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# The Financial Markets Conduct Act 2013

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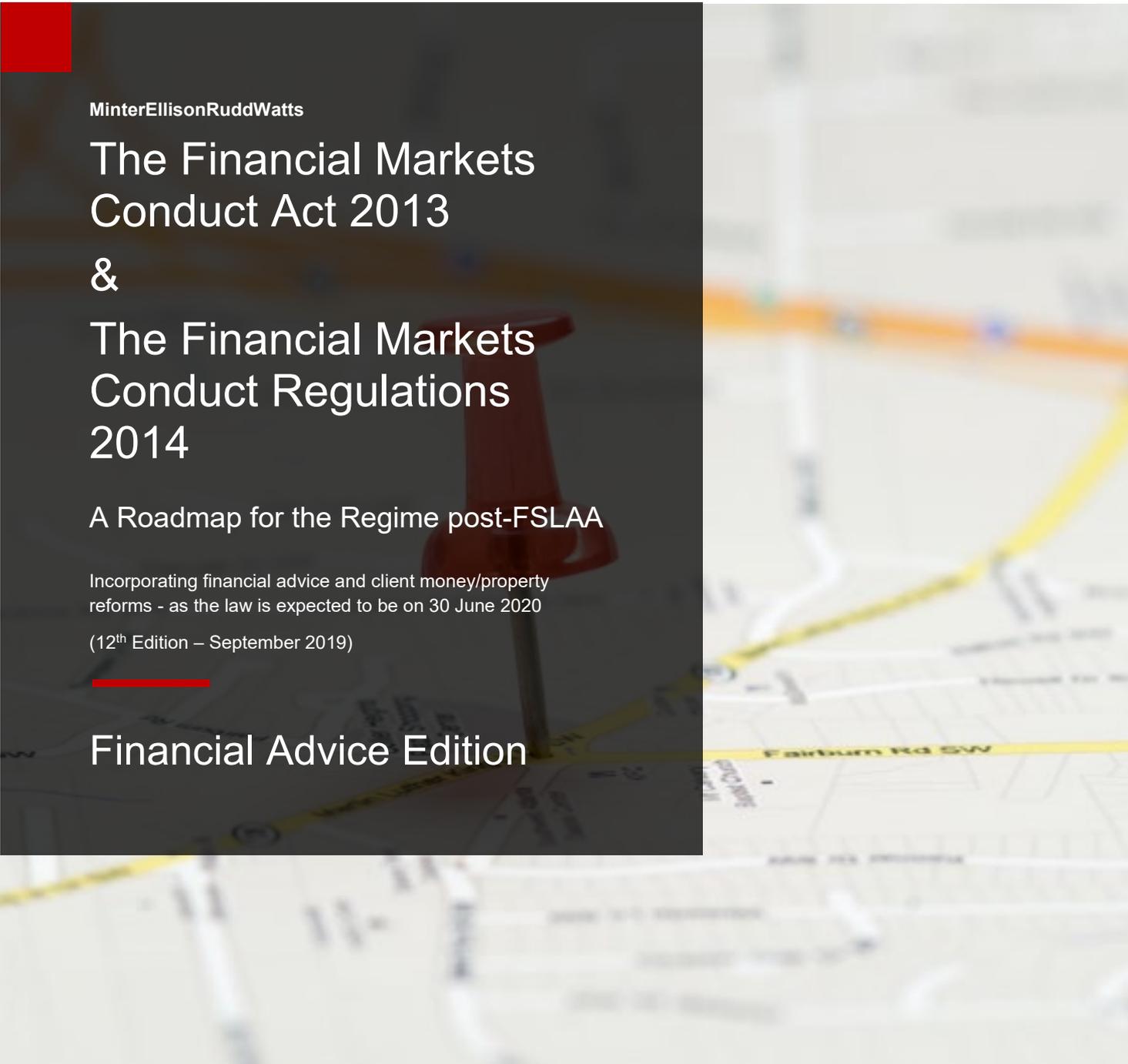
A Roadmap for the Regime post-FSLAA

Incorporating financial advice and client money/property  
reforms - as the law is expected to be on 30 June 2020

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## Financial Advice Edition



MinterEllisonRuddWatts

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\*Disclaimer: This document is intended as a guide and a 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 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.

## Contents

Some of our experts	2
Introduction	4
Your roadmap:	
Breaking down the Act	7
Breaking down the FMC Regulations	9
Part 1 - Preliminary provisions	12
Part 2 - Fair dealing	16
Part 3 - Disclosure of offers of financial products	18
Storyline - When is disclosure required by the FMCA?	23
Length limits and special features under the FMC Regulations for PDS and KIS	24
Offer Register requirements	25
Part 4 - Governance of financial products	27
Storyline - What are the principal requirements for a regulated offer of debt securities?	32
Storyline - What are the principal requirements for a regulated offer of managed investment products?	33
Storyline - What are the principal requirements for a regulated offer of equity securities?	34
Storyline - What are the principal requirements for a regulated offer of derivatives?	35
Storyline - What are the principal requirements for a DIMS provider under the FMCA in relation to retail investors?	36
Part 5 - Dealing in financial products on markets	38
Part 6 - Licensing and other regulation of market services	42
Part 6 (Subparts 5A and 5B) of the FMCA – Financial advice, financial advice services and client money or property services	49
Storyline - What are the principal requirements for a financial advice provider (FAP)?	56
Storyline - How can financial advisers (FAs), nominated representatives (NRs) and financial advice providers (FAPs) satisfy their competence requirements in the Code?	57
Storyline - What are the principal duties that apply to financial advice providers (FAPs)?	58
Part 7 - Financial reporting	59
Part 8 - Enforcement, liability and appeals	62
Part 9 - Regulations, and miscellaneous provisions	64
Schedule 1 of the FMCA and Schedule 8 of the FMC Regulations - Provisions relating to when disclosure is required and exclusions for offers and services	67
Storyline - What are the exclusions for offers for issue (primary offers)?	69
Table: Who can receive a non-regulated offer under the FMCA?	70
Storyline - What are the main circumstances where offers for sale require disclosure (secondary offers)?	75
Schedule 4 of the FMCA and Schedule 1 of the FMC Regulations - Transitional provisions	78
Schedule 5 of the FMCA - Other provisions relating to financial advice and client money or property services	81
Financial Markets (Repeals and Amendments) Act 2013	83
FMA consultations	85



# 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.

It was 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.

*The next big change to the FMCA comes in the form of the Financial Services Legislation Amendment Act 2019 (FSLAA), which was enacted in April 2019. In particular, it repeals the Financial Advisers Act 2008 (FAA) and brings financial advice providers and client money or property service providers within the scope of the FMCA.*

## Passage of the legislation and regulations

The Financial Markets Conduct Bill was introduced into Parliament on 12 October 2011. After being split into two, the new legislation passed its third reading on 27 August 2013 and received royal assent on 13 September 2013 to become the FMCA and the Financial Markets (Repeals and Amendments) Act 2013 (**FMRAA**).

A series of discussion documents, Cabinet papers and exposure drafts in relation to the comprehensive regulations required under the FMCA were released after December 2012, culminating in the Financial Markets Conduct Regulations 2014 (**FMC Regulations**), issued on 3 November 2014.

The FMCA and FMC Regulations were introduced in stages coming into full effect at the end of a two year transition period on 1 December 2016.

**FSLAA CHANGE:** *The new regime for financial advice and for client money and client property services (previously called “broking” services) under FSLAA is expected to come into effect in **June 2020**, with a two year transitional period during which financial advice providers can seek a full licence and benefit from some carve-outs from the new competency requirements.*

*Financial advice providers will need to have a transitional licence in place when the new law is brought into effect, and all of the new duties and the Code of Professional Conduct for Financial Advice Services (**Code**) will apply from that date.*

## This guide

This guide is designed to give you an easy reference “roadmap” to help you to understand the structure and content of the FMCA, FMC Regulations, and the regime as will apply post-FSLAA for financial advice and client money and client property services.

## ... and storylines

We have supplemented our discussion with diagrams illustrating certain mechanics of the FMCA 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).

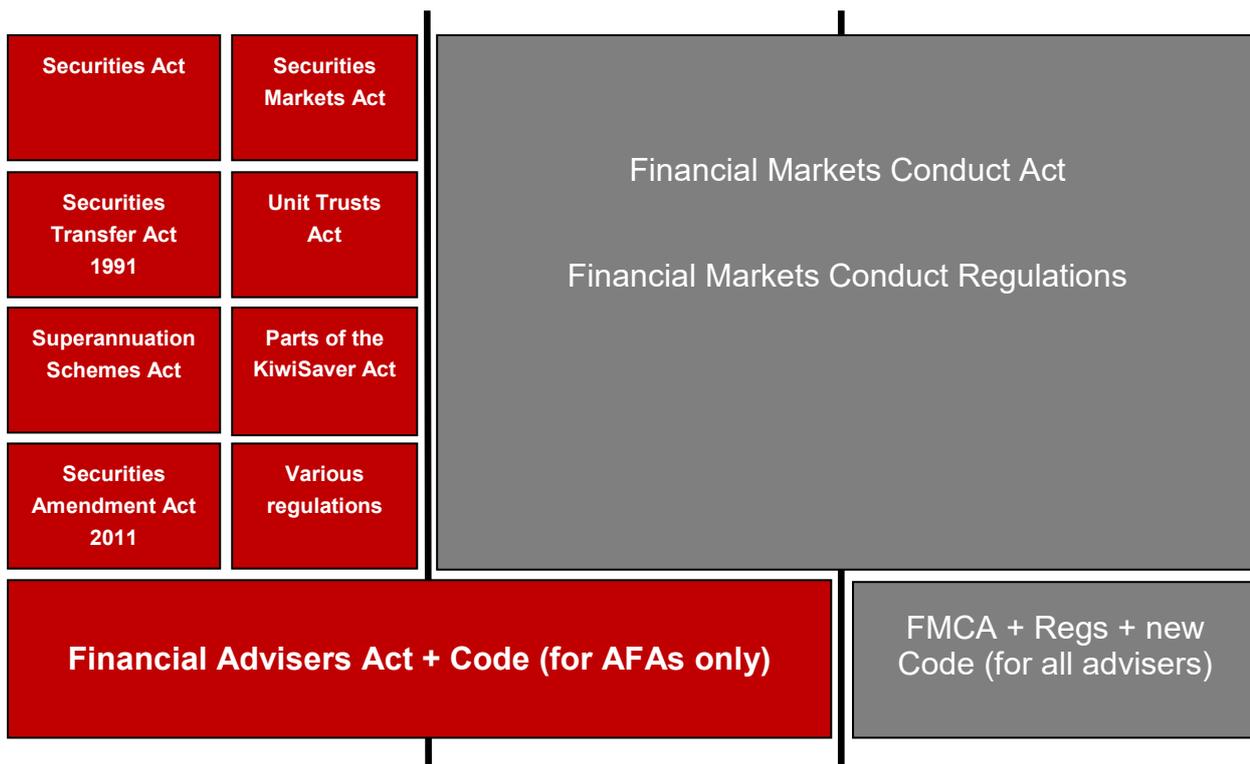
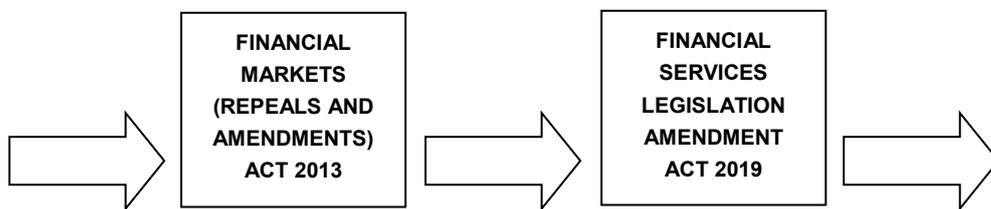
## How can I get a quick understanding of the FMCA?

In this introductory section, we explain how the FMCA and FSLAA 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 a number of 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.

