notice is still needed so as not to discourage employers from having schemes that are tailored to their needs and those of their workplace.

Amendments sought for Exemption Notice

The Commission has sought ASFONZ’s view as to whether any changes are required for the Exemption Notice.

When the Exemption Notice was sought in 2004, it was against a background of somewhat extreme urgency given (among other things):

- (a) the number of employer superannuation schemes with mid-to-late June prospectus expiry dates which wished to continue admitting new members; and
- (b) the number of schemes which had misapprehended the workability of, and were about to begin applying, the statutory exemption.

Materially mirroring the relevant aspect of the statutory exemption facility, the Exemption Notice can apply only to schemes:

- (a) that are promoted by employers; and
- (b) to which admission to membership is conditional on being employed by the promoting employer (or by one of two or more promoting employers, who might all be associated persons) or by an associated person of a promoting employer.

This means that the Exemption Notice excludes schemes other than those offered solely to employees of employers which are all associated persons (subject to limited exceptions for employees of successors in business, and for employees' relatives, partners or dependants).

This constraint has operated to exclude a small number of industry/institution-specific schemes which are entirely employment-based and employer sponsored, but whose sponsoring employers are not all associated persons.

These schemes' exclusion from the Exemption Notice has caused considerable concern and disaffection in some cases (and additional cost to members, reducing their retirement savings) for a request disclosure document which is almost never requested and in relation to which the Commerce Committee (in its report on the Business Law Reform Bill in which the statutory prospectus exemption was prescribed) observed:

Most of the information contained in the prospectus is a duplication on material already available in the investment statement, the trustees' annual report, and the actuarial valuation report or the trust deeds that are required to be filed by employer superannuation schemes under other legislation.

The relevant employer-based schemes are no different from others already covered by the Exemption Notice in that:

- (a) their potential new member "market" is miniscule, as distinct from the entire working public;
- (b) there is no competition for market share; and
- (c) they are not operated for profit.

ASFONZ has seen no indication that there was any explicit awareness of this scope issue on the part of the legislators when prescribing the statutory exemption in 2004. In particular, when the Commerce Committee reported back on the proposed exemption facility it recommended simply that Parliament:

extend the exemption from prospectus requirements for small employer superannuation schemes to all employer superannuation schemes.

This brief comment was significant in our view. *Small employer superannuation schemes*, as defined in the Act, had already been prospectus-exempt since 1998, and did not have to be offered solely to employees of employers who were all associated persons – provided they were employer-promoted, those schemes could be offered to employees of groups of non-associated employers.

The Select Committee added that:

We consider that extending the exemption will reduce compliance costs. The costs of preparing, maintaining, and filing prospectuses, may in previous years have resulted in the closure of some schemes and acted as a disincentive to start new schemes. We feel that employer-based schemes are a major contributor to New Zealand's saving rate, and the reduction of such schemes is seen as having a major impact on superannuation savings in New Zealand.

The copy of the Exemption Notice that comprises the **attached** Appendix 2 indicates (in marked-up form) amendments along the lines which ASFONZ seeks for the *employer superannuation scheme* definition in order to cover the single industry/shared endeavour employer-based schemes which are currently not compliant. The amendments that would address this issue are yellow-highlighted (the other redlined edits are the requisite updates to the Exemption Notice if it is renewed).

ASFONZ would like the opportunity to discuss these suggested amendments, and elaborate as to its reasoning, at a meeting with Commission representatives if possible.

Though promoters would need to conduct their own very careful due diligence enquiries, and in some cases perhaps impose certain added offer restrictions, it appears to ASFONZ that the further employer-based schemes which might practicably qualify for a prospectus exemption under an amended Exemption Notice would be at least a subset of those listed in the **attached** Appendix 3. This list, though prepared after careful enquiry, may not be exhaustive.

Given that the ongoing prospectus requirement has had a significantly detrimental effect on certain of the affected employer-based schemes, risks accelerating wind-ups and affects only a small group of schemes, ASFONZ submits that the Exemption Notice should be amended to allow it to cover the relevant few schemes.

General

We look forward to discussing this application with you at the earliest opportunity.

Please note that if the Commission's consideration of the substantive amendments sought for the Exemption Notice will or might delay its gazettal of a response concerning the renewal of the Exemption Notice, then ASFONZ would be grateful if the Commission could:

- (a) address the renewal application prior to (and separately from) ASFONZ's request for substantive amendments; then
- (b) address ASFONZ's substantive amendment requests in due course.

