



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HIKINA WHAKATUTUKI



Exposure Draft: Takeovers Code Approval Amendment Regulations 2018

Request for submissions

April 2018

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How to have your say

Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the exposure draft of the Takeovers Code Approval Amendment Regulations 2018 by **5pm on 25 May 2018**.

Your submission may respond to any or all of proposed changes. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please include your name and (if applicable) the name of your organisation in your submission.

Please include your contact details in the cover letter or e-mail accompanying your submission.

You can make your submission:

- By sending your submission as a Microsoft Word document to corporate.law@mbie.govt.nz.
- By mailing your submission to:

Business Law
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

Please direct any questions that you have in relation to the submissions process to corporate.law@mbie.govt.nz.

Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on changes to the Takeovers Code. We may contact submitters directly if we require clarification of any matters in submissions.

Release of information

MBIE intends to upload PDF copies of submissions received to MBIE's website at www.mbie.govt.nz. MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

If your submission contains any information that is confidential or you otherwise wish us not to publish, please:

- indicate this on the front of the submission, with any confidential information clearly marked within the text
- provide a separate version excluding the relevant information for publication on our website.

Submissions remain subject to request under the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

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List of Acronyms and Abbreviations

the Act	Takeovers Act 1993
the Amendment Regulations	Proposed Takeovers Code Amendment Regulations 2018
the Code	A schedule under the Takeovers Code Approval Order 2000
MBIE	Ministry of Business, Innovation and Employment
the Panel	Takeovers Panel
Panel's Recommendations	The recommended changes to takeovers legislation that the Panel provided to the Minister of Commerce and Consumer Affairs in March 2017
UEMA	Unsolicited Electronic Messages Act 2007

1 Exposure Draft: Takeovers Code Amendment Regulations 2018

Background

The Takeovers Panel

1. The Takeovers Panel (the **Panel**) is an independent Crown entity established under the *Takeovers Act 1993* (the **Act**). It is responsible for carrying out enforcement functions under the Act, making recommendations to the Minister of Commerce and Consumer Affairs on changes to takeovers law and administering the Takeovers Code (the **Code**).
2. As the regulator of the corporate takeovers market, the Panel plays an important role in assisting the government to achieve its goals by ensuring transparent and equitable takeovers processes. This results in:
 - reduced transaction costs for domestic and international investors
 - increased confidence in the integrity of New Zealand's capital markets.

The Takeovers Code

3. The Code regulates change-in-control transactions in **Code companies**. At present a Code company is a company that is either:
 - listed on a licensed market (ie NZX)
 - unlisted but has 50 or more shareholders with voting rights and has 50 or more share parcels.
4. The Code ensures that the shareholders of Code companies have the opportunity to participate in Code-regulated transactions on an equitable basis.
5. Code-regulated transactions involve a shareholder who owns, or as a result of the transaction will own, 20% or more of the voting rights in the relevant company.
6. The Code is a schedule under the Takeovers Code Approval Order 2000.

The recommendations

7. In October 2016 the Panel undertook public consultation on a range of policy changes to the Act and the Code. A copy of that consultation paper can be found at: www.takeovers.govt.nz/assets/Assets-2/Other-Panel-Documents/Consultation-Paper-Proposed-Amendments-to-the-Takeovers-Code-October-2016.pdf
8. The proposed changes were centred around:
 - changing the definition of a Code company, to better target economically significant companies
 - enabling electronic communication between parties in Code-regulated transactions
 - technical changes to enable better clarity and consistency across the Code.

9. Ten submissions were received, from a range of parties, including from the New Zealand Law Society, the New Zealand Shareholders' Association, Chartered Accountants Australia and New Zealand, interested individuals, small finance firms and crowd funding platforms. Most submissions focused on the change to the definition of a Code company and were supportive of the Panel's proposals.
10. Following on from their consultation, the Panel recommended a raft of changes to the Act and Code to the then Minister of Commerce and Consumers Affairs (the **Panel's Recommendations**). A copy of the Panel's recommendations can be found at: www.takeovers.govt.nz/assets/Assets-2/Other-Panel-Documents/Recommendations-to-the-Minister-Technical-Amendments-March-2017.PDF
11. The Takeovers Code Amendment Regulations 2018 (the **Amendment Regulations**) seek to make most of the Panel's recommendations.
12. Three of the Panel's Recommendations are not being progressed through the Amendment Regulations as they require an amendment to the Act. They are:
 - Changing the definition of a Code company.
 - Clarifying Rule 3A(2), to better explain when Part 7 (compulsory acquisition of remaining shares) applies.
 - Providing the Panel with the power to publish documents on their website, without getting the owner's permission.
13. We anticipate the above recommendations will be progressed through a regulatory systems amendment bill.