**FSLAA CHANGE:** FSLAA will repeal the FAA (and associated regulations and notices), and bring the financial advice and client money and client property services (formerly called “broking” services) into the FMCA.



### Where can I find more information?

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

## Summary of some key aspects of the FMCA

Key aspects of the original FMCA reforms included:

- Replacing the requirement for issuers to prepare an investment statement and prospectus with a requirement to prepare a single product disclosure statement (**PDS**) tailored to retail investors and to enter other material information on a register for offers of financial products.
- Establishing licensing regimes for specific financial sector participants: fund managers, independent trustees of workplace superannuation schemes, providers of DIMS, derivatives issuers, and prescribed intermediaries (including peer-to-peer lenders and crowd funding service providers).
- Introducing governance changes and stricter requirements for managed investment schemes (**MIS**), including new duties on fund managers and supervisors and stronger governance requirements.
- Introducing a new system to regulate securities exchanges.
- Replacing the existing offer to the public threshold with a distinction between regulated and excluded offers based on a retail/wholesale boundary.
- Introducing civil pecuniary penalties of up to \$1 million for individuals and \$5 million for companies if they make misleading statements in PDSs and advertisements.
- Modifying the liability framework for breaches. The FMCA establishes a system of escalating liability from infringement notices for minor breaches through to criminal penalties of up to 10 years' imprisonment and fines of up to \$1 million for individuals and \$5 million for companies for the most egregious conduct.
- Increasing the maximum period the FMA or the Registrar of Companies can ban a person from managing a company from 5 years to 10 years, and allowing the High Court to impose orders for an indefinite period.

**FSLAA CHANGE:** Post-FSLAA, the following additional changes will be made:

- Establishing a new licensing regime for providers of regulated financial advice to retail clients.
- Introducing new duties and conduct obligations on all persons giving financial advice, whether to retail or wholesale, and a new code of conduct for retail advice, in place of the FAA adviser regime.
- Introducing a new client money or property service regime, in place of the FAA broker regime
- Personalised DIMS provided for under FAA will no longer exist, and providers will need to comply with the amended DIMS regime in FMCA.
- Changes to the Financial Service Providers (Resolution and Dispute Resolution Act) 2008 (**FSP Act**).

## Disclose Register

The *Disclose* website containing the offer register and register of managed investment schemes (**MIS**) can be found at: <http://www.business.govt.nz/disclose/about-the-register/searching-for-an-offer-or-scheme>.

The screenshot shows the 'Disclose' website interface. At the top, there is a search bar with the text 'Search this website' and a search button. Below the search bar is a navigation menu with options: 'About the register', 'Getting started', 'Managed investments', 'Debt, equity and derivatives', and 'Overseas issuers'. The main content area is titled 'Searching for an offer or scheme' and includes instructions on how to use the search function. There are two search buttons: 'Search offers' and 'Search schemes'. A sidebar on the left contains a list of links: 'ABOUT THE REGISTER', 'What is the Disclose Register?', 'Searching for an offer or scheme', 'The transition period', 'FMC reporting entities', 'Announcements', 'Forms', and 'Useful sites'. The page is dated 'Last updated 13 July 2015'.

# YOUR ROADMAP: BREAKING DOWN THE FMC ACT

## Part 1 - Preliminary provisions

Sets out preliminary provisions including the purposes and definitions – See page 12 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 services. In addition, this Part prohibits offers of financial products in the course of unsolicited meetings (with certain exceptions for authorised financial advisers and other advisers in limited circumstances) – See page 16 for more detail

## Part 3 - Disclosure of offers of financial products

Replaced Part 2 of the Securities Act 1978. Regulates the disclosure requirements and procedure for making offers of financial products for issue and sale – See page 18 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. 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 27 for more detail

## Part 5 – Dealing in financial products on markets

Replaced parts of the Securities Markets Act and the Securities Transfer Act 1991. Governs participants and conduct in financial products on markets eg disclosure obligations, and insider trading and market manipulation restrictions – See page 38 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.) – See page 42 for more detail

## Part 6 (Subparts 5A and 5B) – Financial advice, financial advice services and client money or property services

**FSLAA CHANGE:** The FAA is replaced by a new regime incorporated into the FMCA. New subparts 5A and 5B of Part 6 outline the updated rules of financial advice and financial advice services, and client money or property services, respectively replacing the FAA financial adviser and broker provisions. – See page 49 for more detail



## Part 7 – Financial reporting

Requires FMC reporting entities to keep proper accounting records and have their financial statements audited – See page 59 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 62 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 64 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 Part 3, including defining wholesale investors – See page 67 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, including FSLAA matters – See page 78 for more detail

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

**FSLAA CHANGE:** Introduced by FSLAA, the new Schedule 5 sets out provisions related to retail and wholesale financial advice, or client money or property clients, financial advice exclusions, client money or property exclusions, establishment of the code of professional conduct for advisers, and the code committee, and complaints and disciplinary proceedings. – See page 81 for more detail



# 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 15 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 17 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 requirements in relation to ongoing disclosure – *See page 21 for more detail*

## Part 4 – Governance of financial products

Sets out the requirements for governing documents for debt securities (including by NBDTs) and registered schemes (in relation to managed investment products), meetings of product holders and scheme participants, governance of managed investment products, requirements relating to registers of regulated products and certain reporting obligations – *See page 30 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 40 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 – *See page 45 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 61 for more detail*

## Part 8 – Enforcement, liability, and appeals

Adjustments to definitions; infringement fee for an infringement offence, and procedure for issuing an infringement notice – *See page 63 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 65 for more detail*

### **Schedule 1 – Transitional, savings, and related provisions**

Transitional, savings and other provisions relating to the enactment of the FMCA including in relation to financial advisers, financial market supervisors, KiwiSaver and disclosure – *See page 80 for more detail*

### **Schedules 2 to 7 – Disclosure of offers of financial products**

Prescribes the content requirements for PDS in relation to debt securities, equity securities, managed investment products, derivatives and NBDT category 2 debt – *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 76 for more detail*

### **Schedule 9 – Limited disclosure document for debt securities**

Prescribes the matters to be included in a limited disclosure document issued by a registered bank or the Crown – *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 an SDS and investment proposal in relation to DIMS – *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*

**FSLAA CHANGE:** *Further schedules will be added to the FMC Regs prior to the FSLAA regime coming in to force, dealing with the detail of matters such as disclosure and Code requirements. Look out in the next edition of this Roadmap.*

## 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](#)

**FSLAA CHANGE:** See changes noted below.

### What do I need to know?

- 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 be provided 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.
- 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.

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**

A managed investment product is an interest in a managed investment scheme (**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 managed investment product 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 managed investment products 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 managed investment products 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.
- The FMCA also provides a regime for licensed providers of discretionary investment management services (**DIMS**). 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.

**DIMS**

A person (A) provides a DIMS if A:

- decides which financial products to acquire or dispose of on behalf of an investor (B); and
- in doing so is acting under an authority granted to A to manage some or all of B’s holdings of financial products.; or
- 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.

**FSLAA CHANGE:** Regulation of DIMS was previously covered in two places, with “class” DIMS regulated by licensing under the FMCA and “personalised” DIMS permitted for an authorised financial adviser (AFA) with the special permission of the FMA, under the FAA. With the repeal of the FAA by FSLAA in June 2020, all DIMS will fall to be regulated by licensing under the FMCA (and the distinction between class and personalised DIMS will no longer be relevant).

- Once FSLAA comes into effect (expected to be June 2020), the FMCA will also regulate **financial advice services**.

**FSLAA CHANGE: Financial advice service**

*A person provides a financial advice service if in the ordinary course of business, that person gives regulated financial advice. 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 managed investment scheme; 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;
- making a recommendation or giving an opinion relating to a class of financial products;
- 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); 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 financial advice provider (**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 always pays 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 certain exceptions for authorised financial advisers and other advisers in limited circumstances).

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

**Sections 34-37 Offers in course of unsolicited meetings**

**Section 38 Civil liability**

**FSLAA CHANGE:** No changes to Part 2.

### What do I need to know?

- Part 2 came into effect on 1 April 2014 (except for the prohibition on unsubstantiated representations which came into effect on 17 June 2014 and the rules around unsolicited meetings which came into effect on 1 December 2014).
- In Part 2, a “financial product” is a financial product as defined in section 7 of the FMCA and includes any class or classes of financial product as defined in the FSP Act declared by the regulations to be a financial product for the purposes of this Part. Once FSLAA comes in to force the reference to financial product as defined in the FSP Act is replaced by “financial advice product” as defined under the FMCA.
- “Financial service” has the same meaning as in section 5 of the FSP Act (which includes a financial advice service and a regulated client money or property service once FSLAA takes effect). 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 service specified by regulations.
- 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. 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 another 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 Financial Service Providers (Registration and Dispute Resolution) Act 2008.

#### ***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 “in otherwise than in trade” rather than being “retail” means this prohibition may have broader application.
- Offers through authorised financial advisers (**AFAs**) and QFE advisers are currently exempt from this rule so that they can continue their established business practise of making unsolicited recommendations to clients, as are offers through persons permitted to give personalised financial advice on quoted financial products. Once FSLAA comes into force, this will be replaced by an exemption for offers through a financial advice provider that is acting in the ordinary course of business as a financial advice provider (**FAP**). 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.

### **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 which apply.

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

### What's covered?

Part 3 replaces Part 2 of the Securities Act 1978. It 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

**FSLAA CHANGE:** No changes to Part 3.

### 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 23 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 67 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**

- Part 3 came into effect on 1 December 2014, subject to the transitional provisions in Schedule 4 (which, in most cases, will apply the new rules from the date an issuer elects into the new disclosure regime). See page 78 for more detail.
- 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 67). 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 managed investment products, 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, 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 23.

## 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*

- For the purposes of section 51(1)(c) of the FMCA, a PDS will not need to be provided to an investor in accordance with section 50 of the FMCA where:
  - 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 financial products are category 2 products (other than bonus bonds within the meaning of section 5 of the FAA), 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);
  - The offer relates to NBDT category 2 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, managed investment products in a managed fund, managed investment products in any other managed investment scheme, derivatives and NBDT category 2 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 24 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.
- 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, managed investment products in a managed fund, managed investment products in any other MIS, derivatives and NBDT category 2 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 managed investment products 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, on the scheme register and 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 managed investment products 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 proposes 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 managed investment products 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?



