The Financial Markets Conduct Act 2013 and The Financial Markets Conduct Regulations 2014

16th Edition
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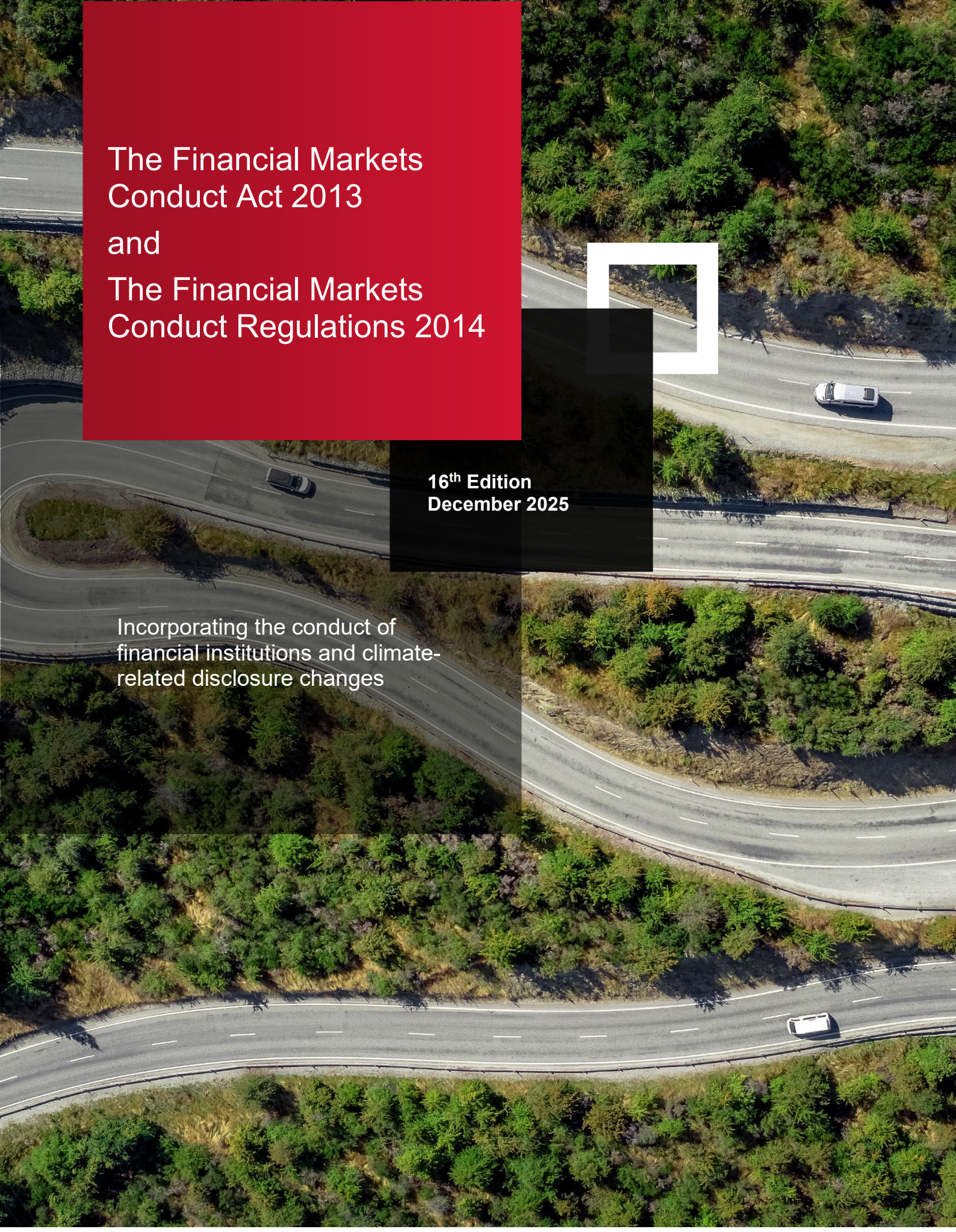
Incorporating the conduct of financial institutions and climate-related disclosure changes



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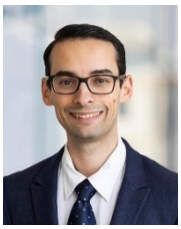
Our Financial Services team is ranked Tier 1 by Chambers Asia Pacific and Band 1 by The Legal500. Directory comments include:

"MinterEllisonRuddWatts' financial services department retains its position as an outstanding funds group serving an impressive roster of New Zealand's major banks, fund managers and investors. The firm advises across all segments of the market on financial services and regulatory compliance matters as well as fund establishment, investments and restructuring."

'Lloyd Kavanagh is highly respected and a thought leader in the industry. He is our go-to lawyer for complex legal issues, where we need well-considered, but pragmatic legal advice.'

"Jeremy Muir is technically sharp, commercially-minded and brings a rare combination of deep legal expertise and strong market awareness, with reliable and relevant advice."

CORPORATE AND COMMERCIAL



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*Disclaimer: This document is intended as a guide and brief summary only. It is not a complete review of the FMCA or FMC Regulations. Professional advice must be sought before applying any of the information in this guide to particular circumstances. While every reasonable care has been taken in the preparation of this guide, MinterEllisonRuddWatts does not accept liability for any errors it may contain or responsibility to update it at any time.

The Financial Markets Conduct Act 2013

Introduction

The Financial Markets Conduct Act 2013 (**FMCA**) represents a once-in-a-generation re-writing of our securities law.

The FMCA and the Financial Markets Conduct Regulations 2014 (**FMC Regulations**) were the result of a comprehensive review of financial markets legislation, taking into account the work of the Capital Markets Development Taskforce, the effects of the global financial crisis, and the failure of finance companies. The FMCA completely overhauled existing securities and financial markets law with a consolidated financial markets conduct regime in an effort to improve financial markets conduct and restore investor confidence.

Subsequently, the FMCA became the preferred vehicle for other key reforms, which have been introduced over the last decade, such as:

- regulation and licensing of financial advice products in 2021
- mandatory climate related disclosure requirements from 2023
- conduct licensing of consumer banking and consumer insurance in 2025

This guide gives a Roadmap

To help you to understand the structure and content of the FMCA and FMC Regulations, and key amendments since.

… and storylines

We have supplemented our discussion with diagrams illustrating certain mechanics of the FMCA in order to break down the complex regime into easy-to-follow “storylines”.

… and other resources

We also set out where you can find other information and guidance (e.g. on the Financial Market Authority’s (**FMA**) website) and outline other key financial service regulatory regimes.

… and glossary

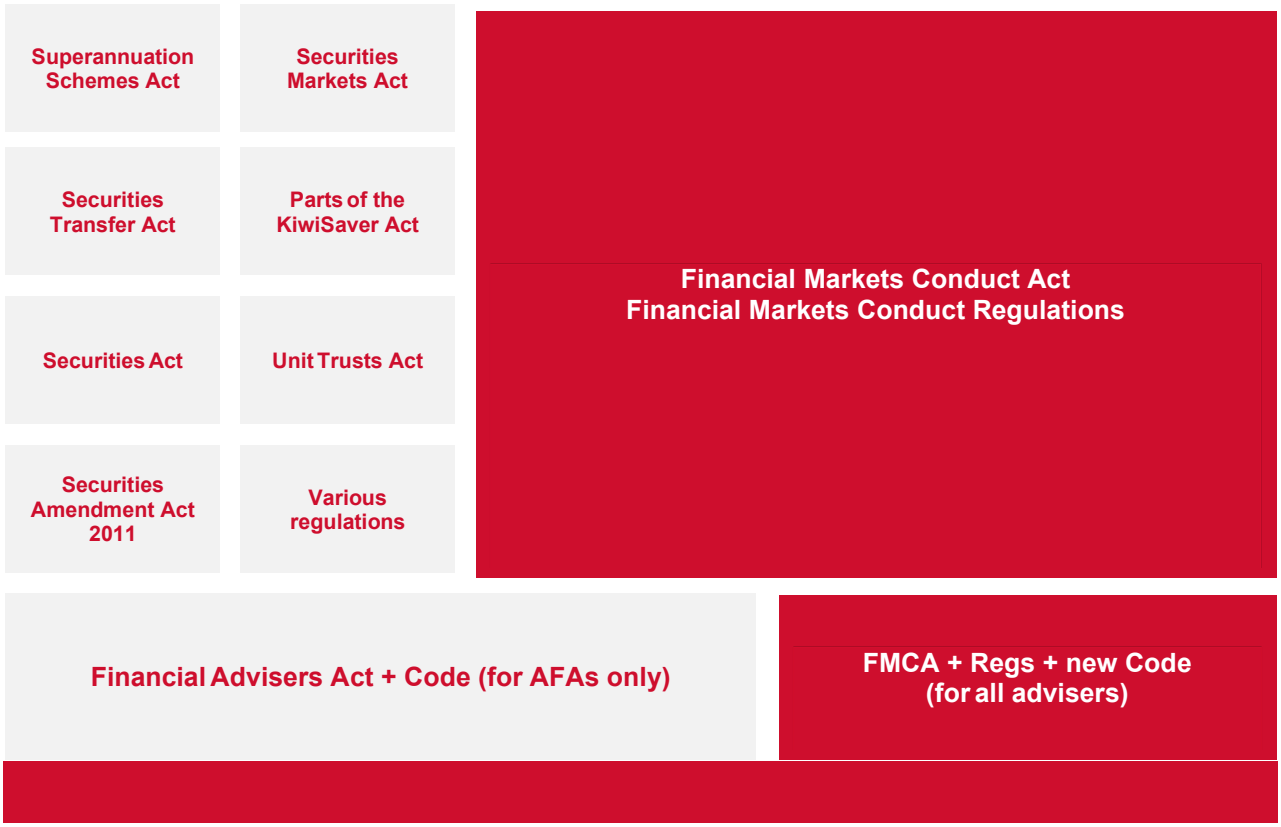
A glossary of key defined terms is set out at the end of this guide.

How can I get a quick understanding of the FMCA?

In this introductory section, we explain how the FMCA changed previous legislation, look at some of the key features of the new regime, and introduce the *Disclose Register*.

Changes to other legislation

The FMCA, together with FMRAA, replaced various pieces of legislation, including the Securities Act 1978 (**Securities Act**), the Securities Markets Act 1988 (**Securities Markets Act**), the Unit Trusts Act 1960 (**Unit Trusts Act**), the Superannuation Schemes Act 1989 (**Superannuation Schemes Act**), and the non-tax parts of the KiwiSaver Act 2006 (**KiwiSaver Act**).



Where can I find more information?

You can find useful information about the FMA's view on various subjects in some of the consultation papers leading up to the implementation of the FMCA, and subsequent guidance, listed at the back of this document.

Other important law

Despite its breadth, the FMCA is not the only law which may be relevant to financial service providers and financial market participants in New Zealand. Schedule 1 of the Financial Markets Authority Act 2011 lists the following:

Part 1

Auditor Regulation Act 2011

Financial Market Infrastructures Act 2021

Financial Markets Authority Act 2011

Financial Markets Conduct Act 2013

Financial Markets Supervisors Act 2011

Financial Service Providers (Registration and Dispute Resolution) Act 2008

Part 4 and Schedule 1 of the KiwiSaver Act 2006

Sections 45U and 45V of the Public Finance Act 1989

Part 2

Anti-Money Laundering and Countering Financing of Terrorism Act 2009

Building Societies Act 1965

Companies Act 1993

Co-operative Companies Act 1996

Corporations (Investigation and Management) Act 1989

Sections 220, 228, 229, 240, 242, and 256 to 260 of the Crimes Act 1961

Financial Reporting Act 2013

Friendly Societies and Credit Unions Act 1982

Industrial and Provident Societies Act 1908

Limited Partnerships Act 2008

Secret Commissions Act 1910

Trustee Companies Act 1967

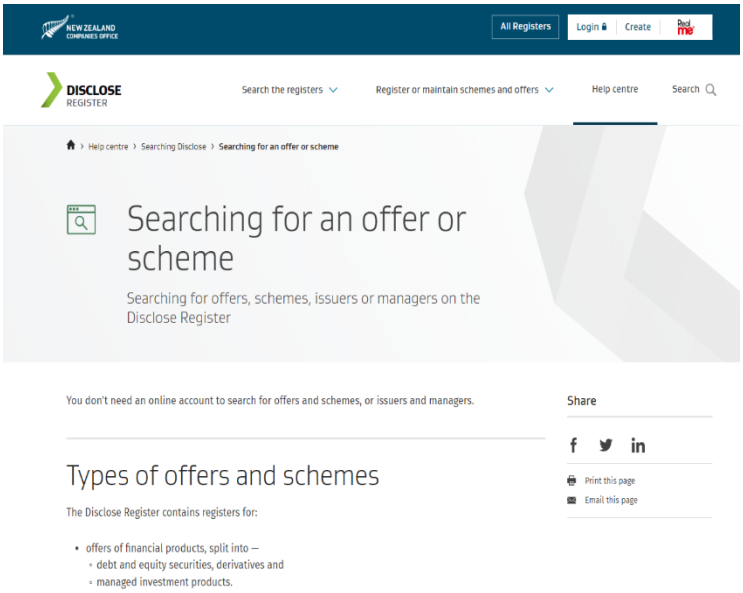
Trustee Companies Management Act 1975

Trusts Act 2019

Other important sources include the following registers:

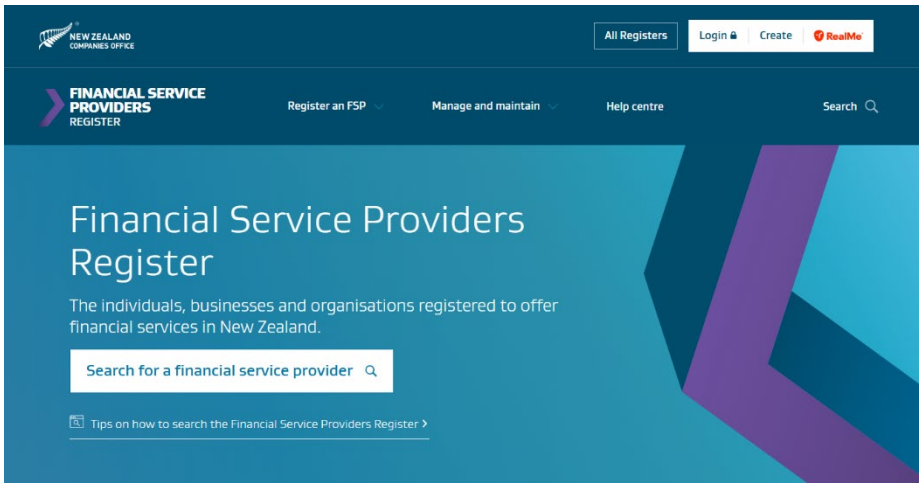
Disclose register

The *Disclose* website containing the offer register and register of MIS can be found at: https://disclose-register.companiesoffice.govt.nz/help-centre/searching-disclose/searching-for-an-offer-or-scheme/.



Financial Service Providers Register

The *Financial Service Providers Register* containing the list of the individuals, businesses and organisations registered to offer financial services in New Zealand can be found at: https://fsp-register.companiesoffice.govt.nz/



Your roadmap: Breaking down the FMCA

Part 1 - Preliminary provisions

Sets out preliminary provisions including the purposes and definitions – *See page 14 for more detail*.

Part 2 - Fair dealing

Part 2 sets out various prohibitions against misleading or deceptive conduct, the making of false or misleading representations, and the making of unsubstantiated representations, in connection with dealings in financial products and the supply of financial services. In addition, this Part prohibits offers of financial products in the course of unsolicited meetings (with exceptions in limited circumstances) – *See page 18 for more detail.*

Part 3 - Disclosure of offers of financial products

Regulates the disclosure requirements and procedure for making regulated offers of financial products for issue and sale – *See page 21 for more detail*.

Part 4 – Governance of financial products

Regulates the governance, registration and administrative requirements of financial products offered under regulated offers of debt securities and managed investment products (**MIP**). Also sets out the duties of persons associated with debt securities or registered schemes to make protected disclosures and enables interventions by the FMA in relation to regulated offers or registered schemes – *See page 30 for more detail*.

Part 5 – Dealing in financial products on markets

Governs participants and conduct in financial products on markets e.g. disclosure obligations, and insider trading and market manipulation restrictions – *See page 41 for more detail*.

Part 6 – Licensing and other regulation of market services

Provides for the licensing and regulation of certain market services (e.g. fund managers, DIMS providers, peer-to-peer lending, financial advice and financial advice services, client money or property services and financial institutions) – *See page 45 for more detail*.

Part 6 (Subpart 5A) – Financial advice, and financial advice services

Outlines the rules for financial advice and financial advice services, replacing the FAA financial adviser regime – See page 53 for more detail.

Part 6 (Subpart 5B) – Client money or property services

Outlines the rules for client money and property services, replacing the FAA broking services regime – See page 61 for more detail.

Part 6 (Subpart 6A) – Conduct of financial institutions

Outlines the licensing and conduct requirements for financial institutions, i.e. consumer banking and consumer insurance – See page 62 for more detail.

Part 7 – Financial reporting

Requires FMC reporting entities to keep proper accounting records and have their financial statements audited – See page 66 for more detail.

Part 7A – Climate-related disclosures for certain FMC reporting entities with higher level of public accountability

Requires certain FMC reporting entities with higher level of public accountability (climate reporting entities) to prepare and lodge mandatory climate-related disclosures, have certain parts audited and keep proper records -– See page 69 for more detail.

Part 8 – Enforcement, liability and appeals

Sets out the liability regime under the FMCA, defences, the various enforcement powers of the FMA and the High Court and the procedure for appeals – *See page 72 for more detail*.

Part 9 – Regulations, transitional provisions and miscellaneous provisions

Provides for regulations to be made and empowers the FMA to grant exemptions, provides frameworks or methodologies relating to detailed or technical matters – *See page 74 for more detail*.

Schedule 1 – Provisions relating to when disclosure is required and exclusions for offers and services

Sets out exclusions to the disclosure regime found in Part 3 of the FMCA, including defining 'wholesale investor' – *See page 76 for more detail*.

Schedule 2 – Registers

Establishes and provides for the purpose and contents of the register of offers of financial products and the register of MIS which together constitute "*Disclose*"– *See the FMCA itself for more detail*.

Schedule 3 – Schedule 3 schemes

Provides a framework for the statutory recognition of a single person self-managed superannuation scheme – *See the FMCA itself for more detail*.

Schedule 4 – Transitional provisions

Sets out comprehensive transitional provisions– *See page 87 for more detail*.

Schedule 5 – Other provisions relating to financial advice services and client money or property services

Sets out provisions relating to retail and wholesale financial advice or client money or property service clients, financial advice exclusions, client money or property service exclusions, establishment of the Code and the Code Committee, and complaints and disciplinary proceedings – See page 89 for more detail.

Your roadmap: Breaking down the FMC regulations

Part 1 – Preliminary provisions

Sets out preliminary matters, including the application of transitional provisions and interpretation for the purposes of Part 1 of the FMCA – *See page 17 for more detail.*

Part 2 – Fair dealing

Declares for the purposes of the fair dealing provisions of the FMCA that the service of being a creditor under a credit contract is not a financial service – *See page 20 for more detail.*

Part 3 – Disclosure of offers of financial products

Sets out when a PDS will not need to be given, the content requirements for PDS and register entries and the requirements in relation to ongoing disclosure – *See page 24 for more detail.*

Part 4 – Governance of financial products

Sets out the requirements for governing documents for debt securities (including by non-bank deposit takers (**NBDT**)) and registered schemes (in relation to MIP), meetings of product holders and scheme participants, governance of MIP, requirements relating to registers of regulated products and certain reporting obligations – *See page 33 for more detail.*

Part 5 – Dealing in financial products on markets

Provides for matters relating to market manipulation, substantial holding disclosure, directors' and senior managers' disclosure obligations, the transfer of transferable financial products and unsolicited offers for off-market purchases – *See page 42 for more detail.*

Part 6 – Licensing and other regulation of market services

Provides for exemptions from the DIMS licensing requirement, sets out matters relating to prescribed intermediary services, sets out procedural matters and conditions of licences, prescribes disclosure obligations for DIMS and sets out requirements regarding investor funds and property held by derivatives issuers, disclosure for regulated financial advice services, custodians of financial products and in relation to the Conduct of Financial institutions (**CoFI**) regime, prescribing requirements in relation to services that are not relevant services, providing information on request and incentives – *See page 48 for more detail.*

Part 7 – Financial reporting

Sets out when an entity relying on the small offers exclusion in Schedule 1 of the FMCA will be an FMC reporting entity, and prescribes offers made under the small offers exclusion for the purposes of the definition of "recipient of money from a conduit issuer" – *See page 68 for more detail.*

Part 7A – Climate-related disclosures for certain FMC reporting entities with higher level of public accountability

Sets out record-keeping requirements and information relating to the climate-related disclosure register – *See page 70 for more detail.* *The substantive requirements for mandatory climate disclosure are in the XRB's Climate Standards, published separately.*

Part 8 – Enforcement, liability, and appeals

Adjustments to definitions, infringement fee for an infringement offence, and procedure for issuing an infringement notice – *See page 73 for more detail.*

Part 9 – Mutual recognition, interest rates, and other provisions

Sets out provisions relating to the mutual recognition of financial product offerings in respect of Australia together with other miscellaneous provisions – *See page 75 for more detail.*

Schedule 1 – Transitional, savings, and related provisions

Transitional, savings and other provisions relating to the enactment of the FMCA and further regulations including in relation to climate-related disclosures and the conduct of financial institutions – *See page 88 for more detail.*

Schedules 2 to 7A – Disclosure of offers of financial products

Prescribes the content requirements for the PDS in relation to debt securities, equity securities, MIP, derivatives and NBDT debt and additional information to accompany KiwiSaver confirmation information– *See the FMC Regulations for more detail.*

Schedule 8 – Exclusions

Prescribes limited disclosure and other requirements in relation to exclusions under Schedule 1 of the FMCA – *See page 85 for more detail.*

Schedule 9 – Limited disclosure document for debt securities and bank perpetual preference shares

Prescribes the matters to be included in a limited disclosure document issued by a registered bank or the Crown and for bank perpetual preference shares – *See the FMC Regulations for more detail.*

Schedules 10 to 13 – Governance of financial products

Implied terms for debt security trust deeds and governing documents for registered MIS, default provisions for meetings of product holders and superannuation scheme rules – *See the FMC Regulations for more detail.*

Schedules 14 to 20 – Dealing in financial products on markets

Default forms for event disclosure, and movements in, or ceasing to have, substantial holdings, the overseas jurisdictions in relation to the substantial holdings exemption, forms for listed issuer disclosures, default forms for directors' and senior managers' disclosure obligations, financial product transfer forms and warning statements in relation to unsolicited offers – *See the FMC Regulations for more detail*.