Please let us know if, in the meantime, we can usefully elaborate or answer any questions.

| **Appendices 1 to 3 follow**

Appendix 1

SECURITIES ACT 1978 – SECTIONS 5A TO 5C – STATUTORY PROSPECTUS EXEMPTION FACILITY

5A Exemption for employer superannuation schemes

Nothing in sections 37, 37A(1)(c), and 39 to 44 applies to any interest in a superannuation scheme that is an employer superannuation scheme.

5B Conditions of exemption for employer superannuation schemes

The exemption in section 5A is subject to the conditions that—

- (a) each annual report prepared under section 14 of the Superannuation Schemes Act 1989 for a financial year during which the superannuation trustees of the scheme relied on that exemption must include the following statements and information:
 - (i) if any superannuation trustee, promoter, or manager of the scheme, or any director of that superannuation trustee, promoter, or manager, has, during the 5 years preceding the specified date, been adjudged bankrupt or insolvent, convicted of any crime involving dishonesty, prohibited from acting as a director of a company, or placed in statutory management or receivership, a statement to that effect including the name and any alternative or former name or names of the superannuation trustee, promoter, manager, or director concerned;
 - (ii) if more than 10% of the value of the scheme's assets (calculated in accordance with generally accepted accounting practice) was, at any time during the year preceding the specified date, represented directly or indirectly by any securities that were issued by a superannuation trustee, manager, or custodian of the scheme (or any associated person of any of them), a description of those securities;
 - (iii) a brief description of any legal proceedings or arbitrations that are pending at the specified date and that may have a material adverse effect on the scheme;
 - (iv) a statement by the superannuation trustees of the scheme (or, if a superannuation trustee is a body corporate or unincorporate, by the directors of that body) as to whether, in their opinion, after due enquiry by them, either or both of the following have materially and adversely changed since the specified date:
 - (A) the value of the scheme's assets relative to its liabilities (including contingent liabilities):

- (B) the ability of the scheme to pay its debts as they become due in the normal course of business; and
- (b) the superannuation trustees of the scheme must, within 5 working days of receiving a member's request for a description of the investment objectives and policy for the scheme or of the means by which changes can be made to those objectives and that policy, without fee, send, or cause to be sent, to that member a brief description of those matters, except to the extent that those matters have been disclosed in the investment statement.

5C Definitions for the purposes of sections 5A to 5C

- (1) For the purposes of this section and sections 5A and 5B, unless the context otherwise requires,—

crime involving dishonesty has the same meaning as in section 2(1) of the Crimes Act 1961

custodian does not include a bare trustee

de facto partner has the meaning as in the Property (Relationships) Act 1976

employer superannuation scheme means a registered superannuation scheme (within the meaning of section 2(1) of the Superannuation Schemes Act 1989) that is promoted by an employer—

- (a) admission to the membership of which is conditional on either or both of the following:
 - (i) being an employee of that employer or an employee of an associated person of that employer;
 - (ii) being a relative, spouse, partner, or dependant of that person who is an employee of that employer or an employee of an associated person of that employer; and
- (b) in respect of which that employer is required to incur in any financial year costs (by way of contributions, expense payments, or both) at least equal to the amount of the costs of administering the scheme in respect of that financial year that are not met in that year from any excess in the value of the scheme's assets over the value of the members' accrued benefits.

manager means an administration manager or an investment manager (as those terms are defined in section 2(1) of the Superannuation Schemes Act 1989)

partner means a civil union partner or de facto partner

specified date means, in relation to an annual report for a financial year, the date on which the financial year ends

spouse has the same meaning as in the Property (Relationships) Act 1976.

- (2) For the purposes of the definition of “employer superannuation scheme”, the costs of administering a scheme do not include costs that are directly attributable to the management of the investments of the scheme.

Appendix 2

TEXT OF EXEMPTION NOTICE (AS AMENDED EFFECTIVE 19 NOVEMBER 2004 AND 20 JANUARY 2006), MARKED UP WITH THE SUBSTANTIVE AMENDMENTS SOUGHT BY ASFONZ

Securities Act (Employer Superannuation Schemes) Exemption Notice 2004 (SR 2004/215)

Pursuant to the Securities Act 1978, the Securities Commission gives the following notice (to which is appended a statement of reasons of the Securities Commission).

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1 Title

This notice is the Securities Act (Employer Superannuation Schemes) Exemption Notice 2004.

2 Commencement

This notice comes into force on 23 July 2004.

3 Expiry

This notice expires on the close of 23 July 2014.

4 Interpretation

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

Act means the Securities Act 1978

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Affiliate means, in relation to an employer, another employer which operates principally:

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(a) in the same industry or government sector as that employer; or

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(b) to further the same charitable purpose as that employer.

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Affiliated group means a group of employers, each of which is an affiliate of every other employer in that group.

