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Simpson Grierson

Corporate Advisory

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Substantial Security Holder Disclosure Gets an Overhaul

On 29 February 2008 a number of important changes will be made to New Zealand's securities law when the Securities Markets Amendment Act 2006 (**Amendment Act**) comes into force.

In amending the Securities Markets Act 1988 (**Act**), it will make substantial changes to insider trading law. It will also change the disclosure regime for substantial security holders and introduce new market manipulation provisions, a general dealing misconduct provision and new disclosure requirements for investment advisers and investment brokers.

In this, the third in our series of publications on the changes, we consider provisions relating to disclosure by substantial security holders. This publication follows previous weeks' releases on the new market manipulation and insider trading provisions. Separate publications reviewing other changes to the Act will be released over the next few weeks.

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Substantial Security Holder (SSH) Regime

The goal of the SSH regime is to provide the market with transparency regarding substantial holdings and other relevant interests in listed voting securities. While that goal has been largely achieved, there have been ongoing issues at the margins which are now being addressed by the Amendment Act and the new Securities Markets (Substantial Security Holders) Regulations 2007 (**Regulations**).

Although it may seem trivial, one key issue has been the form of disclosure itself. In many cases strict adherence to the prescribed form has created uncertainty about exactly what is happening as opposed to providing the market with the intended transparency. That problem was compounded by the treatment of different classes of listed voting securities. Both issues have been resolved by the Amendment Act and the Regulations.

The fundamental disclosure obligations remain. Disclosure must be made:

- when a person becomes a substantial security holder (at the 5% threshold);
- whenever the shareholding of a substantial security holder changes by 1%;
- when there is a change in the nature of any relevant interest held by the substantial security holder (for example, from a non-beneficial interest to a beneficial interest); and
- when a person ceases to be a substantial security holder.

Amendments

It is important for listed companies, SSHs and those persons who may become a SSH to be aware of the forthcoming amendments. Key amendments are to made in the following areas:

- the scope of the regime (i.e., the types of securities in respect of which disclosure must be made);
- the prescribed forms for disclosure (including further specific guidance as to how and when disclosure must be made);
- conditions applicable to trustee and nominee companies;
- exemptions for holdings in issuers with primary listings in offshore jurisdictions; and
- remedies for breaches.

Scope of Regime - Class Disclosure

The most substantive amendment to the regime is the extension of disclosure requirements across different classes of listed voting securities. Under the existing law, disclosure is made of substantial holdings of voting securities (including securities convertible into voting securities) as a generic class. Disclosure will now be required in respect of each listed class of voting securities or securities convertible into voting securities (a "class" being a series of securities with identical rights, privileges, limitations and conditions). Under the new regime, any holder of 5% of such a class (for example, listed capital notes which convert into voting securities) will need to make disclosure.

Forms

The Regulations introduce new prescribed forms for disclosure. Although disclosure may now be made on a disclosure form specified by a registered exchange (i.e., NZX) in relation to securities listed on its market, NZX has confirmed that, at this stage, it will require disclosure in the forms prescribed in schedule 1 of the Regulations. The Regulations now also provide specific guidance as to how disclosure should be made where there is more than one type of "disclosure event" (for instance, an increase in holdings at the same

time as previous holdings moved from being held non-beneficially to beneficially).

Trustee Corporations & Nominee Companies

The new regime carries forward, in very similar terms, the existing exemptions from SSH disclosure requirements for trustee companies and nominee companies which opt into the exemption. There are, however, some additional conditions attaching to the exemption for trustee corporations and nominee companies. These conditions are designed to ensure trustee corporations and nominees keep NZX and the issuer informed regarding identity of SSHs since they have visibility of such holdings to the exclusion of other market participants. Such entities must keep under continuing review the transactions of all persons for whom they hold listed voting securities and inform the relevant public issuer and NZX if any such person becomes or ceases to become a SSH. (There is no obligation to inform in relation to changes in interest.). In addition, a trustee or nominee company must inform NZX if it exercises or proposes to exercise in its own right any voting rights in respect of 5% or more of a class of listed voting securities. Failure to comply with these provisions is an offence carrying a maximum penalty of $10,000.

Overseas Issuers Exemption

The new Regulations create an exemption in respect of securities with primary overseas listings in specified jurisdictions (currently Australia, Canada, Hong Kong, Ireland, Singapore, the United Kingdom and the United States of America) so long as there is an applicable substantial security holder regime in that jurisdiction.

Remedies

New remedies have been introduced for failure to comply with SSH requirements. Under the new law, the Securities Commission may apply to the courts for pecuniary penalties of up to $1 million for serious breaches of the disclosure requirements. In addition the compensatory orders available have opened up the ability to claim for broader categories of loss suffered by the applicant than available under the previous regime. These remedies are in addition to the existing armoury of other civil orders available to the court, such as forfeiture of securities and voting restrictions. The new law also makes it an offence punishable by a fine not exceeding $30,000 for those who know, or ought to know, information that is required to be disclosed, and fail to disclose it in accordance with the regime.

Finally, notwithstanding the slightly more limited scope of the SSH regime, the Securities Commission has been given power to oversee and require disclosure in respect of all relevant interests, whether voting or not, unlisted or not, or issued or yet to be issued.

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