Schedule 21 – Disclosure statement and investment proposal for DIMS

Prescribes the content requirements for a service disclosure statement (**SDS**) and investment proposal in relation to DIMS – *See the FMC Regulations for more detail.*

Schedule 21A to 21C– Prescribed disclosures for regulated financial advice, circumstances when financial advice is not regulated and duties applying to duties that apply when client money or property is held together with other money or property

Prescribes the disclosure requirements for giving regulated financial advice to retail clients, circumstances when financial advice not regulated financial advice and duties that apply when client money or property is held together with other money or property – See the FMC Regulations for more detail.

Schedules 22 to 24 – Enforcement, liability, and appeals

Provides for enforcement matters for the purposes of Part 8 of the FMCA, including prescribing infringement fees and forms of infringement and reminder notices – *See the FMC Regulations for more detail.*

Schedule 25 – Mutual recognition of securities offerings – warning statements

Prescribes the warning statements required in relation to offers made under mutual recognition (in respect of Australia) – See the FMC Regulations for more detail.

Part 1 of the FMCA – Preliminary provisions

What's covered?

Part 1 sets out the preliminary provisions of the FMCA including the main purposes, additional purposes and definitions.

Sections 3-4 Purposes

Section 5 Overview

Sections 6-14 Interpretation

What do I need to know?

Purpose

- The main purposes of the FMCA are to:
  - promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and
  - promote and facilitate the development of fair, efficient, and transparent financial markets.
- These are consistent with the main objectives and function of the FMA.
- The FMCA also has the following additional purposes:
  - to provide for timely, accurate, and understandable information to persons to assist those persons to make decisions relating to financial products or the provision of financial services;
  - to ensure that appropriate governance arrangements apply to financial products and market certain financial services that allow for effective monitoring and reduce governance risks;
  - to avoid unnecessary compliance costs; and
  - to promote innovation and flexibility in the financial markets.

Financial Products

- The FMCA regulates offers of **financial products** which are defined by reference to four discrete categories (as summarised below – note the full definitions in the FMCA contain more detail, and some carve outs):
  - Debt securities:
    - > A debt security is a right to be repaid money or paid interest on money that is, or is to be, deposited with, lent to, or otherwise owing by, any person.
    - > A debenture, bond or note (including convertible notes) and redeemable preference shares (unless only redeemable at the option of the entity), are included in the definition of "debt security".
    - > A debt security does not, however, include certain types of shares in co-operative companies, a derivative or an interest in a registered MIS.
  - Equity securities:
    - > An equity security is a share in a company, an industrial and provident society or a building society.
    - > A company means a New Zealand company or an overseas company.
    - > An equity security does not include a debt security.
  - Managed investment products (MIP):
    - > A MIP is an interest in a MIS, which is a right to participate in, or receive, financial benefits produced principally by the efforts of another person under the scheme, (whether the right is actual, prospective, or contingent, and whether it is enforceable or not).
    - > Examples include interests in limited partnerships, units in unit trusts, memberships in superannuation or KiwiSaver schemes, participations in syndicates or proportionate ownership schemes.
    - > A MIP does not include an equity security or a debt security. But the FMA by designation notice has declared that certain shares in investment companies are MIP, rather than equity securities for the purposes of the FMCA.
    - > MIS are further divided under the FMC Regulations into two categories, subject to different initial and ongoing disclosure requirements:

- > **managed funds** which meet certain liquidity and open offer and redemption requirements; and
- > **other managed investment schemes** (other MIS) which comprise all MIS which are not managed funds.
- > The principle difference is that managed funds have a short form PDS and periodic managed fund updates, while other MIS have a disclosure regime more similar to equity and debt.

– Derivatives:

- > A derivative is an agreement under which a party must, or may be required to, provide at some future time consideration of a particular kind or kinds to another person and the amount of the consideration or the value of the agreement, is ultimately determined, derived from, or varies by reference to the value or amount of something else including: an asset, a rate, an index, or a commodity.
- > A derivative includes those market transactions commonly known as futures or forward contracts, swaps, options (other than options to acquire equity securities, debt securities or MIP by way of issue), contracts for difference, margin contracts and rolling spot contracts, and caps, collars, floors and spreads.

- The FMA is given the power to **designate** products that fall within a broad definition of "security", but that would not otherwise be a financial product, to be a financial product of a particular type, and to re-classify financial products from one class to another. This power can only be used after consultation with issuers.

DIMS

- The FMCA also provides a regime for licensed providers of DIMS - all DIMS provided to retail clients must be licensed under the FMCA. While this is described as a service, in effect it is a fifth category of offering, which will have requirements including a licensed provider and an independent custodian.

  A person (**A**) provides a DIMS if A:

  (a) decides which financial products to acquire or dispose of on behalf of an investor (**B**); and

  (b) in doing so is acting under an authority granted to A to manage some or all of B's holdings of financial products; or

  (c) gives financial advice in the ordinary course of, and incidentally to, providing a DIMS under paragraph (a) (for example, as to the appropriate scope of an investment authority).

In determining whether A is providing a DIMS, it does not matter if B has the right to be consulted on, or to countermand, A's decisions.

Financial advice service

- The FMCA also regulates **financial advice services.**
- A person provides a financial advice service if in the ordinary course of business, that person gives (or engages other persons to give) regulated financial advice to its clients (either retail or wholesale).
- A person gives financial advice if the person:

  – makes a recommendation or gives an opinion about acquiring or disposing of (or not acquiring or disposing of) a financial advice product; or
  – makes a recommendation or gives an opinion about switching funds within a MIS; or
  – designs an investment plan for a person that:
  – purports to be based on:

- an analysis of the person's current and future overall financial situation (including investment needs); and
- the identification of the person's investment goals; and
- includes 1 or more recommendations or opinions on how to realise 1 or more of those goals; or
- provides financial planning of a kind prescribed by regulations.
- Financial advice is ***regulated financial advice*** if:

  – it is given in the ordinary course of a business; and
  – it is not excluded under any of clauses 8 to 18 of Schedule 5.

- A financial service provider can, however, do a number of things in New Zealand which fall short of giving "financial advice" without restriction, including:

- providing information (for example, the cost or terms and conditions of a financial product), which does not include a recommendation or opinion in respect of acquiring or disposing of a financial product;
- carrying out an instruction from a person to acquire or dispose of, or not to acquire or dispose of, a financial advice product for that person;
- making a recommendation or giving an opinion about a kind of financial advice product in general rather than a particular financial advice product (for example, an opinion about shares generally rather than shares of a particular company);
- giving or making available a disclosure document, information from the register entry, a section 89 advertisement, any other document that a person is required by law to give or make available or a document or information prescribed by regulations;
- making a recommendation or giving an opinion about the procedure for acquiring or disposing of financial products;
- transmitting the financial advice of another person (unless they give their own financial advice in doing so or hold out the transmitted financial advice as their own financial advice); or
- recommending that a person consult a financial adviser.

- **Financial advice product** means:
  - a financial product (as defined in section 7 (including: debt security, equity security, derivative or MIP)); or
  - a DIMS facility; or
  - a contract of insurance; or
  - a consumer credit contract; or
  - any other product declared by the regulations to be a financial advice product; or
  - a renewal or variation of the terms or conditions of an existing financial advice product.

A FAP providing regulated financial advice to retail clients will be required to be licensed under the FMCA (or be an authorised body under another FAP's licence).

Other matters

- Sections 6 to 12 contain many other important definitions. When looking at a section in the FMCA, it always pays to check if any words or phrases are specifically defined.
- Section 16 provides that the FMCA has effect despite anything to the contrary in any other enactment, agreement, deed, application, disclosure document or advertisement.

Part 1 of the FMC Regulations - Preliminary provisions

What's covered?

Part 1 sets out preliminary matters, including the application of transitional provisions and interpretation for the purposes of Part 1 of the FMCA.

What do I need to know?

- Regulations 5 to 7 contain definitions. When looking at a section in the FMC Regulations, it is important to check if any words or phrases are specifically defined.
- Statements or warning statements required to be included in a PDS, other disclosure document or register entry in a specified form or using prescribed wording may differ from that set out or prescribed in the FMC Regulations. Where particular information is not applicable to the offer or services, additional or modified information is required to ensure that a statement is not false, misleading, deceptive or confusing or to ensure that a statement is grammatically correct. The issuer must be satisfied that the differences from the specified form or prescribed wording are not broader than is reasonably necessary to address these requirements (regulation 9).
- PDS, other disclosure documents and register entries need not refer to a matter that is required to be contained in the disclosure by the FMC Regulations where it is not applicable to the offer, the financial products or the service for which the disclosure is required (regulation 12).
- For the purposes of section 8(4)(a)(ii) of the FMCA (definition of derivative), the future time for the provision of consideration is 3 working days for a foreign exchange agreement and 1 working day in any other case (regulation 13).

Part 2 of the FMCA - Fair dealing

What's covered?

Part 2 sets out various prohibitions against misleading or deceptive conduct, the making of false or misleading representations, and the making of unsubstantiated representations, in connection with dealings in financial products and the supply of financial services.

In addition, this Part prohibits offers of financial products in the course of unsolicited meetings (with exceptions FAPs).

Sections 19-33 Misleading or deceptive conduct, false or misleading representations and unsubstantiated representations

Sections 34-37 Offers in the course of unsolicited meetings

Section 38 Civil liability

What do I need to know?

- In Part 2, a "financial product" has an expanded meaning set out in section 18. It is a financial product as defined in section 7 of the FMCA (e.g. debt security, equity security, derivative or MIP) and includes any class or classes of "financial advice product" (which also includes contracts of insurance and consumer credit contracts) declared by the regulations to be a financial product for the purposes of Part 2 (as at the date of this guide, this includes all contracts of insurance)..
- "Financial service" has the same meaning as in section 5 of the Financial Service Providers (Registration and Dispute Resolution Act 2008 (**FSP Act**) (which includes a financial advice service and a regulated client money or property service). It also includes a market service (as defined in the FMCA – essentially being the manager of a registered MIS, independent trustee of a restricted scheme, provider of a DIMS, issuer of derivatives, custodian of a registered MIS or DIMS or provider of prescribed intermediary services), but excludes any class of services declared by regulations to not be financial services (currently: being a creditor under a credit contract).
- It is intended that misleading or deceptive conduct regulated by the FMCA would normally be dealt with by the FMA under the FMCA, rather than by the Commerce Commission under the Fair Trading Act 1986 (**FTA**). However, there is provision for the FMA to refer matters to the Commerce Commission.

Fair dealing

- The FMCA prohibits a person, in trade, from:
  - engaging in conduct that is misleading or deceptive or likely to mislead or deceive in relation to: dealing in financial products or quoted financial products; or the supply, possible supply or promotion of financial services (section 19);
  - engaging in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of financial products or financial services (sections 20 and 21);
  - making various false or misleading representations in connection with any dealing in financial products or the supply or possible supply or promotion of financial services (section 22); and
  - making an "unsubstantiated representation" in respect of financial products or services, or in connection with any dealing in financial products, or the supply, possible supply, or promotion of, financial services (sections 23 to 27).
- A contravention of any of sections 19 to 23 may give rise to compensation or a civil liability order under Part 8, including a pecuniary penalty. The pecuniary penalty can be up to the greatest of the consideration for the relevant transaction, three times the amount of the gain made or the loss avoided, and $1 million in the case of an individual or $5 million in any other case.
- Certain conduct under other provisions of the FMCA will not contravene this Part (for example, for statements in the PDS or register entry that are misleading or deceptive – those provisions will be enforced by means of offences and particular civil liability provisions elsewhere in the FMCA).
- The FMCA contains specific provisions and defences in relation to newspapers, magazines, broadcasting, publishers, licensed market operators, or where other legislation applies (sections 29 to 32).
- Sections 19 to 23 apply to conduct in New Zealand and conduct outside New Zealand by a person resident, incorporated, registered or carrying on business in New Zealand to the extent that the conduct relates to dealings in financial products, or the provision of a financial service, that occur (in part or otherwise) within New Zealand. These sections also apply to a "restricted communication" distributed to a person outside New Zealand by any person resident, incorporated, registered or having

a principal place of business in New Zealand. Registered in this context means registered under the FSP Act.

Unsolicited meetings

- The FMCA prohibits a person from offering financial products for issue or sale to a person acting otherwise than in trade in the course of, or because of, an unsolicited meeting (section 34). It is important to note the reference to the investor acting "otherwise than in trade" rather than being "retail" means this prohibition has broader application.
- Offers through a FAP that is acting in the ordinary course of business are exempt from this rule so that they can continue their established business practice of making unsolicited recommendations to their clients. There is also an exemption where the offer relates to a financial product of a co-operative in limited circumstances.
- A person may also withdraw from holding a financial product that was offered as a result of an unsolicited meeting within one month of the date of issue or transfer. Where such withdrawal occurs, the relevant money must be repaid within one month.
- A contravention of section 34 or 36 may give rise to civil liability, including a pecuniary penalty not exceeding $200,000 in the case of an individual or $600,000 in any other case.

Part 2 of the FMC Regulations – Fair dealing

What's covered?

Part 2 declares for the purposes of the fair dealing provisions of the FMCA that the service of being a creditor under a credit contract is not a financial service and that financial product includes contracts of insurance.

What do I need to know?

The FMC Regulations exempt being a creditor under a credit contract from the application of Part 2 of the FMCA, given the other regimes (Credit Contracts and Consumer Finance Act 2003) that apply.

The FMC Regulations state that contract of insurance is included in the definition of "financial product" and therefore subject to Part 2 of the FMCA. This was introduced as part of the CoFI changes.

Useful resources

FMA guidance

Advertising offers of financial products under the FMCA

https://www.fma.govt.nz/assets/Guidance/Advertising-offers-of-financial-products-guidance-note.pdf

Disclosure framework for integrated financial products

https://www.fma.govt.nz/assets/Guidance/Disclosure-framework-for-integrated-financial-products.pdf

Fair dealing in advertising and communications – crowdfunding and peer-to-peer lending

https://www.fma.govt.nz/assets/Guidance/180313-Guidance-on-advertising-in-crowdfunding-and-p-2-p.pdf

Fair dealing and initial coin offers

https://www.fma.govt.nz/compliance/role/cryptocurrencies/fair-dealing-and-initial-coin-offers/

Fair dealing and stop orders

https://www.fma.govt.nz/compliance/conduct/fair-dealing-stop-orders

Part 3 of the FMCA - Disclosure of offers of financial products

What's covered?

Part 3 regulates the disclosure requirements and procedure for making offers of financial products for issue and sale, advertising and publicity in connection with the offers of financial products and sets out the provisions of this Part that may give rise to civil liability.

Sections 39-56 Application (of Part 3), disclosure requirements

Sections 57-62 Content and presentation of PDS and register entries

Section 63-75 Procedures relating to lodgement of PDS and other documents and waiting period

Section 76 Amending register entry

Sections 77-81 Conditions

Sections 82-83 Prohibition of offers where defective disclosure in PDS or register entry

Sections 84-86 Expiry

Section 87 Money for financial products must be held in trust

Section 88 Offering financial products in entity that does not exist

Sections 89-94 Advertising

Sections 95-99 Ongoing disclosure and updating of registers

Section 100 Confirmation

Section 101 Civil liability

What do I need to know?

Key question

The key question in relation to an offer of financial products is whether or not it will be a regulated offer for the purposes of the FMCA – *see the Storyline on page 26 below*.

A regulated offer means an offer of financial products to one or more investors where the offer to at least one of those investors requires disclosure under Part 3 (regardless of whether or not an exclusion under Schedule 1 applies to an offer to one or more other investors); but does not include an offer of financial products if:

- the only investors who are able, under the terms of the offer, to acquire the products are investors to whom disclosure under this Part is not required; and
- all of the investors who acquire the products under the offer are investors to whom disclosure under this Part is not required.

Read the information on Schedule 1 from *page 76* to determine whether an offer can be made in reliance on one or more of the available exclusions. Offers using the exclusions i.e. non-regulated offers, are developing as a key part of the overall regime.

Application

- An offer of financial products for **issue** requires prescribed disclosure to an investor under Part 3 unless an exclusion under Part 1 of Schedule 1 applies (*see page 76*). In general terms, exclusions are available for investors that are sophisticated enough to access the information they need, or for offers too small to warrant compliance or that are regulated under other regimes.
- An offer of financial products for **sale** requires prescribed disclosure to an investor under Part 3 only if disclosure is required under Part 2 of Schedule 1. The requirements are generally aimed at preventing avoidance of the main rules of disclosure for offers of financial products for issue.
- An offer of financial products which requires disclosure to at least one investor is a "regulated offer" for the purpose of the FMCA.
- In relation to derivatives and MIP, the issuer will need to be licensed under Part 6 of the FMCA before making a regulated offer.
- Part 3 applies to offers of financial products in New Zealand, regardless of where any resulting issue or transfer occurs or where the issuer or offeror is resident, incorporated or carries on business.
- Financial products are offered in New Zealand if an offer is received by a person in New Zealand, unless the offeror demonstrates that it has taken all reasonable steps to ensure that persons in New Zealand (to whom disclosure would otherwise be required) may not accept the offer.
- By comparison, under Part 6, a licensee or an authorised body that offers a DIMS to a retail investor must provide prescribed disclosure.

Procedure for making offers

- For regulated offers, the prescribed disclosure has two key components:
  - a PDS, the purpose of which broadly corresponds to an investment statement under the Securities Act i.e. to provide key information to prudent but non-expert investors to help them decide whether or not to acquire financial products; and
  - a series of **register entries** (through the *Disclose* website), comprising both prescribed items (e.g. financial statements) and all other material information not contained in the PDS – having parallels, therefore, to a prospectus under the Securities Act.
- A simplified disclosure PDS may be used for certain offers of debt securities, equity securities or options. *See page 21*.

Advertising

- A person may only distribute an advertisement of a regulated offer in accordance with subpart 3. No director certification of advertisements is established.
- Advertisements for a regulated offer before a PDS is lodged must be limited and contain certain reasonably prominent statements including that no money is currently being sought. Expressions of interest may be sought.
- After a PDS is lodged, advertisements for a regulated offer must include reasonably prominent statements in relation to the identity of the issuer (and if different, the offeror) and in relation to obtaining the PDS.

Ongoing disclosure

- Issuers are also subject to requirements for ongoing disclosure which depend on the nature of the financial products. The matters relating to ongoing disclosure are prescribed in the FMC Regulations. The three forms of ongoing disclosure are:
  - a duty to notify the Registrar of relevant changes i.e. by lodging on the *Disclose Register*;
  - a duty to disclose information to particular investors; and
  - a duty to make information publicly available in prescribed circumstances.

Confirmation

- An issuer or offeror of a regulated product is required to provide a product holder with either the product or confirmation information. The product or confirmation information is prescribed in the FMC Regulations and includes information describing the transaction and the parties to the transaction, identifying the financial products involved and the price per financial product if known and the date of the transaction.
- Particular rules apply to confirmations in relation to continuously offered products, such as managed funds.

Disclosure by derivatives issuers

- The FMCA permits a single PDS to be lodged (and register entry created) for a derivative product type, rather than requiring lodgement of a separate PDS for each individual derivatives contract. The scheme of the FMCA in respect of disclosure for derivatives was described in the Commerce Committee's report back on the Bill and is summarised in the table below:

Party A	Party B	Example	Consequence
Licensed derivatives issuer	Retail investor	A bank and a customer	[A] makes disclosure; [B] doesn't
Person in the business of entering into derivatives	Investor who is not in the business of entering into derivatives	Energy company and a retail investor	[A] must be licensed + disclose; [B] doesn't
Licensed derivatives issuer	Licensed derivatives issuer	Two banks	No disclosure required
Wholesale investor	Wholesale investor	Two large energy companies	No disclosure required
Investor not in the business of issuing derivatives	Investor not in the business of issuing derivatives	No example is given, but this could be two retail investors	No disclosure required

Storyline

- When is disclosure required by the FMCA? *See page 26*.

Part 3 of the FMC Regulations - Disclosure of offers of financial products

What's covered?

Part 3 sets out when a PDS will not need to be given, the content requirements for a PDS, and register entries and requirements in relation to ongoing disclosure.

What do I need to know?

PDS

- Part 3 sets out the prescribed circumstances (for the purposes of section 51(1)(c) of the FMCA) in which a PDS will not need to be provided to an investor in accordance with section 50 of the FMCA (i.e. for offers requiring disclosure) where:[1]
    - A person (**A**) already holds financial products of the same class as those being offered and the offeror has reasonable grounds for believing that A has already been given all of the information that the PDS would be required to contain (regulation 15);
    - The offer relates to certain financial products[2] where the person (**A**) expressly requests that the products are issued and transferred urgently or by a specified time and it is not reasonably practicable to comply with section 50 of the FMCA and still comply with the request. The offeror must provide A with the PDS within 10 working days after the date on which the products are issued or transferred to A. The terms of the offer must include a right to withdraw from the offer and have money repaid for at least 20 working days after the PDS is provided. A notice of this right must be provided to A with the PDS (regulation 17); or
    - The offer (made by a registered bank for the purposes of the exemption under clause 21(a) of Schedule 1 of the FMCA) relates to simple NBDT debt securities, the PDS for the offer is publicly available and the offeror provides a credit risk statement to investors in accordance with regulation 19 where applicable (regulation 18).
- A PDS must contain prescribed information at the start of the document which includes identifying the PDS as a product disclosure statement and identifying the offer, the issuer and the date of the PDS. A prescribed warning statement must also be included.
- Schedules 2 to 7 of the FMC Regulations set out the prescribed content for a PDS in relation to debt securities, equity securities, MIP in a managed fund, MIP in any other MIS, derivatives and NBDT debt securities respectively.
- A simplified disclosure PDS option is available for an offer of debt securities or equity securities or options that rank equally with, or in priority to, existing quoted products of the issuer on a licensed market. A cleansing notice must be provided to the licensed market operator before a simplified disclosure offer is made.
- There are also rules for an offer of financial products that will or may convert into other financial products (**convertibles**). In general, the PDS and register entry requirements that would otherwise apply to the convertibles apply to the offer rather than the requirements that would otherwise apply to the new products.
- A PDS must include a key information summary (**KIS**) the purpose of which is to provide the issuer's assessment of the most significant aspects of the offer of the financial products that are relevant to a prudent but non-expert person's decision as to whether or not to acquire the financial products. Prescribed content for the KIS is set out in Schedules 2 to 6 of the FMC Regulations.
- Length limits apply in relation to a PDS and the KIS within it. *See page 27 for more detail.*
- The format, font and font size of the PDS must be easily readable.
- A PDS may include an application form if the form is included in an unnumbered section at the end of the PDS.