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

	<b>Debt PDS (Part 1 Schedule 2 of the FMC Regulations)</b>	<b>NBDT Category 2 Debt PDS (Schedule 7 of the FMC Regulations)</b>	<b>Managed Fund PDS (Part 1 Schedule 4 of the FMC Regulations)</b>	<b>Other MIS PDS (Part 1 Schedule 5 of the FMC Regulations)</b>	<b>Equity PDS (Part 1 Schedule 3 of the FMC Regulations)</b>	<b>Derivatives PDS (Part 1 Schedule 6 of the FMC Regulations)</b>
Length: KIS	<ul style="list-style-type: none"> <li>• 3 A4 pages</li> <li>OR</li> <li>• 1,500 words</li> </ul>	Not required where PDS contains all of the information set out in Schedule	<ul style="list-style-type: none"> <li>• 2 A4 pages</li> <li>OR</li> <li>• 1,000 words</li> </ul>	<ul style="list-style-type: none"> <li>• 4 A4 pages</li> <li>OR</li> <li>• 2,000 words</li> </ul>	<ul style="list-style-type: none"> <li>• 4 A4 pages</li> <li>OR</li> <li>• 2,000 words</li> </ul>	<ul style="list-style-type: none"> <li>• 2 A4 pages</li> <li>OR</li> <li>• 1,000 words</li> </ul>
PDS (total)	<ul style="list-style-type: none"> <li>• 30 A4 pages</li> <li>OR</li> <li>• 15,000 words</li> </ul>	<ul style="list-style-type: none"> <li>• 30 A4 pages</li> <li>OR</li> <li>• 15,000 words</li> </ul>	<ul style="list-style-type: none"> <li>• 12 A4 pages</li> <li>OR</li> <li>• 6,000 words</li> </ul>	<ul style="list-style-type: none"> <li>• 60 A4 pages</li> <li>OR</li> <li>• 30,000 words</li> </ul>	<ul style="list-style-type: none"> <li>• 60 A4 pages</li> <li>OR</li> <li>• 30,000 words</li> </ul>	<ul style="list-style-type: none"> <li>• 30 A4 pages</li> <li>OR</li> <li>• 15,000 words</li> </ul>
PDS Special Features	<ul style="list-style-type: none"> <li>• Credit rating</li> <li>• Ranking of DS</li> <li>• Selected financial information</li> </ul>	<ul style="list-style-type: none"> <li>• Credit rating</li> </ul>	<ul style="list-style-type: none"> <li>• Risk indicator</li> <li>• Fees example</li> </ul>	<ul style="list-style-type: none"> <li>• Selected financial information</li> <li>• Gearing ratios</li> </ul>	<ul style="list-style-type: none"> <li>• Selected financial information</li> <li>• Key investment metrics</li> </ul>	<ul style="list-style-type: none"> <li>• Credit rating</li> <li>• Custody</li> <li>• Client Agreements</li> </ul>

## Offer register requirements

	<b>Debt securities (Part 2 Schedule 2 of the FMC Regulations)</b>	<b>NBDT Category 2 Debt securities (Schedule 7 of the FMC Regulations)</b>	<b>Managed Fund (Part 2 Schedule 4 of the FMC Regulations)</b>	<b>Other MIS (Part 2 Schedule 5 of the FMC Regulations)</b>	<b>Equity securities (Part 2 Schedule 3 of the FMC Regulations)</b>	<b>Derivatives (Part 2 Schedule 6 of the FMC Regulations)</b>
Offer register entries key features (other than PDS and director consent)	<ul style="list-style-type: none"> <li>• General information</li> <li>• Financial information</li> <li>• Guarantees</li> <li>• Credit ratings</li> <li>• Material contracts</li> <li>• Issue expenses</li> <li>• All other material information not included in the PDS</li> </ul>	<ul style="list-style-type: none"> <li>• As per Part 2 Schedule 2 (see column to left)</li> <li>• Link to or URL for further information on issuer or the offer on the offer register</li> <li>• Key ratios table and other financial information table if incorporated by reference in the PDS</li> </ul>	<ul style="list-style-type: none"> <li>• General information</li> <li>• Material contracts</li> <li>• Market index</li> <li>• Conflicts of interest</li> <li>• Fund information</li> <li>• All other material information not included in the PDS</li> </ul>	<ul style="list-style-type: none"> <li>• General information</li> <li>• Material contracts</li> <li>• Issue expenses</li> <li>• Financial information</li> <li>• Additional scheme information</li> <li>• All other material information not included in the PDS</li> </ul>	<ul style="list-style-type: none"> <li>• General information</li> <li>• Financial information</li> <li>• Constitution</li> <li>• Material contracts</li> <li>• Issue expenses</li> <li>• All other material information not included in the PDS</li> </ul>	<ul style="list-style-type: none"> <li>• General information</li> <li>• Documents lodged or referred to on register entry</li> <li>• All other material information not included in the PDS</li> </ul>

## Useful resources

### FMA guidance:

#### Effective disclosure

<https://fma.govt.nz/assets/Guidance/141201-effective-disclosure-guidance-note.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://fma.govt.nz/assets/Consultations/141201-consultation-paper-fund-update-template-and-guidance-for-calculating-risk-indicators.pdf>

#### Content and form of Disclose register information

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

#### Presentation on Due Diligence for continuous issuers (MIS & Debt) under the FMCA

Minter Ellison Rudd Watts 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.

#### Is the FMCA a watershed for offer due diligence?

<https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-881/is-the-fmca-a-watershed-for-offer-due-diligence>

The LawTalk article summarises the academic article written by Lloyd Kavanagh and Samantha Zhang: 'Delegating Directors' Duty to Review Disclosure Materials: Due Diligence for Continuously Offered Financial Products under the Financial Markets Conduct Act' (2015) 21 NZBLQ 163

## 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](#)

**FSLAA CHANGE:** No changes to Part 4.

### What do I need to know?

- Part 4 came into effect on 1 December 2014, subject to the transitional provisions in Schedule 4. This transitional period relating to the FMCA concluded on 1 December 2016.
- Part 4 applies to debt securities offered under a regulated offer and to managed investment products 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 managed investment products***

- The Securities Act, the Unit Trusts Act, the Superannuation Schemes Act, and Part 4 of the KiwiSaver Act 2006 have been largely consequentially repealed (subject to transitional provisions).
- Managed investment schemes must be registered to make a regulated offer of a managed investment product. 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.

#### ***Derivatives issuers***

- Licensing requirements for derivatives issuers in relation to regulated offers are dealt with principally under Part 6. *See the storyline on page 35 and, generally, the discussion from page 42.*

#### ***DIMS providers***

- Licensing requirements for DIMS providers are dealt with principally under Part 6. *See the storyline on page 36 and, generally, the discussion from page 44.*

#### ***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 32.*
- What are the principal requirements for a regulated offer of managed investment products? *See page 33.*
- What are the principal requirements for a regulated offer of equity securities? *See page 34.*
- What are the principal requirements for a regulated offer of derivatives? *See page 35.*
- What are the principal requirements for DIMS providers under the FMCA in relation to retail investors? *See page 36.*

## 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 managed investment products, 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 managed investment products***

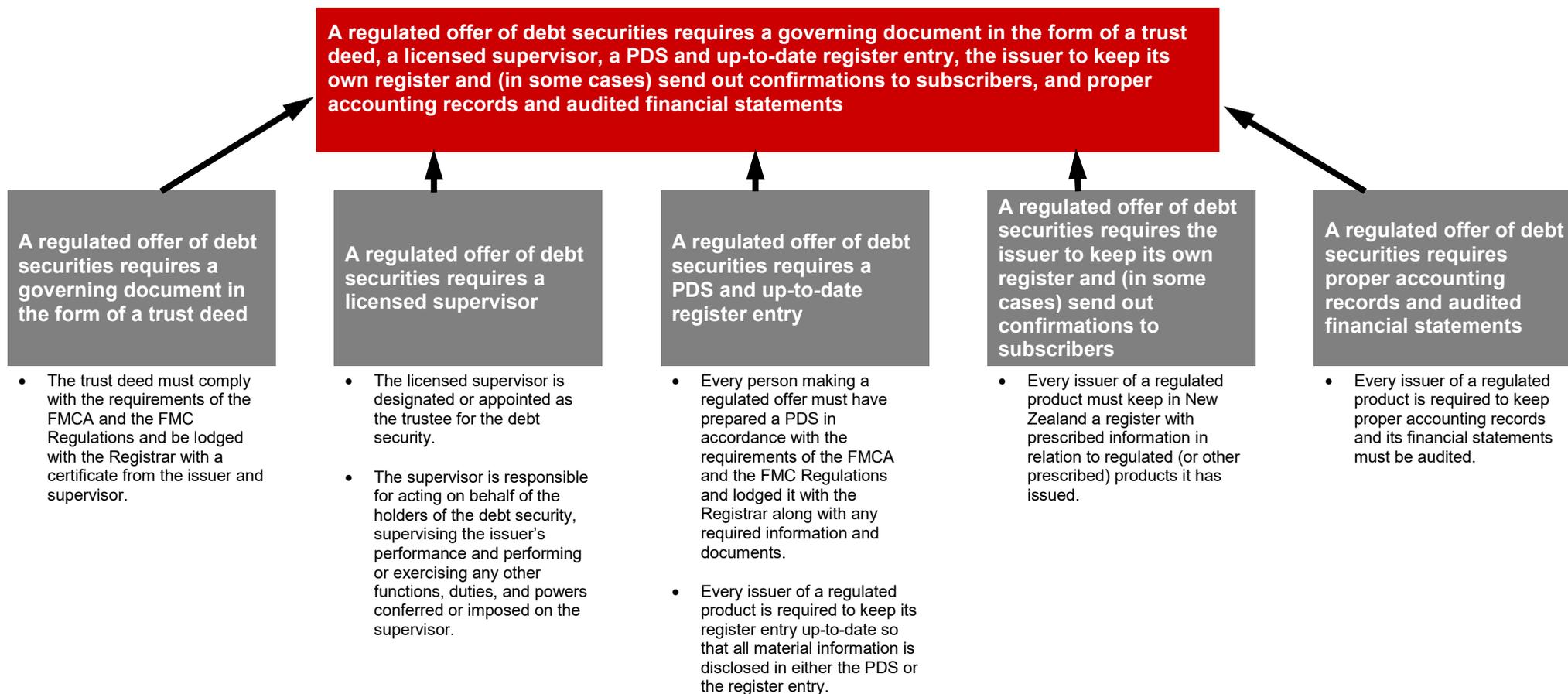
- Schedule 12 of the FMC Regulations sets out the superannuation scheme rules which are treated as being implied into a governing document for a superannuation scheme (or section of the scheme where relevant). The superannuation scheme rules do not apply to a scheme or section of a scheme which is closed 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 managed investment products 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

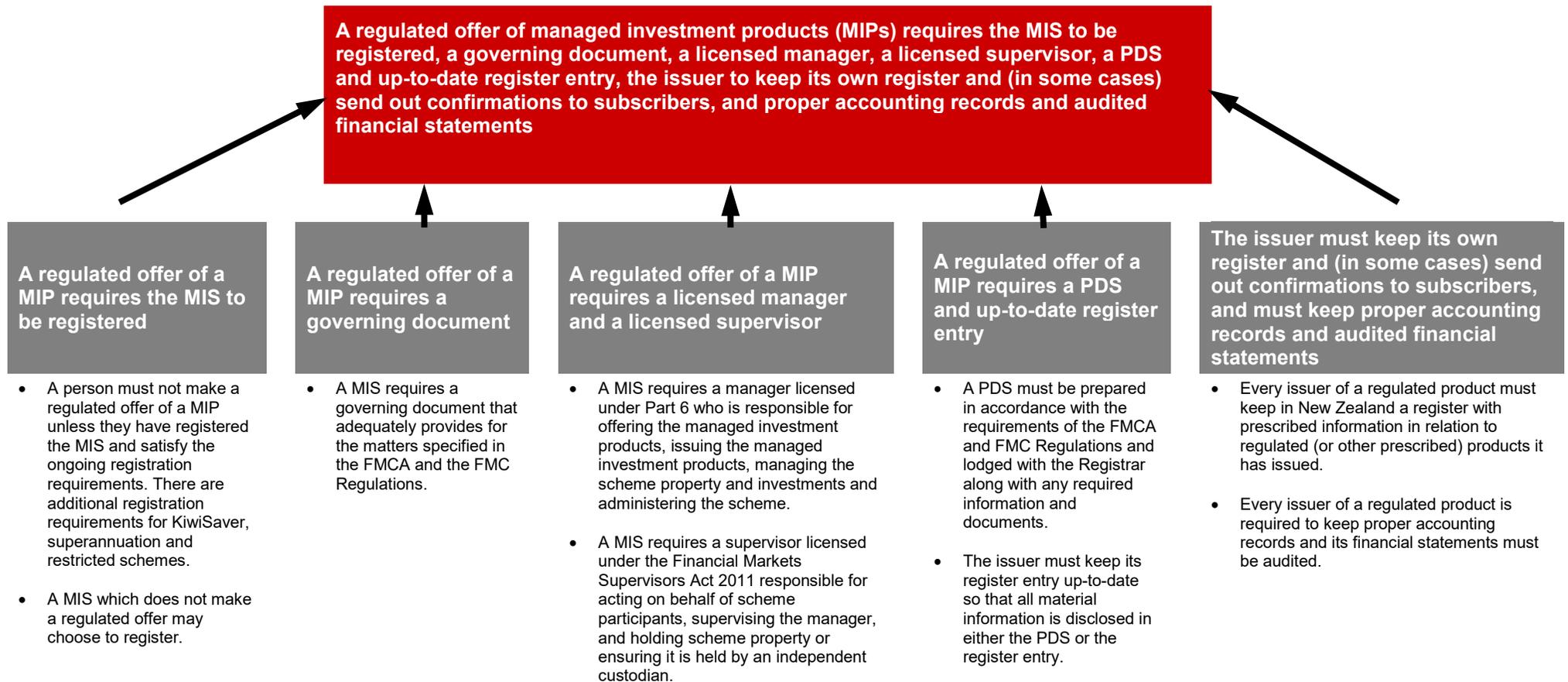
### What are the principal requirements for a regulated offer of debt securities?



