

Consultation Paper: Issuers' Registers of Regulated Products and FMA's Discretion under Section 224

3 November 2014

This paper gives an overview of the requirements relating to issuers' registers of regulated products under Subpart 4 of Part 4 of the Financial Markets Conduct Act 2013 (FMC Act).

It also sets out our thinking on how we will exercise our discretion to authorise an issuer to decline a request for a copy of a register under section 224 of the FMC Act.

We invite you to review our proposals and share your feedback on them with us.

We welcome general comments and have also included a number of questions seeking specific feedback. Responses to these specific questions will help shape an information sheet we intend to issue.

Submissions close on Friday, 21 November 2014. The form at the back provides more details.

Overview of requirements relating to issuers' registers of regulated products

1. Sections 215-220 in Subpart 4 of Part 4 of the FMC Act govern the keeping of registers of regulated products, contents of registers, audit or review of registers and the notification to the Registrar in relation to where registers are kept and of any change in that place.
2. Sections 221-225 govern the inspection of registers of regulated products, requests for copies of those registers and the use of information from these registers. Section 226 provides that sections 221-225 prevail over equivalent provisions in the Companies Act if there are any inconsistencies.
3. Subpart 4 applies to issuers of regulated products and therefore will only apply where an issuer has transitioned across to the FMC Act. Until then, the relevant provisions in the Securities Act continue to apply.
4. Subpart 3 of Part 4 of the Financial Markets Conduct Regulations will set out more detail in relation to when the duty for an issuer to keep a register does not apply, audit of registers, when public inspection of a register is not required, and inspection and copies of documents.
5. We will explain these provisions in more detail in the information sheet we propose to publish following this consultation.

New provisions are introduced

6. The FMC Act introduces provisions that are not included in the Companies Act or the Securities Act. These restrict a person's ability to obtain registers and to use information from those registers:
 - **Section 224(2):** The FMA has a power to authorise issuers to not comply with register requests
 - **Section 225(1) & (2):** Provides that "A person must not... use information about a person obtained from a register kept under this subpart to contact or send material to that person... [unless] relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to those interests; or approved by the issuer that keeps the register"
 - **Section 225(3):** Provides that "A person must not use information obtained from a register kept under this subpart... for any prescribed purpose; or in the case of a request under section 223(1), for any purpose other than the purpose disclosed in the statement under section 224(1)".

7. Sections 224-225 are equivalent, in many respects, to section 52 of the Securities Act (Rights of inspection of registers of securities and to copies of registers and deeds) and to sections 215(1)(c), 217 and 218 of the Companies Act.
8. Under both the Companies Act and Securities Act any person (not just a security holder) is entitled to inspect registers and to request copies of registers. The FMA and most issuers (but not all) have interpreted those sections as being without qualification, with the result that issuers have not been able to decline requests for copies of registers.
9. The introduction of the new regime will restrict a person's ability to obtain registers and to use information from those registers.

Requirement to provide reasons for register requests

10. Under section 224 of the FMC Act, when a person makes a request to an issuer for a copy or extract of its register of investors, they must state their reasons for making the request, including the purpose for which they intend to use the information. The issuer can then elect to provide a copy of the statement of reasons to the FMA.
11. Section 224 introduces new powers for the FMA which gives the FMA discretion to authorise the issuer to decline a request for a copy of a register.
12. If the issuer elects to provide a copy of the statement of reasons to the FMA, the timeframe for responding to the request extends to 10 working days (from five working days). The issuer does not have to comply with the request if, within that 10 working days, the FMA gives written notice to the issuer that it is not required to comply.

FMA's discretion to authorise non-compliance with request

13. We propose that the FMA will only consider using its discretion under section 224 where there is a risk that the person making a register request will not comply with its obligations at law when using the requested information or where there is otherwise a risk of investor harm.
14. The discretion is often discussed in the context of "low ball" or unsolicited offers. However, the law does not currently prohibit unsolicited offers.
15. Unless prohibited by regulations under the FMC Act, issuers cannot decline register requests for the purposes of making an unsolicited offer, unless the FMA exercises its discretion.
16. It would be inconsistent with the scheme and purpose of the FMC Act to authorise an issuer to not comply with a register request solely on the basis that the purpose of the request is to make an unsolicited offer to investors.

Questions

- Q1 Other than in relation to the FMA's discretion under section 224, we propose our information sheet relating to issuer's registers of regulated products will largely summarise the requirements under the FMC Act and Regulations. Are there any matters in relation to issuers' registers of regulated products that are dealt with in the FMC Act or Regulations that you believe will benefit from more detail or FMA guidance?
- Q2 What comments do you have in relation to the FMA's proposed policy of not exercising its discretion solely on the basis that the purpose of a request is to make an unsolicited offer to investors?
- Q3 If you disagree with the FMA's proposed policy, on what basis do you believe that the FMA's discretion extends to authorising issuers to not comply in those circumstances?
- Q4 Are there other circumstances in which you think the FMA should consider using its discretion (noting that section 225 of the FMC Act already prohibits use of information from requests other than where it is relevant to the holding of / exercise of the recorded interests or where the issuer approves that use)?
- Q5 What specific factors do you think the FMA should take into account in considering whether to permit an issuer to not comply with a register request?

How do I make a submission?

Please use the form on the next page – this gives the details of what you need to do. Forms must be submitted electronically in both PDF and word formats and emailed to consultation@fma.govt.nz – please put ‘Feedback Issuers’ Registers of Regulated Products and FMA’s Discretion under Section 224’ in the subject line.

Alternatively, you can make an online submission on our engagement site www.talktous.fma.govt.nz. You need to register to be able to use the site.

Submissions close on 21 November 2014.

Where can I get more information?

You’ll find more information about the changes on our website www.fma.govt.nz, or at the Ministry of Business Innovation and Employment site www.mbie.govt.nz

If you have questions about the consultation process, please get in touch.

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