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[1] For further information on provisions relating to when disclosure is required and exclusions for offers and services – refer to the section on Schedule 1 on page 74. For example, offers of prescribed financial products (e.g. simple debt securities), issued by a registered bank.

[2] Being, call building society shares, call credit union shares, call debt securities, co-operative shares, credit union fixed term deposit products or credit union savings account products.

- Issuers lodging a PDS must supply to the Registrar evidence of the issuer board's consent to the lodgement of the PDS and register entry which is signed on behalf of the board. There is no limit on the form the evidence may take.

Register entry

- The register entry is an important part of the disclosure regime and should receive as much focus as the PDS.
- Schedules 2 to 7 of the FMC Regulations set out the prescribed content for a register entry in relation to debt securities, equity securities, MIP in a managed fund, MIP in any other MIS, derivatives and NBDT debt securities respectively.
- Inclusion of the prescribed information in the register entry does not limit an issuer's obligations under section 57(1)(b)(ii) and (iv) of the FMCA to ensure that the register entry contains all material information relating to the regulated offer not contained in the PDS and to ensure that information concerning consents for expert statements and endorsements is included.
- In relation to "open" PDSs, the issuer must notify the Registrar of changes relating to certain information included in the register entry that makes the information in that entry incorrect; changes in circumstances that have arisen that would have required different information to be disclosed had it arisen before the date of the PDS; and changes to an address for communication specified in the register entry.
- Issuers of debt securities, equity securities and MIP in a managed fund must also lodge prescribed information with the Registrar in order to update the register entry as set out in Schedules 2, 3 and 4 of the FMC Regulations respectively.
- Technically, there are two register entries for a MIS: one on the scheme register and one on the offer register.

Ongoing disclosure - Confirmation notices

- In relation to "open" PDSs, an issuer of regulated products is required to lodge an annual confirmation notice in each year not later than 1 month after the "confirmation date" with the Registrar which must be accompanied by evidence of the issuer board's consent (given no more than 5 working days before) the lodging of the notice. The notice must confirm that an offeror is not prohibited from offering or continuing to offer financial products under the regulated offer under section 82(1) of the FMCA.
- In relation to "closed" PDSs or a specified fund in a managed fund that is covered by a PDS that has a closed to all investment status, a confirmation notice and evidence must be lodged before the status of the PDS changes to an open for application status, or the status of the specified fund changes to an open status or a closed to new investors status.

Ongoing disclosure - Event disclosures

- Issuers of debt securities, equity securities and MIP in a scheme other than a managed fund must make disclosures on certain events occurring.
- For debt securities, event disclosures include changes of guarantors; material changes to the guarantee; a new credit rating of the issuer, the issuer's holding company or the debt securities being obtained or an existing credit rating being changed; or the issuer being subject to an insolvency event.
- For equity securities, event disclosures include the issuer entering into a major transaction or changing the essential nature of its business; the issuer becoming aware that an agreement has been entered into in relation to a change of control of the issuer; or the issuer being subject to an insolvency event.
- For other MIS, event disclosures include the manager entering into a major transaction or changing the essential nature of its business; the manager proposing to resign or change an investment manager for the scheme; or the manager or the scheme being subject to an insolvency event.

Ongoing disclosure - Fund updates

- Registered schemes that are managed funds must make quarterly fund updates available within 20 working days of the end of each quarter in a disclosure year (the period from 1 April to 31 March in the following year). The disclosure requirements are broadly similar to the existing periodic disclosure regime for KiwiSaver schemes. For managed funds that are restricted schemes, annual fund updates are required.
- The FMC Regulations prescribe the format and content for fund updates (regulations 57 to 59).
- A PDS for an offer of MIP can incorporate a fund update by reference and for that fund update to be given to investors.
- Fund updates are required for multi-fund investment options or investment options involving life cycle stages.
- The extent of currency hedging must be disclosed if it is material.

Storyline - When is disclosure required by the Financial Markets Conduct Act 2013?

There is an offer of a financial product or a DIMS

- An offer includes inviting applications for the issue of financial products or inviting applications to purchase financial products, or the offer of a DIMS.
- Financial products include equity securities, debt securities, derivatives and MIP. DIMS are not financial products, but are subject to their own regime.

The financial product or DIMS has been offered in New Zealand

- Financial products or DIMS are offered in New Zealand if an offer is received by a person in New Zealand unless (in the case of an offer of financial products) the offeror demonstrates they took all reasonable steps to ensure that persons in New Zealand (other than persons to whom disclosure is not required because of an exclusion) could not accept the offer.
- The territorial scope of the FMCA can be extended beyond New Zealand by a recognition regime. A recognition regime allows offers to be made in a foreign country in accordance with New Zealand law and investors in that country to rely on and enforce those laws.

The offer is a regulated offer of financial products or is a DIMS offered to a retail investor

- An offer of financial products is regulated when a financial product is offered to one or more persons and at least one of those persons requires disclosure (regardless of whether or not an exclusion under Schedule 1 applies to 1 or more other persons).
- Disclosure must be made before providing a DIMS to each retail investor who receives the service, in accordance with the FMCA and FMC Regulations.
- A retail investor is a person who is not a wholesale investor in one of the defined categories in Schedule 1.

Disclosure is required if all the three elements above are met (unless there is an applicable exemption):[3]

[3] See section 50 and Schedule 1 of the FMCA.*

Length limits and special features under the FMC Regulations for PDS and KIS

	Debt PDS (Part 1 Schedule 2 of the FMC Regulations)	NBDT Debt PDS (Schedule 7 of the FMC Regulations)	Managed Fund PDS (Part 1 Schedule 4 of the FMC Regulations)	Other MIS PDS (Part 1 Schedule 5 of the FMC Regulations)	Equity PDS (Part 1 Schedule 3 of the FMC Regulations)	Derivatives PDS (Part 1 Schedule 6 of the FMC Regulations)
Length: KIS	▪ 3 A4 pages OR ▪ 1,500 words	Not required where PDS contains all of the information set out in Schedule	▪ 2 A4 pages OR ▪ 1,000 words	▪ 4 A4 pages OR ▪ 2,000 words	▪ 4 A4 pages OR ▪ 2,000 words	▪ 2 A4 pages OR ▪ 1,000 words
PDS (total)	▪ 30 A4 pages OR ▪ 15,000 words	▪ 30 A4 pages OR ▪ 15,000 words	▪ 12 A4 pages OR ▪ 6,000 words	▪ 60 A4 pages OR ▪ 30,000 words	▪ 60 A4 pages OR ▪ 30,000 words	▪ 30 A4 pages OR ▪ 15,000 words
PDS Special Features	▪ Credit rating ▪ Ranking of DS ▪ Selected financial information	▪ Credit rating	▪ Risk indicator ▪ Fees example	▪ Selected financial information ▪ Gearing ratios	▪ Selected financial information ▪ Key investment metrics	▪ Credit rating ▪ Custody ▪ Client Agreements

Offer register requirements

	Debt securities (Part 2 Schedule 2 of the FMC Regulations)	NBDT Debt securities (Schedule 7 of the FMC Regulations)	Managed Fund (Part 2 Schedule 4 of the FMC Regulations)	Other MIS (Part 2 Schedule 5 of the FMC Regulations)	Equity securities (Part 2 Schedule 3 of the FMC Regulations)	Derivatives (Part 2 Schedule 6 of the FMC Regulations)
Offer register entries Key features (other than PDS and director consent)	▪ General information ▪ Financial information ▪ Guarantees ▪ Credit ratings ▪ Material contracts ▪ Issue expenses ▪ All other material information not included in the PDS	▪ As per Part 2 Schedule 2 (*see column to left*) ▪ Link to or URL for further information on issuer or the offer on the offer register ▪ Key ratios table and other financial information table if incorporated by reference in the PDS	▪ General information ▪ Material contracts ▪ Market index ▪ Conflicts of interest ▪ Fund information ▪ All other material information not included in the PDS	▪ General information ▪ Material contracts ▪ Issue expenses ▪ Financial information ▪ Additional scheme information ▪ All other material information not included in the PDS	▪ General information ▪ Financial information ▪ Constitution ▪ Material contracts ▪ Issue expenses ▪ All other material information not included in the PDS	▪ General information ▪ Documents lodged or referred to on register entry ▪ All other material information not included in the PDS

Useful resources

FMA guidance and MERW resources

Content and form of *Disclose Register* information

https://fma.govt.nz/assets/Guidance/150220-Content-and-form-of-Disclose-register-information-guidance-note.pdf

Disclosing non-GAAP financial information

https://www.fma.govt.nz/assets/Guidance/120901-guidance-Disclosing-non-gaap-financial-information.pdf

Fee disclosure by managed funds

https://fma.govt.nz/assets/Guidance/160526-Guidance-Note-Fee-Disclosure-For-Managed-Funds.pdf

Fund update template and guidance for calculating risk indicators

https://www.fma.govt.nz/assets/Consultations/141201-Consultation-Fund-update-template-and-guidance-for-calculating-risk-indicators.pdf

General stocktake of fund updates

https://www.fma.govt.nz/assets/Reports/General-stocktake-of-fund-updates.pdf

Guidance note on risk indicators and description of managed funds

https://www.fma.govt.nz/assets/Guidance/Guidance-note-on-risk-indicators-and-description-of-managed-funds.pdf

How performance-based fees should be disclosed

https://fma.cwp.govt.nz/assets/Guidance/160225-Infosheet-Performance-Fee-Disclosure.pdf

Improving financial information in an equity PDS

https://www.fma.govt.nz/assets/Guidance/Improving-financial-information-in-an-equity-PDS.pdf

Is the FMCA a watershed for offer due diligence?

https://issuu.com/nzlawsociety/docs/lawtalk_881_web/50 - The LawTalk article (page 40) summarises the academic article written by Lloyd Kavanagh and Samantha Zhang: 'Delegating Director's Duty to Review Disclosure Materials: Due Diligence for Continuously Offered Financial Products under the Financial Markets Conduct Act' (2015) 21 NZBLQ 163.

Presentation on due diligence for continuous issuers (MIS & Debt) under the FMCA

MinterEllisonRuddWatts has presented to its clients on 'Due diligence for continuous issuers (MIS & Debt) under the FMCA'. If you would like to obtain a free copy of the presentation slides or to find out more about our presentation, please contact one of our experts.

Part 4 of the FMCA - Governance of financial products

What's covered?

This Part regulates the governance, registration and administrative requirements of products offered under regulated offers and registered MIS. Part 4 also requires persons associated with those financial products to make protected disclosures and empowers the FMA to intervene to supervise such products.

Section 102 Overview

Sections 103-123 Debt securities

Sections 124-196 Managed investment schemes

Sections 197-214 Interventions by the FMA, the Courts

Sections 215-226 Registers of regulated products

What do I need to know?

Part 4 applies to debt securities offered under a regulated offer and to MIP in a registered scheme (whether or not there has been a regulated offer). There are also duties for issuers of all regulated products to maintain registers and keep copies of documents.

Governance of debt securities

- There must be a trust deed for regulated offers of debt securities and a licensed supervisor who is the trustee under that trust deed. The trust deed must meet certain requirements. For example, it must provide for matters prescribed in the FMC Regulations and be legally enforceable as between the supervisor, the issuer and the product holders.
- The supervisor must act honestly, act in the best interests of the debt security holders, and exercise reasonable diligence. The supervisor must also do all the things it has the power to do to cause any contravention to be remedied, act in accordance with any direction given by a special resolution of the debt security holders, and must comply with a professional standard of care.
- The issuer must provide reports, and requested information, to the supervisor.

Governance of MIP

- The Securities Act, the Unit Trusts Act, the Superannuation Schemes Act, and Part 4 of the KiwiSaver Act were repealed (subject to transitional provisions).
- MIS must be registered to make a regulated offer of a MIP. A MIS that does not make a regulated offer (other than certain prescribed schemes) may also be registered, and if so, must comply with subpart 3.
- All schemes must have a governing document (which will normally be a trust deed) and a separate and independent licensed manager and licensed supervisor (except in the case of a restricted scheme), and a governing document and name that comply with subpart 3. Most schemes must also have an independent custodian (who must be the supervisor or another appointed nominee).
- A registered scheme, if it meets certain eligibility requirements, may register as a restricted scheme (e.g. employment or family-based KiwiSaver or superannuation schemes).
- A supervisor or custodian appointed by the supervisor that meets the external custodianship requirements must hold the scheme property.
- The provisions of subpart 3 also relate to:
  - the content of governing documents;
  - the role of the manager;
  - the functions, powers and duties of the supervisor and the issuer in relation to reporting to the supervisor; and
  - changes to the supervisor and manager.
- Part 4 also regulates related party transactions in relation to MIS, generally requiring these to be in the best interests of investors, made on arm's length terms or in certain regulated products. In particular, restricted schemes (e.g. employment or family-based KiwiSaver and superannuation schemes) cannot acquire new "in-house assets" that exceed an in-house assets ratio of 5%. In-house assets are investments in related parties or scheme participants and the definition has a wide ambit, including leases and loans.
- Certain investments by a restricted scheme in an unregistered scheme are exempt from the in-house asset test where the transaction and the manager of the unregistered scheme meet certain

requirements. Further rules (from 1 December 2017) provide further requirements an employer-related scheme must satisfy before relying on the exemption.

Intervention in debt securities offered under regulated offers or registered schemes

- Auditors, actuaries, investment managers, administration managers and custodians have a duty to report on breaches by issuers to the supervisor or, in some cases, the FMA. Supervisors are subject to specific reporting duties to the FMA.
- The FMA may give a direction to the supervisor to take certain steps if there is a significant risk that the interest of financial product holders will be materially prejudiced and urgent action is required.
- The supervisor and the FMA may apply to the High Court to remedy certain problems.
- The High Court may appoint a new manager or confer additional powers on managers. The High Court also has the power to order the winding up of the scheme in certain circumstances.

Equity issuers

Equity issuers are not subject to specific governance requirements under Part 4, other than in relation to registers, keeping documents, accounting and audit, and civil liability, as discussed below. However, the FMA by designation notice, has declared that certain shares in investment companies are MIP (rather than equity securities), and as a result those companies are subject to the requirements for MIS.

Derivatives issuers

Licensing requirements for derivatives issuers in relation to regulated offers are dealt with principally under Part 6. *See the storyline on page 38 and, generally, the discussion from page 53.*

DIMS providers

Licensing requirements for DIMS providers are dealt with principally under Part 6. *See the storyline on page 39 and, generally, the discussion from page 49.*

Registers and keeping copies of documents

- Issuers of regulated products (products made under a regulated offer) must ensure that a register of those products and of all financial products that are of the same class of which it is also the issuer is kept in New Zealand. Regulated offers of derivatives are, however, exempted, unless prescribed otherwise by regulations. The register must be open to inspection by the public.
- Issuers, offerors or managers must keep any document required by the FMCA or the FMC Regulations for seven years. Such documents may include a certificate, notice, consent, confirmation or other document in respect of a regulated product.

Accounting records and audit of financial statements

In the FMCA, the provisions relating to accounting records and audit of financial statements are in Part 7.

Civil liability for certain contraventions of Part 4

Subpart 7 contains a list of contraventions that attract both civil liability as well as various pecuniary penalties.

Storylines

- What are the principal requirements for a regulated offer of debt securities? *See* *page 35*.
- What are the principal requirements for a regulated offer of MIP? *See* *page 36*.
- What are the principal requirements for a regulated offer of equity securities? *See* *page 37*.
- What are the principal requirements for a regulated offer of derivatives? *See* *page 38.*
- What are the principal requirements for DIMS providers under the FMCA in relation to retail investors? *See* *page 39*.

Part 4 of the FMC Regulations - Governance of financial products

What's covered?

This Part sets out the requirements for governing documents for debt securities and registered schemes, meetings of product holders and scheme participants, governance of MIP, requirements relating to registers of regulated products and certain reporting obligations.

What do I need to know?

Governance of debt securities

- The FMC Regulations set out a list of matters that must be provided for in trust deeds relating to debt securities. These include any financial covenants that the issuer has given in favour of product holders or the supervisor; any restrictions or prohibitions on the issuer entering into transactions with related parties or associated persons; and the appointment and removal of the supervisor (regulation 74).
- Schedule 10 of the FMC Regulations sets out terms which are implied into trust deeds for debt securities.
- Schedule 11 of the FMC Regulations sets default provisions for proceedings at meetings of holders of debt securities. Other than in relation to notices and quorums for a meeting of a class of holders of a debt security to approve a special resolution, the trust deed may disapply or alter the default provisions in Schedule 11.
- Written resolutions may be passed in lieu of meetings (regulation 78).

Governance of MIP

- Schedule 12 of the FMC Regulations sets out the superannuation scheme rules which are treated as being implied into a governing document for a superannuation scheme (or section of the scheme where relevant). The superannuation scheme rules do not apply to a scheme or section of a scheme which is closed to new members at the time of its registration.
- The FMC Regulations set out a list of matters that must be provided for in the governing document for a registered scheme. For schemes that are not restricted schemes, the governing document must provide for any additions or changes to the default meeting procedures set out in Schedule 11. For other registered schemes, the governing document must also provide for reporting by the manager to the supervisor.
- Schedule 13 of the FMC Regulations sets out terms which are implied into governing documents for registered schemes.
- Schedule 11 of the FMC Regulations sets default provisions for proceedings at meetings of a class of scheme participants. Other than in relation to notices of meetings, notices of meetings to approve related party benefits and quorums for a meeting of a class of scheme participants to approve a special resolution, the governing document may dis-apply or alter the default provisions in Schedule 11.
- Written resolutions may be passed in lieu of meetings (regulation 90).
- Managers of registered schemes that are closed-ended must call an annual meeting of scheme participants not later than six months after the balance date of the scheme and no later than 15 months after the previous annual meeting (regulation 92).
- Managers of registered schemes must report a material breach of any limits on the nature or type of investments that may be made, or the proportion of each type of assets that may be invested in, under the statement of investment policy and objectives (**Limit Break**). Where the Limit Break is not corrected within 5 working days of the manager becoming aware of it, the manager must provide a report to the supervisor or the FMA (in the case of a restricted scheme) containing the information prescribed by regulation 96 including the date the manager became aware of the Limit Break; the nature and cause of the Limit Break; and the steps taken, or to be taken, by the manager to correct the Limit Break. Quarterly reports in relation to Limit Breaks are also required (regulation 95).
- Certificates in relation to related party transactions under section 173 of the FMCA must state the nature and monetary value of the benefit(s) where this can be quantified or, otherwise, state the nature and extent of the relevant benefit(s). The certificate must also provide or have attached to it reasonable evidence supporting the statement regarding the value of the benefit(s) and the basis for relying on sections 173 and 174 of the FMCA (where relevant).

- Managers of registered schemes must provide quarterly reports to the supervisor or the FMA (in the case of a restricted scheme) in relation to any related party certificates given in the previous quarter under section 173(2)(b) or (4) of the FMCA and include copies of the certificates.
- Additional classes of related party transactions are permitted under the FMC Regulations:
  - acquisitions or disposals of products in MIS registered under the Australian Corporations Act 2001;
  - acquisitions or disposals of any public security in the ordinary course of business;
  - the acquisition of "first property" by a scheme; and
  - where the MIP in the scheme are quoted, the transaction is entered into by the manager and the listing rules of the licensed market on which the products are quoted contain related party provisions.

Storyline - What are the principal requirements for a regulated offer of debt securities?

A regulated offer of debt securities requires a governing document in the form of a trust deed, a licensed supervisor, a PDS and up-to-date register entry, the issuer to keep its own register and (in some cases) send out confirmations to subscribers, and proper accounting records and audited financial statements

A regulated offer of debt securities requires a governing document in the form of a trust deed

- The trust deed must comply with the requirements of the FMCA and the FMC Regulations and be lodged with the Registrar with a certificate from the issuer and supervisor.

A regulated offer of debt securities requires a licensed supervisor

- The licensed supervisor is designated or appointed as the trustee for the debt security.
- The supervisor is responsible for acting on behalf of the holders of the debt security, supervising the issuer's performance and performing or exercising any other functions, duties, and powers conferred or imposed on the supervisor.

A regulated offer of debt securities requires a PDS and up-to-date register entry

- Every person making a regulated offer must have prepared a PDS in accordance with the requirements of the FMCA and the FMC Regulations and lodged it with the Registrar along with any required information and documents.
- Every issuer of a regulated product is required to keep its register entry up to date so that all material information is disclosed in either the PDS or the register entry.

A regulated offer of debt securities requires the issuer to keep its own register and (in some cases) send out confirmations to subscribers

- Every issuer of a regulated product must keep in New Zealand a register with prescribed information in relation to regulated (or other prescribed) products it has issued.

A regulated offer of debt securities requires proper accounting records and audited financial statements

- Every issuer of a regulated product is required to keep proper accounting records, and its financial statements must be audited.

Note: NBDT are subject to additional requirements under the Non-Bank Deposit Takers Act 2013 which will impact the governing document and licensed supervisor requirements, amongst other things. Other issuers may also be subject to specific legislation.

Storyline - What are the principal requirements for a regulated offer of managed investment products (managed funds or other MIS)?

A regulated offer of MIP requires the MIS to be registered, a governing document, a licensed manager, a licensed supervisor, a PDS and up-to-date register entry, the issuer to keep its own register and (in some cases) send out confirmations to subscribers, and proper accounting records and audited financial statements

A regulated offer of a MIP requires the MIS to be registered

- A person must not make a regulated offer of a MIP unless they have registered the MIS and satisfy the ongoing registration requirements. There are additional registration requirements for KiwiSaver, superannuation and restricted schemes.
- A MIS which does not make a regulated offer may choose to register.

A regulated offer of a MIP requires a governing document

- A MIS requires a governing document that adequately provides for the matters specified in the FMCA and the FMC Regulations.

A regulated offer of a MIP requires a licensed manager and a licensed supervisor

- A MIS requires a licensed manager under Part 6 who is responsible for offering the MIP, issuing the MIP, managing the scheme property and investments and administering the scheme.
- A MIS requires a licensed supervisor under the Financial Markets Supervisors Act 2011 responsible for acting on behalf of scheme participants, supervising the manager, and holding scheme property or ensuring it is held by an independent custodian.