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custodian does not include a bare trustee

de facto partner has the same meaning as in the Property (Relationships) Act 1976

employer superannuation scheme means a registered superannuation scheme (within the meaning of section 2(1) of the Superannuation Schemes Act 1989) that is promoted by—

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(a) 1 employer only; or

(b) 1 employer and 1 or more of the following:

(i) an associated person of that employer:

(ii) a successor in business of that employer or of any associated person of that employer:

(iii) an affiliate of that employer.

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or which limits new membership admissions to:

(c) employees of 1 employer only; or

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(d) employees of 1 employer and 1 or more of the following:

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(i) an associated person of that employer;

(ii) a successor in business of that employer or of any associated person of that employer;

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(iii) an affiliate of that employer;

and relatives, spouses, civil union partners, de facto partners or dependants of those employees.

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manager means an administration manager or an investment manager (as those terms are defined in section 2(1) of the Superannuation Schemes Act 1989)

Regulations means the Securities Regulations 1983

small employer superannuation scheme means a registered superannuation scheme (within the meaning of section 2(1) of the Superannuation Schemes Act 1989)—

- (a) that is promoted by 1 or more employers or associated persons of 1 or more employers; and
- (b) that was in existence on 1 October 1997; and
- (c) the total assets of which (measured in accordance with generally accepted accounting practice) were less than \$5 million at the end of the financial year to which the most recent annual financial statements for the scheme relate

specified date means, in relation to an annual report for a financial year, the date on which the financial year ends

spouse has the same meaning as in the Property (Relationships) Act 1976.

successor in business means,—

- (a) if an employer or an associated person of an employer disposes of all or part of a business by disposing of all or any of the securities that it holds in a body corporate that operates the business, the body corporate in which the securities are held; and
 - (b) in all other cases, the person to whom an employer or an associated person of an employer disposes of all or part of its business.
- (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.

5 Exemption from section 37(1) of Act for employer superannuation schemes

Every superannuation trustee of an employer superannuation scheme, and every person acting on the trustee's behalf, is exempted from section 37(1) of the Act in respect of any interests in that scheme that are offered only to—

- (a) employees of a person promoting the scheme; or
- (b) employees of any associated person of a promoting person; or
- (c) employees of any successor in business who either—

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- (i) were employed by a promoting person or an associated person immediately before the disposal of the business; or
- (ii) are employed in the business that was disposed of; or

(d) employees of any affiliate of a promoting person; or

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(e) employees of a person named in the employer superannuation scheme's investment statement, or of any person forming part of an affiliated group identified in the employer superannuation scheme's investment statement; or

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(f) relatives, spouses, civil union partners, de facto partners, or dependants of those employees.

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6 Exemption from section 37(1) of Act for small employer superannuation schemes

Every superannuation trustee of a small employer superannuation scheme, and every person acting on the trustee's behalf, is exempted from section 37(1) of the Act in respect of any interests in that scheme that are offered only to—

- (a) employees of a person or persons promoting the scheme; or
- (b) employees of any associated person of a promoting person; or
- (c) relatives, spouses, civil union partners, de facto partners, or dependants of those employees.

7 Condition relating to employer funding of shortfall

- (1) The exemptions in clauses 5 and 6 are subject to the condition that it is a term of the offer that, if there is a shortfall for a financial year, 1 or more specified persons will incur costs (by way of contributions, expense payments, or both), in respect of that year, at least equal to the amount of the shortfall.
- (2) To determine whether there is a shortfall for a financial year,—
 - (a) determine the costs of administering the scheme for the year (these are the **administrative costs**); and
 - (b) then determine how much (if any) of the surplus has been applied to meet contribution liabilities, expense payments (which may include administrative costs), or both, for that year (this is the **applied surplus**); and

(c) then deduct the applied surplus from the administrative costs (and the remaining amount of administrative costs, if any, is the **shortfall**).

(3) In this clause:

administrative costs do not include costs that are directly attributable to the management of the investments of the scheme;

specified person means the person promoting the scheme or any associated person **or affiliate** of that person, **and includes a person employing a member of the scheme (where the member's membership is predicated on that employment relationship)**;

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surplus means the excess in the value of the scheme's assets over the value of the members' accrued benefits.

