

Guidance Note

UNLISTED CODE COMPANIES

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**TAKEOVERS
PANEL**
TE PAE WHITIMANA

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This Guidance Note provides guidance for unlisted Code companies. It expresses the Panel's view on the meanings of "medium-sized" and "shareholders", to assist companies to understand whether the Code applies to them. It also indicates how the Code might impact unlisted Code companies.

1 Code Companies

- 1.1 The Code applies only to "Code companies". A company is a Code company if it is a New Zealand-registered company:
- (a) that is a party to a listing agreement with a licensed market operator and has securities that confer voting rights quoted on a licensed market; or
 - (b) that was within paragraph (a) at any time during the period of 12 months before a date or the occurrence of an event referred to in the Code; or
 - (c) that:
 - (i) has 50 or more shareholders (with voting rights) and 50 or more share parcels; and
 - (ii) is at least medium-sized.
- 1.2 A company is at least medium-sized if—
- (a) the company has completed 1 or more accounting periods and either or both of the following are true:
 - (i) on the last day of the company's most recently completed accounting period, the total assets of the company and its subsidiaries (if any) are at least \$30 million;
 - (ii) in the most recently completed accounting period, the total revenue of the company and its subsidiaries (if any) is at least \$15 million; or
 - (b) the company has not completed its first accounting period and on the last day of the most recently completed month the total assets of the company and its subsidiaries (if any) are at least \$30 million.
- 1.3 This Guidance Note is concerned with those companies which fall into category 2.1(c) above: unlisted Code companies.

Meaning of "medium-sized"

- 1.4 There are two financial thresholds applicable to the definition of "medium-sized", relating to the total assets and total revenue of a company in aggregate with its subsidiaries. If a company meets either of these thresholds, and has 50 or more shareholders (with voting rights) and 50 or more share parcels, then it is a Code company.
- 1.5 These financial thresholds are an adaptation of the thresholds found in the Financial Reporting Act 2013 for defining "large" companies. This means that the values of "total assets" and "total revenue" should be calculated as they would be under the Financial Reporting Act.
- 1.6 The relevant accounting period for the calculations of "total assets" and "total revenue" is the company's most recently completed accounting period. This means, for example, that an unlisted Code company might meet one (or both) of the financial thresholds in one year, but fall below the thresholds in a subsequent year. If the company did not meet either threshold in its most recently completed accounting period, it is no longer a Code company and the Code does not apply to it, even if it still has 50 or more shareholders and share parcels. If the same company meets either of the financial thresholds again in a subsequent accounting period, the Code will apply to it again from the end of that period.



- 1.7 If a company has yet to complete its first accounting period, the most recently completed month is used to calculate the “total assets” value.

Meaning of “shareholder”

- 1.8 Under the Companies Act 1993, *shareholder* means each shareholder named in the company’s share register (section 96). The Panel enforces the Code on that basis. Note that only shareholders whose shares confer voting rights should be counted.
- 1.9 In the case of joint shareholders (e.g., spouses or trustees of a family trust), the Panel’s view is that each joint shareholder must be counted when working out whether a company has 50 or more shareholders and therefore is a Code company (provided that it also has 50 or more share parcels). Joint shareholders each have their names entered in the company’s share register, so each joint shareholder must be counted when assessing how many shareholders there are.
- 1.10 Double counting should be avoided. A shareholder is a person who holds a share or shares. If a person holds several share parcels in different capacities, that person only counts as one shareholder.
- 1.11 For unlisted Code companies, the Panel is not averse to the shareholders deciding to restructure their shareholdings so that they do not fall under the definition of Code company, provided that the restructuring is undertaken in a manner that complies with the Code.

2 Why do unlisted Code companies run into difficulty with the Code?

- 2.1 Shareholders in an unlisted Code company may be involved in the activities and operations of the company, or be connected to the history of the company in some way. The shareholders may be family members, existing or former employees, or persons with whom the company has a significant trading connection. This could give rise to association between those shareholders, as discussed below.

Associates

- 2.2 Rule 4 of the Code states that, for the purposes of the Code, a person is an associate of another person if:
- (a) the persons are acting jointly or in concert; or
 - (b) the first person acts, or is accustomed to act, in accordance with the wishes of the other person; or
 - (c) the persons are related companies; or
 - (d) the persons have a business relationship, personal relationship, or an ownership relationship such that they should, under the circumstances, be regarded as associates; or
 - (e) the first person is an associate of a third person who is an associate of the other person (in both cases under any of paragraphs (a) to (d)) and the nature of the relationships between the first person, the third person, and the other person (or any of them) is such that, under the circumstances, the first person should be regarded as an associate of the other person.
- 2.3 It will often be the types of relationships described in paragraph (d) above that shareholders in unlisted Code companies have. This means that, due to the relationships between shareholders in an unlisted company, the shareholders may be considered to be associates of one another under rule 4 of the Code.
- 2.4 Shareholders being associates of one another is not problematic in itself; that is if the fundamental rule of the Code is adhered to (i.e., no person, together with their associates, increases their shareholding over 20%) and the compliance options in rule 7 of the Code are followed (i.e., takeover offers are made to all shareholders or by obtaining shareholder approval for an increase in shareholding).
- 2.5 However, if all or a majority of existing shareholders are associates then they will not be able to buy or transfer shares (other than through a Code offer) between themselves (because each shareholder, together with its



associates would together hold or control more than 20% of the voting rights in the company), and if shareholder approval is sought for any acquisition or allotment of shares the acquirer, the disposer, the allottee and their respective associates would be excluded from voting on the question by rule 17. If all of the shareholders are associated, then under the Code there is no-one to vote on the resolutions required by rule 7 in order to move ahead with a proposed transaction. If a company is unable to comply with the Code for this reason, the company may choose to apply to the Panel for an exemption, which will be considered on a case-by-case basis.¹

- 2.6 Although it is only one part of the relationship between shareholders, a shareholders' agreement may be a relevant factor as to whether association exists. A shareholders' agreement sets out rules and procedures for shareholders on matters relating to the company.
- 2.7 The Panel's view on shareholders' agreements is that the parties to those agreements may be associates for the purposes of the Code. Whether or not those parties are in fact associates will depend on the nature of the shareholders' agreement and the surrounding circumstances. Accordingly, the Panel considers questions of association for these types of agreements on a case-by-case basis. Further guidance, of a general nature, is available in the [Guidance Note on Control and Association](#), at section 7.

3 Contact us

- 3.1 The Panel executive is available to help and can explain the implications of the Code, whether an exemption might be necessary, and the matters that the Panel will consider for granting an exemption.

¹ For example, see the [Takeovers Code \(Smith & Caughey Holdings Limited\) Exemption Notice 2018](#).