

18 September 2007

Ministry of Economic Development
33 Bowen Street
WELLINGTON

LISTED COMPANY ASSOCIATION SUBMISSIONS

Draft Regulations under the Securities Markets Act 1988

The Listed Company Association (**LCA**) is pleased to present its submissions on the draft Securities Markets (Substantial Security Holders) Regulations 2007 (**Draft Regulations**) provided under cover of your email of 29 August 2007. The LCA has decided to focus its attention on the substantial security holder regulations, rather than the investment advisers and market manipulation regulations, as the substantial security holder regulations are the regulations of primary interest to its members.

The LCA is an independent and voluntary non-profit organisation established in 1981. Its members are NZSX, NZAX and NZDX listed companies. As at 1 March 2007, LCA represented more than 70% of issuers by market capitalisation of listed companies in New Zealand.

1. **Feedback on Particular Issues:** In relation to the particular issues on which your introductory paper invited comment, LCA advises as follows:
 - (a) LCA is in favour of the "3 separate forms" approach, which avoids an unwieldy and complex "all purpose" form.
 - (b) The exemptions from disclosure of documents seem appropriate as general exemptions.
 - (c) The exemptions for issuers listed on overseas exchanges are appropriate, in that they are predicated on the existence of "home exchange" disclosure requirements. See also the comments in paragraph 15 below.

2. **General Drafting Comments:** As a general comment, the Draft Regulations use some terminology which is not reflected in the Securities Markets Act 1988 (**SMA**). For example:
 - (a) The Draft Regulations make reference to "substantial holders", which is not a term defined in the SMA. The corresponding term in the SMA is "substantial security holder" and it is suggested that this is a more appropriate term to use in the Draft Regulations.
 - (b) The Draft Regulations refer to a person's "relevant interest power", for example, to exercise a right to vote. The concept of "relevant interest power" is not one which is used in the SMA and, it is submitted, could lead to confusion, in that it could be taken to require a further enquiry into the nature of the power and its relationship to a relevant interest, rather than it merely *being* the relevant power.

- (c) Various references are made to "holdings" and "holder" in the Draft Regulations where, in fact, the reference appears to be to a "substantial holding" or "substantial security holder", respectively, as defined in the SMA. Merely referring to a "substantial holding" as a "holding" is inappropriate, as "holding" could be taken to be a reference to an actual holding (i.e. the securities registered in the name of a holder) rather than having a "substantial holding" which refers to having a relevant interest in securities comprising 5% or more of a class. Similarly, a reference to a "holder" could be taken to be limited to a reference to the registered holder, rather than the holder of a "substantial holding" – i.e. a "substantial security holder".

We note various examples of the above usage as we work through the Draft Regulations below.

3. **Draft Regulation 7(1) - Use of Terminology from SMA Titles:** In subclause 7(1) reference is made to "a subsequent movement of 1% in a holding" and "a subsequent change of nature of relevant interests". These phrases appear in the titles of sections 23 and 24 of the SMA respectively. It is suggested this is inappropriate, as the headings do not capture precisely the events described in the relevant sections. In both cases, we suggest the references should be to the actual language used in the relevant sections, viz "a movement of 1% or more in a substantial holding" and "a change in the nature of any relevant interest". We have marked up suggested amendments in the copy of subclause 7(1) below:

A person may disclose, in 1 event disclosure, both a movement of 1% or more in a substantial holding and a change in the nature of any relevant interest in the same substantial holding.

4. **Draft Regulation 7(2) - Event Disclosure in Event Disclosure:** This subclause contains a reference to "1 type of event disclosure in an event disclosure". This could create confusion between the concept of the "event disclosure" and the "relevant event" triggering the disclosure ("relevant event" being a term defined in the new section 2(1) of the SMA). We recommend that the first time the phrase "event disclosure" appears in the subclause it is replaced with the phrase "relevant event".

5. **Regulation 7(3) - Use of Titles, Reference to Holdings:** In line with the comments in paragraph 1(c) and 2 above, we recommend that this clause be redrafted to read as follows (changes are marked):

A person who ceases to have a substantial holding need make only that type of event disclosure, and not also the following types of event disclosures for the same transactions or events:

- (a) *a movement of 1% or more in the substantial holding; or*
- (b) *a change in the nature of any relevant interest in the substantial holding.*

6. **Clause 11(1)(b) - Qualifications:** This paragraph makes reference to a qualification arising "on" a relevant interest. It would be more common usage to refer to a qualification arising "to" an interest. In addition, the paragraph uses the phrase "relevant interest power", which we believe is inappropriate for the reasons stated in paragraph 1(b) above. Accordingly we recommend that the clause be redrafted as follows (changes are marked):

a qualification to a person's power to exercise, or control exercise of, a right to vote, acquire, or dispose of a security arises.

