

# Guidance Note

December 2014

## Effective Disclosure

### About this guidance note

#### **This guidance note is for**

Issuers of securities under the Securities Act 1978 pursuant to the transitional provisions of the Financial Markets Conduct Act 2013. It is also for their directors and advisers.

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#### **It gives guidance on**

The approach the Financial Markets Authority (FMA) intends to take in reviewing prospectuses and investment statements for compliance with the law. It also provides our views on good practice for preparing these disclosure documents.

## About FMA guidance notes

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### Our guidance:

- explains when and how we will exercise specific powers under legislation
  - explains how we interpret the law
  - describes the principles underlying our approach
  - gives practical examples about how to meet obligations.
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**Guidance notes:** provide guidance on a topic or topic theme. Typically we will seek industry feedback via a public consultation paper, or more targeted consultation before we release a guidance note.

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

You might also like to check the reports and papers on our website. For example, our monitoring reports describe actual practice we are seeing and our comments on this.

### Document history

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This version was issued in December 2014 and is based on legislation and regulations as at the date of issue. It incorporates amendments to the original version issued in June 2012. Details of these amendments are contained in the introduction to this guidance note.

**[www.fma.govt.nz](http://www.fma.govt.nz)**

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## About this guidance note

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This guidance note was originally published in June 2012 when the FMA was relatively new and therefore includes detail on our regulatory approach at that time. As a result the guidance (at over 50 pages) is not as concise as we would like. However, this guidance will have a limited life as issuers' transition to the new disclosure regime under the *FMC Act*. We have therefore focused on essential updates only to reflect the *FMC Act*, any recent changes to our approach or changes to market practice in preparing disclosure documents.

The *FMC Act* is now in effect and contains transitional provisions allowing some offers of securities to be made under the *1978 Act* up to 30 November 2016. This guidance note focuses on new offers made under the *1978 Act* during this *transitional period*, however parts of the guidance will apply to offers under the *FMC Act*. Any comments we make about the *FMC Act* are contained in pullout quotes (in blue). We have also highlighted where issuers could benefit from considering aspects of the new *FMC Act* regime to help them produce clear, concise and effective documents under the *1978 Act* regime.

Where existing issuers of continuously issued securities are working towards transition into the *FMC Act* regime, we do not expect them to refresh their existing *1978 Act*-compliant offer documents solely to take into account the updated information contained in this guidance note.

We do not currently propose to produce separate guidance on effective disclosure under the *FMC Act*. However we encourage issuers to use the new Product Disclosure Statement (*PDS*) regime and we will engage directly with issuers who wish to do this. We also encourage issuers and advisers to tell us where guidance from the FMA would be useful in the future to assist with preparation of the new *PDS* formats.

We will also provide separate guidance around how to structure and present information that is included in the financial product register entry.

We have provided examples throughout this guidance to help explain our approach. These examples are not exhaustive and are not intended to be a checklist. Terms in italics are defined in the Glossary on page 49 of this guidance note.

Every issuer must comply with all legal requirements for disclosure documents. This guidance note is not intended to be a substitute for legal advice.

# Introductory comments

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## Key points

- This guidance note is published as part of the FMA's commitment to adopt an open and educative approach, enabling participants to achieve good practice standards of compliance.
- This guidance note does not change the legal requirements for disclosure documents.
- It aims to help you comply with those requirements by preparing disclosure documents that:
  - investors want to read and are less likely to be misled or confused by, when they do;
  - in the case of a prospectus, includes all matters likely to be material to a person considering investing in the particular offer; and
  - issuers and their directors are satisfied are holistically true taking account of all the information available to them.
- We will use this guidance note in our review of disclosure documents for compliance with the law.

## Purpose of this guidance note

This guidance note does not, and cannot, change the legal requirements for disclosure documents (see Section A). Rather, it aims to help you comply with those legal requirements and address some of our key concerns such as:

- the style and presentation of disclosure documents: they should be clear, so investors want to read the documents and so they, and their financial advisers, are less likely to be misled or confused when they do;
- that full consideration has been given by issuers and their directors, and disclosure has been made of all matters that are likely to be material to a person considering investing in the particular offer;
- that issuers and their directors are satisfied disclosure documents are holistically true taking account of all the information available to them.
- We believe it is important for issuers to provide high quality information to the market, to investors and to their advisers. This is a whole of market initiative. To help achieve it, we want to play our part by explaining what we think high quality disclosure documents look like. We also want to emphasise the need for issuers and their directors to 'own' the process of preparing them.

We have seen a significant improvement in the presentation and layout of offer documents since this guidance was first issued in June 2012. In particular, recent offer documents for major initial public offerings (IPOs) have consisted of separate investment statements and prospectuses and have become substantially shorter and more readable. We encourage directors and their advisors to continue to focus on producing shorter and clearer offer documents that carefully consider what might be material to an investor, looking at the offer as a whole. By 'material' we mean matters that are likely to affect the judgment of an intending investor when making a decision about whether or not to invest in the offer.

One area that still needs improvement in most offer documents is the description of the risks that are specific to the offer. Risks are rarely ranked in order of significance to the business and risk disclosures are often still too lengthy and too generic. Guidance on effective risk disclosure can be found in Section D of this guidance note.

## FMA's approach to reviewing disclosure documents

As part of our surveillance activities, we select disclosure documents for review after registration using a risk based framework. This includes any reviews performed under our statutory consideration period of five working days.<sup>1</sup> We will use this guidance note as part of our review framework.

To help improve the quality of financial product offer documents we are happy to work with issuers of novel or complex offers. We provide pre-registration guidance and feedback on aspects of these offers, however we will focus our assistance on issuers who are making offers under the *FMC Act* regime. Our approach is designed to help issuers feel more confident their offer documents are likely to satisfy FMA expectations. More information about our [pre-registration review of offer documents](#) is available on our website.

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We want to encourage issuers to make the most of and adopt the new *FMC Act* disclosure regime. If you intend to adopt a product disclosure statement (PDS) early in the *transitional period*, or you are producing a PDS for a financial product where there aren't good precedents already, we can provide pre-registration guidance and feedback on your draft PDS. Please contact us at [compliance@fma.govt.nz](mailto:compliance@fma.govt.nz) (ensure you insert "PDS HELP" in your subject line) to discuss how we can help.