A regulated offer of a MIP requires a PDS and up-to-date register entry

- A PDS must be prepared in accordance with the requirements of the FMCA and FMC Regulations and lodged with the Registrar along with any required information and documents.
- The issuer must keep its register entry up to date so that all material information is disclosed in either the PDS or the register entry.

The issuer must keep its own register and (in some cases) send out confirmations to subscribers, and must keep proper accounting records and audited financial statements

- Every issuer of a regulated product must keep in New Zealand a register with prescribed information in relation to regulated (or other prescribed) products it has issued.
- Every issuer of a regulated product is required to keep proper accounting records, and its financial statements must be audited.

Storyline - What are the principal requirements for a regulated offer of equity securities?

A regulated offer of equity securities requires a PDS and up-to-date register entry, the issuer to keep its own register and (in some cases) send out confirmations to subscribers, and proper accounting records and audited financial statements

A regulated offer of equity securities requires a PDS and up-to-date register entry

- Every person making a regulated offer must have prepared a PDS in accordance with the requirements of the FMCA and the FMC Regulations and lodged it with the Registrar along with any required information and documents.
- Every issuer of a regulated product is required to keep its register entry up to date so that all material information is disclosed in either the PDS or the register entry.

A regulated offer of equity securities requires the issuer to keep its own register and (in some cases) send out confirmations to subscribers

- Every issuer of a regulated product must keep in New Zealand a register with prescribed information in relation to regulated (or other prescribed) products it has issued.
- Confirmations are not required where certificates would not generally be required, or generally in relation to co-operative companies, building societies or industrial and provident societies.

A regulated offer of equity securities requires proper accounting records and audited financial statements

- Every issuer of a regulated product is required to keep proper accounting records, and its financial statements must be audited.

Storyline - What are the principal requirements for a regulated offer of derivatives by a derivatives issuer?

A regulated offer of derivatives by a derivatives issuer requires the issuer to be licensed, a client agreement, confirmations to be sent out to subscribers, a PDS and up-to-date register entry, and proper accounting records and audited financial statements

A "derivatives issuer" must be licensed

- A "derivatives issuer" means a person that is in the business of entering into derivatives.
- A derivatives issuer must be licensed under Part 6 if it makes regulated offers of derivatives.

A derivatives issuer must use a client agreement

- A licensed derivatives issuer must provide services to a retail investor under a client agreement.

A derivatives issuer must send out confirmations to subscribers

- Confirmations must be sent out unless regulations prescribe otherwise.

A regulated offer of derivatives requires a PDS and up-to-date register entry

- Every person making a regulated offer must have prepared a PDS in accordance with the requirements of the FMCA and the FMC Regulations and lodged it with the Registrar along with any required information and documents.
- Every issuer of a regulated product is required to keep its register entry up to date so that all material information is disclosed in either the PDS or the register entry.

A regulated offer of derivatives requires proper accounting records and audited financial statements

- Every issuer of a regulated product is required to keep proper accounting records, and its financial statements must be audited.
- Unlike other financial products, however, there is no requirement to keep a register unless prescribed by regulations for specific derivatives or classes of derivatives.

Storyline - What are the principal requirements for a DIMS provider under the FMCA in relation to retail investors?

An offer of a DIMS under the FMCA to a retail investor requires the DIMS provider to be licensed, a client agreement and an investment authority to be in place, investor money and property to be held by an independent custodian (in most cases), a disclosure statement to be given, and compliance with other prescribed matters

A DIMS provider who provides a retail service must be licensed

- A "retail service" is a service supplied to a retail investor or a class of investors that includes at least one retail investor.
- Provision of DIMS (including a class DIMS) to retail investors requires a licence.

A DIMS that is a retail service must have in place a client agreement

- A licensee or an authorised body that provides a DIMS service that is a retail service must ensure that the licensee provides services to a retail investor under a client agreement.

A DIMS that is a retail service must have in place an investment authority

- A licensee or an authorised body that provides a DIMS service that is a retail service must ensure that the licensee provides services to a retail investor in accordance with an agreed investment authority.

A DIMS licensee must ensure that investor money and property is held by an independent custodian (in most cases)

- A custodian must be a body corporate (other than the DIMS licensee) that the DIMS licensee believes, on reasonable grounds, to be appropriate to hold and safeguard, the money or property.
- The custodian may only be an associated person of the DIMS licensee where permitted by specific conditions of the licence.

A DIMS that is a retail service requires a disclosure statement to be given

- A licensee or an authorised body that provides a DIMS service that is a retail service must ensure that a disclosure statement is provided to each retail investor who receives the service.

Useful resources

FMA guidance and MERW resources:

Governance under Part 4 of the FMCA

https://www.fma.govt.nz/assets/Guidance/140901-Guidance-Governance-under-Part-4-of-the-FMC-Act.pdf

Issuers' registers of regulated products and FMA's discretion under section 224

https://www.fma.govt.nz/assets/Information-sheets/150227-Issuers-registers-of-regulated-products-and-the-FMAs-discretion-under-section-224.pdf

Presentation on due diligence for continuous issuers (MIS & Debt) under the FMCA

MinterEllisonRuddWatts has presented to its clients on 'Due diligence for continuous issuers (MIS & Debt) under the FMCA'. If you would like to obtain a free copy of the presentation slides or to find out more about our presentation, please contact one of our experts.

Reporting duties under Part 4 of the FMCA

https://www.fma.govt.nz/assets/Information-sheets/141001-Reporting-duties-under-Part-4-of-the-FMC-Act-Information-Sheet-and-Table.pdf

Reporting SIPO limit breaks

https://fma.govt.nz/assets/Information-sheets/150224-information-sheet-Reporting-SIPO-limit-breaks.pdf

Statement of investment policies and objectives

https://www.fma.govt.nz/assets/Guidance/141101-Guidance-statements-of-investment-policy-and-objectives-under-fmc-act.pdf

Part 5 of the FMCA - Dealing in financial products on markets

What's covered?

Part 5 governs participants and conduct in financial product markets. Part 5 replaces parts of the Securities Markets Act and the Securities Transfer Act.

Sections 229-230 Purposes, overview and interpretation

Sections 231-238 Definitions

Section 239 Territorial Scope

Sections 240-261 Insider trading

Sections 262-269 Market manipulation

Sections 270-272 Continuous disclosure

Sections 273-295 Substantial holding disclosure

Sections 296-307 Disclosure of relevant interests in quoted financial products

Sections 308-370 Licensing of markets

Sections 376-380 Transfer by electronic means

Sections 381-384 Unsolicited offers

Section 385 Civil liability

What do I need to know?

- Part 5 came into effect on 1 December 2014, subject to the transitional provisions in Schedule 4.
- Part 5 has the following purposes for financial product markets (in addition to sections 3 and 4 of the FMCA):
  - to promote fair, orderly, and transparent financial product markets; and
  - to encourage a diversity of financial product markets to take account of the differing needs and objectives of issuers and investors.
- While the existing requirements for financial product markets will be continued for large markets, provision has been made for "stepping stone markets" under which disclosure requirements and conduct rules can be adapted to the particular market, issuers, and investors involved.
- The insider trading, market manipulation, continuous disclosure, substantial product holding, and directors' and senior managers' disclosure provisions cover conduct both inside and outside New Zealand in certain cases. The intent is to ensure the law applies to overseas conduct which affects New Zealand traded securities.
- Much of Part 5 of the FMCA essentially carries over existing law on financial product markets, primarily the Securities Markets Act, but with changes.

Insider trading

- An information insider must not:
  - trade in quoted financial products of the issuer, or in quoted derivatives, or in derivatives where the underlying is a quoted financial product;
  - disclose inside information to another person if the information insider knows or ought reasonably to know, or believes, that that person will, or is likely to, trade quoted financial products of the issuer or derivatives of that person or will, or is likely to, advise or encourage another person to trade or hold the products or derivatives; or
  - advise or encourage trading in or holding the issuer's quoted financial products or quoted derivatives.
- Note that, if the underlying of a derivative is a quoted financial product of a listed issuer, the derivative must, for the purposes of subparts 1 and subpart 2 of Part 5, be treated as being a quoted financial product of the listed issuer (whether the derivative is quoted or not) (section 233).

- The FMCA imposes criminal liability for insider conduct and contains exceptions and defences to insider conduct provisions.

Market manipulation

- Market manipulation is dealt with by:
  - prohibiting a person from making a materially false or misleading statement that is likely to induce a person to trade in quoted financial products or have the effect of increasing, reducing, maintaining, or stabilising the price for trading in those financial products or to induce a person to exercise a voting right in a particular way; and
  - prohibiting a person from creating a false or misleading appearance with respect to the extent of active trading in quoted financial products or with respect to the supply of, demand for, price for trading in, or value of those financial products.
- The FMCA also imposes criminal liability for market manipulation and contains exceptions and defences to market manipulation provisions.

Disclosure of interests of substantial product holders in listed issuers

- Subpart 5 imposes certain disclosure obligations in relation to substantial holdings (meaning that a person has a relevant interest in quoted voting products that comprise 5% or more of a class of quoted voting products of the listed issuer) including requiring disclosure when it has begun to have a substantial holding and disclose a subsequent movement of 1% or more in the holding.
- The requirement for public issuers to maintain a register of substantial product holder disclosures for public inspection has been removed, but that information must be disclosed in the annual report.
- A person must disclose if they begin to have a substantial holding unless an exemption in subpart 5 applies.
- A listed issuer may require a person to disclose the details of any person who has an interest in it (e.g. if someone is holding an interest in the listed issuer on behalf of somebody else).
- The FMCA allows a listed issuer to require a registered holder of relevant interests to disclose relevant interests. This allows requests for relevant information all the way up the chain of ownership to trace interests in listed issuers and allow requests to be made for purposes other than substantial security holdings.

Disclosure of relevant interests in quoted financial products by directors and senior managers of listed issuers

Subpart 6 imposes certain disclosure obligations on directors and senior managers of listed issuers in respect of quoted financial products including the requirement to disclose relevant interests and dealings in relevant interests in quoted financial products. The equivalent subpart in the Securities Markets Act related to officers rather than senior managers.

Licensing of markets for trading financial products

Subpart 7 requires a person operating a financial product market to be licensed unless exempted (either via regulations or if the market does not meet certain size thresholds). Licensed markets must have their rules approved by the FMA.

Operation of licensed markets

The provisions of the Securities Markets Act are continued in relation to licensed market operators, requiring registered exchanges to share information with the FMA and conferring powers of intervention on the FMA.

Unsolicited offers to purchase financial products

Where unsolicited offers to purchase financial products are made off-market, the FMCA provides for regulations specifying disclosure to ensure that offerees are informed as to the value of their holdings and any warnings that have been issued by the FMA.

Part 5 of the FMC Regulations - Dealing in financial products on markets

What's covered?

Part 5 provides for matters relating to market manipulation, substantial holding disclosure, directors' and senior managers' disclosure obligations, the transfer of transferable financial products and unsolicited offers for off-market purchases.

What do I need to know?

Market manipulation

Regulations 116 to 130 of the FMC Regulations set out the exemption from the prohibition against market manipulation under subpart 3 of Part 5 of the FMCA for market stabilisation. The exemption broadly follows the existing regime under the Securities Markets (Market Manipulation) Regulations 2007, although certain changes have been made.

Disclosure of interests of substantial product holders in listed issuers

- Event disclosures required under subpart 5 of Part 5 of the FMCA must be made to licensed market operators using the operator's form (where one has been set by the market operator).
- Where the market operator has not set a form, or using the operator's form would delay making the disclosure, Schedule 14 of the FMC Regulations contains default forms to be used for event disclosures for:
  - disclosure of beginning to have substantial holding (default form 1);
  - disclosure of movement of 1% or more in substantial holding or change in nature of relevant interest, or both (default form 2); and
  - disclosure of ceasing to have substantial holding (default form 3).
- Two new exemptions from the requirements to make event disclosures have been introduced for substantial holdings held for hedging by derivatives issuers acting in a client-serving capacity and from disclosing derivatives where the relevant interest to acquire or dispose of the underlying is disclosed (regulations 145 and 146).
- Schedule 16 of the FMC Regulations contains forms to be used by listed issuers in relation to requiring disclosure of relevant interests and information under sections 290 and 291 of the FMCA respectively.

Disclosure of relevant interests in quoted financial products by directors and senior managers of listed issuers

- Disclosures required under subpart 6 of Part 5 of the FMCA can be made either using the licensed market operator's form or the default forms set out in Schedule 17 of the FMC Regulations.
- Disclosure notices must be delivered to the address of the person to whom the notice is given or given by other electronic means consented to by the recipient. "Delivered" for these purposes does not include delivered by post.
- A new exemption from the requirement to make disclosures under subpart 6 has been introduced in relation to disclosing derivatives where the relevant interest to acquire or dispose of the underlying is disclosed (regulation 155).

Transfer of transferable financial products

Schedule 18 of the FMC Regulations contains the standard form for product transfers for the purposes of sections 372 and 373(1)(a) of the FMCA.

Unsolicited offers to purchase financial products

- The FMC Regulations contain provisions regarding unsolicited offers to purchase financial products off-market. These include:
  - the types of unsolicited offers that will be captured by the FMC Regulations;

- exclusions for offers to wholesale investors, associated persons of the offeror and close business associates and relatives of the offeror or one of its directors;
- a requirement on the offeror to give written notice to the listed issuer of its intention to make the offer before the offer is made; and
- a requirement that the unsolicited offer be made in a disclosure document which meets the content and presentation requirements set out in regulations 168 and 169 (including standard form statements set out in Schedules 19 and 20).

- The FMC Regulations specify the issuer, a person who maintains a financial products register on behalf of the issuer and people acting on their behalf in connection with a transfer of financial products as protected persons for the purposes of section 384 of the FMCA.

Useful resources

FMA guidance and MERW resources:

Guidance on substantial product holder disclosures

https://www.fma.govt.nz/assets/Guidance/170927-Guidance-on-substantial-product-holder-disclosures.pdf

Market misconduct risks: a guide for MIS managers

https://www.fma.govt.nz/assets/Information-sheets/150813-Market-misconduct-risks-a-guide-for-MIS-managers.pdf

Presentations on insider trading, market manipulation and fair dealing

MinterEllisonRuddWatts has presented to its clients on 'Insider Trading', 'Market Manipulation' and 'Fair Dealing'. If you would like to obtain a free copy of the presentation slides or to find out more about our presentations, please contact one of our experts.

Part 6 of the FMCA - Licensing and other regulation of market services

What's covered?

Provides for the licensing of market services and regulates the provision of market services by licensees and other persons.

Sub-Part 1 Sections 386-392 Overview and territorial scope

Sub-Part 2 Issue of licenses, conditions and duration:

- Sections 393 Principles
- Sections 394-401 Issue of licences
- Sections 402-406 Conditions of licences
- Sections 407-409 Expiry, suspension and cancellation

Sub-Part 3 Sections 410-421 Monitoring and enforcement of licenses

Sub-Part 4 Sections 422-428 Disclosure obligations for certain services provided to retail investors (DIMS and prescribed intermediary services (e.g. equity crowd funding/peer-to-peer))

Sub-Part 5 Sections 429-431 Requirements for certain services to be provided under client agreements (DIMS, derivatives and prescribed intermediary services)

Sub-Part 5A Sections 431A-431U Regulation of financial advice and financial advice services (*see page 53 below*)

Sub-Part 5B Sections 431V-431ZH Regulation of client money or property services (*see page 61 below*)

Sub-Part 6 Additional Regulation of DIMs and related custodial services

- Sections 432-438 DIMS licences
- Sections 439-443 Related party transactions
- Sections 444-446 Broking and custodial services performed as part of a DIMS

Sub-Part 6A Regulating conduct of financial institutions

- Sections 446C-446D Fair conduct principle
- Sections 446E-446446F Key definitions
- Sections 446G-446J Fundamental duties to meet fair conduct principle
- Sections 446K-446M Duties relating to incentives regulations
- Sections 446N-448 Miscellaneous provisions

Sub - Part 7A Sections 448A – 448J Additional regulation of licences relating to financial benchmarks

Sub-Part 7 Sections 447-448 Holding of investor funds and property by derivatives issuers

Sub-Part 8 Section 449 Civil liability

CoFI CHANGES: *See changes noted below. See also the next sections on Part 6 - Sub-part 6A from page 62.*

What do I need to know?

- The FMA is guided by specific principles in issuing licences. The FMA must issue a licence that covers a market service or a class of market service if it is satisfied of various matters, including whether the

applicant's directors and senior managers are fit and proper persons, and whether those persons satisfy the eligibility criteria prescribed in regulations.
- Licences may cover one or more market services and may specify certain conditions.
- Licensees are subject to ongoing reporting and monitoring obligations. The FMA is given certain powers of interventions in the case of a breach of a market service obligation, material change in circumstances or the provision of false or misleading information.
- The following providers of market services must be licensed (section 388):
  - managers of registered schemes (other than a restricted scheme);
  - independent trustees of restricted schemes;
  - providers of DIMS (but not for wholesale clients, *see section 389(3)*);
  - derivatives issuers in respect of regulated offers of derivatives that are made by the derivatives issuer;
  - providers of a financial advice service to retail clients (but not if for wholesale clients only, *see section 389(2)*) (See section X of this roadmap for more); and
  - acting as a financial institution (see section X of this roadmap for more).
- In addition, a person may obtain a licence to act as a provider of prescribed intermediary services (e.g. peer-to-peer lending or crowd funding services) (section 390).

Licensing criteria and ongoing obligations

- Following consultation, the FMA has imposed eligibility criteria for obtaining and maintaining a licence. Several eligibility criteria are common across most categories of licensee, including:
  - a "fit and proper person" requirement for controlling owners of licensees;
  - a "capability" test, which requires licensees to have staff with a certain level of skill and experience relevant to the business of the licensee;
  - an "operational infrastructure" requirement, which includes requirements relating to fair dealing, investment selection, managing conflicts and IT systems;
  - "financial resources" requirements which include requirements relating to solvency, asset holdings, and professional indemnity insurance; and
  - "governance" requirements, such as having a reporting and governance framework covering all aspects of the business.
- The fit and proper person, capability and governance proposals are generally similar across the different kinds of licensee. Requirements in the areas of operational infrastructure and financial resources differ in some respects according to the service in question.
- The FMA has also imposed standard and specific licence conditions for the different kinds of licensee. These are additional to any conditions specified in regulations and are designed to support the obligations a licensee has under its licence.
- The FMA also has the ability to put specific conditions on licences for FAPs. FMA have also released a list of full conditions for full FAP licences. There are also conditions imposed under the FMC Regulations, which currently only includes a general reporting obligation (regulation 191 of the FMC Regulations).

MIS managers

- MIS managers of registered schemes are subject to additional conduct obligations under the FMCA, including duties of a fiduciary nature and a duty not to gain an improper advantage by using information gained as a result of being the manager.
- Operational infrastructure criteria by the FMA in relation to MIS managers include meeting a variety of minimum standards in relation to investment selection and investment monitoring.
- Eligibility criteria in relation to financial resources include:
  - positive net tangible assets;
  - an ability to pay debts as they fall due, and use of suitable forecasting mechanisms;
  - maintaining an appropriate level of liquid assets at all times, supported by use of suitable forecasting (excluding client funds and own investments in funds managed);
  - adequate and effective systems, policies, procedures and controls to monitor financial resources, liquidity and risks and reporting material changes to the FMA; and
  - an appropriate level of professional indemnity insurance to cover the risks of the market service – at a level suited to the nature, scale and complexity of the service.

- Requirements also apply in relation to fit and proper directors and senior managers, capability of people in key roles, governance, operational infrastructure, scheme formation, advertising and disclosure, selecting investments, monitoring performance, asset valuation, unit pricing, accounting/registry, custody, outsourcing, resources and technology, records, reporting and on-going compliance.

DIMS providers

- DIMS providers are subject to additional conduct obligations under the FMCA which include a professional standard of care, duties of a fiduciary nature, prohibitions on related party transactions and the requirement to hold investor money or property (that is not held directly by the investor) through a custodian.
- A DIMS provider is exempt from the licensing requirement under section 388(c) in respect of a service to the extent that the service is not provided to any retail clients; or the service is a prescribed exempt service.

Alternative models for capital raising and investment

- The FMA has used its power under Sub-Part 5 of Part 6 to licence prescribed intermediary services, to create useful alternative models to capital raising and investment.
- Getting an **equity crowd funding** licence allows a licensee to create a facility (usually via a website) by means of which offers of shares in a company can be made without Part 3 disclosure where the principal purpose of the facility is to facilitate the matching of companies who wish to raise funds with many investors who are seeking to invest relatively small amounts.
- Holding a **peer-to-peer lending** licence allows the licensee to provide a facility (again, usually via a website) by means of which offers of debt securities can be made (i.e. borrowers can look for loans) without making Part 3 disclosure where the principal purpose of the facility is to facilitate the matching of lenders with borrowers who are seeking loans for personal, charitable, or small business purposes.

Part 6 of the FMC Regulations - Licensing and other regulation of market services

What's covered?

Sets out matters relating to prescribed intermediary services, sets out procedural matters and conditions of licences, provides for exemptions from the DIMS licensing requirement, prescribes disclosure obligations for DIMS, sets out requirements regarding investor funds and property held by derivatives issuers and prescribed disclosure requirements for financial advice to retail clients and other requirements relating to financial advice and client money and property services

What do I need to know?

Licensing criteria and ongoing obligations

- The FMC Regulations add to the provisions already in the FMCA with:
  - general procedural requirements for the FMA granting licences, including a requirement to have regard to past regulatory actions, offences and penalties that would affect an assessment of the good character of controlling owners and other associated persons of the applicant;
  - general conditions applying to licences, including financial advice services covered by a licence (e.g. as to reporting requirements);
  - specific conditions applying to licensed independent trustees, DIMS providers, derivatives issuers and providers of crowd funding and peer-to-peer lending services;
  - powers for the FMA to impose conditions (in addition to those it may impose under the FMCA);
  - an exemption for temporary management of portfolios in situations of absence or incapacity or unexpected contingencies;
  - definitions of crowd funding and peer-to-peer lending services for licensing purposes;
  - additional eligibility criteria for crowd funding and peer-to-peer lending services;
  - disclosure requirements for providers of crowd funding and peer-to-peer lending services; and
  - implied terms and required contents of client agreements for crowd funding and peer-to-peer lending services.
- The FMC Regulations contain the provisions needed to enable the FMA to licence applicants for market services under the FMCA. The licensing regime has been designed to be risk-based, flexible and relatively "light" by international standards.