7. **Regulation 13 - "Holder" and "Relevant Interest Power":** For the reasons stated in paragraphs 1(b) and (c) above, we recommend that this clause be redrafted as follows (changes are marked):

(1) *A relevant agreement document need not be attached to an event disclosure for a relevant interest if the substantial security holder has the relevant interest only because the substantial security holder -*

(a) *is a registered holder of the securities; or*

(b) *is the beneficial owner of the securities; or*

(c) *is both the registered holder and the beneficial owner of the securities.*

(2) *However, subclause (1) does not exempt the substantial security holder from the requirement to attach a relevant agreement document for any qualification to the substantial security holder's power to exercise, or control the exercise of, a right to vote, dispose of, or acquire a security.*

8. **Regulation 14(1)(c) - Singular and Plural:** Under section 33 of the Interpretation Act 1999, words in the singular include the plural and vice versa. Accordingly, we do not consider it appropriate to refer to "relevant interest or interests" in this paragraph. It could create a contextual confusion as to the general application of section 33 (see section 4(1)(b) of the Interpretation Act 1999). Accordingly we recommend that this clause be redrafted as follows (changes are marked):

the relevant interest, or qualification, arising under the relevant agreement document arises only because A has those powers...

9. **Regulation 14(1)(d) - Ownership of Fund:** We consider that the requirement for the relevant client to have beneficial ownership of the entire fund including the relevant securities could be overly restrictive, as various pooled funds may be run for clients by an investment manager. Accordingly we recommend that the words "has beneficial ownership of the fund" be changed to read "has a beneficial ownership interest in the fund" in this paragraph.

10. **Regulation 14(1)(e)(i) - Too Narrow?:** The qualification under this subparagraph, requiring relevant interests to arise "only from the powers of investment" in an investment management contract appears to be too restrictive. Many of the powers held by an investment manager will be held by virtue of their holding or controlling of the holding of the relevant securities, and will not arise from any powers of investment contained in the relevant contract. Accordingly, this subparagraph will, by definition, cause the exemption provided in Regulation 14 to apply only in extremely limited circumstances or, indeed, never to apply. The concern to which it is directed appears to be dealt with in paragraphs 14(1)(b) and (c), in any case. We recommend its deletion.

11. **Regulation 20 - Conflicting Amendment:** This amendment would appear to conflict with the amendment made to regulation 21 of the Securities Markets (Disclosure of Relevant Interest by Directors and Officers) Regulations 2003 under Part 3 of the Schedule to the Securities Markets Amendment Act 2006 (see also section 14 of that Act).

12. **Schedule 1, Form 1:** For the reasons set out in paragraph 1(a) above, it is recommended that, wherever "substantial holder" appears in this form, the reference be changed to "substantial security holder". In addition, wherever the word "holder" is used by itself, the phrase "substantial security holder" should be substituted, for the reasons set out in paragraph 1(c) above. In note 5 the references to "form" should be preceded by "the". In note 9(a), for the reasons discussed above at paragraph 1(b), the reference to "holder's relevant interest power" should be changed to "person's power" in addition, for clarity, the final words of this paragraph should be changed to "or dispose of any of the securities in the substantial holding".
13. **Schedule 1, Form 2:** For the reasons set out in paragraph 1(a) above, wherever "substantial holder" appears the words "substantial security holder" should be substituted. In addition, wherever the word "holder" is used by itself, the phrase "substantial security holder" should be substituted, for the reasons set out in paragraph 1(c) above. In note 1 to the form, for the reasons set out in paragraph 2 above, the words "subsequent movement of 1% of holding or a subsequent change in nature of a relevant interest" should be changed to "movement of 1% or more in a substantial holding or a change in the nature of a relevant interest in a substantial holding". In addition, for the reasons stated in paragraph 1(b) above, note 14(a) of the form should be redrafted to read as follows (changes have been marked):
- state that the relevant interest is "qualified" or "conditional" if there is any qualification to the substantial security holder's power to exercise, or control the exercise of, a right to vote, acquire, or dispose of any of the securities in the substantial holding...*
14. **Schedule 1, Form 3:** Again "substantial holder" and "holder" should be changed to "substantial security holder".
15. **Schedule 2 - Overseas Exchanges:** It is recommended that, for consistency amongst relevant regulations, the overseas exchanges referenced here be commensurate with the relief provided by the Securities Act (Overseas Companies) Exemption Notice 2002. This reflects a recognition, in policy terms, that these exchanges operate rules which are sufficiently similar to NZX to warrant exemption from securities laws in connection with various types of offers. Accordingly, it might be worth referencing any stock exchange in the United Kingdom, the Commonwealth of Australia, Canada, the United States of America, Spain or Hong Kong. We recommend that Singapore be added to this list, given that at least one NZX-listed company has a listing on SGX. In this regard it is noteworthy that regulation 16 does not create a blanket exemption for companies listed on such an exchange, but still requires the relevant person to be subject to overseas substantial holding disclosure requirements. Accordingly, inclusion in the schedule does not necessarily recognise that such requirements are imposed, but merely recognises the exchange as a type of exchange for which exemption should be available if it does in fact enforce substantial holding disclosure requirements.
16. **Schedule 3 - Form 2:** In paragraph 2 of this form, it is recommended that the words "in [*public issuer*]" be added at the end, to ensure that the scope of the inquiry is properly understood. In paragraph 3, the word "Please" at the beginning should be replaced with "You are required to", to ensure that no impression is created that the form constitutes a mere request, but in fact represents a legal requirement.

We trust the above comments are helpful. If you have any queries in relation to these comments, please contact:

A handwritten signature in black ink, appearing to read 'Linda Cox'.

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