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We have power to act if disclosure documents do not comply with legal requirements. This includes where a statement in the document is misleading (including by omission) or where an investment statement is deceptive or confusing. (See section A).

But, except where a disclosure document fails to comply with legal requirements to such a degree that urgent action is required to protect the interests of intending investors, we will not move immediately to cancel or prohibit disclosure documents.

In most cases, we will engage with the issuer first, with the aim of improving the disclosure on a voluntary basis. When we do that, you should be able to explain your particular decisions about including or not including information and the basis for those decisions. You should also be able to demonstrate the 'ownership' of the process of preparing the document as referred to below.

## Issuers' and directors' responsibilities

Issuers and their directors have a critical role to play in the provision of high quality information to the market and to investors. We see prospectuses and investment statements as principal information channels for investors and their financial advisers. Disclosure documents should help potential investors make informed investment decisions by providing them with information about:

- the risks and returns associated with an offer of securities;
- the entity offering the investment, the people involved and its business.

Investors must have access to the information they need to make informed investment decisions. This consists of all information which:

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<sup>1</sup> Section 43D of the Securities Act 1978

- the 1978 Act and Regulations require; and
- has been determined as required through court decisions.

Issuers must comply with all legal requirements for disclosure documents. This includes that they must not be misleading and in relation to investment statements, that they are not likely to deceive or confuse. We believe this requires disclosure documents which are more than the sum of their individual compliant parts. Overall, they must convey an adequate and accurate<sup>2</sup> impression of the investment offer and a balanced disclosure of the benefits and the risks.

To address our key concerns we want to see disclosure documents that demonstrate you have:

- considered your disclosure documents holistically and not just ‘ticked the boxes’ through a compliance checklist;
- taken total ‘ownership’ of the task of ensuring that the documents meet all legal requirements including that the prospectus includes all material matters and the disclosure documents are holistically true. You cannot cede responsibility for this task to executives or to advisers. Advisers, such as lawyers, investment bankers and accountants can provide useful assistance to issuers in preparing disclosure documents. But the law is clear; it is the responsibility of the issuer and its directors to ensure the documents are accurate and not misleading as a whole and in each detailed disclosure.

Although the issuer and its directors cannot ‘delegate’ responsibility for disclosure documents, they can engage suitable managers and advisers to implement an effective due diligence process. If it’s reasonable in the circumstances, they can rely on the advice of those managers and advisers, but the directors must retain a key role in the design and monitoring of the due diligence process. If there is reason to question the reliability of information provided by others, directors are obliged to take a much more direct personal interest in the relevant issues<sup>3</sup>.

The primary purpose of the due diligence process should be to identify issues and ensure the offer documents are accurate and not misleading. It is important to adapt the process to fit the circumstances of the issuer. For example continuous issuers may have a mature and well established process for verification and due diligence, while one-off issuers undertaking an IPO will need to implement a new, more intensive due diligence process requiring closer director oversight. Directors should ensure appropriate due diligence procedures are in place and ensure they have suitably qualified people to carry them out.

We encourage issuers to use a risk register to record their assessment of the likelihood and potential impact of risks relevant to the offer. Where issuers already use a risk register as part of their enterprise risk management, the due diligence process for the offer can leverage this existing tool to help identify the more limited list of risks relevant to the offer and help directors understand the likelihood and potential impact of those risks. Continuous issuers might focus their due diligence process on keeping their risk register up to date.

Taking into account the above, appropriate steps for directors to achieve ‘ownership’ of the disclosure documents may include:

- Personally reading the disclosure documents and bringing to bear the director’s skills, knowledge and experience in questioning their adequacy and accuracy<sup>4</sup>. This will involve considering each individual disclosure in the document at a level of detail appropriate to the circumstances.
- Establishing a due diligence process to ensure the adequacy and accuracy of the disclosure documents. This is likely to involve input from subject matter experts and advisers. The directors’ direct involvement in the process will depend on the extent to which the offer falls within the issuer’s business as usual activities.

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<sup>2</sup> *R v Graham* HC Wellington, 24 February 2012, Dobson J at para [12]

<sup>3</sup> *Jeffries v R* [2013] NZCA 188, Randerson J at para [197]

<sup>4</sup> *R v Graham* (ibid)



- Being satisfied the due diligence process has been implemented, which should include directors having the opportunity to engage directly with those involved in the due diligence process.
- Ensuring the disclosure documents are consistent with all other information available to directors, such as information in board or other management reports.
- For continuous issues, reading the whole document ‘clean’ rather than only looking at any tracked changes since the previous version.
- Considering whether each disclosure document conveys an adequate and accurate overall impression of the offer and provides a balanced disclosure of the benefits and risks.

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We will continue to encourage directors to focus on appropriate and effective due diligence processes and procedures as we transition into the *FMC Act* disclosure regime. This message is supported by the new regime’s more proportionate and flexible civil liability regime.

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## Audience for disclosure documents

An investment statement needs to be readily understandable by a prudent but non-expert investor.<sup>5</sup> An investment statement must not be confusing<sup>6</sup> and it must make all required disclosures in a succinct manner.<sup>7</sup>

A prospectus needs to be understandable by the intended audience. A non-expert investor or a financial adviser can request a prospectus. Recent court decisions have held that the target audience contemplated by the notion of a prudent but non-expert person is also the audience in respect of which an issuer is deemed to prepare a prospectus.<sup>8</sup> We also expect financial advisers to consider prospectuses as well as investment statements as part of their analysis of a security before making a recommendation to a client.<sup>9</sup>

This guidance note outlines our views on good practice for ensuring disclosure documents are understandable to their intended audience. If you adopt this good practice, it will help ensure that disclosure documents are not misleading, deceptive or confusing.

## Prospectuses and materiality

When evaluating prospectuses, we will consider whether the prospectus contains all material information – by this we mean information that is likely to affect the judgment of an intending investor when making a decision whether or not to invest<sup>10</sup>. In this guidance note we outline our view on some factors that we think are likely to be material, based on a range of experiences and history, including our reviews of disclosure documents.

This aspect of the guidance note is not a checklist to use in isolation from the special circumstances relating to your offer. Some of it is expressed in general terms. Parts of the guidance note may not be fully applicable to some types of issuers and offers.