Peer-to-peer lending

- The FMC Regulations confirm that peer-to-peer lending services are a type of prescribed intermediary service.
- Under the FMC Regulations, a person (**A**) provides a peer-to-peer lending service if:
  - A provides a facility by means of which offers of debt securities are made; and
  - the principal purpose of the facility is to facilitate the matching of lenders with borrowers who are seeking loans for personal, charitable, or small business purposes.
- A peer-to-peer lending service also includes any broking services or ancillary financial product market services provided in the course of that service.
- Extensive eligibility criteria for peer-to-peer lending service providers are set out in the FMC Regulations.

Crowd funding

- The FMC Regulations confirm that crowd funding services are a second type of prescribed intermediary service.
- Under the FMC Regulations, a person (**A**) provides a crowd funding service if:
  - A provides a facility by means of which offers of shares in a company are made; and
  - the principal purpose of the facility is to facilitate the matching of companies who wish to raise funds with many investors who are seeking to invest relatively small amounts.
- A crowd funding service also includes any broking services or ancillary financial product market services provided in the course of that service.
- Extensive eligibility criteria for crowd funding platform providers are set out in the FMC Regulations.

For both peer-to-peer lending and crowd funding services

- In relation to both peer-to-peer lending and crowd funding services, the FMC Regulations also:
  - allow the FMA to impose conditions restricting the provider or its associated persons from using the service (or how they may use the service);
  - require a disclosure statement to be provided in relation to the provider and the service (the statement may incorporate website material, where the service is internet based);
  - require certain transaction information to be provided to service users; and
  - require users to enter into a client agreement (and require agreements to contain certain terms and imply certain further terms into agreements).
- Both peer-to-peer lending and crowd funding platforms are subject to limits on the amounts that can be raised via the platform – in both cases, the maximum amount that issuers are able to raise through prescribed intermediary services and the "small offers" exemption is $2 million during each twelve month period.

DIMS providers

- The FMC Regulations set out additional requirements for DIMS providers:
  - to keep documents and to give up documents on request;
  - to disclose if a service is wholesale;
  - to comply with additional conditions which may be imposed by the FMA in relation to the provision of financial advice and to permit custody of investor money and property by an associated person of the DIMS provider;
  - requiring DIMS client agreements to provide adequately for:
    - custody over assets;
    - the manner of exercise of rights relating to investor's assets (e.g. voting);
    - re-delivery of client assets on termination of a DIMS client agreement within a reasonable time, with appropriate treatment of wholesale assets;
    - how an investment authority may be changed; and
    - a right for the investor to terminate the client agreement without penalty within a reasonable notice period.
- The FMC Regulations exempt from the DIMS licensing requirements certain services, including, those provided by trustee corporations in relation to wills and estates, a Crown-related entity and certain non-profit organisations.
- Schedule 21 of the FMC Regulations sets out prescribed information to be included within the SDS and investment proposal in relation to DIMS.

Derivatives issuers

- The FMC Regulations provide for licensed derivatives issuers to:
  - maintain a minimum level and type of capital that the FMA considers is appropriate (unless the licensee is a registered bank, an NBDT or a licensed insurer i.e. already covered by adequate prudential regulation);
  - have systems or procedures for assessing the suitability of a derivative for a retail investor or class of retail investors and for preventing the issue of a derivative to a retail investor where the derivative is assessed as not suitable;
  - maintain and enforce limits on the extent to which a retail investor is permitted to be leveraged under a derivative issued by the licensee;
  - provide that the reconciliation of derivatives investor money held in trust can either be an equity-based reconciliation or a cash-based reconciliation; and
    - provide for ongoing confirmation information to investors at the end of the reporting period (no later than 10 working days after the expiry of the reporting period) to which the information relates.

Financial advice and financial advice services

- In relation to financial advice and financial advice services, the FMC Regulations also:
  - outlines the disclosure requirements when giving financial advice to retail clients, including, publicly available information, disclosures relating to the nature and scope of the advice, disclosures relating to the advice and disclosure relating to complaints information;
  - sets out the circumstances in which financial advice is not regulated financial advice;
  - requires record keeping in relation to NRs; and

- provides regulations in relation to custodians of financial products and holding client money or property.
- provides that FAPs can provide contingency DIMS without being subject to DIMS licensing requirements if they comply with prescribed requirements.
- prescribes the statement that lenders under consumer credit contracts must give to make clear to consumers if they are relying on the limited exclusion from the financial advice regime relating to lender responsibilities (regulation 229L).

Our experience

MinterEllisonRuddWatts can assist clients to obtain a MIS licence and has acted for clients in relation to DIMS and peer-to-peer lending licences, and frequently advises on derivative issuer and equity crowdfunding matters.

Presentations on financial services licensing and shining a light on DIMS

MinterEllisonRuddWatts has presented to its clients on 'Financial Services Licensing', 'Shining a light on DIMS' and 'Effective Governance for (financial advice) SMEs'. If you would like to obtain a free copy of the presentation slides or to find out more, please contact one of our experts.

Useful resources

FMA licensing guides and information:

For DIMS providers

Guide to applying for a DIMS licence

https://fma.govt.nz/assets/Licensing-guides/141101-dims-provider-how-do-i-apply-for-a-licence-part-b4.pdf

Quick guide to licence applications for small businesses providing DIMS

https://www.fma.govt.nz/assets/images/Brochures-and-reports/Quick-guide-to-licence-applications-for-small-businesses-providing-DIMS.PNG

Standard conditions for DIMS licenses

https://www.fma.govt.nz/assets/Compliance/160331-Standard-Conditions-for-DIMS-updated-March-2016.pdf

For FAPs

Guide to applying for a full FAP licence

https://www.fma.govt.nz/assets/Licensing-guides/Introductory-guide-to-full-licence-requirements.pdf

Classes of financial advice service for full FAP licences

https://www.fma.govt.nz/assets/Information-sheets/Classes-of-financial-advice-service-for-full-FAP-licences.pdf

Standard conditions for full FAP licences

https://www.fma.govt.nz/assets/Consultations/Standard-Conditions-for-full-FAP-licences.pdf

Who will need a licence to provide financial advice?

https://www.fma.govt.nz/assets/Fact-sheets/Who-will-need-a-licence-to-provide-financial-advice.pdf

For derivatives issuers

Guide to applying for a derivatives issuer licence

https://www.fma.govt.nz/assets/Licensing-guides/derivatives-issuers-how-do-i-apply-for-a-licence-part-b5.pdf**Standard conditions for licensed derivatives issuers**

https://www.fma.govt.nz/assets/Compliance/170503-Standard-Conditions-for-derivatives-issuers.pdf

For peer-to-peer lending

Guide to applying for a peer-to-peer lending services licence

https://www.fma.govt.nz/assets/Licensing-guides/141101-peer-to-peer-services-how-do-i-apply-for-a-licence-to-provide-part-b2.pdf

Standard conditions for peer-to-peer lending services licenses

https://www.fma.govt.nz/assets/Licensing-guides/160331-P2P-Standard-Conditions-updated-March-2016.pdf

For crowdfunding

Guide to applying for a crowdfunding licence

https://fma.govt.nz/assets/Licensing-guides/141101-crowd-funding-services-how-do-i-apply-for-licence-part-b1.pdf

Standard conditions for crowdfunding licenses

https://www.fma.govt.nz/assets/Guidance/Crowd-Funding-Standard-Conditions-updated-160601.pdf

For MIS managers

Guide to applying for a MIS manager licence

https://www.fma.govt.nz/assets/Licensing-guides/141101-how-do-i-apply-for-a-licence-part-b3.pdf

Standard conditions for MIS manager licenses

https://www.fma.govt.nz/assets/Compliance/160331-Standard-conditions-for-MIS.pdf

For independent trustees

Guide to applying for an individual trustee licence

https://fma.govt.nz/assets/Licensing-guides/141101-independent-trustee-how-do-i-apply-for-a-licence-part-b6.pdf (individual)

Standard conditions for independent trustees

https://www.fma.govt.nz/assets/Compliance/190823-Standard-conditions-for-independent-trustee-individuals.pdf (individual)

https://www.fma.govt.nz/assets/Compliance/190823-Standard-conditions-for-independent-trustee-corporates.pdf (corporate)

Part 6 (Subpart 5A) of the FMCA - Financial advice and financial advice services

What's covered?

Provides for the licensing and regulation of financial advice services.

Sections 431A-431T Additional regulation of financial advice and financial advice services

What do I need to know?

- Those providing a "regulated financial advice" to retail clients are required to be licensed as a FAP under the FMCA. *See the storyline on page 57 for what amounts to 'financial advice' and 'regulated financial advice'.*
- In order to hold a FAP licence, advisers need to provide evidence to demonstrate that they have the appropriate level of competence and procedures in place to demonstrate that they are a fit and proper person to be holding a FAP licence. Factors include demonstrating sufficient:
  - organisational capability;
  - operational infrastructure e.g. how you are practically communicating information and managing conflicts;
  - financial resources;
  - governance; and
  - culture and compliance arrangements.

Type of advisers

- **FAP** is the key status. They are firms (or sole traders) that require a licence from the FMA (or who are an authorised body under another person's licence) to provide financial advice services to retail clients. They may give advice directly, including through robo-advice and online channels, and may engage FA or NR to provide financial advice on the FAPs' behalf.

- **FAs** are individuals who must be engaged by or on behalf of a licensed FAP to give advice and must be individually registered on the Financial Service Providers Register (**FSPR**).

- **NRs** are individuals who must be engaged to give advice by or on behalf of a licensed FAP but who are not individually registered on the FSPR.

- **Sole traders:** A FAP can be an individual. However, it is unlikely this will often be the case, because of the advantages of trading through a company or limited partnership, e.g. the limited liability. For those adopting the sole trader model, the person would be personally responsible for complying with the relevant legislative duties and the Code, and for any FA or NR engaged by them (although in practice it may be difficult for a sole trader to have appropriate processes and limitations in place to appoint an NR).

Both FA and NR can potentially give advice on all types of financial product to any customer. The key differences between FA and NR relate to liability:

- FA are responsible for meeting their own compliance obligations - in tandem with the FAP - and may be disciplined for non-compliance with the Code. The licensed FAP which engages them has a limited exclusion for pecuniary penalties if it can show that it took all reasonable steps to ensure the adviser complied with their duties.

- NR do not have personal legal responsibility under the FMCA. Instead, the relevant FAP is required to have in place processes and controls appropriate to the types of advice NR give and the FAP is responsible for the NR's compliance with conduct and disclosure duties when advice is given by the NR on the FAP's behalf.

It follows that a FAP will need to exert a higher level of control (via systems, controls and processes) over the activities of their NR and may be willing to give FAs a higher level of autonomy. However, given that the FAP will be potentially liable for failures by either the FA or NR engaged by them, and the reputational risks, the FAP is likely to supervise the activities of both.

FAPs are also subject to additional conduct obligations under the FMCA, including duties on persons giving regulated financial advice such as meeting standards of competence, giving priority to client's interests, exercising care, diligence and skill and complying with the Code.

Licensing

- A provider of financial advice services to retail clients will either need to hold, or be engaged by a firm that holds, a licence as a FAP. Any person (who does not hold and is not engaged by a firm who holds a transitional licence) providing a financial advice service to retail clients, will either need to apply for and receive, or be engaged by a firm that holds, a full licence as a FAP.

The FMA has published guidance indicating that there will be 3 categories of full licence with different requirements. *Please see the table below*.

Class of licence	What does it cover?	How can financial advice be provided?	What does this mean in practice?
Class 1	The service of the licence holder providing regulated financial advice to retail clients.	▪ On the licence holder's own account; and/or ▪ Through a sole adviser practice structure.	Providing advice as a sole adviser business (whether incorporated or unincorporated). It does not permit the use of interposed persons, authorised bodies, multiple FAs, or NRs.
Class 2	The service of a FAP (whether the licence holder or any authorised body) providing regulated financial advice to retail clients.	▪ On the FAPs own account; and/or ▪ Through one or more FAs.	Permits the licence holder and any authorised bodies to engage any number of financial advisers, but it does not allow the licence holder or any authorised bodies to engage NRs.
Class 3	The service of providing regulated financial advice to retail clients.	▪ In any manner, subject to the limitations in the FMCA.	Permits the licence holder and any authorised bodies to engage any number of NRs, along with any other type of structure permitted by the FMCA and not covered by licence Class 1 or 2.

Adviser Conduct

There are conduct duties on persons who give regulated financial advice to clients (whether they are retail or wholesale).

All (retail and wholesale clients)	Retail clients
Priority to client's interests.	Meet standards of competence, knowledge and skill.
Exercise care, diligence and skill.	Ensure client understands nature and scope of advice.
Not to recommend contravening product.	Comply with the Code: ▪ Treat clients fairly; ▪ Act with integrity; ▪ Give financial advice that is suitable; ▪ Ensure client understands the advice; and ▪ Protect client information.
Make available prescribed information (currently prescribed disclosure for retail clients only).	
No false or misleading information (Part 2 of the FMCA).	

Code of Professional Conduct for Financial Advice Services (Code)

- A FAP may be civilly liable for breaches of the Code by the FAP, both for advice given directly by them, and for advice given by FAs and NRs who act on the FAP's behalf. FAs who breach obligations under the Code are themselves subject to disciplinary action for breaches. NRs are themselves not civilly liable under the Code, but breaches may be contrary to their terms of engagement with their FAP.

- A copy of the Code can be found here: https://financialadvicecode.govt.nz/wp-content/uploads/2025/10/financial-advice-code-of-conduct-2025.pdf

Disclosure Regulations

- The FMC Regulations specify the disclosure requirements that will apply in the financial advice regime. Anyone who gives regulated financial advice to a retail client will be required to disclose information regarding:
    - the licence they hold and certain duties that they are subject to;
    - the types of financial advice products they can advise on, and any limitations on the advice;
    - the applicable fees and costs associated with the advice;
    - the commissions, incentives and other conflicts of interests that could impact the advice;
    - the complaints handling and dispute resolution process;
    - any previous disciplinary history, and certain criminal convictions or civil proceedings; and
    - in the case of FAs, bankruptcy proceedings within four years of the date of discharge.
- Different sets of disclosure information must be provided:
    - publicly on a website or (if the provider doesn't have a website) on request;
    - to the client when the nature and scope of advice to be given becomes known;
    - to the client when the advice is given; and
    - if a complaint is received.
- The table on page 59 indicates what is required to be disclosed and when.
- It is important to have the correct operational infrastructure in place to decide **when** and **how** it is best to provide disclosure to the customer depending on what they need to know to make an informed decision.

Licensing fees and the FMA levy

- There are FMA levies that must be paid by FAPs and authorised bodies which can be found in the Financial Markets Authority (Levies) Regulations 2012.There are licensing fees for a FAP licence which can be found under the Financial Markets Conduct (Fees) Regulations 2014.

Exemptions and authorisations

- The FMA supports exception for Australian licensees – the Australian licensees notice, that exempts Australian-regulated licensed financial services firms providing financial advice services in New Zealand in limited circumstances (Financial Markets Conduct (Australian Licensees) Exemption Notice 2020).
- The FMA has confirmed that it will recognise that individual Australian advisers demonstrate the competence, knowledge and skill standards set by the Code if they hold certain Australian adviser qualifications, and is set to confirm this in a statement on the FMA website.

Table: What is 'financial advice' and 'regulated financial advice'?

Does the statement amount to 'financial advice'?

A person gives 'financial advice' under the FMCA if the person:

(a) *makes a recommendation or gives an opinion about acquiring or disposing of (or not acquiring or disposing of) a financial advice product*; or
(b) makes a recommendation or gives an opinion about switching funds within a managed investment scheme; or
(c) designs an investment plan for a person that—
  (i) purports to be based on—
    (A) an analysis of the person's current and future overall financial situation (including investment needs); and
    (B) the identification of the person's investment goals; and
  (ii) includes 1 or more recommendations or opinions on how to realise 1 or more of those goals; or
(d) provides financial planning of a kind prescribed by the regulations.

***Hot Tip**: References to making recommendations and giving opinions can include implicit recommendations or opinions – as is common in promotional material. So, any statement that explicitly or implicitly highlight the merits of a particular financial advice product (or products of a particular issuer) or compare it favourably to alternatives may prima facie be 'financial advice'.*

BUT: a person does not give 'financial advice' merely by doing 1 or more of the things set out in clause 7 of Schedule 5 of the FMCA - see page 87 for more detail, but in summary these are:

(a) providing factual information:
(b) carrying out an instruction:
(c) making a recommendation or giving an opinion about a kind of financial advice product in general:
(d) recommending that a person obtain financial advice:
(e) passing on financial advice given by another person:
(f) giving or making available documents regulated under other regimes:
(g) carrying out a prescribed activity.

YES

NO

Statement does not amount to 'financial advice' and therefore does not come within Subpart 5A of Part 6 of the FMCA.

Is the financial advice 'regulated financial advice'?

Financial advice is 'regulated financial advice' under the FMCA if:

(a) it is given in the ordinary course of a business; and
(b) it is not excluded under any of clauses 8 to 18 of Schedule 5 of the FMCA – see pages 87-88 for more detail on these exclusions, but in summary these relate to:

- ancillary services and other occupations.
- the provision of credit by a business not providing a financial service.
- compliance with responsible lender obligations.
- specific types of organisations/entities.
- workplace financial products.
- advice given to product providers.
- activities governed by other regulatory frameworks.
- prescribed circumstances.
- any controlling owner, director, employee, agent etc of a person to whom one of the exclusions outlined above apply.

YES

NO

Statement amounts to 'regulated financial advice' coming within Subpart 5A of Part 6 of the FMCA. Subpart 5A imposes conduct duties on persons who give regulated financial advice to clients (whether the clients are retail or wholesale). See the table on page 55 for more details on these duties.

Statement amounts to 'financial advice' but does not amount to 'regulated financial advice' and does not fall within Subpart 5A of Part 6 of the FMCA.

Storyline - What are the principal requirements for a financial advice provider (FAP)?

A FAP providing regulated financial advice to retail clients is required to be licensed under the FMCA, registered on the FSP Act, including being a member of an approved dispute resolution scheme, and ensure any FA and NR who acts on their behalf complies with the Code and complies with their duties and obligations under the FMCA

A FAP providing regulated financial advice to retail clients is required to be licensed under the FMCA

- A FAP will need to be licensed as a FAP under the FMCA if it provides regulated financial advice to retail customers. A licence is not required if it only provides financial advice to wholesale clients.

A FAP providing regulated financial advice to retail clients is required to be registered under the FSP Act

- A FAP must be registered as a financial service provider on the FSPR.
- A FAP will need to be a member of an approved dispute resolution scheme.

A FAP providing regulated financial advice to retail clients is required to ensure any FA and NR who acts on their behalf complies with the Code

- FAPs may be civilly liable for FA and NR who act on their behalf and breach the Code.

A FAP providing regulated financial advice to retail clients is required to comply with their duties and obligations under the FMCA

- All FAPs will need to comply with duties and obligations under the FMCA. FAPs providing only wholesale advice will still have some duties but not as many as those providing retail advice (*see storyline on page 57 for list of relevant duties*).
- FAPs will also need to comply with fair dealing requirements under Part 2 of the FMCA.

Storyline - How can financial advisers (FAs), nominated representatives (NRs) and financial advice providers (FAPs) satisfy their competence requirements in the Code?

Those who provide regulated financial advice to retail clients* need to comply with the Code. In addition to the Ethical Behaviour, Conduct, and Client Care standards under Part 1 of the Code, FA, NR and FAPs need to satisfy the Competence, Knowledge, and Skill standards under Part 2 of the Code. These include having general competence, knowledge and skill, having particular competence, knowledge, and skill for designing an investment plan and for product advice, and keeping competence, knowledge, and skills up-to-date

Those who provide regulated financial advice to retail clients need to comply with Ethical Behaviour, Conduct, and Client Care standards under Part 1 of the Code

The standards under Part 1 include:

- treat clients fairly.
- act with integrity.
- give financial advice that is suitable.
- ensure that the client understands the financial advice.
- protect client information.

Those who provide regulated financial advice to retail clients need to have general competence, knowledge and skill

- General competence can be demonstrated through specific qualifications, or by objective, measurable and independently-verifiable reference to an alternative qualification or experience.

Those who provide regulated financial advice to retail clients need to have particular competence, knowledge, and skill for designing an investment plan

- This particular competence can be demonstrated in the same ways as general competence is demonstrated (*see column to the left*).
- This is an interim standard, with future consultation intended to determine whether higher qualifications should be required.

Those who provide regulated financial advice to retail clients need to have particular competence, knowledge, and skill for product advice

A person must not give financial advice that includes a recommendation or opinion about acquiring or disposing of a financial advice product, or switching funds within a managed investment scheme unless:

- the person holds level 5 standard of NZCFS; or
- the person holds level 5 equivalence.

Those who provide regulated financial advice to retail clients need to keep competence, knowledge, and skills up-to-date

- Entities must, at least annually, review their procedures, systems and expertise to ensure they maintain the capabilities for the financial advice they give.
- The details for this are expected to be specified by relevant industry groups.

* The Code does not apply in respect of giving advice to wholesale clients.

Table - What needs to be disclosed and when by licensed financial advice providers (FAPs)?

Type of disclosure	Publicly available	General nature and scope	Financial advice given	Receipt of complaint
Licensing status and conditions	✔			
Nature and scope of financial advice service	✔	✔		
Reliability history		✔		
Identifying information (FAs)		✔		
Fees, expenses, or other amounts payable	✔	✔	✔ (to the extent not already given in nature and scope disclosure)	
Conflicts of interest, including commissions or other incentives	✔	✔	✔ (to the extent not already given in nature and scope disclosure)	
Complaints procedure and dispute resolution process	✔		✔	✔
Duties information	✔		✔	

Useful resources

FMA guidance

A guide to talking about money online

https://www.fma.govt.nz/library/articles/a-guide-to-talking-about-money-online/

Guidance note: Financial Markets Conduct (Australian Licensees) Exemption Notice 2020

https://www.fma.govt.nz/assets/Guidance/Australian-Licensees-Exemption-Notice-guidance.pdf

Part 6 (Subpart 5B) of the FMCA - Client money and property services

What's covered?

Provides for the licensing and regulation of client money or property services.
Sections 431V-431ZH Regulation of client money or property services

What do I need to know?

