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## CORPORATE

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## FAST TRACK RESPONSE FOR CAPITAL RAISING NOW IN THE HOUSE

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**Stephen Layburn**  
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The new Securities Disclosure and Financial Advisers Amendment Bill, introduced into Parliament yesterday, contains key measures aimed at streamlining raising of capital for New Zealand businesses.

Flowing from the first round of recommendations of the Capital Market Development (CMD) Taskforce for steps to respond to current financial conditions, they are particularly relevant for listed issuers and also reflect recommendations made by NZX.

Central to the bill's key provisions is the objective of making it easier for businesses to raise capital by introducing a simplified disclosure prospectus regime into the Securities Act 1978, doing away with a lot of duplicated information for NZX-listed issuers. At the same time, the simplified disclosure prospectus aims to ensure that timely and accurate disclosure of information is made to prospective investors.

The contents of the new simplified disclosure prospectus will be contained in regulations which, we understand, are currently being worked on. Once implemented, the new simplified disclosure prospectus will enable listed issuers to offer certain debt and equity securities without the need to duplicate information that is

already made publicly available through the NZX continuous disclosure regime. Specifically, the bill's explanatory notes say that listed issuers will only be able to use the simplified disclosure prospectus route to issue securities of equal or higher rank than those securities already on issue.

The bill also proposes technical changes to categories of people exempt from disclosure requirements, making it easier for all companies - both listed and unlisted - to raise capital.

The bill also makes a number of minor, technical, amendments to the Financial Advisers Act 2008.

### **Simplified disclosure prospectus**

A new definition has been inserted in the Securities Act to provide for use of the simplified disclosure prospectus by those issuers subject to continuous disclosure obligations. Background to the decision-making process that led to this new category of disclosure document are outlined in the bill's notes and traverse the possible legislative responses to the CMD Taskforce's initial recommendations released in November.

In particular, the notes make it clear that the preferred option for removing

unnecessary impediments to capital raising by listed issuers is to use a new, single (simplified), offer document that relies on the information already made publicly available pursuant to the issuer's continuous disclosure obligations.

Specifically, by using a new (simplified) prospectus, those issuers who are subject to continuous disclosure would be able to make an offer of securities - relying on the information previously disclosed pursuant to those continuous disclosure obligations and any additional information material to the offer.

The obvious advantage for listed issuers is to reduce the time and cost of complying with the full (prospectus and investment statement) disclosure regime. The simplified disclosure prospectus would not seek to reduce the amount of information available to investors, instead simply to reduce duplication. As a result, relevant announcements and information made through the continuous disclosure regime will need to be referenced (incorporated by reference) in a simplified disclosure prospectus and made available to investors.

The provisions in the Securities Act relating to liability, penalties and remedies for the disclosure of false or misleading information will continue to apply to simplified disclosure prospectus in the same manner that they do to a full prospectus. However, the quid pro quo for the maintenance of these obligations is that the due diligence defences provided by the Securities Act in relation to the existing disclosure regime will also be available for a simplified disclosure prospectus. By contrast, the simplified disclosure regime being used in Australia to facilitate rights issues by listed issuers, using a very simple offering memorandum and a 'Cleansing Statement', does not provide the issuer and its directors with the same protections.

The additional changes made to the Securities Act to accommodate the use of a simplified disclosure prospectus include:

- creating an exception so that simplified disclosure prospectuses that refer to financial statements do not need to be accompanied by a copy of those financial statements; and
- providing a mechanism for the Securities Commission to make an extension order (extending the period within which securities may be allotted pursuant to a simplified disclosure prospectus) in three specified circumstances – two of which concern an issuer disclosing information that may have an adverse effect on the issuer and is material to the offer and the final one of which concerns an issuer failing to comply with its continuous disclosure obligations.

The bill also includes a mechanism and an example (which itself is a new development) for dealing with such an extension order. That example helps explain an investor's options if an extension order is made by the Securities Commission. Those options are to actively re-subscribe for the securities, to require that the investment be repaid or a "do nothing" option which preserves the investor's existing rights under the Securities Act to require the repayment of a subscription paid in respect of a "voidable allotment" within a period of up to 12 months.

### **Amendments to existing safe harbours in the Securities Act**

Pleasingly the bill also contains changes to the exceptions in sections 3(2) of the Securities Act and to the "eligible persons" regime.



**David Flacks**  
PARTNER

The effect of the amendment to section 3(2) is to provide that an offer of securities made only to persons who have previously paid a minimum subscription of at least \$500,000 for (initial) securities in a single transaction is not an offer of securities to the public to which the prospectus disclosure regime applies. However, there are some restrictions including that:

- the further securities offered must be identical to those initial securities; and
- the offer of further securities must be made within 12 months of the first allotment of the initial securities.

The proposed changes to the “eligible persons” regime amend anomalies in the original wording of that concessionary treatment enabling offers of securities to be made to “eligible persons” without the need for a prospectus or investment statement. The proposed amendments:

- allow a single offer of securities to both categories of “eligible person” (i.e. “wealthy” or “experienced” persons) and persons who are deemed not to be members of the public under the safe harbours provided by section 3(2) of the Securities Act, correcting an anomaly where the offer could only be made to one category but not both categories together;
- clarify that a family trust is a “person” for the purposes of applying the eligible person criteria; and
- allow certification that a person is “wealthy” every 12 months rather than every six months.

These changes apply to both listed and unlisted issuers and will help facilitate private placements in the SME market, particularly for start-ups and “angel investors”.

## What's next

The detail and content of the simplified disclosure prospectus will be contained in regulations which are yet to be promulgated.

The bill’s explanatory note says that, in addition to background work first undertaken by the Ministry of Economic Development (MED) in 2006 and the interim report of the CMD Taskforce, the urgency attached to this reform package has meant that MED has limited consultation to discussions with a targeted group of industry participants. There has been close co-operation with the Securities Commission and consultation with Treasury and the Prime Minister’s department. Officials have also notified Australian authorities in the context of the trans-Tasman mutual recognition regime. It seems likely that there will be no lengthy, formal, process for submissions on the bill and, possibly, only a further round of consultation with a targeted group of industry participants on the detail of the simplified disclosure prospectus to be contained in regulations.

While the devil will be in the detail of the regulations governing the content of the simplified disclosure prospectus, the speed and decisiveness with which the relevant policy decisions have been made to introduce the bill are encouraging.

The rapid introduction provides a further signal of the willingness with which officials have been prepared to address the need for a range of New Zealand businesses to raise capital quickly to respond to the pressures being brought to bear by the existing financial conditions.

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