We discourage you from including immaterial factors, including ones referred to in this guidance note, unless the *1978 Act* or the *Regulations* expressly require them or they are required to avoid a statement in a disclosure

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<sup>5</sup> s38D(a) of the *1978 Act*

<sup>6</sup> s38B(1)(a) of the *1978 Act*

<sup>7</sup> cl 19(1) of the *Regulations*

<sup>8</sup> *R v Moses & ors*, HC Auckland CRI 2009 -004-1338, 8 July 2011, Heath J at para [63], *R v Graham* (ibid) Dobson J at para [25]

<sup>9</sup> FMA Guidance Note: Code Standard 6(d) – Analysis Before Recommendation

<sup>10</sup> See *R v Moses* (Ibid) Heath J and *Coleman v Myers* [1977] 2NZLR 255 (CA)

document being misleading. It is for you to judge whether a factor is material in the context of your particular offer.

Including a significant volume of immaterial factors or information may make the document unnecessarily long and impenetrable, which may itself make it misleading or confusing. We hope issuers will guard against this tendency.

## Structure of guidance note

The glossary sets out defined terms used in this guidance note which are italicised. In this guidance note, we will refer to the Financial Markets Authority as 'FMA' or 'we' and to issuers and their directors as 'issuers' or 'you'.

Table I: Structure of guidance note

Topic	What our guidance covers	Where to find it
Disclosure requirements	The <i>1978 Act</i> and the <i>Regulations</i> .	<a href="#">Section A</a>
Clear, concise, and effective	Guidance on good practice information style and presentation.	<a href="#">Section B</a>
Key information	Guidance on good practice relating to presenting key information.	<a href="#">Section C</a>
Material information	Our guidance on some factors that we think are likely to be material	<a href="#">Section D</a>
<i>Financial information</i>	Our guidance on use of past and prospective <i>financial information</i> .	<a href="#">Section E</a>
Sector specific issues	Our guidance on some factors that we think are likely to be material for particular sectors such as managed funds (including KiwiSaver), debt securities, property related offers.	<a href="#">Section F</a>

## Section A: Disclosure requirements

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### Key points

- This guidance note applies to prospectuses and investment statements. We encourage issuers to prepare separate prospectuses and investment statements.
- This guidance is not specifically directed at other disclosure documents such as advertisements, but issuers and their advisers may find the good practice aspects of this guidance useful when preparing them.
- The requirements for prospectuses and investment statements are set out in the *1978 Act* and the *Regulations*.
- As well as including the particular matters listed in the schedules to the *Regulations*, issuers must include, in most prospectuses, all other information material to the offer. This means all matters that are likely to affect the judgment of an intending investor when making a decision as to whether or not to invest.
- FMA has broad powers to: cancel registration of a prospectus, prohibit the allotment of securities, and prohibit the distribution of an investment statement.
- We can exercise those powers in circumstances including where:
  - an investment statement is likely to deceive, mislead or confuse as to a material particular or is inconsistent with the registered prospectus;
  - a registered prospectus is false or misleading as to a material particular, omits a material particular or contains a material misdescription or error, or any material matter that is not clearly legible; and
  - an investment statement or registered prospectus does not comply with the *1978 Act* or *Regulations*.
- This guidance note does not override exemptions contained in the *1978 Act* or general or specific exemptions granted by the FMA.

### Legal requirements

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The legal requirements under the *FMC Act* are different to those under the *1978 Act*. In particular:

- the PDS must be worded and presented in a clear, concise and effective manner<sup>11</sup>,
- the PDS must not be longer than the length limits specified in the *FMC Regulations*
- the PDS must contain the information prescribed by regulations, and is not required to contain other material information about the offer. The register entry must contain all material information relating to the regulated offer that is not contained in the PDS

See our website for further updates on the implementation of the *FMC Act*.

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<sup>11</sup> Section 61 of the Financial Markets Conduct Act 2013

The most important disclosure documents under the *1978 Act* are the registered prospectus and the investment statement. This guidance note applies to those two documents. In this guidance note we talk about prospectuses and investment statements on the basis that they are separate documents.

Securities may also be offered or promoted through advertisements. Other than investment statements, this guidance note does not provide guidance on advertisements. We have published separate guidance concerning pre-prospectus publicity of offers. We have also published an information sheet explaining how the fair dealing provisions in the *FMC Act* affect advertisements for offers made under the *1978 Act* during the *transitional period*.

The requirements for prospectuses and investment statements are set out in the *1978 Act* and the *Regulations*.

- The *1978 Act* contains general obligations to register a prospectus and to prepare and distribute an investment statement.
- The *Regulations* contain more specific requirements. The information required depends on the nature of the securities, and the circumstances in which they are being offered. You must comply with the relevant *Regulations* and applicable Schedule.
- In addition to these specific requirements, the *Regulations* incorporate a general requirement: a registered prospectus (other than a short form prospectus or a simplified disclosure prospectus for offers of securities of the same class as listed securities) must include all other information material to the offer of securities<sup>12</sup>. The Courts have held material matters are all matters which are likely to affect the judgment of an intending investor when making a decision as to whether or not to invest.

The *1978 Act* and *Regulations* envisage that the content of a prospectus and an investment statement will differ. An investment statement provides simplified disclosure for a potential investor, using a question and answer format and referencing other documents. The prospectus provides more detailed information about the security and the issuer.

The purposes of an investment statement are to:

- provide key information that is likely to assist a prudent but non-expert person to decide whether or not to subscribe for securities; and
- bring to the attention of such a person the fact that other important information about the securities is available to them in other documents.<sup>13</sup> It may also involve cross referencing to additional information set out in the prospectus<sup>14</sup>.

The investment statement must not be inconsistent with the prospectus,<sup>15</sup> but this doesn't mean it should repeat the same content as is contained in the prospectus. An investment statement must address each particular matter required by the *Regulations* to be addressed in the investment statement; it may also cross reference to additional information about that matter set out in the prospectus.

You are not restricted in what information you may include in an investment statement and must include additional information if needed to avoid the investment statement being deceptive, misleading or confusing.

However, this must be done in a way which does not result in the investment statement being likely to deceive, mislead or confuse as to any matter that is material to the offer<sup>16</sup>.