- Client money or property service providers are subject to additional obligations under the FMCA including a requirement to be registered under the FSP Act, disclose information to retail clients, exercise care, diligence and skill, as well as obligations on how to handle client money such as holding client money or property on trust.
- A **client money or property service:**
  - is the receipt of client money or client property by a person and the holding, payment, or transfer of that client money or client property; and
  - includes a custodial service.
- A **custodial service** is the holding of client money or client property by a person (**A**) in trust for, or on behalf of, a client (**C**), or another person nominated by C, under an agreement between A and C or between A and another person with whom C has an agreement (whether or not there are also other parties to the agreement).
- The mere transmission of a non-transferable instrument payable to another person is not a client money or property service.
- A client money or property service is a regulated client money or property service if it is not excluded under any of clauses 19 to 23 of Schedule 5.
- **Client money** means money:
  - received in connection with acquiring, holding, or disposing of a financial advice product or otherwise in connection with a financial advice product; and
  - received from, or on account of, a client by a person (**A**) (and not on A's own account).
- **Client property** means property (other than money) to which the following apply:
  - the property is a financial advice product, is a beneficial interest in a financial advice product, or is received in connection with a financial advice product; and
  - the property is received from, or on account of, the client by a person (**A**) (and not on A's own account).
- The FMA supports exception for:
  - **Overseas custodians** – the assurance engagement notice, that exempts overseas custodians who hold client money or client property relating to an FMCA financial product from the requirement to get an assurance engagement with a New Zealand auditor (Financial Markets Conduct (Overseas Providers of Custodial Services – Assurance Engagement) Exemption Notice 2025).

Custodian regulations

The Financial Markets Conduct Amendment Regulations 2020 (**FMC Amendment Regulations**) sets out requirements for custodians under the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014 (as amended). The provisions include:

- clarifying when assurance reports for assurance engagements must be obtained by custodians;
- prescribing requirements for providers of custodial services that relate to financial products. These requirements include duties to provide information to clients, to reconcile records of client money and property, and to obtain assurance engagements.
- clarifying that a custodian that holds scheme property under sections 156 to 160 (custodianship of scheme property) of the FMCA is not providing a regulated client money or property service.

- **Wholesale clients**
  - Regulation 229W expands the application of sections 431ZC to 431ZH of the Act (obligations for handling client money and client property) to custodial services provided by a custodian to wholesale client, unless solely for completing a transaction, securing an obligation, or both. However, note the definition of wholesale client is narrower (regulation 229W(2)).

Part 6 (Subpart 6A) of the FMCA - Regulating conduct of financial institutions

What's covered?

Provides a regime for conduct licensing and regulation of consumer banking and consumer insurance. It does this by requiring specified financial institutions to establish, implement, and maintain fair conduct programmes (**FCP**) that comply with the fair conduct principle. Those Financial institutions and their intermediaries are also required to comply with the incentive restrictions, which prohibit certain incentives based on volume or value of products or services.

Sections 446A-446B Overview and territorial scope of subpart

Sections 446C-446D Fair conduct principle

Sections 446E-446F Key definitions

Sections 446G-446J Fundamental duties to meet fair conduct principle

Sections 446K-446M Duties relating to incentives regulations

Sections 446N-446W Miscellaneous provisions

What do I need to know?

- The FM(CoF)AA inserted a new subpart 6A of Part 6 of the FMCA, establishing the CoFI regime.
- The CoFI regime is a legal framework requiring financial institutions to:
  - be licensed by the FMA in respect of their conduct towards consumers;
  - comply with the fair conduct principle to treat consumers fairly, through the requirement for financial institutions to establish, maintain and implement an FCP;
  - take all reasonable steps to comply with its FCP; and
  - comply with regulations that ban target-based sales incentives and regulate other types of incentives.

Who is a financial institution?

- For the purposes of this part, a person is a financial institution if it:
  - is a registered bank, licensed insurer, or a licensed NBDT; and
  - is in the business of providing one or more of the following services:
    - acting as an insurer;
    - being a creditor under a consumer credit contract (which is defined by reference to the CCCFA);
    - providing a retail financial service referred to in section 5(1)(a), (ab), (d), (f) to (ia), (ib)(i) to (v), or (ic) to (l) of the FSP Act; or
    - acting as an intermediary for any of the services above.

- Insurer means a person who carries on insurance business in New Zealand and enters into any one or more of the following with a New Zealand policy holder:
  - a consumer contract of insurance, i.e. insurance entered into for person, domestic or household purposes; or
  - a contract for life or health insurance, regardless of the purpose for which it is entered into.

Fair conduct principle

- Section 446C sets out the fair conduct principle, which is a requirement to treat customers fairly.
- The requirement to treat consumers fairly includes:
  - paying due regard to consumers' interests;
  - acting ethically, transparently and in good faith;
  - assisting consumers to make informed decisions;
  - ensuring that relevant services and products are likely to meet the requirements and objectives of consumers; and
  - not subjecting consumers to unfair pressure or undue influence.

- A financial institution must apply the fair conduct principle when it is:
  - designing any relevant service or associated product;
  - offering to provide and providing a relevant service or associated product to a consumer; and
  - has any dealings or interactions with a consumer in connection with any relevant service or associated product (for example, responding to a complaint or handling a claim under an insurance contract).

Fair Conduct Programme

- Section 446G sets out the duty to establish, implement, and maintain effective fair conduct programme (**FCP**).
- Section 446I requires financial institutions to comply with their FCP.

A fair conduct programme means policies, processes, systems, and controls that are designed to ensure the financial institution's compliance with the fair conduct principle (section 446G(3))

*In considering what policies, processes, systems, and controls are effective for the purposes of [section 446(1)], the financial institution **must have regard to**:*

- The nature, size and complexity of FIs business
- Relevant services and products FI offers and the methods it provides those
- Types of customers FI deals with including vulnerable customers

Types of intermediaries involved and agents engaged

*The fair conduct programme must be **in writing** and include effective policies, processes, systems, and controls to (section 446J):*

- Enable FI to meet obligations to consumers
- Design and manage a provision of services and products to consumers
- Identify and monitor risks associated with conduct that fails to comply with FCP
- Identify conduct that fails to comply
- Require FI's employees and agents to comply with procedures/processes
- Require and check on training
- Manage and supervise employees to ensure they are supporting compliance with FCP
- Design and manage incentives to avoid adverse effects
- Communications about relevant services
- Methods for regularly reviewing and identifying deficiencies
- Ensure deficiencies are remedied

Incentives

- Every financial institution (section 446K) and intermediary that offers or gives an incentive to any of its employees or agents or to another intermediary in connection with the provision of a financial institution's relevant services or associated products (section 446L), must comply with the incentive regulations made under section 546(1)(og) of the FMC Regulations (See Part 6 (Subpart 5) of the FMC Regulations below).
- Section 446M states that an incentive, in relation to a relevant service or any associated product, means a commission, benefit, or other incentive (whether monetary or non-monetary and whether direct or indirect) that is offered or given to a person (A) if—

  (a) the commission, benefit, or other incentive is offered or given to A in connection with A (directly or indirectly) being involved in the provision of the service or the products; and

  (b) A's entitlement to the commission, benefit, or other incentive, or the nature or value of the commission, benefit, or other incentive, is determined or calculated in any way by reference (directly or indirectly) to the volume or value of the services or products.

Intermediaries

- Intermediaries, who are third parties involved in the sale or distribution of a financial institutions' products or services to consumers, will also have obligations under CoFI.
- Someone is an intermediary if they (section 446Q):

- "**Involved"** in providing a relevant service to a consumer;
- Paid or provided **commission/consideration** in connection with the involvement; and
- The commission/consideration is **paid or provided (directly or indirectly) by or on behalf of the financial institution** that provided the service or if the intermediary is a financial institution itself, then by another financial institution, or by another person who is an intermediary in relation to the service or product.
    - Under the FMCA, every intermediary that offers or gives an incentive to any of its employees or agents or to another intermediary in connection with the provision of relevant services or associated products must comply with the incentives regulations (section 446L).

Useful resources

FMA Financial institution licensing FAQs

https://www.fma.govt.nz/business/services/financial-institutions/financial-institution-licensing-faqs/

https://www.fma.govt.nz/assets/Guidance/CoFI-intermediated-distribution-guidance.pdf

Part 6 (Subpart 5) of the FMC Regulations – Conduct of Financial Institutions (incentives)

What's covered?

Regulations 237D to 237H prescribe matters for the purposes of sections 446K and 446L of the Act, which require financial institutions and their intermediaries to comply with regulations relating to incentives.

What do I need to know?

The prohibitions can apply directly to brokers, financial advisers and insurance intermediaries, who are not otherwise in the conduct of financial institutions regime.

What is a prohibited incentive: An incentive is prohibited if a person's entitlement to it, or its nature or value, is determined or calculated in any way by a direct reference to a target or other threshold that relates to the volume or value of relevant services or associated products.

For example, an employee of a life insurer offered a $1,000 bonus for selling at least 100 life policies in a 3-month period would be a prohibited incentive because the employee's entitlement to the bonus is determined by way of a direct reference to a sales target.

When are incentive not prohibited: There are three main exceptions where an incentive is not prohibited:

1. Linear basis exception: An incentive is allowed if it is calculated on a simple per-service or per-product basis and does not depend on any sales target or threshold. (*Example: A fixed 5% commission on each insurance policy sold*.)
2. Wholesale clients only exception: An incentive is allowed if it is based on targets or thresholds that relate only to services or products provided to wholesale clients, and not to retail clients.
3. Financial advice provider exception: An incentive is allowed if a financial advice provider (not a financial institution) gives it to an employee, calculated on a linear basis and linked to only one target or threshold, and the employee also receives a base salary.

Useful Resources:

https://www.fma.govt.nz/business/services/financial-institutions/sales-incentive-faqs/

Part 7 of the FMCA – Financial reporting

What's covered?

Requires issuers to keep proper accounting records and have the issuer's financial statements audited.

Sections 450-454 Overview, application, interpretation

Sections 455-459 Accounting records

Sections 460-461H Preparation, audit and lodgement of financial statements

Section 461I Offence

Sections 461J–461L FMC Reporting entities with higher public accountability

Section 461M Civil liability

What do I need to know?

- The Financial Reporting Act 2013 (**FRA 2013**) and the Financial Reporting (Amendments to Other Enactments) Act 2013 (**FRAOEA**) came into effect on 1 April 2014. The FRAOEA inserted a new Part 7 into the FMCA, which itself came into effect on the same date under the Phase 1 Commencement Order.
- The FRA 2013 regime moved substantive reporting requirements and related enforcement provisions into sector, industry, and entity-specific Acts. Consistent with this model, the substantive reporting requirements for issuers and other financial markets participants moved from the Financial Reporting Act 1993 into the FMCA.
- Transitional provisions apply to provide that changes apply only in relation to accounting periods that commenced on or after 1 April 2014 (or 1 April 2015 in the case of charitable entities).
- Part 7 of the FMCA, as amended by the FRAOEA, applies to entities defined as FMC reporting entities. This includes:
  - every person who is an issuer of a regulated product (other than certain companies that have fewer than 50 shareholders or parcels of shares that are voting products) – for this purpose, the FMCA defines a regulated product as a financial product offered under a regulated offer or an interest in a registered MIS (whether or not there has been a regulated offer);
  - every person who holds a licence under Part 6 (other than an independent trustee of a restricted superannuation scheme);
  - every licensed supervisor;
  - every listed issuer;
  - every operator of a licensed market (other than a licensed overseas-regulated market);
  - every recipient of money from a conduit issuer;
  - every registered bank;
  - every licensed insurer;
  - every credit union;
  - every building society; and
  - every person that is an FMC reporting entity according to regulations.
- FMC reporting entities must keep proper accounting records, make them available for inspection, prepare financial statements or group financial statements, have them audited, and lodge them with the Registrar of Financial Service Providers. The financial reporting requirements will be subject to the enforcement and liability regime in the FMCA. A contravention may give rise to a civil remedy under subpart 3 of Part 8, including a pecuniary penalty. In addition, both the FMC reporting entity and its directors may be liable for an offence for knowingly failing to comply with financial reporting standards.
- The FMA can impose a stop order, or make a direction order, where material is false or misleading or likely to confuse, contains any material misdirection or material error or does not comply with the FMCA or regulations.
- The FMA can grant exemptions under the FMCA in respect of the new requirements.
- The time frame for preparing financial statements is 4 months after the balance date to ensure timely reporting.

- An FMC reporting entity that is a parent will only be required to prepare group financial statements (rather than both parent financial statements and group financial statements under the Financial Reporting Act 1993).
- Accounting records required to be kept must be kept for at least 7 years.
- An FMC reporting entity must make the accounting records available for inspection without charge to directors of the FMC reporting entity, any supervisor, the FMA and any other persons authorised or permitted by an enactment to inspect the accounting records.
- A manager of MIS will become an FMC reporting entity when it becomes licensed under the FMCA. This is an issue to consider when deciding when to seek a licence.

Part 7 of the FMC Regulations – Financial reporting

What's covered?

Sets out when an entity relying on the small offers exclusion in Schedule 1 of the FMCA will be an FMC reporting entity, and prescribes offers made under the small offers exclusion for the purposes of the definition of "recipient of money from a conduit issuer".

What do I need to know?

- An entity that is offering under the "small offers" exception will be an FMC reporting entity if it has 50 or more shareholders and 50 or more parcels of shares (regulation 251).
- An entity will be a recipient of money from a conduit issuer for the purposes of section 453(b)(ii) of the FMCA where the offer is made under the "small offers" exception by an entity that is an FMC reporting entity as a result of regulation 251 or will be an FMC reporting entity as a result of regulation 251 after the issue or transfer of voting products under the offer.

Useful resources

FMA guidance: https://www.fma.govt.nz/compliance/guidance-library/faqs/

Part 7A of the FMCA – Climate-related disclosures for certain FMC reporting entities with higher level of public accountability

What's covered?

Requires certain FMC reporting entities with higher level of public accountability (climate reporting entities) to prepare and lodge mandatory climate-related disclosures, have certain parts audited and keep proper records.

Sections 461N-461U Overview, application, and interpretation

Sections 461V-461Y CRD records

Sections 461Z-461ZG Preparation of climate statements

Sections 461ZH-461ZHE Assurance engagements

Sections 461ZI-461ZJ Lodgement of climate statements

Section 461ZK Civil liability for certain contraventions of this Part

2025 Capital Markets Reforms: *As at December 2025, Cabinet has agreed to make changes to the CRD regime as part of a broader suite of changes to New Zealand's capital markets. The adjustments intend to lift the mandatory climate reporting threshold for listed issuers from $60 million market capitalisation to $1 billion, remove managed investment schemes as CREs, and adjust director and company liability settings to reduce unnecessary risk and cost while preserving robust climate disclosures.*

What do I need to know?

- The FS(CRD)AA amended the Financial Reporting Act 2013 and inserted a new Part 7A of the FMCA, establishing the climate-related disclosures (**CRD**) regime.

- The CRD regime requires mandatory climate reporting from climate reporting entities (**CREs**) in respect of reporting periods starting on and from 1 January 2023.
- Under section 461O, CREs include:
  - large NZX-listed issuers of quoted equity securities or quoted debt securities;
  - large registered banks, licenced insurers, credit unions and building societies; and
  - large licensed managers of registered managed investment schemes.

- Key obligations of CREs:

Prepare climate statements – under the climate-related disclosure framework for reporting periods from 1 January 2023 (section 461Z)

Obtain an assurance engagement (to the extent any statements are required to disclose greenhouse gas emissions) from 27 October 2024 (Section 461ZH)

Lodge statements within 4 months from balance date (section 461ZI)

Keep proper records relating to their obligations to make 9(climate-related disclosures (section 461V)

- The Financial Reporting Act 2013 states that the purpose of NZ CS is to provide for, or promote, CRD in order to:

- encourage entities to routinely consider the short-, medium-, and long-term risks and opportunities that climate change presents for the activities of the entity or the entity's group;
- enable entities to show how they are considering those risks and opportunities; and
- enable investors and other stakeholders to assess the merits of how entities are considering those risks and opportunities.

- The required content of climate statements is detailed across the Aotearoa New Zealand Climate Standards (**NZ CS**) published by the External Reporting Board (**XRB**):
  - NZ CS 1 sets out the specific disclosure requirements for the content of the climate statements, structured around four thematic areas: governance, strategy, risk management, and metrics and targets;
  - NZ CS 2 sets out relief provisions from specific disclosure requirements under NZ CS 1 in recognition that implementing good quality standards will take time; and
  - NZ CS 3 sets out the principles and general considerations which climate statements must abide by, including fair presentation and materiality.
  - The requirements are based on the recommendations of the Taskforce on Climate-related Financial Disclosures. This internationally recognised framework is designed to help companies consistently report climate-related risk and opportunities to investors and other stakeholders, focusing on four core areas:
    - Governance
    - Strategy
    - Risk management
    - Metric and targets.

Useful resources

FMA CRD regime: What you need to know

https://www.fma.govt.nz/assets/Guidance/CRD-What-you-need-to-know.pdf

XRB Aotearoa New Zealand Climate Standards

https://www.xrb.govt.nz/standards/climate-related-disclosures/aotearoa-new-zealand-climate-standards/

Companies Office CRD Register

https://www.companiesoffice.govt.nz/all-registers/climate-related-disclosures/

MBIE Mandatory climate-related disclosures

https://www.mbie.govt.nz/business-and-employment/business/regulating-entities/mandatory-climate-related-disclosures

Part 7A of the FMC Regulations - Climate-related disclosures for certain FMC reporting entities with higher level of public accountability

What's covered?

Sets out record keeping requirements of CRD records, including the manner in which CRD records must be made available for inspection, and prescribes CRD Register requirements, such as the information about CREs that must be contained on the CRD Register.

What do I need to know?

- Under regulations 252A to 252C, CRD records must be readily identifiable and comprehensive, kept in English or te reo Māori, and must be available for inspection within 5 working days after a CRE receives a written notice of intention to inspect its CRD records.
- Regulations 252D to 252F prescribe the information about CREs required to be on the CRD Register and what searches can be made on the CRD Register. Copies of climate statements or group climate statements must be available on the CRD Register.

Part 8 of the FMCA - Enforcement, liability and appeals

What's covered?

Sets out the liability regime under the FMCA, the various enforcement powers of the FMA and the High Court and the procedure for making appeals.

Sections 462-479 FMA's enforcement powers

Sections 480-483 High Court's enforcement powers

Sections 484-498 Civil liabilities

Sections 499-508 Defences

Sections 510-512 Criminal offences

Sections 513-516 Infringement notices

Sections 517-521 Management bans

Sections 526-530 Indemnities and insurance

Sections 531-532C Appeals

Sections 533-536 Accessory and director liability

Sections 537-542 Procedure, orders

What do I need to know?

- The enforcement and liability regime for Phase 1 came into effect on 1 April 2014. For other matters, the key date was 1 December 2014, subject to the transitional provisions in Schedule 4.
- The FMCA includes all relevant liability provisions, and by provides for an escalating hierarchy of liability.
- The FMA has power to make stop orders to prohibit further action in respect of offers of financial products that are likely to deceive, mislead, or confuse, contain any material misdescription or material error or any material matter that is not clearly legible, and other contraventions of the FMCA whether or not the person has previously contravened the provision and whether or not there is an imminent danger of substantial damage to any person.
- A person cannot be ordered to pay a pecuniary penalty, or be liable for a fine, under the FMCA and be liable for a fine under the FTA, the Credit Contracts and Consumer Finance Act 2003, or the FSP Act for the same conduct.
- The FMCA introduces an infringement notice regime for minor compliance-type contraventions. The FMC Regulations set out initial infringement fee levels.
- The FMCA places an increased emphasis on civil liability for contraventions of the regime, including the ability of the FMA to apply to the High Court for a civil pecuniary penalty in a wide variety of circumstances.
- Serious criminal offences that include the possibility of imprisonment are targeted at egregious violations of the law, such as where the conduct in question involved knowledge or recklessness.
- Directors are liable for civil pecuniary penalties and to compensate investors that lose money if they fail to perform their duties, but are not liable to imprisonment where there is no element of fault.
- A new term "involvement in a contravention" is used to refer to the behaviour of accessories in the civil context. This potentially expands the liability net to include at least senior management as well as directors.
- There is a general defence for contravention if the person's contravention was due to reasonable reliance on information supplied by another person, or, that the contravention was due to the act or default of another person and the contravener took reasonable precautions and exercised due diligence to avoid the contravention.
- In respect of defective disclosure, an investor must be treated as suffering loss unless the decline in value of the investment is shown to have been caused by a matter other than the defect. This allows an investor to more readily obtain compensation.
- Appeals are able to be made to the High Court against certain licensing decisions of the FMA under Part 6 and for questions of law against certain other decisions of the FMA.
- Appeals may be made to the District Court against a decision of the disciplinary committee to take any action referred to in clause 46 of Schedule against the person.

Part 8 of the FMC Regulations - Enforcement, liability and appeals

What's covered?

Sets out the exclusion of providing credit from the definition of financial service for the purposes of the definition of restricted communication, sets out the infringement fee for an infringement offence, and provides for the procedure for issuing an infringement notice.

What do I need to know?

- The FMC Regulations declare that the service of being a creditor under a credit contract is not a financial service for the purposes of section 464 of the FMCA.
- Under regulation 254, the infringement fees for infringement offences are specified in Schedule 22 of the FMC Regulations.
- Under regulation 255, an infringement notice under section 514(1) of the FMCA and a reminder notice under section 515(4) of the FMCA must be in the prescribed forms set out in Schedules 23 and 24 of the FMC Regulations respectively.

Part 9 of the FMCA – Regulations, transitional and miscellaneous provisions

What's covered?

Provides for regulations to be made for the purposes of the FMCA and empowers the FMA to grant exemptions from substantive parts of the FMCA, provides frameworks or methodologies relating to detailed or technical matters.

Sections 543-555 Regulations

Sections 556-561A Exemptions

Sections 562-566 Designations

Sections 567-569 Frameworks and methodologies

Sections 573-594 Recognition regimes

Sections 595-596 Miscellaneous

What do I need to know?