Note: Non-bank deposit takers 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.

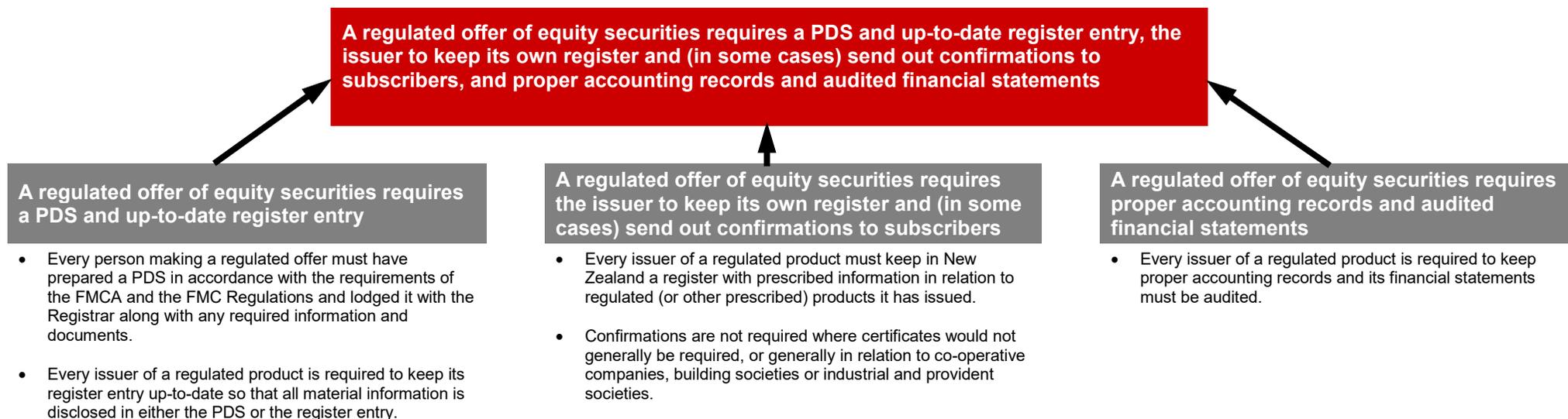
## Storyline

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



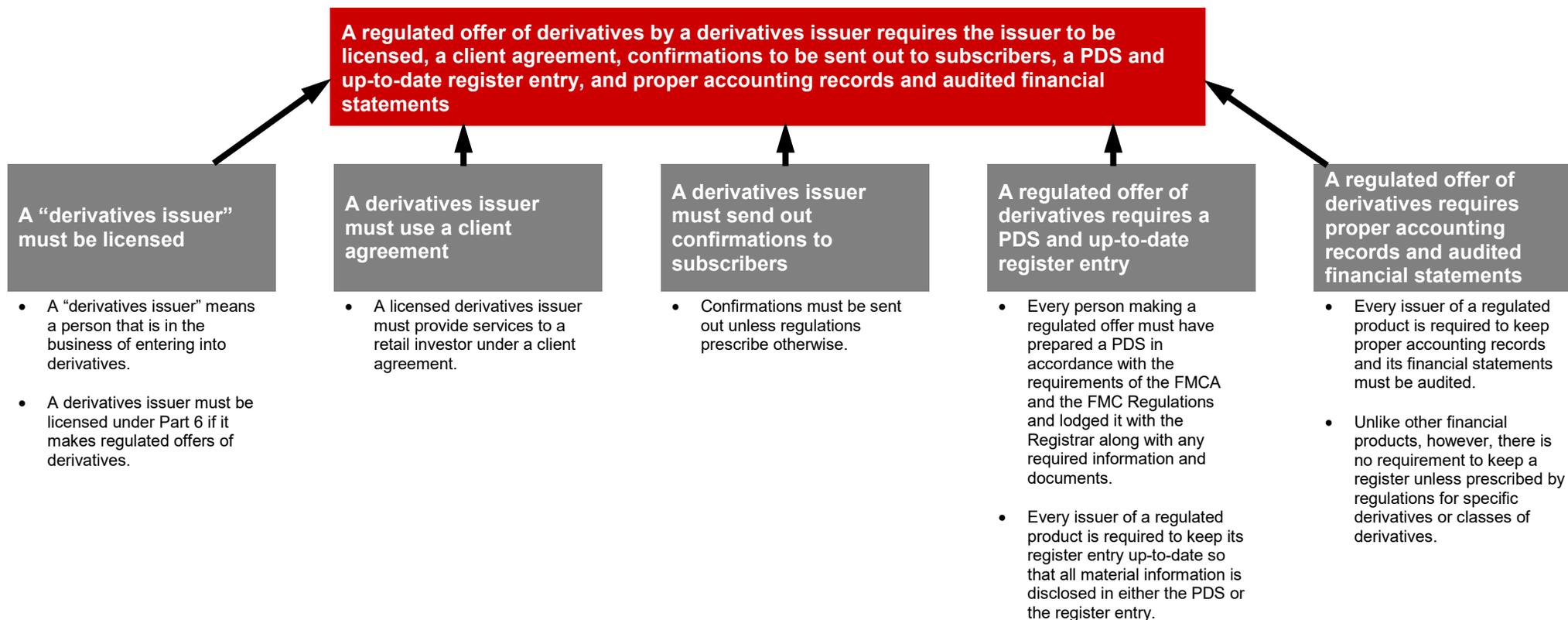
## Storyline

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



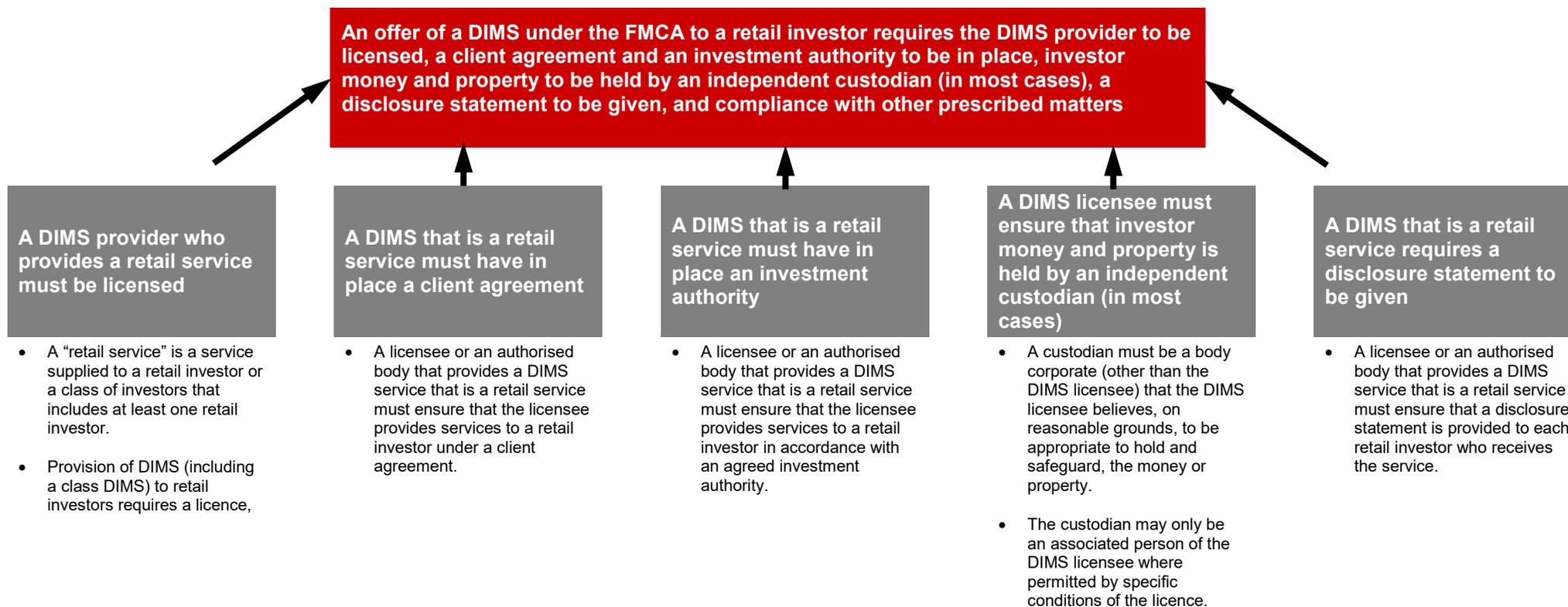
## Storyline

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



## Storyline

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



## Useful resources

### FMA guidance:

#### Governance under Part 4 of the FMCA

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

#### Statement of Investment Policies and Objectives

<http://fma.govt.nz/assets/Guidance/141101-statements-of-investment-policy-and-objectives-under-the-fmc-act-guidance-note.pdf>

#### Reporting SIPO limit breaks

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

#### Issuers' Registers of Regulated Products and FMA's Discretion under section 224

[https://fma.govt.nz/assets/Information-sheets/\\_versions/5510/150227-Issuers-registers-of-regulated-products-and-the-FMAs-discretion-under-section-224.2.pdf](https://fma.govt.nz/assets/Information-sheets/_versions/5510/150227-Issuers-registers-of-regulated-products-and-the-FMAs-discretion-under-section-224.2.pdf)

#### Presentation on Due Diligence for continuous issuers (MIS & Debt) under the FMCA

Minter Ellison Rudd Watts 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 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 1991.

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

**FSLAA CHANGE:** No changes to Part 5.

### 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):
  - 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 the 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 exempt (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 markets 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:**

#### **Market misconduct risks: a guide for MIS managers**

<https://fma.govt.nz/assets/Guidance/150813-Market-misconduct-risks-a-guide-for-MIS-managers.pdf>

#### **Presentations on Insider Trading, Market Manipulation and Fair Dealing**

**Minter Ellison Rudd Watts** 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.

Sections 386-392 Overview and territorial scope

Sections 393 Principles

Sections 394-401 Issue of licences

Sections 402-406 Conditions of licences

Sections 407-409 Expiry, suspension and cancellation

Sections 410-421 Monitoring and enforcement

Sections 422-428 Disclosure requirements

Sections 429-431 Client agreements

Sections 431A-431T Additional regulation of financial advice and financial advice services (see page 49 below)

Sections 431U-431ZH Regulation of client money or property services (see page 52 below)

Sections 432-438 DIMS licences

Sections 439-443 Related party transactions

Sections 444-446 Broking and custodial services

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

Section 449 Civil liability

**FSLAA CHANGE:** See changes noted below. See also the next section on Part 6 (Subparts 5A and 5B), from page 49.

### 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 class 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; and
  - **FSLAA CHANGE:** providers of a financial advice service (but not for wholesale clients, see section 389(2)).

- 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).

## Alternative models for 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 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.

### 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.

**FSLAA CHANGE:** FSLAA introduces the ability for the FMA to put specific conditions on licences for financial advice providers.

### 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.

**FSLAA CHANGE:** Regulation of DIMS was previously covered in two places, with “class” DIMS regulated by licensing under the FMCA and “personalised” DIMS permitted for an authorised financial adviser (AFA) with the special permission of the FMA, under the FAA. With the repeal of the FAA by FSLAA in June 2020, all DIMS will fall to be regulated by licensing under the FMCA (and the distinction between class and personalised DIMS will no longer be relevant).