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<sup>12</sup> other than information set out in the financial statements referred to in the prospectus or contracts entered into in the ordinary course of business

<sup>13</sup>For example, this is achieved by inclusion in the investment statement of a reference to the prospectus (where applicable) or, in the case of an issue of debt securities by a registered bank, to its disclosure statement and outlining how a copy of the prospectus or disclosure statement may be obtained – see Cl 18, Schedule 3 of the *Regulations*

<sup>14</sup> In the case of a registered bank, its disclosure statement - see cl 19(3) of the *Regulations*

<sup>15</sup> Cl 24 of the *Regulations* or, in the case of an offer of debt securities by a registered bank, its disclosure statement.

See Cl 24 of the *Regulations*, s38B(2) of the *1978 Act*

<sup>16</sup>s43F(1) of the *1978 Act*

The *1978 Act* gives us broad powers to:

- cancel registration of a prospectus;
- prohibit the allotment of securities; or
- prohibit distribution of an investment statement

in certain circumstances.

These circumstances include those set out in sections 38B and 43F-43G of the *1978 Act*. They include circumstances where we are of the opinion that:

- in relation to an investment statement: it is likely to deceive, mislead or confuse as to a material particular, or is inconsistent with any registered prospectus or disclosure statement referred to in it; or
- in relation to a registered prospectus: it is false or misleading as to a material particular, omits a material particular or contains a material misdescription or error or any material matter that is not clearly legible; and
- in relation to an investment statement or a registered prospectus: it does not comply with the *1978 Act* or *Regulations*.

A number of issuers currently prepare and issue their disclosure documents in reliance on exemptions contained in the *1978 Act* or general or specific exemptions granted by us. For example, where a registered bank offers debt securities it is not required to register a prospectus but must issue an investment statement<sup>17</sup>. In other cases (for example co-operative companies) issuers are exempted from the requirement to disclose 'all other material matters' in their prospectuses. If you now or in future rely on an exemption, the contents of this guidance note do not override the exemption. You can continue to rely on that exemption until it expires.

We have granted the Securities Act (Form and Content of Investment Statement for Equity Securities Offers) Exemption 2014 to encourage clearer and more effective investment statements for initial public offers that are to be listed on the NZX Main Board. This exemption will continue to be available during the transition period although we encourage issuers to make new offers under the *FMC Act* regime.

Registered banks must ensure that their disclosure statements contain all other information relating to the business or affairs of the registered bank and its banking group, that would, if disclosed, materially affect the decision of a person to subscribe for debt securities of which the registered bank or any member of the registered bank's banking group is the member. This aligns with the requirement that a registered prospectus must contain all other material matters.

If you rely on an exemption which exempts you entirely from the requirement to provide a prospectus and investment statement on condition that you provide a separate disclosure document<sup>18</sup>, then this guidance note does not specifically apply to that separate disclosure document. Issuers and their advisers may find the good practice aspects of this guidance useful when preparing those documents.

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<sup>17</sup> S52C of the *1978 Act*. The investment statement must inform potential investors that information about the debt securities and the registered bank is contained in the bank's disclosure statement published by the bank under the Reserve Bank of New Zealand Act 1989.

<sup>18</sup> for example, Securities Act (Registered Banks Futures Contracts) Exemption Notice 2007

## Section A reminders

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The registered prospectus and the investment statement are the two key disclosure documents available to potential investors. This guidance note applies to these two documents.

Issuers and directors should consider:

- Are you familiar with the requirements of the *1978 Act* and the *Regulations*?
- Do your prospectus and investment statement contain all the information they are required to?
- What other information are you aware of that might be material to the offer?
- Does your investment statement provide key information likely to assist a prudent but non-expert person to decide whether or not to subscribe for securities?

## Section B: Clear, concise and effective

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### Key points

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- Documents that are clear, concise and effective are more likely to be read by investors and their advisers.
- They are also less likely to be misleading, or, for investment statements, deceptive or confusing.
- We believe the 'clear, concise and effective' standard represents good practice for disclosure documents.
- We encourage issuers to adopt the techniques set out in this section to help them prepare and present disclosure documents in a clear, concise and effective way.

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The 'clear, concise and effective' standard is a statutory requirement under the *FMC Act*. This section of the guidance will assist issuers producing a PDS to understand how FMA will interpret the new statutory requirement.

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### General comments

Clear, concise and effective disclosure documents improve the quality of disclosure, and help potential investors make better investment decisions. This is the requirement for prospectuses and product disclosure documents in Australia and is consistent with the approach for product disclosure statements in the *FMC Act*. It is also relevant that the *Regulations* require all disclosures in an investment statement to be expressed in a succinct manner.

We therefore believe the 'clear, concise and effective' standard represents good practice for all disclosure documents as well as reflecting the manner of disclosure which the *Regulations* specifically require for investment statements. Applying this approach will assist in meeting legal obligations that disclosure documents are not misleading and that investment statements are also not deceptive or confusing.

We encourage you to prepare and present registered prospectuses and investment statements in a 'clear' and 'concise' and 'effective' manner. Each concept qualifies the other and you should consider all three aspects.

## Clear

Disclosure documents are clear if they:

- use plain language;
- use a font and font size that are easily readable
- are logically ordered and easy to navigate;
- highlight important information; and
- explain complex information in plain language and include a clear explanation of any necessary jargon.

The language, structure, and presentation of a document should all work together to help the reader. A document written in plain language is easy to read and understand. There are many plain language techniques which can be used to make a disclosure document clear for a potential investor. We do not prescribe any particular technique and we do not expect issuers to use the services of ‘plain English’ consultants, though some may choose to do so. We would like to see issuers choosing to test their disclosure documents for readability, and accessibility, with members of the public. Table II contains technique examples for you to consider.

**Table II: Plain language examples to consider:**

Technique	Explanation	Examples
Use the active voice	Express the subject’s actions in the active tense (subject, verb, object), rather than the passive.	‘We will pay you’ rather than ‘You will be paid by us’
Use pronouns not labels	Use ‘you’, ‘we’ and ‘us’ instead of labels such as ‘the applicant’ and ‘the company’.	‘We will pay you’ rather than ‘The company will pay the security holder’
Avoid double negatives	It is easier to understand sentences phrased positively.	‘It is likely that ...’ rather than ‘It is not unlikely that ...’
Use definitions effectively	If a reader has to refer elsewhere to a definitions section too often, the document may be confusing.	Do not define commonly understood words. Place definitions in an accessible place in the document
Do not use jargon unnecessarily	Jargon is not clear for a reader who is not experienced in the relevant business or profession. Where jargon is necessary, provide a clear explanation in plain language.	Any finance terms which are not used in everyday language such as ‘leveraged’ or ‘annuity’.
Use short sentences	Each idea in a separate sentence.  Remove superfluous words.	‘You can apply if ...’ rather than ‘You may be able to apply if ...’