What does this paper do?

14. This paper outlines the intended effect of the changes to the Code being made by the Amendment Regulations.
15. We have included some suggested questions but we are interested in any feedback you have on the Amendment Regulations. We welcome any other relevant information that you wish to provide.

2 The Draft Regulations

Part 1 – Amendments to Takeovers Code Approval Order 2000 (other than amendments to the Code)

16. Part 1 of the Amendment Regulations deals with technical changes that are intended to support the clarity. These changes were not proposed by the Panel.
17. The proposed amendments:
 - change the name of the Takeovers Code Approval Order 2000 to the more appropriate Takeovers Regulations 2000
 - combining the Takeovers Code Approval Order 2000 with the Takeovers (Fees) Regulations 2001 so that all relevant information is in a single set of regulations. The Takeovers (Fees) Regulations 2001 will be subsequently revoked
 - confirm that the fees the Panel charges are GST exclusive.

Part 2 – Amendments to the Takeovers Code

18. The changes to the Code itself are intended to give effect to the Panel's Recommendations. The changes largely fall into three categories:
 - standardising timeframes
 - facilitating and prioritising electronic communication
 - improving information disclosure.
19. We summarise the intended effect of these changes in further detail in sub-paragraphs i-xiii below. For the purposes of the discussion below, the following definitions apply:

Term	Definition
offer	An offer for voting securities and any other financial products in a Code company.
offeror	A person who has made an offer or a person who has sent a takeover notice to a Code company
target company	A Code company whose securities are the subject of an offer or that has received a takeover notice.

Standardising timeframes

- i. **Change day-based timeframes expressed in the Code from calendar days to working days.** Timeframes have been adjusted accordingly (eg 7 days has been amended to 5 working days).
- ii. **Standardise how timeframes are expressed.** Where possible, timeframes have been expressed in a consistent fashion.

Facilitating and prioritising electronic communication

- iii. **Require a target company to provide its shareholders' email addresses (if held) alongside the financial products register under Rule 42B.** This will provide the offeror with the email addresses of shareholders who have previously requested to receive any document from the target company electronically (under section 391(3A) of the *Companies Act 1993*). These shareholders have been defined in the Amendment Regulations as "e-shareholders". As we understand it, the vast majority of shareholders who choose to receive documents from a target company electronically will choose to receive all documents electronically.

1

Are there any administrative implications of specifying that shareholders who have requested to receive takeovers related documents electronically, are considered e-shareholders? If so, what are they and what is the impact?

- iv. **Require information provided to e-shareholders to be provided in electronic form.** However, a provision has been included which allows shareholders to request hard copies of any documents and a requirement for the hard copies to be sent within one working day of request. This will allow shareholders who prefer certain documents in hard copy to access them in a reasonable timeframe.
- v. **Require documents provided to the Panel to be provided electronically.**
- vi. **Enable target companies to provide electronic access to half-year and interim-reports in lieu of physical copies.** A provision has been included which allows shareholders to request hard copies of any documents and a requirement for the hard copies to be sent within one working day of request.
- vii. **Require an electronic copy of the independent adviser's report¹ to be made available to shareholders, in conjunction with the current requirements.**
- viii. **Allow shareholders in a Code company to request a copy of that company's financial product register (including email addresses) for the purposes of communicating with other shareholders about a current Code-regulated transaction.** A provision has been included which requires the shareholder to use the information in good faith, which will allow the Panel to take action if the shareholder misuses the information.