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

### What's covered?

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.

### What do I need to know?

#### *Licensing criteria and ongoing obligations*

- The FMC Regulations add to the provisions already in the FMCA with:
  - 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;
  - 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 (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);
  - 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.

#### *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 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 provided by trustee corporations in relation to wills and estates, Crown Organisations (other than Public Trust), the Reserve Bank, and certain non-profit organisations.
- Schedule 21 of the FMC Regulations sets out prescribed information to be included within the simplified disclosure statement 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 (not later than 10 working days after the expiry of the reporting period) to which the information relates.

#### ***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.

### **Our experience**

MinterEllisonRuddWatts assisted a client to obtain the first MIS licence and has acted for clients in relation to DIMS and peer-to-peer lending licences, and 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:**

#### **For DIMS providers**

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

Quick guide for small businesses applying for DIMS licence

<https://fma.govt.nz/assets/Guidance/140618-licensing-small-dims-businesses-guide.pdf>

Standard conditions for DIMS licenses

<https://fma.govt.nz/assets/Compliance-section/141201-dims-licences-standard-conditions.pdf>

Guidance on transitional licence for financial advice providers

<https://www.fma.govt.nz/assets/Fact-sheets/Financial-Advice-Provider-transitional-licensing-guide.pdf>

### **For derivatives issuers**

<https://fma.govt.nz/assets/Licensing-guides/141101-derivatives-issuers-how-do-i-apply-for-a-licence-part-b5.pdf>

Standard conditions for licensed derivatives issuers

<https://fma.govt.nz/assets/Compliance-section/150415-derivatives-Issuer-licences-standard-conditions.pdf>

### **For peer-to-peer lending**

<https://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://fma.govt.nz/assets/Compliance-section/141201-peer-to-peer-lending-service-licences-standard-conditions.pdf>

### **For crowdfunding**

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

Standard conditions for crowd funding licenses

<https://fma.govt.nz/assets/Compliance-section/141201-crowdfunding-service-licences-standard-conditions.pdf>

### **For managed investment scheme managers**

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

Standard conditions for managed investment scheme manager licenses

<https://fma.govt.nz/assets/Compliance-section/141201-mis-service-licences-standard-conditions.pdf>

### **For independent trustees**

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

<https://fma.govt.nz/assets/Guidance/140901-independent-trustee-corporate-licence-guide.pdf> (corporate)

Standard conditions for independent trustees

<https://fma.govt.nz/assets/Compliance-section/141201-independent-trustee-licence-standard-conditions-for-individuals.pdf> (individual)

<https://fma.govt.nz/assets/Compliance-section/141201-independent-trustee-licences-standard-conditions-for-corporates.pdf> (corporate)

## Part 6 (Subparts 5A and 5B) of the FMCA – Financial advice, financial advice services and client money or property services

### What's covered?

Provides for the licensing and regulation of financial advice services and client money or property services.

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

Sections 431U-431ZH Regulation of client money or property services

**FSLAA CHANGE:** Subparts 5A and 5B are newly introduced by FSLAA, and together with the new Schedule 5 comprise the bulk of the new financial advice and client money/client property services regimes.

### What do I need to know?

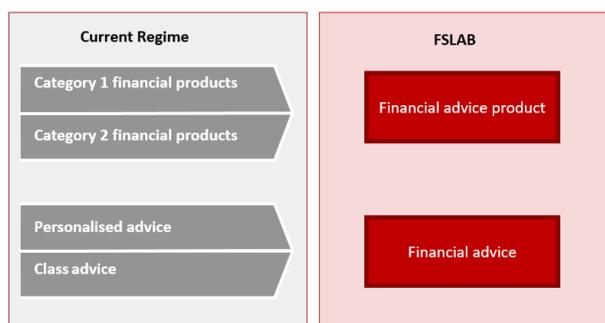
- From commencement of the FSLAA regime (expected to be June 2020), those providing “regulated financial advice” to retail clients will be required to be licensed as a FAP under the FMCA.
- In order to hold a FAP licence, advisers will need to provide evidence to prove that they have the appropriate 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.
- A transitional licence can be granted before the new FSLAA regime comes into force and lasts 2 years after the commencement of the new regime unless it is sooner cancelled (see below on transitional licences). Transitional licence applications are expected to be able to be made to the FMA from November 2019.

#### **Financial advice services**

- The new regime replaces the standalone FAA with rules contained in the FMCA. Generally the new regime is less complex, which was one of the objectives of the reform.

#### **Removal of distinction between financial products**

- The distinction between different categories of financial products was considered artificial, not reflecting the actual product risks.

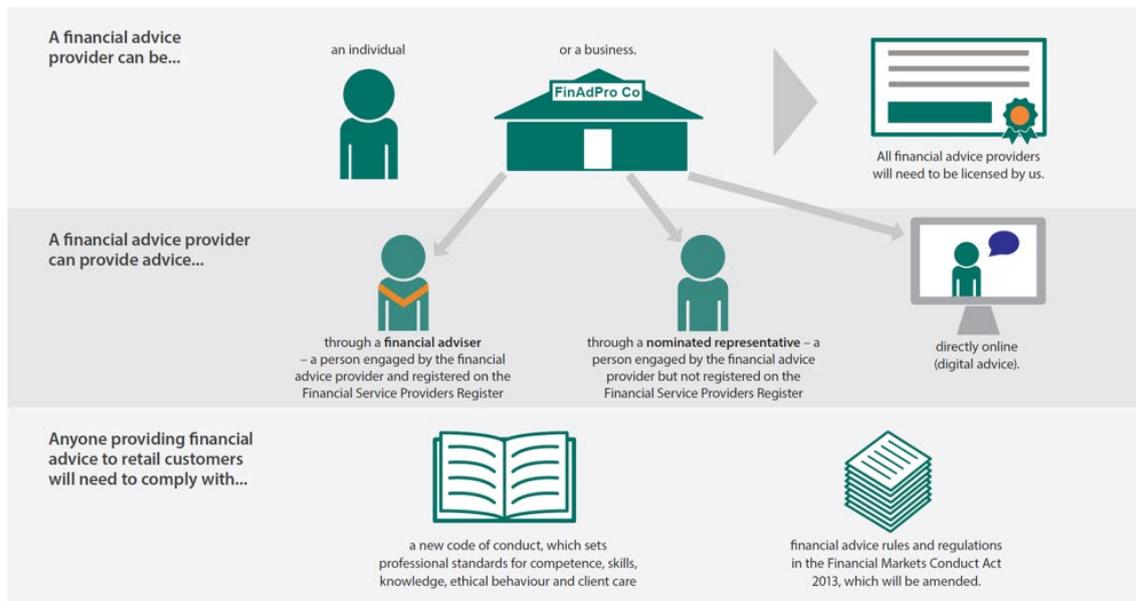


## Type of advisers

- The range of adviser types is also simplified.
- The FSLAA regime no longer makes distinction between the types of financial advisers under FAA e.g., AFAs, QFE advisers, RFAs, and Exempt Providers. Instead, financial advisers are classified as Financial Advice Providers (**FAP**), Financial Advisers (**FA**), and Nominated Representatives (**NR**).

## Under the new financial advice regime

Advice can only be provided by or on behalf of a financial advice provider.



For the new adviser types:

- **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 adviser services to retail clients. They may give advice directly, including through robo-advice and online channels, and may engage FAs or NRs 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 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, eg 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 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 FAs and NRs can potentially give advice on all types of financial product, to any customer. The key differences between FAs and NRs relate to liability:

- FAs are legally responsible for meeting their own compliance obligations - in tandem with the FAP - and in particular 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 duties.

- NRs 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 NRs 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 FAPs will need to exert a higher level of control (via systems, controls and processes) over the activities of their NRs and may be willing to give FAs a higher level of autonomy. But, given the FAP will be potentially liable for failures by either FAs or NRs engaged by them, and the reputational risks, FAPs are 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.

#### **Code of Professional Conduct for Financial Advice Services (Code)**

- *FAPs however 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 FAPs behalf. FAs who breach obligations under the Code are themselves subject to disciplinary action. NRs are not liable under the Code*
- *A person who gives regulated financial advice to a retail client must comply with the standards of ethical behaviour, conduct and client care required by the Code. Those standards are set out in Part 1 of the Code.*
  - **Standard 1:** *Treat clients fairly*
  - **Standard 2:** *Act with integrity*
  - **Standard 3:** *Give financial advice that is suitable*
  - **Standard 4:** *Ensure that the client understands the financial advice*
  - **Standard 5:** *Protect client information*
- *A person must not give regulated financial advice to a retail client unless the person meets the standards of competence, knowledge, and skill (including any continuing professional development requirements) provided in the code for giving the advice. Those standards are set out in Part 2 of the Code.*
  - **Standard 6:** *Have general competence, knowledge, and skill*
  - **Standard 7:** *Have particular competence, knowledge, and skill for designing an investment plan*
  - **Standard 8:** *Have particular competence, knowledge, and skill for product advice*
  - **Standard 9:** *Keep competence, knowledge, and skill up-to-date*

#### **Transitional licence**

- In order to continue providing financial advice to retail clients after the FSLAA regime comes into effect (expected to be in June 2020), a provider of financial advice services will either need to apply for and receive, or be engaged by a firm that applies for and receives, a transitional licence as a FAP. The FMA has advised that it will start accepting applications from November 2019.
- While regulations setting out the eligibility criteria are yet to be released, the criteria for obtaining a transitional licence are expected to be straightforward: being a provider currently registered to provide financial advice should get you there unless there are known integrity issues to be addressed.
- The FMA has released guidance as to its requirements. The FMA may issue a transitional licence (upon receiving an application) if it is satisfied that:
  - the eligibility criteria (if any) that are prescribed by the regulations for transitional licences are satisfied;
  - the applicant's directors and senior managers are fit and proper persons to hold their respective positions and otherwise satisfy the requirements that are prescribed by the regulations for transitional licences (if any);

- there is no reason to believe that the applicant is likely to contravene the market services licensee obligations; and
- the applicant is, or will be, registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 on and from commencing to provide the service.
- Significantly, only QFEs (including corporate entity members of QFE groups) will be able to engage nominated representatives under transitional licences. Non-QFE firms will have to wait until they receive a full licence under the new regime to do so.
- Once the transitional period ends 2 years after the commencement of section 16 (expected to be on or around the second quarter of 2022), each transitional licensee must hold a full licence and all financial advisers engaged by each licensee must comply fully with the competency requirements under the Code of Conduct. It is expected that this will be the more demanding process, and it is at this time that the FMA can be expected to be more discriminating as to whether or not it will grant a licence.

#### ***Client money or property service***

- 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)
- It is expected that the government will retain and enhance the requirements for custodians, under the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014, under replacement regulations to be issued under the FMCA. However, as at the date of this Roadmap, those have not been consulted on or issued.



## What's still to come?

### ***FMC Regulations for financial advice services and client money or property services***

- A number of regulations will be made to support the new regime. These are expected to enter into force simultaneously with the commencement of FSLAA.

### ***Disclosure requirements***

- On 25 February 2019 Cabinet agreed on the disclosure requirements that will apply in the new financial advice regime. Once the new regime has come into force, 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 financial advice services that they can provide, the range of 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
  - in the case of financial advisers, bankruptcy proceedings within four years of the date of discharge.
- It is important to have the correct operational infrastructure to decide **when** and **how** is the best to provide disclosure to the customer depending on what they need to know to make an informed decision.

### ***Custodian regulations***

- Detail is awaited on changes to the existing regulations for custodians.

### ***Licensing fees and the FMA levy***

- On 13 December 2018, the Minister of Commerce and Consumer Affairs released a discussion paper that is seeking feedback on proposed financial advice provider licensing fees, and changes to the FMA levy that will apply in the new financial advice regime.
- The discussion paper sets out MBIE's proposed licensing fees for financial advice providers and amendments on how the FMA levy is collected. All amounts exclude GST.