8 Condition relating to annual report

The exemptions in clauses 5 and 6 are subject to the condition that it is a term of the offer that each annual report prepared under section 14 of the Superannuation Schemes Act 1989 for a financial year during which the superannuation trustees of the scheme relied on that exemption must include the following statements and information:

- (a) if any superannuation trustee, promoter, or manager of the scheme, or any director of that superannuation trustee, promoter, or manager, has, during the 5 years preceding the specified date, been adjudged bankrupt or insolvent, convicted of any crime involving dishonesty (within the meaning of section 2(1) of the Crimes Act 1961), prohibited from acting as a director of a company, or placed in statutory management or receivership, a statement to that effect including the name and any alternative or former name or names of the superannuation trustee, promoter, manager, or director concerned:
- (b) if more than 10% of the value of the scheme's assets (calculated in accordance with generally accepted accounting practice) was, at any time during the year preceding the specified date, represented directly or indirectly by any securities that were issued by a superannuation trustee, manager, or custodian of the scheme (or any associated person of any of them), a description of those securities:
- (c) a brief description of any legal proceedings or arbitrations that are pending at the specified date and that may have a material adverse effect on the scheme:
- (d) a statement by the superannuation trustees of the scheme (or, if a superannuation trustee is a body corporate or unincorporate, by the directors of that body) as to whether, in their opinion, after due enquiry by them, either or

both of the following have materially and adversely changed since the specified date:

- (i) the value of the scheme's assets relative to its liabilities (including contingent liabilities):
 - (ii) the ability of the scheme to pay its debts as they become due in the normal course of business:
- (e) a statement as to whether a person was required (under the terms of the offer required by clause 7) to incur costs for that financial year and, if so, a statement that those costs have been incurred.

9 Condition relating to requests for investment objectives and policy of scheme

The exemptions in clauses 5 and 6 are subject to the condition that it is a term of the offer that—

- (a) the superannuation trustees of the scheme must send, or cause to be sent, to any member who requests it a description of the investment objectives and policy for the scheme or of the means by which changes can be made to those objectives and that policy (except to the extent that those matters have been disclosed in the investment statement); and
- (b) they must do so within 5 working days of receiving the member's request and without fee.

10 Condition relating to investment statements

- (1) The exemption in clause 5 (which relates to employer superannuation schemes) is subject to the condition that a statement in the following form is included at the end of the statement required by clause 1(1) of Schedule 3D of the Regulations in the investment statement for the scheme:

"WARNING—RESTRICTED DISCLOSURE

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The law requires that persons considering whether to join a superannuation scheme must be supplied on request with a prospectus about that scheme.

However, this employer superannuation scheme has been exempted from this requirement under the Securities Act (Employer Superannuation Schemes) Exemption Notice 2004.

You should be aware that in choosing to become a member of this superannuation scheme you may be doing so on the basis of more limited information than is generally available to investors making important decisions

about investments. However, every prospective member of this scheme has a right, under the Superannuation Schemes Act 1989, to request to receive certain information about the scheme (including a copy of the trust deed)."

(2) The exemption in clause 6 (which relates to small employer superannuation schemes) is subject to the condition that a statement in the form set out in subclause (1) is included at the end of the statement required by clause 1(1) of Schedule 3D of the Regulations in the investment statement for the scheme.

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(4) The exemptions in clauses 5 and 6 are subject to the further condition that the terms of the offer referred to in clauses 7(1), 8, and 9 are stated in the investment statement for the scheme.

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(b)
(3) Subclause (2)(b) expires on the close of 23 October 2004.

10A Condition relating to successors in business

(1) This clause applies to—

Deleted: (5) Subclause (4) applies to small employer superannuation schemes only from the close of 23 October 2004.

(a) the exemption in clause 5(c); and

Deleted: ba

(b) the exemption in clause 5(e) to the extent that it applies to any relative, spouse, civil union partner, de facto partner, or dependant of an employee of a successor in business who is referred to in clause 5(e).

Deleted: c

Deleted: ba

(2) Those exemptions are subject to the condition that the offer must be made within 12 months after the promoter of an employer superannuation scheme, or an associated person of that promoter, disposes of all or part of the business in question.

11 Most of exemption notice does not apply to employer superannuation schemes exempted by section 5A of Act

Nothing in this notice (except clause 12) applies to an offer of an interest in a superannuation scheme that is exempted under section 5A of the Act (which relates to employer superannuation schemes).

Dated at Wellington this 20th day of July 2004.

Deleted: 12 Transitional exemption for small employer superannuation schemes previously exempted by Regulations
[Expired]

The Common Seal of the Securities Commission was affixed in the presence of:

J Diplock,
Chairperson.

[LS]

STATEMENT OF REASONS

This notice, which comes into force on 23 July 2004 and expires on 23 July 2009, exempts 2 types of employer superannuation schemes from the registered prospectus requirements of the Securities Act 1978 (the Act).