Technique	Explanation	Examples
Ensure layout assists the reader	Use white space, informative headings and structure effectively so the reader can follow the document easily.	Use clear headings, colour and notes to help the reader.
Use navigation tools and a well-considered structure	Tools which help a reader follow the flow of a document.	Hyperlinks, cross-referencing, heading structure and colour.
Use page numbering	Assist with the flow.	Self-evident.
Present important information prominently	Techniques to make sure information stands out and attracts the reader's eye.	Use clear headings, colour or highlighting, distinct font, bold font and position information so it stands out.

We recognise these techniques will be more appropriate for some aspects of disclosure documents than others. For example, it may not be appropriate to use plain language to describe technical trust deed provisions in a prospectus. It may still be possible to use some of the techniques above to make the descriptions more accessible.

## Concise

The content required in disclosure documents is largely prescribed. All disclosures in an investment statement required by the *Regulations* must be expressed in a succinct manner.<sup>19</sup> This aspect of this guidance note addresses form, format and other tools to keep content as concise as possible. Table III contains examples.

'Concise' refers to the presentation of specific information rather than the overall length of the disclosure document. It is generally desirable for disclosure documents to be as short as possible, while satisfying the disclosure requirements. Although there are no length limits under the *1978 Act*, we encourage issuers to take note of the prescribed length limits for PDS under the *FMC Act* and to produce disclosure documents (and investment statements in particular) within these limits where reasonably practical. If your document has to be longer in order to include all information required by the *1978 Act* and *Regulations* and/or a key information section, then it can still be concise.

**Table III: Examples of concise presentation to consider**

Technique	Explanation
Short sentences	Each idea in a separate sentence. Remove extra words which are not needed.
Highlight important information in overviews/ summaries	Use overviews and/or summaries and publishing tools to highlight key information for the reader.
Diagrams and graphs	Simple diagrams and graphs can summarise information clearly, and more effectively than long sections of text. Consider testing diagrams and graphs to ensure they can be understood and include any explanatory information.

<sup>19</sup> cl 19(1) of the Regulations.

Technique	Explanation
<i>Brand information</i>	Can and should support, but not dominate, a disclosure document, otherwise you risk selling the brand rather than the offer.
Photographs and other images	Should only be used if they do not dominate, or distract or detract from the disclosures. Where appropriate, they should be meaningfully labelled.

## Effective

Effectiveness involves an overall assessment of whether a disclosure document provides adequate and accurate information for investment decision making. It looks at the disclosure documents both as a whole and considering each individual disclosure. Clarity and conciseness help to achieve effectiveness. But they are not the only two elements of the test.

Effective disclosure documents give adequate and accurate information about an offer to potential investors. Directors and issuers should ask themselves whether the disclosure documents, taken as a whole, convey an accurate and balanced impression of:

- the issuer and its business; and
- the investment offer and its associated risks.

Tools and techniques such as document layout, font and structure help to make a document effective.

An important part of the layout is the placement of application forms. Issuers should ensure that application forms are placed near the back of the documents and in all cases after the required or statutory disclosures, to ensure a potential investor reads essential information before completing an application.

Where practicable, you might consider conducting user testing or legibility testing (as discussed above on page 16 under the heading “Clear”) to ensure disclosure documents are effective. Testing can readily be undertaken in relation to continuous issues using the disclosure documents already in the market. For new issues, testing of the disclosure documents for the offer can be confined to a limited group on a confidential basis making clear that the testing is not an ‘offer’ for the securities.

Material such as brand information, photographs and images can be used to make a disclosure document clear, concise and effective. We recognise it is important for disclosure documents to be attractively presented, but brand information must not mask legal disclosures. For example:

- images of any kind should not distract or detract from the substantive disclosure;
- brand information should not dominate any disclosure document or distract or detract from the required disclosures;
- this material should generally only be used if it is relevant to your business and the offer;
- celebrity photographs should be included only after careful consideration of whether the photographs risk detracting from the disclosure from an intending investor's perspective; and
- overall a disclosure document must give investors the relevant information about the offer and should not seek to rely on selling the securities through alignment with a known brand.

## Section B reminders

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Documents that are clear, concise and effective are less likely to be misleading and are more likely to be read and understood.

Issuers and directors should consider:

- Do your disclosure documents use:
  - plain language; and
  - tools such as structure and layout to make them clear, concise and effective?
- Is *branding information* used appropriately so it does not dominate or distract/detract from the required disclosures?
- Have you included only information which is necessary to convey adequate and accurate information about the offer?
- Have you used techniques to make your disclosure documents clear, concise and effective?
- Have you looked at the equivalent requirements for a *PDS* under the *FMC Act* and taken these into account when preparing your disclosure documents, to the extent that your documents still meet the requirements of the *1978 Act* and *Regulations*?

## Section C: Key information

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### Key points

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- You may choose to include a key information section at the start of a disclosure document. When preparing a key information section, we recommend you take into account the key information summary section contained in the equivalent *PDS* under the *FMC Regulations* and consider whether equivalent information would be useful in your key information section.
- This is likely to help achieve clear, concise and effective disclosure and help ensure the document is not misleading, deceptive or confusing.
- If you include a key information section, it should:
  - be reasonably brief and highlight the main offer terms, the main benefits and risks of the investment and any other factors likely to be particularly material to an investor's investment decision; and
  - signal to an investor where in the disclosure documents further relevant information about those factors can be found.
- The content of a key information section will differ depending on the nature of the securities being offered. We encourage issuers to consider the factors referred to in this section for inclusion as key information.

A *PDS* under the *FMC Act* must contain a key information summary. Issuers under the *FMC Act* should refer to the *FMC Regulations*, rather than this guidance, to determine what should be included in the key information summary.