Improving information disclosure

- ix. **Require the identity of the person(s) controlling the offeror to be identified in the offer document.**
- x. **Extend the disclosure of a target company's (and its directors' and senior officers') interest in the offeror, to also include companies related to the offeror.**
- xi. **Require offerors to disclose the date where multiple transactions took place, under clause 7 of schedule 1.**
- xii. **Enable offerors to confirm that information in the offer has not been provided to a regulatory body (except the Panel).** This is an alternative to confirming that the information is simply consistent with information provided to another regulatory body.
- xiii. **Require disclosure of agreements and arrangements entered into by the person who will become the controller of an increased percentage of voting securities.** This change will bring rules 15(g) and 16(g) in line with rules 15(a) and 16(a).

¹ If a summary of the report is provided to shareholders in accordance with Rule 18 of the Code and clause 19(2) of Schedule 2.

2

Do you agree with our approach for implementing the Panel's recommendations? If not, why not?

Commencement date

20. The Amendment Regulations have an indicative commencement date of 1 September 2018 (clause 2). The commencement date is subject to Cabinet approval.
21. The Amendment Regulations will not come into force before 1 September 2018 and at least 28 days' notice will be provided.

3

Are there specific changes which would be difficult to implement or comply with within the given time period? If so, which ones and why?

Transitional arrangements

22. The Amendment Regulations provide that any Code-regulated transaction which begins before the commencement date must be completed under the Regulations (ie the status quo applies). Any Code-regulated transaction which begins on or after the commencement date must be completed under the Amendment Regulations.
23. A Code-regulated transaction begins with:
 - the sending of any offer made pursuant to a takeover notice to a target company
 - the sending of a notice of any compulsory sale or voluntary sale pursuant to an acquisition notice by the dominant owner (as defined in Part 7 of the Regulations)
 - the sending of a notice of meeting of shareholders for the purposes of an acquisition or allotment as defined under current rules 7(c) or (d).

4

Are there additional transitional arrangements that you think are required? If so, what are they and why are they needed?

3 Additional elements

Unsolicited Electronic Messages Act 2007 exemption

24. The Unsolicited Electronic Messages Act 2007 (**UEMA**) protects individuals from receiving unsolicited, commercial electronic messages (spam).
25. Under the proposed changes to the Takeovers Code, it would be a requirement for offerors² and shareholders to contact e-shareholders electronically. Offerors may contact e-shareholders to make an offer for their shareholdings. Shareholders may contact other e-shareholders to discuss an offer. The electronic messages that shareholders and offerors send in these instances, may be seen as sending *commercial messages* as currently defined by the UEMA³.
26. The UEMA requires the sender of an electronic, commercial message to have explicit permission from the recipient for the sending of the message. The tight timeframes under the Code and the lack of existing relationship between e-shareholders and offerors/other shareholders may mean getting e-shareholders' explicit permission to receive the "electronic, commercial message" would be difficult. The requirements under the Amendment Regulations are likely to breach the UEMA.
27. As such, we will seek to exclude messages sent under the Code from the definition of a *commercial message*. This will be done through a change to the Unsolicited Electronic Messages Regulations 2007 as provided by section 6(b)(viii) of the UEMA.

Recommendations from the Panel not included in the Amendment Regulations

28. Three of the Panel's recommendations have not been implemented through the Amendment Regulations. They are:
 - changing the definition of a Code company
 - clarifying when the compulsory acquisition provisions under Part 7 of the Code apply
 - providing the Panel with the power to publish documents received online.
29. These recommendations have not been included in the Amendment Regulations as they require an amendment to the Act. They will be progressed through Regulatory Systems Amendment Bills.

² Individuals or companies who are seeking to acquire (additional) shares in a Code company.

³ Section 6 of the UEMA

4 Recap of questions

1	Are there any administrative implications of specifying that shareholders, who have requested to receive takeovers related documents electronically, are considered e-shareholders? If so, what are they and what is the impact?
2	Do you agree with our approach for implementing the Panel's recommendations? If not why not?
3	Are there specific changes which would be difficult to implement or comply with within the given time period? If so, which ones and why?
4	Are there additional transitional arrangements that you think are required? If so, what are they and why are they needed?