

FINANCIAL MARKETS CONDUCT ACT 2013 WHOLESALE INVESTOR 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 FMCA “wholesale investor” exclusion that permits issues to investors that are considered able to look after themselves.

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.

WHOLESALE INVESTOR EXCLUSION

Disclosure under the FMCA is not required if the investor is what is known as a “wholesale investor”. There are eight categories of “wholesale investor”:

1. investment business;
2. investment activity criteria;
3. large;
4. government agency;
5. eligible investor;
6. \$750,000 minimum investment;
7. underwriting agreement;
8. derivatives \$5 million minimum.

The chart below gives more detail about these categories and any relevant FMCA disclosure requirements.

This exclusion also applies to offers to any entity under a wholesale investor’s control.

HOW DO I KNOW IF THE PERSON IS A WHOLESALE INVESTOR?

Categories 1 to 5: These exclusions are not straight forward as they depend on the nature of the investor and the offeror may not have these details. Helpfully, an offeror can rely on a prescribed certificate from an investor to confirm that the investor is a wholesale investor under these categories:

- **Safe harbour certificate:** For categories 1 to 4, the offeror can request the investor provide a safe harbour certificate to the offeror confirming they

are a wholesale investor. The certificate is signed by the investor and must state which category the investor falls within.

While certificates are not required by the FMCA, offerors can rely on a certificate unless they know before issuing the securities (called “financial products” in the FMCA) that the applicant was not a wholesale investor.

An offeror does not have to receive a safe harbour certificate before issuing financial products, but receiving a certificate does provide certainty for the offeror when relying on a wholesale investor category.

- **Eligible investor certificate:** For category 5, the investor is required to give the offeror an eligible investor certificate which certifies that the investor fits within the FMCA requirements for this exclusion. The content of this certificate is prescribed by the FMCA. The certificate must be confirmed by an advisor (lawyer, authorised financial advisor, or chartered accountant) who is independent of the offeror.

Safe harbour and eligible investor certificates are valid for two years unless revoked earlier by the investor.

Categories 6 to 8: These exclusions depend on the nature of the offer so offerors can more easily assess for themselves whether these exclusions will apply.

REMAINING OBLIGATIONS

Offerors who rely on a wholesale investor exclusion will still need to be aware of the following FMCA obligations:

- **Warning statement:** Where a person is investing at least \$750,000 (category 6 above), alternative disclosure obligations still apply:
 - a. 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 an investor that sets out the key terms of the offer; and
 - b. Offerors must receive a written acknowledgment (in prescribed form) from the investor prior to accepting their application.
- **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 offers to wholesale investors.

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 financial products.

WHOLESALE INVESTOR SUMMARY CHART

Wholesale investor type		Category specific disclosure requirements or certification	
<p>1. Investment business</p> <p>A person who is:</p> <ul style="list-style-type: none"> An entity whose principal business is investing in, trading in, underwriting or providing financial adviser or brokering services in relation to financial products A registered bank A non-bank deposit taker A licensed insurer A manager (with a market services licence) of a registered scheme or discretionary investment management service A derivatives issuer with a market services licence A QFE or authorised financial adviser. 	<p>2. Investment activity criteria</p> <p>A person who:</p> <ul style="list-style-type: none"> Owns or has owned (together with its controlled entities) a portfolio of specified financial products to the value of at least \$1 million* within the last two years; Has carried out (together with its controlled entities) one or more transactions with non-related parties to acquire specified financial products to the aggregate value of at least \$1 million* in the last two years; or Has been employed or engaged in an investment business within the last 10 years and has participated to a material extent in the investment decisions made by the investment business for at least two years during that time. 	<p>Safe harbour certificate (not required but offeror can rely on)</p>	
<p>3. Large</p> <p>A person is large if, for the last 2 financial years, they and their controlled entities had:</p> <ul style="list-style-type: none"> net assets which exceeded \$5 million; or a consolidated turnover which exceeded \$5 million. 	<p>4. Government agency</p> <p>Includes government departments, Crown entities, local authorities, State enterprises, the Reserve Bank and the Board of Trustees of the National Provident Fund.</p>		
<p>5. Eligible investor</p> <p>A person who has certified as to their previous investment experience and knowledge which enables them to assess:</p> <ul style="list-style-type: none"> merits of the investment; their own information needs in the transaction; and the adequacy of any information provided to them, and that they understand the consequences of certifying themselves as an eligible investor. 			<p>Eligible investor certificate</p> <p>Must be confirmed by an advisor (lawyer, authorised financial advisor, or chartered accountant) who is independent of the offeror</p>
<p>6. \$750,000 minimum investment</p> <p>A person who is required to invest a minimum of \$750,000 for the financial products up front (later payments are not counted).</p>			<p>Prescribed warning statement & acknowledgement</p>
<p>7. Underwriting agreement</p> <p>A person who acquires the financial products under a bona fide underwriting agreement.</p>	<p>8. Derivatives \$5 million minimum</p> <p>A person acquiring derivatives with a minimum notional value (or initial face value) of \$5 million.</p>	<p>None</p>	

* The value of a derivative is treated as the face value on entry divided by 10.

The term *financial products* in the FMCA is very broad and covers debt, equity, managed investment products and derivatives.

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