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### Key information section

You may choose to include a key information section at the start of a disclosure document. This is likely to help:

- achieve clear, concise and effective disclosure; and
- ensure disclosure documents are not misleading, deceptive or confusing.

If an investment statement contains only the information required by Schedule 13 of the *Regulations*, you may not need to include a separate key information section. If an investment statement contains other information, consider whether a key information section should be included to reduce the likelihood of the investment statement being misleading, deceptive or confusing to a potential investor.

If you choose to include a key information section, it should be reasonably brief and highlight the main offer terms, the main benefits and risks of the investment and any other factors likely to be particularly material to an investor's investment decision. It should:

- be the first substantive section of a disclosure document following any statements or disclosures required by law to be at the front;
- contain a meaningful summary of the information which is fundamental to an investment decision; and
- provide a balanced disclosure of the benefits and the principal risks.

The key information section should signal to an investor where in the disclosure documents further relevant information is located. For instance, if you are highlighting a related party transaction in the key information section, you should consider identifying:

- who the related party is;
- enough detail to highlight any material risks to investors; and
- where to look for further detail in the disclosure documents.

The content of a key information section will differ depending on the nature of the securities being offered. Table IV outlines factors that should usually be considered for a key information section.

**Table IV: Examples of factors to consider including in a key information section**

Topic	Factors for consideration
Offer terms	Describe the overall nature of the investment and terms of the offer. Explain how investments can be on-sold (such as trading on an exchange). Detail any guarantees and whether the offer is underwritten.
Benefits	Explain key financial benefits and how you plan to use investors' funds.
Principal risks	Identify the principal risks relevant to the offer.
Fees and costs	Be specific and clear about any fees or costs that may affect returns.

Other factors which are likely to be particularly material to an investor in the context of the particular offer should also be highlighted in a key information section. These factors might include:

- a brief summary of the issuer's business and strategy;
- significant related party transactions or dependencies;
- the state of the issuer's liquidity and projected liquidity;
- any circumstances in which an investor may be locked into an investment (for example by reason of an inability to redeem);
- key elements of the *financial information* section; and
- impact of fundraising on key financial metrics.

## Section C reminders

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Good practice suggests disclosure documents should contain a key information section unless it is an *investment statement* with no information in it other than required by the *Regulations*.

Issuers and directors should consider:

- Have you considered whether a key information section would be desirable?
- If you have decided to include a key information section, does it highlight the main factors which are likely to be particularly material to an investor's investment decision?
- When preparing the key information section, have you looked at the key information summary section contained in the equivalent *PDS* under the *FMC Regulations* and considered whether equivalent information would be useful in your key information section?

## Section D: Material information

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### Key points:

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- The schedules to the *Regulations* (other than those for simplified disclosure or short form prospectuses) require all other material matters relating to the offer to be disclosed in the prospectus.
- The directors' most critical role in this process is to ensure the prospectus identifies and explains all information likely to be material to an investor considering whether or not to invest in the security.
- In this section, we give examples of matters we believe are likely to be material and, if so, will need to be in your prospectus. But we recognise these factors may not be material across all sectors.
- These factors should not be considered an exhaustive list of matters to be considered. They should not be included just because they are mentioned in this guidance note.
- Issuers should turn their minds to these and all other matters which may be material to an offer and form a view as to whether they are in fact material and whether they should be disclosed.

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A PDS is not required to contain all material information about the offer. Instead, the register entry must contain all material information that is not contained in the PDS. This section of the guidance will assist issuers producing a PDS and register entry to determine what information is 'material' to an offer. However, issuers under the *FMC Act* should first refer to the *FMC Regulations* to determine what information is required to be disclosed in a PDS and register entry.

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### General comments

The schedules to the *Regulations* require specific information to be included in a prospectus. The schedules (other than those for simplified disclosure or short form prospectuses) also require that all other material matters relating to the offer (other than matters set out in the financial statements referred to in the prospectus and contracts entered into in the ordinary course of business) must be disclosed in the prospectus. Information about those material matters must be disclosed in the prospectus; it is not sufficient to cross reference to information contained on a website or in another source.

We recognise some aspects relating to the proposed investment or business plan may be uncertain. But we consider the most critical role of the directors in this process is to ensure the prospectus identifies and explains all information likely to be material to a potential investor. Information to consider includes information about:

- the overall nature of the investment;
- the business model underlying the investment;
- the directors and senior management who are involved in the business;
- risks associated with the investment;

- related party transactions; and
- credit ratings where relevant.

We comment further on some of those factors in the paragraphs below.

If you have assessed that any of the above factors is not likely to be material to a potential investor in your particular offer, you do not need to include it. You may wish to bring it to the potential investors' attention by other means, for example by including a reference to a website. If doing so, you should be aware that the material referenced is then considered to be part of the prospectus for the purposes of the *1978 Act* and so must not be misleading.<sup>20</sup>

You may not always need to disclose all of this information where a simplified disclosure prospectus or short form prospectus is issued. In considering whether to omit information, you should note the following:

- A simplified disclosure prospectus must:
  - include all information which has not previously been released to the market and which is material to the investment decision of a prudent but non expert person; and
  - inform an investor about information which has previously been released to the market that is material to the offer;
- An equity short form prospectus must include any material information that may be relevant to the trading prospects of the issuer. This includes any special trade factors and risks that are not likely to be known or anticipated by the general public and which could materially affect the prospects of the issuer.
- A unit trust short form prospectus must include an outline of any material developments relating to the unit trust during the preceding five years.
- You must be satisfied the omission of any material information from a simplified disclosure prospectus or short form prospectus will not result in it being misleading.

The aspects highlighted for your consideration in this section and elsewhere in this guidance note are intended as examples of factors we believe are likely to be material and if so, will need to be in your prospectus. We recognise they may not be material across all sectors. For example, we recognise that business model information is unlikely to be relevant in the case of managed funds.

Generally, these factors should not be considered an exhaustive list of matters to be considered. They should not be included just because they are mentioned in this guidance note. Issuers need to turn their minds to these and all other matters which may be material to an offer and to form a view as to whether they are in fact material and whether they should be disclosed<sup>21</sup>.

If, having considered a matter, you determine that it is not material to the particular offer, there is no need to include a statement to that effect in the prospectus.

We may engage with an issuer to explore why factors identified in this guidance note have, or have not, been disclosed in particular cases. This will assist us in assessing the disclosure.

