

FINANCIAL MARKETS CONDUCT ACT 2013 SMALL OFFERS EXCLUSION UNDER THE DISCLOSURE REGIME

July 2017

INTRODUCTION

The Financial Markets Conduct Act 2013 (**FMCA**) overhauled the rules relating to securities and financial markets and introduced a new regime for offers of financial products. Understanding the disclosure requirements is important for businesses offering investments and raising capital.

Set out below is an overview of the “small offers” exclusion that permits certain small personal offers of debt and equity securities.

It is important to note that even if an offer is made in reliance on an exclusion, the FMCA may still impose short-form disclosure, warning statements or other requirements on the offeror.

Please click [here](#) to see further information about the FMCA disclosure requirements and other FMCA disclosure exclusions.

SMALL OFFERS EXCLUSION

Disclosure under the FMCA is not required for certain small personal offers of debt or equity securities. The main purpose of this exclusion is to promote small and medium-sized business growth by permitting these entities to make offers without prescribed disclosure. The offer must comply with certain caps, and the offer cannot be advertised to the general public. The ‘small offers’ exclusion will be of particular interest to companies wanting to obtain investment from high income earners, angel investors and others who have shown an interest in investing in the company.

A *personal offer* of financial products does not require a disclosure under the FMCA if:

- the offer is for equity or debt securities;
- there is a maximum of **20** investors accepting the offer in a **12-month period**; and
- the amount raised is less than **\$2 million** in a **12-month period**.

WHAT IS A PERSONAL OFFER?

A *personal offer* is an offer to issue or sell financial products made to, and only accepted by, a person who either:

- is likely to be interested in the offer as a result of:
 - previous contact with the offeror;

- a professional or other connection with the offeror; or
- statements or actions that the person is interested in offers of that kind; or
- has (or is controlled by someone who has) a gross income of at least \$200,000 for each of the last two years.

The FMCA sets out certain relationships that tend toward a personal offer, including professional connections, where the issuer and investor have had previous contract, and extends to angel investors.

The flow chart below sets out the FMCA requirements for small offers.

REMAINING OBLIGATIONS

Offerors who rely on a small offers exclusion will still need to be aware of the following obligations:

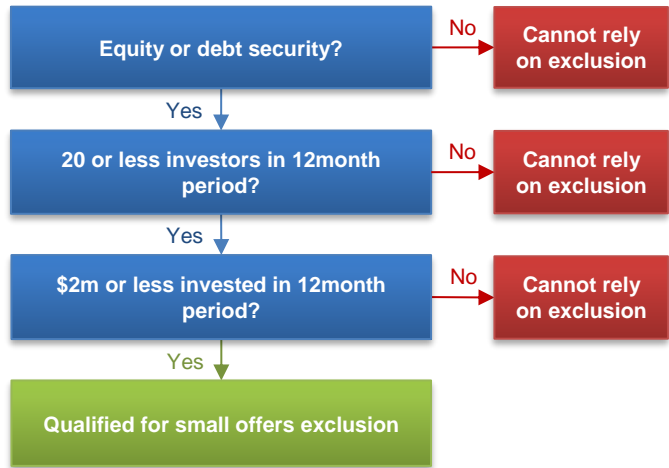
- **Warning statement:** Offers must include a prominent prescribed warning about the nature of the offer and the implications of this exemption. The warning must be included at the front of every document provided to potential investors that sets out the key terms of the offer.
- **FMA notification:** An offeror must give the Financial Markets Authority notice of the details of the small offer(s) made within an accounting period, within one month after the end of that accounting period.
- **Advertising restriction:** An offeror will need to have systems in place to ensure that the offer is only made to, and capable of acceptance by, people who fit into a personal offer category. If the offer is advertised to other persons, the exclusion will not apply and the offeror will be caught by the disclosure regime.
- **Fair dealing:** The ‘fair dealing’ provisions of the FMCA that prohibit misleading or deceptive conduct and representations that are false, misleading, or unsubstantiated, will still apply to small offers.
- **FMC reporting entity:** An offeror will only have ongoing financial reporting obligations as an FMC reporting entity under the Financial Reporting Act 2013 if it gains 50 or more shareholders through offers using the small offers exclusion.

Disclaimer

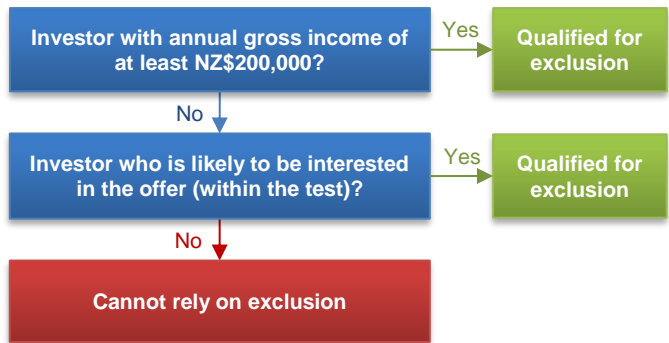
This article is a general summary of complex laws and regulations that contain severe sanctions for breach. Specific advice should be obtained in relation to proposed marketing, offering or selling of financial products.

SMALL OFFERS SUMMARY FLOW CHART

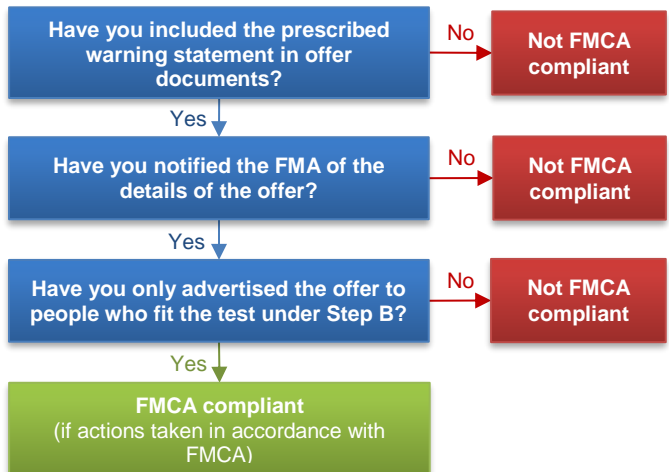
Step A: Is it a “small offer”?



Step B: Who can the small offer be given to and accepted by?



Step C: Is my small offer FMCA compliant?



Jackson Russell

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