### **Transitional licence fees:**

Transitional licensing is expected to be straight forward and similar for all licence applicants. MBIE are therefore proposing the following fees:

- Financial advice providers will pay a \$363 application fee.
- There will be additional fees of \$39 per authorised body named in the application and \$100 for any application to vary licence conditions or to add or remove an authorised body (plus \$155 for every hour or part-hour pro rata, of work carried out).

### **Full licence fees:**

- The cost to apply for a full licence will scale to the size of the business applying to reflect the costs associated with the extra complexity and time of the licensing process.
- A financial advice provider that is a single adviser business or only giving advice on its own account will pay \$575 plus \$155 per hour if the processing time exceeds 2 hours.
- A financial advice provider that engages multiple financial advisers but no nominated representatives will pay \$730 plus \$155 per hour if the processing time exceeds 3 hours.
- A financial advice provider that engages nominated representatives would pay \$885 plus \$155 per hour if the processing time exceeds 4 hours.

- There will be additional fees of \$155 per authorised body named in the application and \$100 for any application to vary licence conditions (plus \$155 for every hour or part-hour pro rata, of work carried out).

**FMA levies:**

- Unlike licensing fees, levies are not set at a cost recovery basis, but reflect the relative benefits that each participant receives from operating in a well-regulated environment. The levy will generally be proportionate to the size of the business.
- MBIE proposes that financial advice providers or financial advisers pay \$460 at initial registration.
- For each annual confirmation financial advice providers will pay \$230 plus \$179 per nominated representative and \$1,106 if the financial advice provider gives advice on its own account.
- For financial advisers the levy at each annual confirmation will be \$267.
- Financial advice providers will not be required to pay more than a cap of \$80,000.

● **Authorised bodies:**

- The discussion paper also proposes changes to how authorised bodies, and market services licensees under the FMCA, are levied.
- Currently different levies are charged depending on the financial services provided by the authorised body. The discussion paper proposes to change this so all authorised bodies will pay a levy of \$460, regardless of the financial service that they provide.
- Financial service providers that pay a levy under the tiered classes (e.g. fund managers, DIMS providers) will pay a levy based on the total funds or assets under management of both the main licensee and any authorised bodies covered by the licence. The total levy payable will be calculated under the current class in Schedule 2 of the Financial Markets Authority (Levies) Regulations 2012.
- Financial advice providers would pay the levy for the total number of nominated representatives engaged by the financial advice provider and any authorised bodies covered by the licence. Each authorised body would pay \$460.

**Replacement exemptions and authorisations**

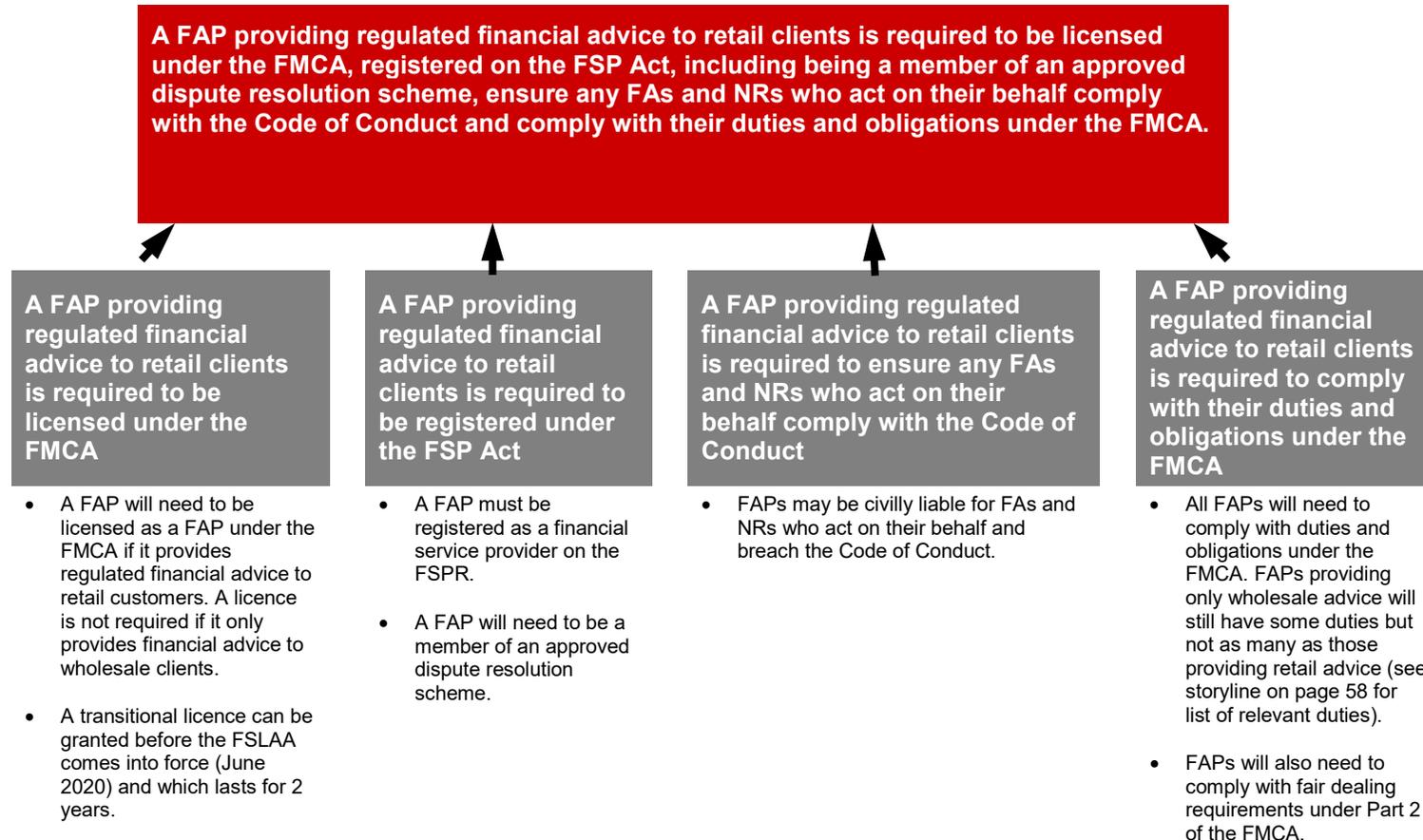
- Various exemptions and authorisations have been issued by the FMA over the years under the FAA. When the FAA is repealed on commencement of the FSLAA (expected to be June 2020) those exemptions and authorisations will cease. The FMA is currently consulting as to whether replacement exemptions or authorisations will be required in relation to the new regime for the following:
- The consultation paper discusses three matters where the FMA thinks it may be useful to continue existing FAA exemption relief to support effective operation of the new FSLAA financial advice regime:
  - Overseas custodians – the assurance engagement notice, that exempts overseas custodians who hold client money or client property relating to an FMC Act financial product from the requirement to get an assurance engagement with a New Zealand auditor.
  - Australian licensees – the Australian licensees notice, that exempts Australian-regulated licensed financial services firms providing financial adviser services in New Zealand in limited circumstances.
  - Australian qualified advisers – the Australian qualified advisers notice, that exempts Australian advisers who meet certain qualification requirements from the educational competency requirements under the current Code.
- The consultation paper also discusses four matters where the FMA thinks existing FAA exemption support will no longer be required given expected changes in the law:
  - Recognition of alternative qualifications – the Certified Investment Management Analyst notice which exempts Authorised Financial Adviser applicants from Code Standard 16 of the Code.
  - NZX and non-NZX brokers – the NZX Brokers Client Money and Client Property notice and non-NZX Brokers Client Money notice.



- Personalised digital advice – the Personalised Digital Advice notice which enables named entities to provide personalised digital advice services to retail clients.
- Offers of financial products through Authorised Financial Advisers supplying personalised Discretionary Investment Management Services (DIMS)– in particular, the FMC Act statutory exclusion from the standard disclosure regime for offers of financial products made through a licensed DIMS provider.
- Schedule 2 of the consultation paper contains further discussion relating to Australian licensees and their representatives, in particular:
  - the exemptions from new regime requirements for Australian licensees and their representatives which are likely to be required;
  - conditions relating to Australian licensees that may or may not be still be required; and
  - 10 specific questions, in which the FMA is seeking feedback on, relating to exemption relief, conditions under the existing Australian Licensee notice, and specific requirements.
- If you are currently relying on any of the above you should seek advice and contact the FMA urgently.

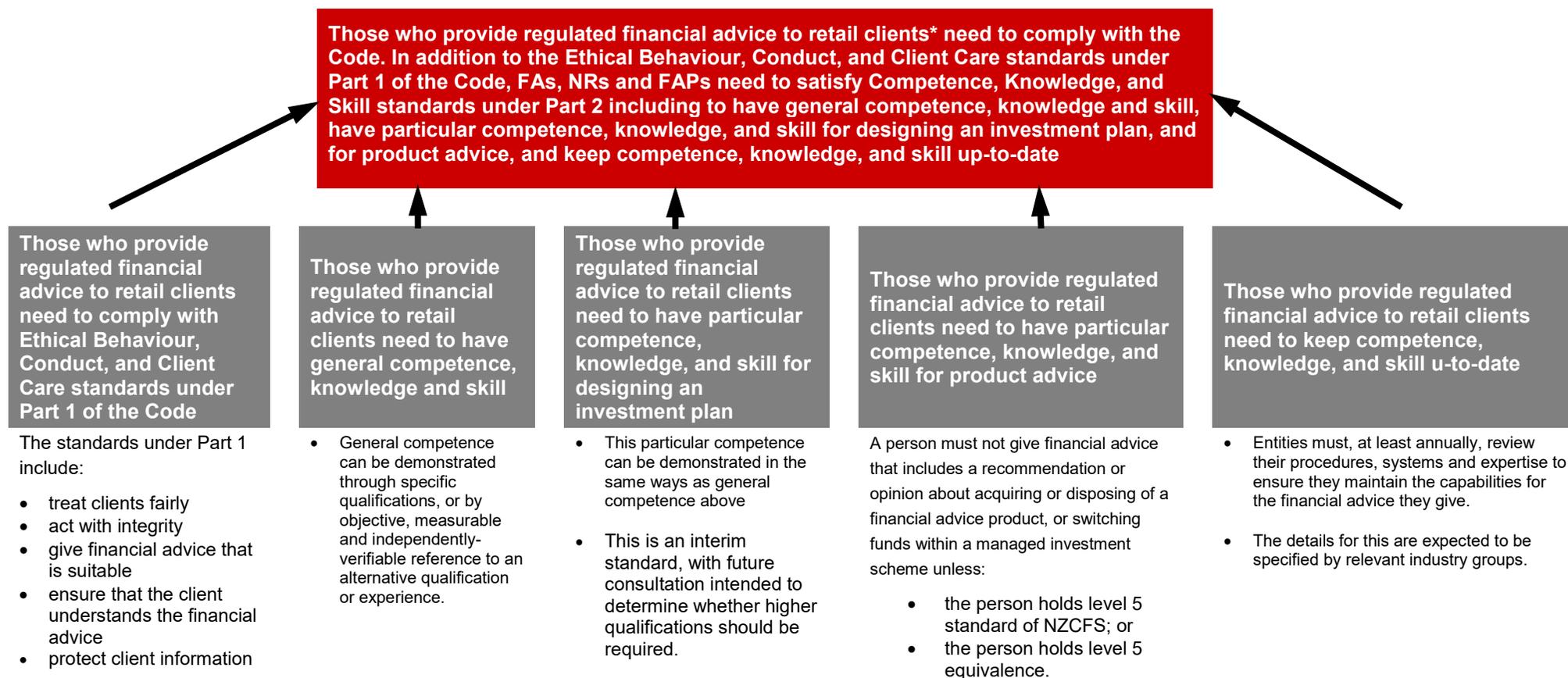
## Storyline

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



## Storyline

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



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



## Storyline

### What are the principal duties that apply to financial advice providers (FAPs)?

**Some duties apply to advice to retail clients only; others apply for both retail and wholesale clients**

#### Wholesale & Retail

- Give priority to client's interests;
- Exercise care, diligence, and skill;
- Not recommend financial products that are a contravening product;
- Make prescribed information available; and
- Not make false or misleading statements and omissions.