- The FMA is empowered to grant exemptions from the substantive parts of the FMCA, various transitional provisions, and the FMC Regulations. The FMA can only exercise this power if:
  - the exemption is necessary or desirable in order to promote the purposes of the FMCA; and
  - the exemption is not broader than necessary.
- Subpart 3 gives the regime some flexibility to deal with complex financial instruments and arrangements by giving the FMA the power to:
  - declare that a security that would not otherwise be a financial product is a financial product of a particular kind;
  - move a financial product of a particular kind between categories;
  - declare that an offer that would not otherwise require disclosure, requires disclosure;
  - declare that exemptions from certain obligations do not apply;
  - declare that a person or class of persons that would otherwise be a wholesale investor or a wholesale client is, or is to become, a retail investor or a retail client;
  - declare that advice is or is not financial advice and is or is not regulated financial advice;
  - declare that a service is or is not a financial advice service; and
  - declare that a person, service, or conduct not be exempt under any exemption that would otherwise apply under the exemption for financial advice services (section 389(2)) and the exemption for DIMS (section 389(3)) and accordingly the licensing requirement under the FMCA applies.

Part 9 of the FMC Regulations – Mutual recognition, interest rates and other miscellaneous provisions

What's covered?

Sets out provisions relating to the mutual recognition of financial product offerings in respect of Australia together with other miscellaneous provisions.

What do I need to know?

- The FMC Regulations designates Australia as the country to which the mutual recognition regime under the FMCA applies. The FMC Regulations also set out when New Zealand will be considered the host country for the offer and when an offer constitutes a recognised offer. Regulations 262 to 268 set out pre-conditions for the purposes of section 577(1)(d) of the FMCA.
- The disclosure document in relation to an offer under the recognition regime must include the warning statements set out in Schedule 25 of the FMC Regulations (as relevant).

Prescribed rate of interest, status of PDS and other miscellaneous matters

- The prescribed rate of interest for the purposes of sections 36(1)(b) and (2)(c), 55(1)(b) and (2)(c), 80(3) and 85(5) of the FMCA is 10% per annum.
- The register entry in relation to a PDS must contain one of the following five statuses:
  - registered;
  - open for applications;
  - closed for applications;
  - withdrawn; or
  - finalised.
- A PDS has a "registered" status if it does not have one of the other four statuses set out above.
- A PDS is "open for applications" if the offeror is accepting applications for financial products offered under the PDS.
- A PDS is "closed for applications" if the PDS has had an open for applications status but the offeror is no longer accepting applications for financial products offered under the PDS and the PDS does not have a withdrawn status.
- A PDS is "withdrawn" if no financial products have been issued under the PDS; the PDS does not have an open for applications status and the offeror has determined that it has no intention that the PDS will have such status at any future time; and the PDS does not have a finalised status.
- A PDS is "finalised" if the PDS has had an open for applications status and a closed for applications status; the offeror is not accepting applications for financial products offered under the PDS; and all financial products issued under the PDS have been cancelled, redeemed or forfeited or all the obligations owing under those products have been discharged.
- Regulation 281 revokes the Phase 1 Regulations.

Useful resources

FMA guidance:

Applying for an exemption

https://www.fma.govt.nz/compliance/exemptions/how-to-apply-for-an-exemption/

Offering financial products in Australia and New Zealand under mutual recognition

https://www.fma.govt.nz/assets/Guidance/20170725-Offering-financial-products-in-New-Zealand-and-Australia-under-mutual-recognition-MRSO.pdf

Schedule 1 of the FMCA – Provisions relating to when disclosure is required and exclusions

What's covered?

Sets out exclusions to the disclosure regime in Part 3.

Clauses 3-24 Exclusions

Clauses 25-29 Limited disclosure requirements

Clauses 30-34 Secondary market rules

Clauses 35-40 Definitions relevant to exclusions

Clause 41 Eligible investors

Clauses 42-47 Certification

Clauses 48-49 Meaning of "control" and other definitions

What do I need to know?

- Schedule 1 of the FMCA contains exclusions for offers of financial products to particular persons or types of offers that do not require disclosure under Part 3 of the FMCA. The scope of these exclusions are a key part of the regime and should be considered carefully to see whether an offer can be made within the exclusions and, if so, what other requirements apply.
- The Schedule 1 rules apply differently depending on whether the offer is of financial products for issue or for sale.
- *See the Storyline on page 80 below for a short list of the different categories in Schedule 1*. We also provide a more detailed breakdown of the categories and the various definitions needed to understand them on *pages 79 to 83*.

Structuring an offer under Schedule 1

- In putting together an offer which relies on one or more exclusions in Schedule 1 it is important to realise that not all exclusions operate in the same way. In some cases, reliance on an exclusion may be subject to:
  - limited disclosure requirements (such as the requirements for employee share purchase schemes, dividend re-investment plans, quoted financial products, certain registered bank products, certain Crown offers, renewals and variations – in each case as set out further in Schedule 8 of the FMC Regulations – *see page 85*); or
  - other process requirements (such as reporting to the FMA, *see the discussion on the Small offers regime below*).
- In relation to those "buy side" exclusions which rely on the nature of the person receiving the offer it is, for example, possible to distinguish between a 'core' wholesale category of those persons who require no disclosure or warning statements (e.g. "investment businesses") and those where further steps are required such as:
  - persons relying on a minimum subscription exemption who are required to receive a warning statement and give a confirmation; and
  - "eligible investors" who must both give a certificate and have it confirmed by a third party (see Certificates *below*).

Certificates

- Certificates for "eligible investors" must be obtained in order to rely on the eligible investor exclusion. They must be confirmed by a FA, a qualified statutory accountant or a lawyer in accordance with the requirements set out in the FMCA and the FMC Regulations.
- Safe harbour certificates for certain "wholesale investors" can also be obtained and relied on by issuers, where they do not have knowledge that the certificates are false. These certificates are not mandatory but provide an issuer with additional comfort that they are making a compliant offer. These certificates are generally effective for two years after the date on which they are given.

Small offers regime

One particular innovation of Schedule 1 adapted from Australia is the introduction of a small offers regime which allows an offer of equity or debt securities to be made without Part 3 disclosure if certain requirements are met.

2	12	20
▪ A company can raise up to $2 million ▪ Including any crowd funding or P2P lending funds raised ▪ Excluding any wholesale, foreign, or regulated offer investors	▪ In any 12-month period ▪ Must give notice to FMA each year of any amounts raised under exemption	▪ Up to 20 investors ▪ Based on a personal offer only ▪ Warning statement required ▪ Note, see the FAQs on FMA's website in relation to the use of nominees to group investors

Storylines

- What are the exclusions for offers for issue (primary offers)? *See page 80*.
- What are the main circumstances where offers for sale require disclosure (secondary offers)? *See page 84*.

Table

- See our detailed table explaining the Schedule 1 exclusions. *See pages 79 to 83*.

Storyline - What are the exclusions for offers for issue (primary offers)?

Offers for issue require full disclosure unless an exclusion under Part 1 of Schedule 1 applies.

How can we break down Part 1 of Schedule 1 exclusions?

Buy side

- Wholesale investors.
- Close business associates and relatives.
- Investment businesses.
- Investment activity criteria.
- Large persons.
- Government agencies.
- Eligible investors.
- Minimum subscription/value.
- Close business associates.

Channels

- Offers through DIMS licensees.
- Offers through peer-to-peer lending platforms.
- Offers through equity crowd funding platforms.

Sell side

- Certain offers of derivatives.
- Certain offers of registered banks.
- Offers by the Crown.

Particular offers

- Small offers.
- Certain offers of financial products of same class as quoted financial products offers.
- Small MIS.
- Dividend reinvestment plans.
- Offers to persons under common control with the offeror.
- Complying employee share purchase schemes.
- Dividend re-investment plans.
- Offers for no consideration.
- Retirement villages.
- Renewals and variations.

Table – Who can receive a non-regulated offer under the FMCA?

A reference to not requiring disclosure means not requiring disclosure under Part 3 of the FMCA.

Broad category	FMCA	Relevant further definitions/comments
Wholesale investors	A person is a wholesale investor if: (a) the person is an investment business; (b) the person meets certain investment activity criteria; (c) the person is large; or (d) the person is a government agency. [*FMCA, Sch 1, cl 3(2)*].	A person is an investment business if the person is— (a) an entity whose principal business consists of 1 or more of the following: (i) investing in financial products; (ii) acting as an underwriter; (iii) providing a financial advice service; or (iv) provide client money or property service; or (v) trading in financial products on behalf of others; (b) registered bank; (c) a non-bank deposit taker (NBDT); (d) a licensed insurer; (e) a manager of a registered scheme, or a DIMS, that holds a market services licence; (f) a derivatives issuer that holds a market services licence; or (g) a financial adviser. An entity is not an investment business if the entity was established or acquired with a view to using it as an entity to which offers of financial products may be made in reliance upon this exclusion. [*FMCA, Sch 1, cl 37*].
		A person (**A**) meets the investment activity criteria if at least 1 of the following applies: (a) A owns, or at any time during the 2-year period before the relevant time has owned, a portfolio of specified financial products of a value of at least NZ$1 million (in aggregate): (b) A has, during the 2-year period before the relevant time, carried out 1 or more transactions to acquire specified financial products where the amount payable under those transactions (in aggregate) is at least NZ$1 million and the other parties to the transactions are not associated persons of A: (c) A is an individual who has, within the last 10 years before the relevant time, been employed or engaged in an investment business and has, for at least 2 years during that 10-year period, participated to a material extent in the investment decisions made by the investment business. *See the FMCA for more detail*. [*FMCA, Sch 1, cl 38*].
		A person is large if at least 1 of the following applies: (a) as at the last day of each of the 2 most recently completed financial years of the person before the relevant time, the net assets of the person and the entities controlled by the person exceeded NZ$5m: (b) in each of the 2 most recently completed financial years of the person before the relevant time, the total consolidated turnover of the person and the entities controlled by the person exceeded NZ$5m.

Broad category	FMCA	Relevant further definitions/comments
		[*FMCA, Sch 1, cl 39*]. *See definition of "control" in Sch 1, cl 48.*
		A government agency includes government departments, crown entities, local authorities, state-owned enterprises, the Reserve Bank and the Board of Trustees of the National Provident Fund. [*FMCA, Sch 1, cl 40*].
		A wholesale investor within each of the above categories may give a safe harbour certificate that can be relied on by the offeror. [*FMCA, Sch 1, cl 44 and 45*] Certain additional requirements in relation to the certificate are contained in the FMC Regulations. [*FMC Regulations, Sch 8, cl 48*].
	A person is also a wholesale investor, in relation to an offer of financial products, if: (a) the person is an eligible investor; or (b) in relation to an offer of financial products for issue or sale: (i) the minimum amount payable by the person on acceptance of the offer is at least NZ$750,000; (ii) the amount payable by the person on acceptance of the offer plus the amounts previously paid by the person for financial products of the issuer of the same class that are held by the person add up to at least NZ$750,000; or (iii) it is proposed that the person will acquire the financial products under a bona fide underwriting or sub-underwriting agreement; or (c) in relation to an offer of a derivative for issue or sale, the notional value of the derivative is at least NZ$5m. [*FMCA, Sch 1, cl 3(3)*].	A person (**A**) is an eligible investor, in relation to a relevant transaction or class of relevant transactions, if: (a) A certifies in writing: (i) as to A's previous experience enabling A to assess the relevant financial products or services; and (ii) that A understands the consequences of certifying himself, herself, or itself to be an eligible investor; (b) A states in the certificate the grounds for this certification; and (c) a financial adviser, a chartered accountant, or a lawyer signs a written confirmation of the certification. *See the FMCA for more details*. [*FMCA, Sch 1, cl 41 to 43*]. Additional warning statements in relation to the certificate are contained in the FMC Regulations. [*FMC Regulations, Sch 8, cl 47*].
		Limited disclosure obligations including a prescribed warning statement are required to rely on the NZ$750,000 minimum subscription exemption. [*FMC Regulations, Sch 8, cl 3 to 5*].
Close business associates	An offer of financial products to a close business associate of the offeror does not require Part 3 disclosure. [*FMCA, Sch 1, cl 4*].	A person (**A**) is a close business associate of the offeror if: (a) A is a director or senior manager of the offeror or of a related body corporate of the offeror; (b) A holds or controls 5% or more of the voting products of the offeror; (c) A is a related body corporate of the offeror; (d) A holds or controls 20% or more of the voting products of a related body corporate of the offeror; (e) A is a partner of the offeror or of a director of the offeror (under the Partnership Law Act 2019); (f) A is a spouse, civil union partner, or de facto partner of a person who is a close business associate of the offeror under any of paragraphs (a) to (e) or the additional categories below; or (g) A is a child, parent, brother, or sister of a person who is a close business associate of the offeror (whether or not by a step relationship). A person (**A**) is also a close business associate of the offeror, in relation to an offer of financial products, if A has a close professional or business relationship with the offeror, or a director or senior manager of the offeror, that allows A to: (a) assess the merits of the offer; or

Broad category	FMCA	Relevant further definitions/comments
		(b) obtain information from the offeror or any other person involved in the offer that will enable A to assess the merits of the offer. *See further definitions of "offeror", "director", "senior manager", "related" and "voting product" in the FMCA. See definition of "control" in Sch 1, cl 48.*
Relatives	An offer of financial products to a relative of the offeror or of a director of the offeror does not require Part 3 disclosure. [*FMCA, Sch 1, cl 5*].	Relative is defined to include spouses, civil union or de factor partners, various blood relatives and trustees of certain trusts where relatives are beneficiaries. *See the FMCA for more detail.*
Offers through licensed intermediaries	An offer of financial products through a licensed intermediary in the course of supplying prescribed intermediary services does not require Part 3 disclosure. [*FMCA, Sch 1, cl 6*].	This covers offers through licensed equity crowd-funding and peer-to-peer lending platforms which are subject to their own regulation under their licence. Limited disclosure and other requirements apply in relation to this exemption. [*FMC Regulations, Sch 8, cl 6 to 8*].
Offers through DIMS licensees	An offer of financial products to a person (**A)** does not require Part 3 disclosure if: (a) the offer is through a DIMS licensee; and (b) the DIMS licensee decides whether to acquire the financial products on behalf of A in the course of supplying a DIMS to A. [*FMCA, Sch 1, cl 7*].	This covers the situation where a DIMS licensee with a discretionary investment authority decides to invest in a non-regulated offer on behalf of a person who themselves would be a retail investor otherwise.
Employee share purchase schemes	An offer of specified financial products to an eligible person under an employee share purchase scheme does not require Part 3 disclosure if certain requirements are met (including a cap of 10% of the voting products of the issuer over a 12-month period). [*FMCA, Sch 1, cl 8*].	*See the further specified requirements and additional definitions of "eligible person" (generally an employee, director or personal services contractor of the issuer or any of its subsidiaries), "specified financial products" and "voting products" in the FMCA*. Limited disclosure and other requirements including a prescribed warning statement apply in relation to this exemption. [*FMC Regulations, Sch 8, cl 9 to 12*].
Offers to persons under control	If, under any of the categories above, an offer of financial products to a person would not require disclosure under Part 3 of the FMCA, an offer of those financial products to an entity controlled by A does not require Part 3 disclosure. [*FMCA, Sch 1, cl 9*].	This extends the scope of the exemptions above to persons controlled by an otherwise exempt person. *See definition of "control" in Sch 1, cl 48.*
Dividend reinvestment plans	An offer of specified financial products to a person under a dividend reinvestment plan does not require Part 3 disclosure if certain specified conditions are met. [*FMCA, Sch 1, cl 10*].	*See the provision for more detail.* Limited disclosure and other requirements apply in relation to this exemption. [*FMC Regulations, Sch 8, cl 13 to 15*].
Offers of financial products for no consideration	An offer of financial products (other than options or other financial products to which this clause does not apply) does not require Part 3 disclosure if no consideration is to be provided for the issue or transfer of the products. [*FMCA, Sch 1, cl 11*].	Specific rules apply in relation to options.

Broad category	FMCA	Relevant further definitions/comments
Small offers	Certain small personal offers of equity or debt securities do not require disclosure under Part 3 of the FMCA if fewer than 20 persons invest less than NZ$2m in aggregate. [*FMCA, Sch 1, cl 12 to 14*].	*See the FMCA for more detail as to how a personal offer must be made (including advertising restrictions) and on the 20-investor and NZ$2m limits*. Limited disclosure and other requirements including warning statements apply in relation to this exemption. [*FMC Regulations, Sch 8, cl 16 to 18*].
Offers of controlling interest	An offer of equity securities that comprise more than 50% of the voting products of an entity does not require Part 3 disclosure if 5 or fewer persons acquire the securities, acting in concert and certain other requirements are met. [*FMCA, Sch 1, cl 15*].	*See the provision for more detail.*
Small managed investment schemes	An offer of managed investment products does not require Part 3 disclosure if it has 5 or fewer scheme participants and is not promoted by a person, or an associate of a person, who is in the business of promoting managed investment schemes. [*FMCA, Sch 1, cl 16 to 18*].	Advertising restrictions apply.
Same class quoted financial products	An offer of equity securities, debt securities, or managed investment products of the same class as existing quoted products does not require Part 3 disclosure. [*FMCA, Sch 1, cl 19*].	Limited disclosure and other requirements apply in relation to this exemption. [*FMC Regulations, Sch 8, cl 19 to 22*]. The exemption also does not apply in certain circumstances. [*FMC Regulations, Sch 8, cl 46*].
Certain offers of derivatives	Certain offers of derivatives do not require Part 3 disclosure. Generally, disclosure is only required when derivatives are issued by a person in the business of issuing derivatives. [*FMCA, Sch 1, cl 20*]. There are also certain transitional exemptions for existing derivatives issuers. [*FMC Regulations, Sch 1, cl 17*].	*See the provisions for more detail.*
Certain offers by registered banks	Certain offers of debt securities, interest in cash funds and currency forwards issued by registered banks do not require Part 3 disclosure. [*FMCA, Sch 1, cl 21*].	*See the FMCA and FMC Regulations for more detail*. [*FMC Regulations, Sch 8, cl 44*]. Limited disclosure and other requirements apply in relation to reliance on this exemption in some (not all) cases. [*FMC Regulations, Sch 8, cl 23 to 28, 37 to 43, also Sch 9*].
Offers by the Crown	Certain offers by the Crown and related entities do not require Part 3 disclosure. [*FMCA, Sch 1, cl 22*].	*See the FMCA for more detail*. Limited disclosure and other requirements apply in relation to reliance on this exemption in some (not all) cases e.g. debt securities. [*FMC Regulations, Sch 8, cl 29 to 31, 37 to 43, also Sch 9*].
Offers of interests in retirement villages	An offer of an interest in a retirement village does not require Part 3 disclosure if the interest is exempted under the Retirement Villages Act 2003. [*FMCA, Sch 1, cl 23*].	There is a separate regime which applies to most (not all) interests in retirement villages.

Broad category	FMCA	Relevant further definitions/comments
Offers of renewals or variations	An offer of a renewal or variation of the terms or conditions of a financial product does not require Part 3 disclosure. [*FMCA, Sch 1, cl 24*].	Limited disclosure and other requirements apply in relation to reliance on this exemption. [*FMC Regulations, Sch 8, cl 32 to 36, 37 to 43*].

Storyline - What are the main circumstances where offers for sale require disclosure (secondary offers)?

Offers for sale require disclosure only if Part 2 of Schedule 1 applies.
The main circumstances where an offer for sale requires disclosure are:

Offers with a view to dealing

- where financial products are issued with a view to the original holder dealing with products; and
- the offer is made within 12 months after the issue; and
- the financial products have not previously been offered for issue or sale under a regulated offer or prescribed circumstances.

Issuer involvement

- where the issuer advises, encourages, or knowingly assists the offeror (or is the offeror); or
- the issuer is the offeror.

Offeror controls issuer

- where the offeror controls the issuer and the financial products are not quoted; and
- either:

  the financial products are not quoted;

  or

  if quoted, the products are not offered for sale in the ordinary course of trading on a licensed market.

Sale by a Controller

- where the offer is made within 12 months after the date on which the products were sold by a person who controlled the issuer (**Controller**); and
- the Controller sold the financial products with a view to the purchaser dealing with the products; and
- at the time of the sale the financial products were not quoted; or
- if quoted, those products were not offered for sale in the ordinary course of trading; and
- the Controller sold the financial products otherwise than under a regulated offer or prescribed circumstances.

Schedule 8 of the FMC Regulations – Provisions relating to exclusions and other Schedule 1 of the FMCA matters

What's covered?

Prescribes limited disclosure and other requirements in relation to exclusions under Schedule 1 of the FMCA.

What do I need to know?

- Regulation 72 and Schedules 8, 9 and 9A of the FMC Regulations set out limited disclosure and other requirements and conditions relating to the exclusions from the disclosure requirements in Part 3 of the FMCA.
- Some of the key requirements in Schedule 8 include:
  - For the wholesale investor exclusion in relation to the $750,000 investment amount (clause 3(3)(b)(i) or (ii) of Part 1 Schedule 1 of the FMCA), an offeror is required to provide a prescribed warning statement to the offeree and obtain a written acknowledgment in a prescribed form before an application is made.
  - For the registered bank exclusion under clause 21(b) of Part 1 Schedule 1 of the FMCA, an offeror is required to provide a limited disclosure document (LDD) to the offeree before an application is made. The LDD must include the information in Schedule 9 of the FMC Regulations and meet certain requirements of the FMCA as if the LDD were a PDS.
  - Additional governance requirements apply in relation to offers made in reliance on the registered bank exclusion under clause 21(c) of Part 1 Schedule 1 of the FMCA in relation to PIE call fund units, PIE term fund units and bank notice products that are specified units.
  - For the exclusion under clause 22(1) of Part 1 Schedule 1 of the FMCA relating to offers of financial products issued by the Crown, the Reserve Bank etc., an offeror is required to provide an LDD to the offeree before an application is made. The LDD must comply with certain requirements of the FMCA as if the LDD were an equivalent PDS, and in the case of an offer of debt securities issued by the Crown (whether by way of issue or sale), the LDD must include the information in Schedule 9 of the FMC Regulations.
  - Clauses 37 to 43 of Schedule 8 of the FMC Regulations set out process requirements in relation to the limited disclosure requirements for the registered bank and Crown exclusions. In certain circumstances, an LDD will not need to be provided to an offeree. These include where the offeree has already been provided with a PDS or LDD; the offeror believes on reasonable grounds that the PDS or LDD has already been provided to the offeree; and where the application form was included in, or accompanied by, the LDD and the application form includes an acknowledgement that the offeree has received the LDD.
  - There are prescribed warning statements that must be included in eligible investor certificates (under clause 41 of Schedule 1 of the FMCA) and safe harbour certificates (under clause 44 of Schedule 1 of the FMCA).
  - Clause 46A sets out the products that are not specified financial products for the purposes of the investment activity test in relation to the wholesale investor definition (i.e. the products that will not be considered in determining if the investment activity test is met by a client).