The notice exempts superannuation schemes promoted by an employer (or associated persons) and offered to its employees or employees of associated persons (or to relatives, spouses, de facto partners, or dependants of those employees). This exemption applies to schemes that would have come within the exemption for employer superannuation schemes in section 5A of the Act except for any or all of the following reasons:

- the offer is only made to employees, etc, but it is not a term of the trust deed itself that only these persons may be admitted to membership of the scheme so membership is not strictly conditional on being an employee, etc:
- it is a term of the offer, but it is not a term of the trust deed itself (so is not a legal requirement for the scheme), that the employer will incur costs to cover any shortfall in the administrative costs of the scheme:
- those employer costs are incurred by an associated person of the employer, rather than the employer itself:
- those employer costs are incurred in respect of the year in which there is a shortfall, but not in that year itself:
- the employer (or associated person) does not incur costs equal to the full administrative costs of the scheme, but the surplus of the scheme is applied to meet contribution liabilities, expense payments (including administrative costs), or both, and the employer incurs costs at least equal to the difference between that applied surplus and the administration costs.

The notice also exempts small employer superannuation schemes. The key differences from the other employer superannuation schemes are that these schemes may have more than 1 unassociated participating employer, but must have total assets of less than \$5 million and have been in existence on 1 October 1997. This exemption is similar to that previously contained in regulation 2C of the Securities Regulations 1983 (the Regulations) before they were amended by the Securities Amendment Act 2004. These schemes would have come within the exemption in section 5A of the Act except for the reasons (set out above) applying to the other employer superannuation schemes or because they have more than 1 unassociated participating employer.

Both exemptions are subject to conditions similar to those applying to employer superannuation schemes exempted under section 5A of the Act. The main differences (other than those relating to the employer costs requirement, which are covered above) are that

- the annual report must state whether the employer was required to incur costs to fund any shortfall; and
- the employer costs requirement (in clause 7), the requirement as to the annual report (in clause 8), and the requirement to respond to requests for the investment objectives and policy of the scheme (in clause 9) must be included, as terms of the offer, in the investment statement (except there is a transitional period of 3 months during which this condition does not apply to small employer superannuation schemes, to allow them to continue using their existing investment statements); and
- for a transitional period of 3 months, small employer superannuation schemes may continue to use the statement warning of restricted disclosure in the form previously required by the Regulations.

These exemptions do not apply to employer superannuation schemes that are in fact exempt under section 5A of the Act (which means that it is clear which exemption and related conditions apply in each case). However, there is an additional transitional exemption for small employer superannuation schemes (as previously defined in regulation 2C of the Regulations) that were previously exempt under section 5(2E) of the Act but are exempt now under section 5A of the Act.

As with small employer superannuation schemes relying on this notice, for 3 months these schemes may continue to use the statement warning of restricted disclosure in the form previously required by the Regulations.

The Securities Commission (the Commission) considers that it is appropriate to grant the exemptions because

- the Commission considers that the purpose of section 5A of the Act is to grant an exemption from the requirement to have a registered prospectus to employer superannuation schemes where the costs of the scheme are met by the employer. Some schemes meet this policy purpose, but are unable to comply with the terms of the statutory exemption for various technical reasons. The Commission considers that it is consistent with the purpose of the Act to grant an exemption to

- extend the effect of the exemption in section 5A of the Act to these schemes, and to schemes that previously enjoyed the benefit of the section 5(2E) exemption for small employer superannuation schemes before the Securities Amendment Act 2004 came into force:
- the Commission is of the view that it is appropriate to have a transitional period in which issuers of schemes that previously enjoyed the benefit of the exemption in the Regulations for small employer superannuation schemes can rely on the exemption from the requirement to have a registered prospectus while using their existing investment statements. The content of those existing investment statements is sufficiently similar to the content required under the new exemptions that the benefit of immediately preparing new investment statements is outweighed by the cost of doing so.

Issued under the authority of the Acts and Regulations Publication Act 1989.

Date of notification in Gazette: 22 July 2004.

Appendix 3

PROVISIONAL LIST OF POTENTIAL FURTHER EXEMPTION CANDIDATES

Baptist Union Superannuation Scheme

Dairy Industry Superannuation Scheme

Defence Force Superannuation Scheme

Fonterra Superannuation Scheme

Local Government Superannuation Scheme

Meat Industry Superannuation Scheme

Medical Assurance Society Retirement Savings Plan and KiwiSaver Plan

NZ Maritime Officers Super Fund and KiwiSaver Scheme

NZ Ships Officers Super Fund

NZ Universities Super Scheme

Seafarers Retirement Fund and SRF KiwiSaver Scheme

Waterfront Industry Superannuation Scheme and KiwiSaver Scheme