#### Retail only

In addition to those under wholesale:

- Meet standards of competence, knowledge, and skill;
- Ensure client understands nature and scope of advice; and
- Comply with the Code.

## 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

**FSLAA CHANGE:** See changes noted below.

### 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 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 move 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;
  - every person that is an FMC reporting entity according to regulations.

- **FSLAA CHANGE:** A person who holds a licence under Part 6 is not an FMC reporting entity if the licence only covers a financial advice service and the person is not a person referred to in one of the categories above.

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- 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 Act or regulations.
  - The FMA can grant exemptions under the FMCA in respect of the new requirements.
  - The time frame for preparing financial statements has been reduced from 5 months after the balance date to 4 months (proposed to have been 3 months under the original Bill) to ensure more 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 than 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 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 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:

#### FMC reporting entities - transition timeline

<https://fma.govt.nz/assets/Compliance-section/financial-reporting-for-fmc-entities-transition-timeline.pdf>

#### FAQs

<http://fma.govt.nz/compliance/financial-reporting/faqs/>

#### Presentation on Financial Reporting

Minter Ellison Rudd Watts has presented on ‘Financial Reporting’ to its clients. 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 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. New provisions for financial advice service and client money or property service providers have been integrated and provisions amended.

Sections 462-479 the FMA orders and directions

Sections 480-483 Court orders

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

**FSLAA CHANGE:** Part 8 is extended to cover offences in relation to financial advice or client money/client property services. See also the discussion of the disciplinary committee for financial advisers on page 83.

### 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 intends to simplify the current liability regime by including all relevant liability provisions to the extent possible, and by providing 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, contains 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 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.

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- 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 modifies the current regime and 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 556-561 Exemptions

Sections 562-566 Designations

Sections 567-569 Frameworks and methodologies

Sections 573-594 Recognition regimes

Sections 595-597 Transition/miscellaneous

**FSLAA CHANGE:** *FSLAA introduces the power to issue regulations in relation to financial advice and client money/client property matters.*

### 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; and
  - declare that exemptions from certain obligations do not apply.



## 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:**

#### **Offering financial products in Australia and New Zealand under mutual recognition**

<https://fma.govt.nz/assets/Guidance/141201-Offering-financial-products-in-New-Zealand-and-Australia-under-mutual-recognition.pdf>

#### **Applying for an exemption**

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

# 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

Clause 48 Meaning of "control"

**FSLAA CHANGE:** *The exemptions and exclusions in Schedule 1 are applied to financial adviser services, in place of those previously in the FAA. A key difference is in the definition of a "large" person where the threshold moves from net assets of NZ\$1 million to the existing FMCA threshold of NZ\$5 million.*

## 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 69 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 from pages 70 - 74.

### **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 further set out in Schedule 8 of the FMC Regulations – see page 76); 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 an authorised financial adviser, 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
<ul style="list-style-type: none"><li>• A company can raise up to \$2 million</li><li>• Including any crowd funding or P2P lending funds raised</li><li>• Excluding any wholesale, foreign, or regulated offer investors</li></ul>	<ul style="list-style-type: none"><li>• In any 12 month period</li><li>• Must give notice to FMA each year of any amounts raised under exemption</li></ul>	<ul style="list-style-type: none"><li>• From up to 20 investors</li><li>• Based on a personal offer only</li><li>• Warning statement required</li><li>• Note, see the FAQs on FMA’s website in relation to use of nominees to group investors</li></ul>

## Storylines

- What are the exclusions for offers for issue (primary offers)? *See page 69.*
- What are the main circumstances where offers for sale require disclosure (secondary offers)? *See page 75.*

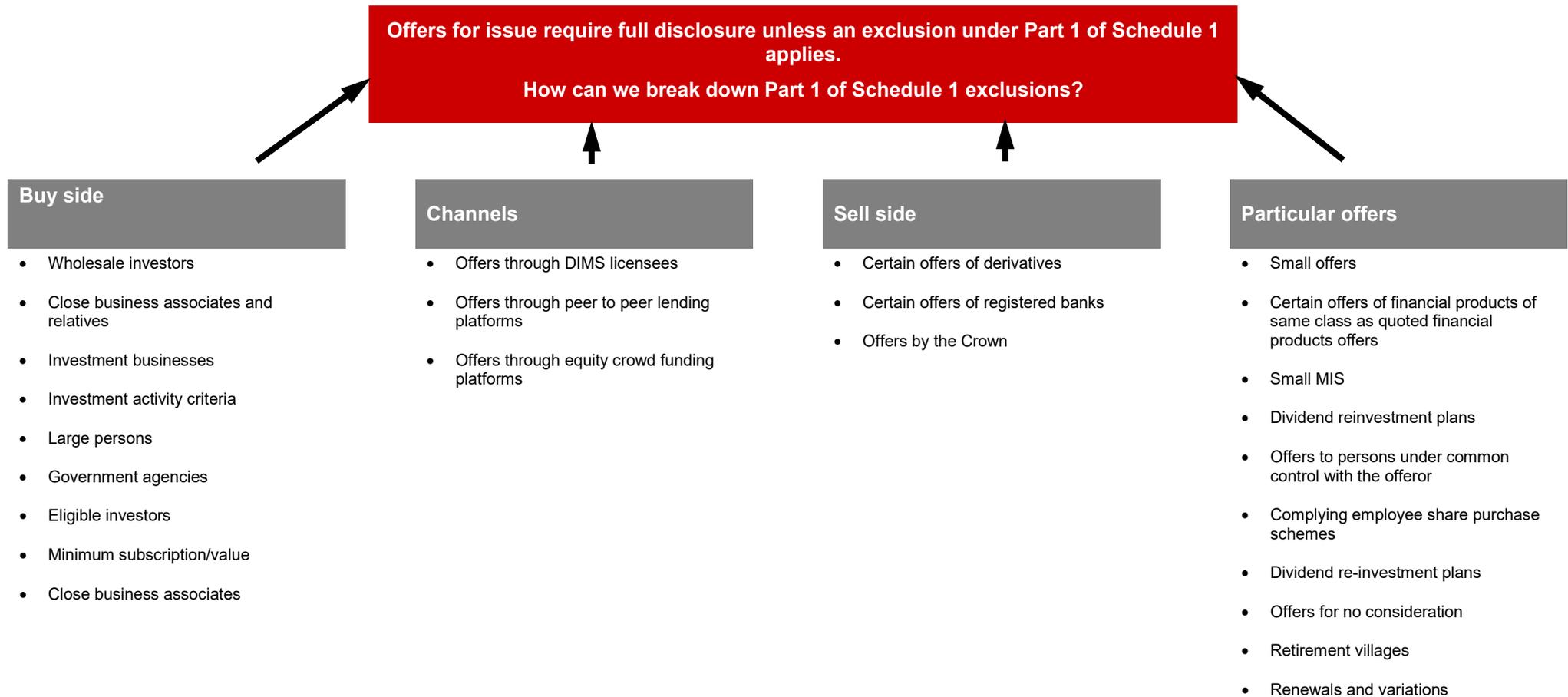
## Table

- See our detailed table explaining the Schedule 1 exclusions. *See pages 70 to 74.*



## Storyline

### What are the exclusions for offers for issue (primary offers)?





## TABLE: WHO CAN RECEIVE A NON-REGULATED OFFER UNDER THE FMCA?

**FMCA** = Financial Markets Conduct Act 2013, **FMC Regs** = Financial Markets Conduct Regulations 2014. A reference to not requiring disclosure means not requiring disclosure under Part 3 of the FMCA.

Broad category	FMCA	Relevant further definitions/comments
<b>Wholesale investors</b>	<p>A person is a wholesale investor if:</p> <ul style="list-style-type: none"> <li>(a) the person is an <u>investment business</u>;</li> <li>(b) the person meets certain <u>investment activity criteria</u>;</li> <li>(c) the person is <u>large</u>; or</li> <li>(d) the person is a <u>government agency</u>.</li> </ul> <p>[FMCA, Sch 1, cl 3(2)]</p>	<p>A person is an <u>investment business</u> if the person is—</p> <ul style="list-style-type: none"> <li>(a) an entity whose principal business consists of 1 or more of the following:               <ul style="list-style-type: none"> <li>(i) investing in financial products;</li> <li>(ii) acting as an underwriter;</li> <li>(iii) providing a financial advice service; or</li> <li>(iv) provide client money or property service; or</li> <li>(v) trading in financial products on behalf of others;</li> </ul> </li> <li>(b) registered bank;</li> <li>(c) a non-bank deposit taker (NBDT);</li> <li>(d) a licensed insurer;</li> <li>(e) a manager of a registered scheme, or a DIMS, that holds a market services licence;</li> <li>(f) a derivatives issuer that holds a market services licence; or</li> <li>(g) a financial adviser.</li> </ul> <p>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]</p>
		<p>A person (A) meets the <u>investment activity criteria</u> if at least 1 of the following applies:</p> <ul style="list-style-type: none"> <li>(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);</li> <li>(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;</li> <li>(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.</li> </ul> <p>See the FMCA for more detail. [FMCA, Sch 1, cl 38]</p>
		<p>A person is <u>large</u> if at least 1 of the following applies:</p> <ul style="list-style-type: none"> <li>(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;</li> <li>(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.</li> </ul> <p>[FMCA, Sch 1, cl 39] See definition of “control” in Sch 1, cl 48.</p>

Broad category	FMCA	Relevant further definitions/comments
		<p>A <u>government agency</u> 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]</p> <p>A wholesale investor within each of the above categories may give a <u>safe harbour</u> 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 Regs. [FMC Regs, Sch 8, cl 48]</p>
	<p>A person is also a wholesale investor, in relation to an offer of financial products, if:</p> <p>(a) the person is an <u>eligible investor</u>; or</p> <p>(b) in relation to an offer of financial products for issue or sale:</p> <p>(i) the minimum amount payable by the person on acceptance of the offer is at least NZ\$750,000;</p> <p>(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</p> <p>(iii) it is proposed that the person will acquire the financial products under a bona fide underwriting or sub-underwriting agreement; or</p> <p>(c) in relation to an offer of a derivative for issue or sale, the notional value of the derivative is at least NZ\$5m.</p> <p>[FMCA, Sch 1, cl 3(3)]</p>	<p>A person (A) is an <u>eligible investor</u>, in relation to a relevant transaction or class of relevant transactions, if:</p> <p>(a) A certifies in writing:</p> <p>(i) as to A's previous experience enabling A to assess the relevant financial products or services; and</p> <p>(ii) that A understands the consequences of certifying himself, herself, or itself to be an eligible investor;</p> <p>(b) A states in the certificate the grounds for this certification; and</p> <p>(c) an authorised financial adviser, a chartered accountant, or a lawyer signs a written confirmation of the certification.</p> <p>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 Regs. [FMC Regs, Sch 8, cl 47]</p> <p>Limited disclosure obligations including a prescribed warning statement are required to rely on the NZ\$750,000 minimum subscription exemption. [FMC Regs, Sch 8, cl 3 to 5]</p>
<p><b>Close business associates</b></p>	<p>An offer of financial products to a <u>close business associate</u> of the offeror does not require Part 3 disclosure.</p> <p>[FMCA, Sch 1, cl 4]</p>	<p>A person (A) is a <u>close business associate</u> of the offeror if:</p> <p>(a) A is a director or senior manager of the offeror or of a related body corporate of the offeror;</p> <p>(b) A holds or controls 5% or more of the voting products of the offeror;</p> <p>(c) A is a related body corporate of the offeror;</p> <p>(d) A holds or controls 20% or more of the voting products of a related body corporate of the offeror;</p> <p>(e) A is a partner of the offeror or of a director of the offeror (under the Partnership Act 1908);</p>