Useful resources

FMA guidance:

Presentation on private offers under the FMCA

MinterEllisonRuddWatts has presented to its clients on 'Private Offers under the FMCA'. If you would like to obtain a free copy of the presentation slides or to find out more about our presentation, please contact one of our experts.

Schedule 1 offers

https://www.fma.govt.nz/compliance/offer-information/offers-under-the-fmc-act/schedule-1-offers/

Summary of schedule 1 exclusions

https://www.fma.govt.nz/assets/Information-sheets/141101-Exclusions-under-the-Financial-Markets-Conduct-Act-2013-FMC-Act-summary-of-schedule-1.pdf

Schedule 4 of the FMCA – Transitional, savings and related provisions

What's covered?

Sets out comprehensive transitional provisions.

Clauses 4-14 For offers

Clauses 15-19 For allotted securities

Clauses 20-33 After effective date

Clauses 34-70 Other

Clauses 71- 89A FSLAA

Clauses 91-94 FS(CRD)AA

Clauses 95-98 FM(CoF)AA

Clauses 99-100 Further FS(CRD)AA provisions

Clauses 101-102 Regulatory Systems (Economic Development) Amendment Act 2025

What do I need to know?

- The Schedule provides comprehensive transitional provisions included to ensure the orderly implementation of the original FMCA reform.
- Issuers were able to choose to register prospectuses under the former law (Securities Act and Securities Regulations 2009) for new offers during the first year after commencement, and continuous offers during the first two years after commencement.
- There is a transitional disclosure exclusion that allows existing wholesale investor exclusions under the Securities Act to continue for a transitional period to allow for compliance processes to be established.
- No offer or allotment of MIP may be made under the current law once the MIS has become a registered scheme.
- There are additional specific transitional provisions which apply to MIS.
- The former law will continue to apply to participatory securities that are not financial products (unless the participating security holders, e.g. marina berth licensees, opt out of continuing compliance by a 75% vote) and to contributory mortgages.
- Authorised futures dealers under the Securities Markets Act will be deemed to hold a derivatives issuer licence, unless one is not required.
- The FMCA includes provisions to facilitate changes to existing governing documents in order to comply with the new regime.
- It is intended that changes to schemes to comply with the new regime will not give rise to tax liability.
- Existing registered exchanges and authorised futures exchanges will be treated as holding a financial product market licence in respect of each of their current markets, and a process is set out to enable currently unlicensed markets to seek a licence under the transitional provisions. In respect of licensed services, it is intended that the requirement to be licensed will only apply once existing providers have had the opportunity to obtain a licence.
- The transitional provisions are complex, and specific advice should always be sought as to how they apply to particular circumstances. Parts 6 to 9 introduce new provisions relating to the CoFI and CRD regimes.

Schedule 1 of the FMC Regulations – Transitional, savings and related provisions

What's covered?

Schedule 1 covers the application of transitional provisions and interpretation for the purposes of Part 1 of the FMCA. Its clauses have now largely been revoked or related to time periods which have now passed. There are new Parts 9, 10, 11 and 12 of the Schedule, relating to climate disclosures, CoFI, certain restricted schemes and depositor compensation scheme.

What do I need to know?

Regulation 4 provides for the transitional provisions set out in Schedule 1 of the FMC Regulations.

- The original clauses in Schedule 1 have largely been revoked or related to time periods which have now passed. New parts have been inserted to cover transitional periods for new regulations. Part 8 (Provisions relating to the FMC Amendment Regulations 2020) sets out:
  - exemption for temporary management of portfolio by FA who is engaged by FAP or becomes a FAP;
  - transitional arrangements for custodians' assurance engagement duty;
  - transitional provisions relating to Financial Advisers (Non-NZX Brokers—Client Money) Exemption Notice 2017; and
  - provisions relating to amendments to information in the PDS, SDS, confirmation information for KiwiSaver schemes and warning statements.
- New Part 9 (Provisions relating to the Financial Markets Conduct (Climate-related Disclosures and Fees) Amendment Regulations 2023) sets out that the register does not need to contain assurance practitioners' reports until related amendments in the FS(CRD)AA come into force.
- New Part 10 (Provisions relating to Financial Markets Conduct (Conduct of Institutions) Amendment Regulations 2023) sets out the application of incentives regulations, specifically regulations 237D to 237H, which apply to prohibited incentives offered, given, or otherwise payable on or after the commencement of clause 54 in Part 10.
- New Part 11 (Provisions relating to Financial Markets Conduct Amendment Regulations 2025) sets out various amendments relating to fund updates for certain restricted schemes, when confirmation information must be provided, confirmation information for certain restricted schemes, custodian assurance engagement for restricted schemes, and reporting requirements for restricted schemes
- New Part 12 (Provisions relating to Financial Markets Conduct (Depositor Compensation Scheme) Amendment Regulations 2025) sets out a transition period until 30 June 2026 during which issuers are not required to comply with certain requirements relating to the depositor compensation scheme, including the requirement to include a section headed "Protection under depositor compensation scheme" in the key information summary, though they may choose to do so.

Schedule 5 of the FMCA – Other provisions relating to financial advice and client money or property services

What's covered?

Sets out comprehensive provisions that apply to financial advice and client money or property services.

Clauses 2-6 Retail and wholesale financial advice or client money or property service clients

Clauses 7-18 Financial advice exclusions

Clauses 19-23 Client money or property service exclusions

Clauses 24-40 Code of professional conduct and code committee

Clauses 41-64 Complaints and disciplinary proceedings

What do I need to know?

Schedule 5 provides for matters relating to financial advice services under subpart 5A of Part 6 of the FMCA and client money or property services under subpart 5B of Part 6 of the FMCA.

Exclusions from 'financial advice'

Clause 7 of Schedule 5 outlines a series of exclusions from the definition of 'financial advice'. Therefore, a person does not provide 'financial advice' merely by doing 1 or more of the following:

(a) providing factual information (for example, information about the cost or terms and conditions of a financial advice product, or about the procedure for acquiring or disposing of a financial advice product):

(b) carrying out an instruction from a person to acquire or dispose of, or not to acquire or dispose of, a financial advice product for that person:

(c) making a recommendation or giving an opinion about a kind of financial advice product in general rather than a particular financial advice product (for example, an opinion about shares generally rather than shares of a particular company):

(d) recommending that a person obtain financial advice:

(e) passing on financial advice given by another person (unless the person holds out that the financial advice is the person's own advice):

(f) giving or making available any of the following:

- (i) a disclosure document:
- (ii) information from a register entry:
- (iii) an advertisement referred to in section 89:
- (iv) any other document or information that the person is required by law to give or make available:
- (v) a document or information prescribed by the regulations:

(d) carrying out a prescribed activity.

Exclusions from 'regulated financial advice'

- Clauses 8 to 18 of Schedule 5 outline a series of exclusions from the definition of 'regulated financial advice'.
- Changes are made to the exclusions from regulated financial advice to further limit the exclusion for lawyers, journalists, accountants and other occupations to advice given in the ordinary course of carrying on that occupation and that is an ancillary part of carrying on the principal activity of that occupation, being an activity that is not the provision of a financial service (see clause 8).
- Financial advice is not regulated financial advice if it is incidental (carried on to facilitate the carrying out of the business or is otherwise ancillary to the business) to the provision of credit by a business not providing a financial service (see clause 9). In other words, this exclusion requires the statement to be given in connection with the provision of credit under a credit contract and for the credit to be provided, and the advice given, as an incidental part of a business (the principal activity of which is not the provision of a financial service).
- Financial advice is not regulated financial advice if it is given for the purpose of complying with lender responsibilities under the Credit Contracts and Consumer Finance Act 2003 (see clause 10). This exclusion requires the advice to be given by a lender to a borrower in relation to a consumer credit contract or relevant insurance agreement in order to comply with the lender's lender responsibilities or as a reasonably incidental consequence of complying with the lender's lender responsibilities and for the lender to take reasonable steps to ensure that the borrower understands that the advice is not regulated financial advice and the implications of that.
- Financial advice is also exempted in some circumstances related to:
  - Crown-related entities (*see clause 11*) – financial advice is not regulated financial advice if it is given in the ordinary course of the business of either a Crown entity under section 7 of the Crown Entities Act 2004 (other than Public Trust), a department named in Schedule 1 of the State Sector Act 1988 (**SSA**), a government-related organisation as defined in section 4 of the Crown Organisations (Criminal Liability) Act 2002, or the Reserve Bank of New Zealand. Financial advice is also not regulated financial advice if it is given by a Minister of the Crown, an MP, an employee as defined in section 2 of the SSA), a chief executive in any part of the State services (as defined in section 2 of the SSA), the holder of, or a person performing the duties of, an office established by an enactment (other than the Māori Trustee), or a person performing duties that are expressly conferred on him or her by virtue of his or her office by an enactment and the person gives the advice in the ordinary course of carrying on that occupation, or exercising the powers or performing the functions of that office or position.
  - Trustee corporations (*see clause 12*) – financial advice is not regulated financial advice if it is given in the ordinary course of the business of a trustee corporation providing legal or financial services in relation to the preparation of a will or estate management and administration services (and associated legal, financial, and other services carried out under the Act governing the corporation). Trustee corporation is defined as the Public Trust, the Māori Trustee, a corporation that is authorised by an Act to administer the estates of deceased persons and other trust estates or a wholly owned subsidiary of such a corporation that is guaranteed by the parent.
  - Non-financial not-for-profit organisations (*see clause 13*) – financial advice is not regulated financial advice is it is given in the ordinary course of the business of a non-financial not-for-profit organisation and for no charge. Non-financial not-for-profit organisation is defined as an organisation that operates other than for the purposes of profit or gain to an owner, a member, or a shareholder and is not the product provider (or related to the product provider) of a financial advice product.
  - Workplace financial products (*see clause 14*) – financial advice is not regulated financial advice if it is given by or for an employer to an employee in relation to a financial advice product that is made available through the employee's workplace.
  - Advice to product provider (*see clause 15*) – financial advice is not regulated financial advice if it is given in connection with a financial advice product, to the provider of the financial advice product, by a person engaged by the provider to give the financial advice.
  - Activities governed by other regulatory frameworks (*see clause 16*) – financial advice is not regulated financial advice if it is given:
    - as part of a DIMS and the provision of that service is covered by a market services licence or is exempted from the licensing requirement under section 389 of the FMCA; or
    - in the ordinary course of a business carried on by a rating agency approved under section 86 of the Non-bank Deposit Takers Act 2013 or section 62 of the Insurance (Prudential Supervision) Act 2010 and in connection with a rating given or to be given by the agency; or

    - in connection with an offer of a financial product by or on behalf of the offeror and the offer to the person does not require disclosure under Part 3 of the FMCA because of any 1 or more of clauses 3 to 5 of Schedule 1; or
    - by an offeror or a target company in the course of a takeover offer that is regulated under the Takeovers Code or by an independent adviser in the course of exercising his or her functions under the Takeovers Code.
  - Prescribed circumstances (see clause 17) – financial advice is not regulated financial advice if given in the prescribed circumstances.
  - Controlling owners, directors, etc (see clause 18) - if an exclusion under clauses 8 to 17 applies to a person (A), it applies equally to any controlling owner, director, employee, agent, or other person acting in the course of, and for the purposes of, A's business to the same extent as it applies to A.
- Regarding client money or property exclusions, Schedule 5 makes an exclusion for lawyers, accountants, real estate agents, and other occupations. In addition, exclusions also apply regarding services:
  - if the person giving the service is an operator of a designated FMI (as defined in the Financial Market Infrastructure Act 2021) and the service is provided by the receipt, holding, payment, or transfer of money or property in accordance with the designated FMI's rules.
  - provided by derivatives issuers acting under a licence issued under Part 6; or
  - provided by an employer to an employee in connection with a financial product made available through the person's workplace.
- The code committee is established and functions to draft and review the code, which provides the minimum standards of professional conduct that must be demonstrated by persons who give regulated financial advice.
- Any person may complain to the FMA about the conduct of another person (A) in A's capacity as a financial adviser. The FMA may also initiate a complaint. The FMA may investigate complaints and refer a complaint to a disciplinary committee who may take action such as directing the Registrar to deregister A under the FSP Act, impose fines, or set restrictions on the giving of regulated financial advice by A.

Useful resources

FMA guidance:

Financial advice given for the purpose of complying with lender responsibilities

https://www.fma.govt.nz/assets/Information-sheets/Financial-advice-lender-exclusion.pdf

FMA consultations

Additional consultation matters are set out on the FMA's website at https://www.fma.govt.nz/compliance/consultation/.

Previous and current public and targeted FMA consultations

Consultation	Status
Proposed guidance for ethical investing disclosure	Closed 7 November 2025
Proposed class exemption for entities incorporated in foreign jurisdictions from New Zealand climate reporting duties	Closed 24 October 2025
Tokenisation in financial markets	Closed 31 October 2025
Proposed class exemption for listed issuers for buy-backs of quoted debt securities	Closed 13 June 2025
Seeking feedback on current standard conditions	Closed 30 May 2025
Review of expiring class exemption notices, and designations	Closed 17 July 2025
Review of access to financial advice for New Zealand: proposed terms of reference	Closed 30 May 2025
Proposed reporting, audit and assurance exemptions for schemes in wind-up	Closed 12 May 2025
Renewal of class exemption for DIMS licensees from certain financial reporting requirements	Closed 29 November 2024
Regulatory returns for financial institution licensees	Closed 25 October 2024
Draft guidance on designations under the FMI Act	Closed 10 September 2024
Renewal of class exemptions for overseas custodians and overseas providers of custodial services – assurance engagements	Closed 27 August 2024
Proposed guidance on references to climate statements in disclosure documents	Closed 30 August 2024
Standard conditions for derivatives issuer licenses	Closed 7 August 2024
Class exemption renewal for disclosure of relevant interests by directors and senior managers, and NZCDC Settlement System	Closed 21 June 2024
Proposed exemptions for advice on UK law aspects of defined benefit pension transfers	Closed 13 June 2024
Proposed exemption for certain green, social, sustainability and sustainability-linked bonds	Closed 30 April 2024
Proposed fair outcomes for consumers and markets	Closed 1 March 2024
Renewal of class exemption for dual language (English and te reo Māori) product disclosure statements	Closed 1 March 2023
Proposed guidance and expectations for keeping proper climate-related disclosure records	Closed 4 August 2023

Consultation	Status
Renewal of class exemption for same class offers ASX/NZX-quoted financial products	Closed 30 June 2023
Proposed liquidity risk management guidance	Closed 10 November 2023
Renewal of class exemption for MIS managers where assets do not have an appropriate market index	Closed 14 April 2023
Climate-related disclosures timing challenge	Closed 7 August 2023
Proposed guidance on winding-up requirements for registered schemes	Closed 13 October 2023
Proposed standard conditions on business continuity and technology systems	Closed 1 September 2023
Proposed CoFI guidance note on intermediated distribution	Closed 14 April 2023
Proposed exemptions for CREs in liquidation, receivership, or voluntary administration	Closed 20 July 2023
Proposed exemptions for foreign listed issuers from climate reporting duties	Closed 17 April 2023
AML/CFT Act – Draft regulations public consultation	Closed 14 April 2023
Proposed guidance on reasonable grounds for financial advice about IPOs and listed equity securities	Closed 5 August 2022
Review of the Small Co-operatives and Irrigation Companies Class Exemptions.	Closed 11 April 2022
Proposed standard conditions for financial institution licenses	Closed 7 September 2022
Proposed financial reporting exemptions for FMC reporting entities in liquidation, receivership or voluntary administration	Closed 6 October 2021
Potential changes to the assurance requirement in the climate-related disclosures regime	Closed 10 February 2023
Proposed guidance and expectations for keeping proper accounting records	Closed 31 October 2022
Proposed regulatory returns for licensed Class 1 financial advice providers (FAPs)	Closed 18 November 2022
Proposed regulatory returns for licensed Class 2 financial advice providers (FAPs)	Closed 18 November 2022
Proposed guidance for client money or property service providers	Closed 1 November 2022
Proposed standards for Financial Market Infrastructure Act	Closed 18 November 2022
Proposed regulatory returns for licensed Class 3 Financial Advice Providers (FAPs)	Closed 12 September 2022
Proposed class exemption for restricted schemes from certain disclosure and reporting obligations	Closed 21 April 2021

Consultation	Status
Review of the Wholesale Investor Exclusion $750,000 Minimum Investment Exemption	Closed 26 February 2021
New financial advice regime exemptions	Closed 22 December 2020
Recognition of Australian adviser qualifications	Closed 15 December 2020
Proposed guidance on KiwiSaver fees and value for money	Closed 15 December 2020
Prescribed Minimum Standards and Conditions for Licensed Auditors and Registered Audit Firms Notice 2020	Closed 21 September 2020
Consultation on expiring class legislative notices	Closed 20 August 2020
Proposed standard conditions for financial advice provider full licences and classes of financial advice service	Closed 7 August 2020
Review of Financial Markets Authority funding and levies	Closed 28 February 2020
Proposed guidance on green bonds and other responsible investment products	Closed 24 October 2019
New financial advice regime exemptions	Closed 13 September 2019
Proposed standard conditions for financial advice provider transitional licences	Closed 26 July 2019
Exemptions, other legislative notices, and unnecessary compliance costs	Closed 31 August 2018
Proposed exemption for restricted schemes from custodian assurance requirements	Closed 31 August 2018
Proposed exemption from requirement to name assets	Closed 23 July 2018
Determining whether you are acquiring a business or assets	Closed 19 July 2018
Proposed exemption for same class offers of ASX NZX-quoted financial products	Closed 13 June 2018
Proposed exemption to enable dual-language PDS	Closed 17 May 2018
Including an annual declaration of compliance in regulatory returns and updating the standard regulatory returns condition	Closed 14 May 2018
Content of regulatory returns for licensed DI, MIS managers and DIMS providers	Closed 11 April 2018
Proposed exemption to facilitate personalised digital advice	Closed 15 December 2017
Updated corporate governance handbook	Closed 8 December 2017
Proposed exemption from the market index requirement	Closed 1 September 2017
Improving financial information in an equity PDS	Closed 30 June 2017
KiwiSaver annual statements – calculation of total fees in dollars	Closed 23 June 2017
Proposed guidance on substantial product holder disclosures	Closed 16 June 2017

Consultation	Status
Proposed exemption from the obligation to prepare scheme financial statements for bundled unit trusts	Closed 9 June 2017
Short duration derivatives	Closed 28 April 2017
Disclosing non-GAAP financial information	Closed 7 April 2017
Proposed transitional relief for non-NZX brokers to allow limited use of buffers	Closed 17 March 2017
Requirements for managers of multiple participant schemes to register participation agreements	Closed 16 January 2017
A guide to the FMA's view of conduct	Closed 31 October 2016
Regulatory returns for prescribed intermediary services	Closed 28 October 2016
KiwiSaver advice	Closed 16 December 2016
Reviews of the FMA funding and the FMA levy	Closed 22 August 2016
Exemption for small offers of co-operative shares	closed 6 May 2016
Exemptions impacting overseas businesses, and restricted schemes	closed 24 Mar 2016
Recognition of overseas regimes – proposed exemption relief	closed 26 Feb 2016
Forestry scheme issues and exemptions proposals	closed 19 Feb 2016
Proposed exemptions for existing property schemes	closed 19 Feb 2016
Class designation of shares to managed investment products in a MIS	closed 19 Feb 2016
Proposal for annual declaration of compliance for FMCA licensees	closed 21 Dec 2015
Proposed variations to standard conditions of market services licences	closed 14 Dec 2015
Draft guidance on disclosure of certain fees and returns by managed funds	closed 27 Nov 2015
Charities raising funds by debt securities	closed 5 Nov 2015
Communal facilities offered with real property	closed 6 Nov 2015
Employee share purchase schemes	closed 15 Oct 2015
Offers through AFAs providing DIMS	closed 8 Oct 2015
Proposed class exemption for US futures commodity merchants	closed 30 Sep 2015
Scrip offers in takeovers	closed 25 Sep 2015
Proposed amendments to the Auditor Regulation Act (Prescribed Minimum Standards and Conditions for Licensed Auditors and Registered Audit Firms) Notice 2012	closed 24 Sep 2015
Venture capital schemes	closed 18 Sep 2015

Glossary

Key Term	Definition
AFA	Authorised Financial Adviser(s)
Bill	Financial Markets Conduct Bill
CRD	Climate-related disclosures
CRE	Climate reporting entity
Code	Code of Professional Conduct for Financial Advice Services
CoFI	Conduct of Financial Institutions
Controller	A person who controls the issuer of financial products
DIMS	Discretionary investment management services
FA	Financial Adviser(s)
FAA	Financial Advisers Act 2008
FAP	Financial Advice Provider(s)
FMA	Financial Markets Authority
FM(CoF)AA	Financial Markets (Conduct of Institutions) Amendment Act 2022
FMC Amendment Regulations	Financial Markets Conduct Amendment Regulations 2020
FMC Regulations	Financial Markets Conduct Regulations 2014
FMCA	Financial Markets Conduct Act 2013
FMRAA	Financial Markets (Repeals and Amendments) Act 2013
FRA 2013	Financial Reporting Act 2013
FRAOEA	Financial Reporting (Amendments to Other Enactments) Act 2013
FS(CRD)AA	Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021
FSLAA	Financial Services Legislation Amendment Act 2019
FSP Act	Financial Service Providers (Resolution and Dispute Resolution Act) 2008
FSPR	Financial Service Providers Register
FTA	Fair Trading Act 1986
KIS	Key Information Summary
KiwiSaver Act	KiwiSaver Act 2006
LDD	Limited Disclosure Document

Key Term	Definition
Limit Break	Any limits on the nature or type of investments that may be made, or the proportion of each type of assets that may be invested in, under the statement of investment policy and objectives
MIP	Managed Investment Product(s)
MIS	Managed Investment Scheme(s)
NBDT	Non-Bank Deposit Taker(s)
NR	Nominated Representative(s)
NZCFS	New Zealand Certificate in Financial Services
NZ CS	Aotearoa New Zealand Climate Standards
PDS	Product Disclosure Statement
QFE	Qualifying Financial Entity / Entities
RFA	Registered Financial Adviser
SDS	Service Disclosure Statement
Securities Act	Securities Act 1978
Securities Markets Act	Securities Markets Act 1988
Securities Transfer Act	Securities Transfer Act 1991
SSA	State Sector Act 1988
Superannuation Schemes Act	Superannuation Schemes Act 1989
Unit Trusts Act	Unit Trusts Act 1960
XRB	External Reporting Board

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