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<sup>20</sup> s55(a) and (b)(iii) of the *1978 Act*.

<sup>21</sup> Registered banks may also wish to consider whether the matters identified in this section should be addressed in their disclosure statements and cross-referenced in their investment statements to avoid their investment statements being likely to deceive, mislead or confuse



## Business description

You should ensure that, if it is material to the particular offer, the prospectus clearly describes the business underpinning the offer. For example, you should explain how you will generate income or capital for investors, or for debt issues, how you will generate income to allow interest to be paid and principal returned.

Disclosure of business information can usually be at a sufficiently high level that you do not need to disclose commercially sensitive information. Commercial sensitivity does not excuse non-disclosure of material information or information which needs to be disclosed to prevent a disclosure document being misleading. Table V sets out factors which may be material and, if so, should be included in your prospectus.

**Table V: Examples of information about your business which may be material**

Topic	Factors for consideration
Nature of business	The nature of your business, including its stage of development.
Industry overview	A summary of the industry in which the business operates, including an overview of any industry wide issues.
Corporate structure	The corporate structure of your business and any corporate group it is part of. Using diagrams to show corporate structures and lines of responsibility may assist understanding.
Material assets and material liabilities	A description of the material assets owned by the business and material liabilities of the business.
Performance factors	The main factors that have historically affected the issuer's financial and operating performance and those that are expected to do so in the future. This may include identifying developments and risks that might affect profit and the sensitivity to those risks. It may also involve normalising historical data and making projections of underlying profit ranges.
Key contributors	The key contributors to revenue and expenses.
Strategy	A high level overview of your strategy and business plan for the future.
Financing	A high level overview of expected future financing needs and the anticipated manner of sourcing that financing. Where the use of the proceeds of an offer is to part fund a particular project or acquisition, a description of how the balance of the funds required will be financed.
Assumptions	A summary of key assumptions underlying your business plan for the future (whether specific to the business or to wider socio-economic issues). Cross refer to detailed forecasts and underlying assumptions included elsewhere in the disclosure documents. You need to have a reasonable basis for those assumptions. Expert analysis or opinion, although not mandatory, may provide support for those assumptions.
Dependencies	Key dependencies for your ongoing operations. A dependency is any external factor that the entity is reliant on which, if it were not available, would be likely to have a material adverse impact on the financial performance of the entity. Dependencies may include

Topic	Factors for consideration
	suppliers, employees, intellectual property, regulation/legislation, and contractual or other relationships.
Market/competition	Details of the market or markets you operate in, your position in the market, your key competitors and any barriers to entry.
Other aspects	Any other material aspects relating to your business model or to the industry.

## Directors and senior management

Potential investors will often need to judge the capability and capacity of the directors and members of the senior management, in order to make an investment decision. Information about directors and senior management can be important to investors and you should therefore consider whether information about the directors and some or all of the senior management is material to the offer and should, therefore, be included in the prospectus

Factors that are likely to be material to investors include the relevant skills, experience and expertise for those directors and senior management. This should:

- include their qualifications and their relevant employment history; and
- portray a balanced view of their corporate, employment and professional history.

This information should be tailored to the offer. Table VI contains examples of information about a director or senior manager which may be material to a potential investor. For example, we recognise directors and senior managers of registered banks are subject to fitness and propriety checks by the Reserve Bank of New Zealand and so registered banks may not need to include some of the factors below. If there has been a material change in any of those persons' circumstances since their last suitability check by the Reserve Bank then you may need to include some of these factors.

**Table VI: Examples of information about directors or senior management which may be material**

Topic	Factors for consideration
Role	Their full name, role title and brief description, involvement in any governance committees and the amount of time they have committed to make available to the role.
Expertise and capability	Their qualifications, expertise and experience relevant to the role, for example previous capital raising and outcomes for investors.
Other appointments	All of their past and present director and/or <i>senior management</i> roles in the past five years.
Independence	Their shareholder affiliations and any shares held directly or indirectly (including, for example, shares in which they have a beneficial interest under a family trust). If they are not an independent director, state this and explain why the person is not seen as independent.
Remuneration	Details of remuneration including any contingent or non-cash entitlements.
Honesty	Any information you have which brings into question their honesty or character.

Topic	Factors for consideration
Legal or disciplinary history	<p>Explain the information required by Schedule 1, clause 5 of the <i>Regulations</i>. Where you are highlighting the skills, knowledge and expertise of a particular director or senior manager, you should disclose any other relevant factors so a balanced view of that individual is presented. You should consider disclosing information about any legal or disciplinary actions against either the person or any entities of which they were a director at the time to the extent this is likely to be material to an investor. (Information is relevant whether it relates to New Zealand or overseas. Information which only relates to a person's private capacity and does not bring into question their honesty may not be material.) Consider including the following:</p> <ul style="list-style-type: none"> <li>• criminal convictions involving dishonesty;</li> <li>• bankruptcy or insolvency or company failure for any reason;</li> <li>• civil proceedings and settlements;</li> <li>• enforcement proceedings by any government agency;</li> <li>• disciplinary action by a professional body or regulator of securities markets; and</li> <li>• refusal, suspension or cancellation of membership of a professional organisation.</li> </ul>
Insolvent companies or failed businesses	<p>If they were or are a director or senior manager of a company or business that entered into liquidation, receivership, winding up or any other form of administration (other than as part of a solvent reorganisation), and their role was current at the time of or within 5 years before that event.</p>

Information which is likely to be material to investors regarding directors or members of senior management should be disclosed in the prospectus. This information does not need to be repeated in full in the investment statement if the investment statement states that additional information about directors and senior management is available in the prospectus.

We recognise that there may be a change in a director or senior manager during the currency of an offer and that an amendment to a prospectus will not always be required on that account. You should review the change having regard to the relative skills, experience and probity of the retiring and incoming individual/s and the overall capability of the directors and/or senior management to assess whether that change is likely to be material to an intending investor.

## Auditors

The Regulations require the disclosure of the auditor of the issuer. It is important that any material information regarding the audit firm or the individual auditor is also disclosed in your prospectus.

The identity of the audit firm or auditor and the fact that it is registered or that he or she is licensed under the Auditor Regulation Act 2011 are likely to be material information to an investor. Any restrictions or limitations on an audit firm's registration or an auditor's licence is also likely to be material and therefore should be disclosed.