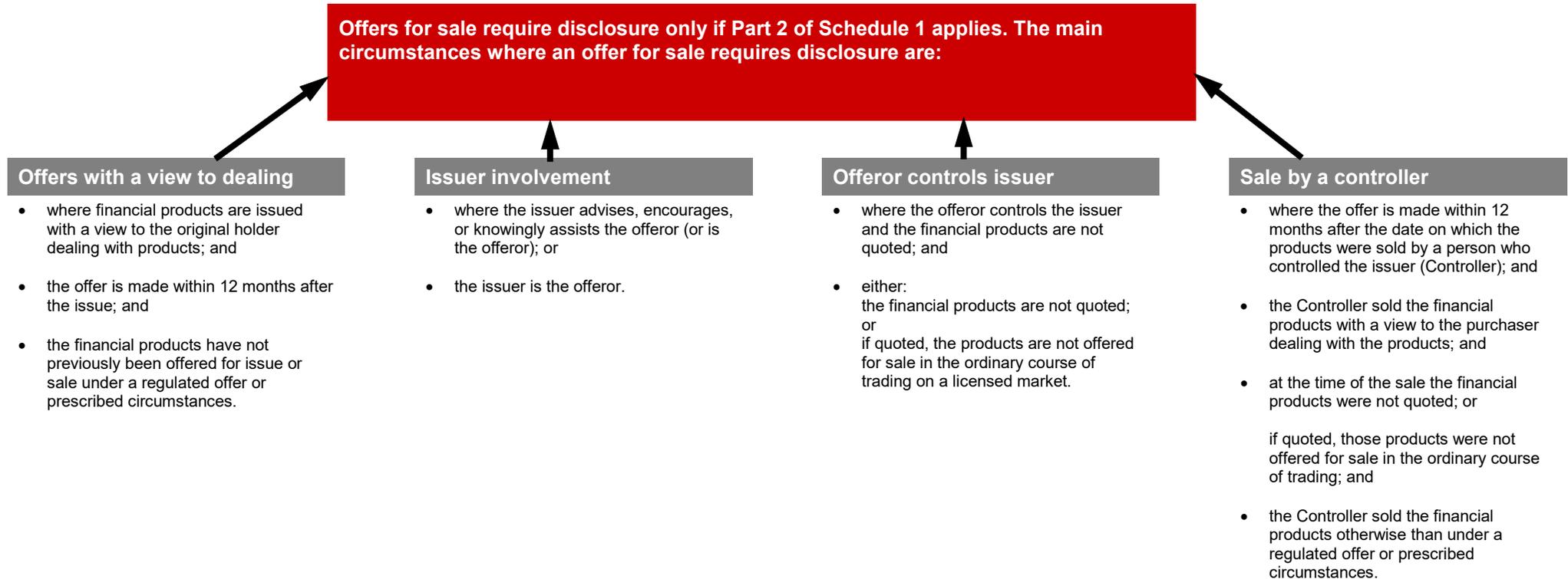
Broad category	FMCA	Relevant further definitions/comments
		<p>(f) A is a spouse, civil union partner, or de facto partner of a person who is a close business associate of the offeror under any of paragraphs (a) to (e) or the additional categories below; or</p> <p>(g) A is a child, parent, brother, or sister of a person who is a close business associate of the offeror (whether or not by a step relationship).</p> <p>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:</p> <p>(a) assess the merits of the offer; or</p> <p>(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.</p> <p>See further definitions of “offeror”, “director”, “senior manager”, “related” and “voting product” in the FMCA. See definition of “control” in Sch 1, cl 48.</p>
<b>Relatives</b>	<p>An offer of financial products to a <u>relative</u> of the offeror or of a director of the offeror does not require Part 3 disclosure.</p> <p>[FMCA, Sch 1, cl 5]</p>	<p><u>Relative</u> 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.</p>
<b>Offers through licensed intermediaries</b>	<p>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]</p>	<p>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 Regs, Sch 8, cl 6 to 8]</p>
<b>Offers through DIMS licensees</b>	<p>An offer of financial products to a person (A) does not require Part 3 disclosure if:</p> <p>(a) the offer is through a DIMS licensee; and</p> <p>(b) the DIMS licensee decides whether to acquire the financial products on behalf of A in the course of supplying a DIMS to A.</p> <p>[FMCA, Sch 1, cl 7]</p>	<p>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 be themselves a retail investor otherwise.</p>
<b>Employee share purchase schemes</b>	<p>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]</p>	<p>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 Regs, Sch 8, cl 9 to 12]</p>
<b>Offers to persons</b>	<p>If, under any of the categories above, an offer of financial products to a person (A) would not require disclosure under Part 3 of the FMCA, an</p>	<p>This extends the scope of the exemptions above to persons controlled by an otherwise exempt person.</p>

Broad category	FMCA	Relevant further definitions/comments
<b>under control</b>	offer of those financial products to an entity controlled by A does not require Part 3 disclosure.  [FMCA, Sch 1, cl 9]	See definition of "control" in Sch 1, cl 48.
<b>Dividend reinvestment plans</b>	An offer of specified financial products to a person (A) 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 Regs, Sch 8, cl 13 to 15]
<b>Offers of financial products for no consideration</b>	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.
<b>Small offers</b>	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 Regs, Sch 8, cl 16 to 18]
<b>Offers of controlling interest</b>	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.
<b>Small managed investment schemes</b>	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.
<b>Same class quoted financial products</b>	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 Regs, Sch 8, cl 19 to 22]  The exemption also does not apply in certain circumstances. [FMC Regs, Sch 8, cl 46]
<b>Certain offers of</b>	Certain offers of derivatives do not require Part 3 disclosure. Generally disclosure is only required when derivatives are issued by a	See the provisions for more detail.

Broad category	FMCA	Relevant further definitions/comments
<b>derivatives</b>	person in the business of issuing derivatives. [FMCA, Sch 1, cl 20]  There are also certain transitional exemptions for existing derivatives issuers. [FMC Regs, Sch 1, cl 17]	
<b>Certain offers by registered banks</b>	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 Regs for more detail. [FMC Regs, Sch 8, cl 44]  Limited disclosure and other requirements apply in relation to reliance on this exemption in some (not all) cases. [FMC Regs, Sch 8, cl 23 to 28, 37 to 43, also Sch 9]
<b>Offers by the Crown</b>	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 Regs, Sch 8, cl 29 to 31, 37 to 43, also Sch 9]
<b>Offers of interests in retirement villages</b>	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 (although not all) interests in retirement villages.
<b>Offers of renewals or variations</b>	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 Regs, Sch 8, cl 32 to 36, 37 to 43]

## Storyline

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



## 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 and 9 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).

## Useful resources

### FMA guidance:

#### Summary of Schedule 1 exclusions

<https://fma.govt.nz/assets/Information-sheets/141101-Summary-of-Schedule-1-exclusions-under-the-Financial-Markets-Conduct-Act-2013-FMC-Act.pdf>

### FAQs

<https://fma.govt.nz/compliance/offer-information/faqs/#schedule1offers>

### Presentation on Private Offers under the FMCA

Minter Ellison Rudd Watts 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 4 of the FMCA - Transitional 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 34-62 other

**FSLAA CHANGE:** See changes noted below.

### What do I need to know?

- The schedule provides comprehensive transitional provisions included to ensure the orderly implementation of the introduction 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 managed investment products 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.



**FSLAA CHANGE:**

- *Part 6 introduces new transitional provisions relating to FSLAA. The FMA may issue a transitional licence that continues in force until 2 years after the commencement of section 16 of the FSLAA.*
- *Transitional licensing applications would open by November 2019, six months before the new regime starts.*
- *During the transitional period, new duties and the code of conduct for advisers would be in force, with a competency safe harbour for previous industry participants.*
- *FAPs would have to hold a transitional or full licence and financial advisers would have to be engaged by a FAP. Both would need to be registered on the FSPR.*



## Schedule 1 of the FMC Regulations - Transitional provisions

### What's covered?

Schedule 1 originally covered 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.

### What do I need to know?

- Regulation 4 provided for the transitional provisions set out in Schedule 1 of the FMC Regulations.
- Schedule 1 originally covered 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.

## 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 41-60 Complaints and disciplinary proceedings

**FSLAA CHANGE:** *New schedule introduced by FSLAA.*

### 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.
- Makes changes 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.
- 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).
- Financial advice is also exempted in some circumstances related to:
  - Crown-related entities;
  - Trustee corporations;
  - Non-financial not-for-profit organisations;
  - Workplace financial products;
  - Advice to product provider;
  - Activities governed by other regulatory frameworks;
  - Prescribed circumstances; and
  - Controlling owners, directors, etc.
- In regards to client money or property exclusions, schedule 5 makes exclusion for lawyers, accountants, real estate agents, and other occupations. In addition, exclusions also apply in regards to services:
  - by an operator of a designated settlement system under s 156N of the RBNZ Act;
  - provided by derivatives issuer acting under a licence under Part 6;
  - 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.

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- Any person may complain 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.

# The Financial Markets (Repeals and Amendments) Act 2013 and FSLAA repeals

## What's covered?

Sets out provisions in order to enable the implementation of the FMCA and the amendment and repeal of existing laws.

**FSLAA CHANGE:** FSLAA does not change FMRAA but does itself repeal or amend further legislation.

## What do I need to know?

- The FMCA repealed the following Acts:
  - Securities Act;
  - Securities Markets Act;
  - Securities Transfer Act 1991;
  - Superannuation Schemes Act; and
  - Unit Trusts Act.
- Amendments were made to various other Acts, including more significant changes to each of the following Acts:
  - Fair Trading Act 1986;
  - Financial Advisers Act 2008;
  - Financial Markets Authority Act 2011;
  - KiwiSaver Act 2006; and
  - Financial Service Providers (Registration and Disputes Resolution) Act 2008.

- **FSLAA CHANGE:** FSLAA further makes the following repeals and revocations:
  - *The Financial Advisers Act 2008 (2008 No 91) is repealed.*
  - *The following regulations are revoked:*
    - *Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014 (LI 2014/48);*
    - *Financial Advisers (Definitions, Voluntary Authorisation, Prescribed Entities, and Exemptions) Regulations 2011 (SR 2011/50);*
    - *Financial Advisers (Disclosure) Regulations 2010 (SR 2010/378);*
    - *Financial Advisers (Fees) Regulations 2010 (SR 2010/234);*
    - *Financial Advisers (Personalised DIMS) Regulations 2014 (LI 2014/333).*
  - *The following notices are revoked:*
    - *Financial Advisers (Australian Licensees) Exemption Notice 2011 (SR 2011/238);*
    - *Financial Advisers (NZX Brokers—Client Money and Client Property) Exemption Notice 2015 (SR 2015/298);*
    - *Financial Advisers (Overseas Custodians—Assurance Engagement) Exemption Notice 2017 (LI 2017/23);*

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- *Financial Advisers (Non-NZX Brokers—Client Money) Exemption Notice 2017 (LI 2017/169);*
  - *Financial Advisers (Overseas Custodians—Assurance Engagement) Exemption Notice 2018 (LI 2018/8);*
  - *Financial Advisers (Personalised Digital Advice) Exemption Notice 2018 (LI 2018/67);*
  - *every other notice made under section 148 of the Financial Advisers Act 2008 that is in force on the commencement of this section;*
  - *Financial Markets Conduct (Offers of Financial Products Through Authorised Financial Advisers Supplying Personalised DIMS) Exemption Notice 2015 (LI 2015/254).*
- *As at the date of this Roadmap, the FMA is consulting as to whether corresponding exemption notices will be required under the new FSLAA regime. If you relying on the existing exemptions, it will be important to take advice urgently.*

## FMA consultations

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

### Previous public and targeted FMA consultations

Consultation	Closed
New financial advice regime exemptions	Closes 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
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

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