Your audit firm or auditor must be independent from the issuer, however if there could be any potential conflict of interest this is likely to be material information which should be disclosed. You should also disclose how appropriate safeguards have been applied to eliminate conflicts of interest or reduce them to an acceptable level.

## Securities trustees and statutory supervisors

The Regulations require the disclosure of the name and address of the supervisor. Under the *FMC Act*, the term “supervisor” replaces the previously used term “securities trustee” from 1 December 2014. It is important that any material information regarding the supervisor is also disclosed in your prospectus.

The fact the supervisor is licensed by FMA is likely to be material information to an investor. The duration of the licence and any conditions of the licence may also be material information to an investor and therefore should be considered for inclusion in disclosure documents.

## Risks

The requirement to disclose ‘all other material matters’ means that in your prospectus you are required to disclose any risk which is likely to be material to an investor (a ‘material risk’). In an investment statement you are required to provide a brief description of the principal risks of not recovering in full the amount invested, of not receiving the expected returns on the investment or of being required to pay additional amounts in connection with the investment.<sup>22</sup> We consider ‘principal’ risks to mean the ‘main’ risks or the ‘most significant’ risks.

You should disclose these risks in a way that helps potential investors to understand and assess those risks. It is not sufficient to simply identify potential risks in a prospectus. A prospectus is required to “bring home the imminence”<sup>23</sup> of those risks. Your disclosure documents may be misleading or missing material information if they do not do so. For example if less significant risks are given prominence at the expense of more significant risks. For obvious reasons, this will be a particular area we focus on when reviewing disclosure documents.

We recommend you consider these comments when drafting risk disclosures.

- Some material risks are likely to be more significant than others. You can help investors understand the risks by ranking them in order of significance to the business and by describing the circumstances that might affect their likelihood of occurring and their impact. You may also be able to describe briefly the steps being taken to manage the risks.
- In some circumstances it is not sufficient to just describe generic risks. For example, if your existing circumstances mean it’s more likely a generic risk could occur, and the impact would be material, you need to clearly describe those circumstances that already make the risk more likely.
- Not all risks will be material. Some risks may be immaterial due to their remoteness or their limited impact. You do not need to disclose immaterial risks. If you do disclose immaterial risks this may make the document misleading or confusing.
- Organise your risk disclosure logically. You might categorise risks such as ‘risks relating to the particular investment’, ‘risks relating to the issuer’ and ‘general risks’.
- Consider using a risk matrix, scale, diagram or graph if this will help potential investors to understand and assess risks.
- Consider providing a brief description of principal risks in your investment statement, with greater detail set out in your prospectus.

We are aware that issuers are sometimes reluctant to make a judgment as to which risks should be disclosed in the investment statement as principal risks. Instead issuers often either repeat all risks in the investment statement from the prospectus, or in the past they may have used a combined prospectus and investment statement.

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<sup>22</sup> cl 11, Schedule 13 of the Regulations

<sup>23</sup> *Jeffries v R* [2013] NZCA 188, Randerson J at para [89]

Repeating all risks from a prospectus in an investment statement may not meet the requirements of the Regulations for the investment statement to provide a 'brief description' of certain 'principal' risks in a 'succinct' manner. We encourage issuers and their directors to be mindful of these requirements and not to copy the full risk section from the prospectus into the investment statement. You can, for example, after providing a brief description of the principal risks, cross refer to additional information in the prospectus (Reg 19(3)). Since we first issued this guidance we have seen significant improvement in the length and relevance of risk information in investment statements, but further improvement is still needed to make the likelihood and consequences of risks clear.

Ensure that your risk disclosures are customised to your particular offer to the extent applicable and reflect your specific circumstances. Your due diligence processes should be designed with this in mind. In many cases, they may draw on the existing risk management systems (such as risk registers) and processes within your business.

This is necessary even where your offer involves a generic business proposition such as, for example, a managed fund that invests in a particular class of equities. Specific risks may still arise. For example, your investment philosophy, current hedging policy or approach to leverage may give rise to specific risks that need to be disclosed.

We do not expect all issuers to use the services of specialist risk consultants, but we do expect issuers to;

- have assessed the risks applicable to the offer, the likelihood of them occurring and the severity of the impact for investors if they do happen, and
- be able to explain that assessment to us if we ask about the risk sections of the disclosure documents.

Table VII sets out some risk topics you might consider. This is designed to provide a prompt as a starting point. It is not intended to be exhaustive or treated as a tick-box. Some of the risks identified will not be relevant to some types of issuer and directors have a key role to play in validating the risk information in their disclosure documents.

**Table VII: Examples of risk topics to consider**

Topic	Topics for consideration
Identify topics considered in your risk evaluation so it is clear an appropriate range of material business risks have been considered by you as issuer	<ul style="list-style-type: none"> <li>• lending and/or liquidity</li> <li>• currency</li> <li>• credit/counterparty risk</li> <li>• risk associated with the use of derivatives</li> <li>• major events which you have considered</li> <li>• property development</li> <li>• product development</li> <li>• potential public or product liability</li> <li>• any issues of concern or risk about the ongoing viability of your business for example, competitive risks</li> <li>• intellectual property</li> <li>• material or equipment where supply is critical</li> <li>• personnel with specialised skills</li> <li>• risk associated with underlying investment markets</li> </ul>

Topic	Topics for consideration
	<ul style="list-style-type: none"> <li>• key relationships and key contracts</li> <li>• customer concentration risks</li> <li>• any consents you must have</li> <li>• regulatory risks</li> <li>• geographical concentrations or other lack of diverse investment</li> <li>• any past regulatory non-compliance and steps taken to rectify this</li> <li>• new business risk</li> <li>• tax risk</li> <li>• natural disaster risk</li> </ul>

## Related parties and transactions

Related parties include:

- people or entities that have the ability to significantly influence or control the operations and strategies of the issuer or, conversely, that the issuer has the ability to influence in this same manner;
- commonly owned or controlled entities;
- entities associated with directors, executives or major shareholders of the issuer; and
- other people or entities where the relationship between the issuer and that person or entity may be regarded as other than arms' length.

A related party transaction is a transfer of resources, services or obligations between an entity and a related party, regardless of whether a price is charged. The list in the above paragraph is not intended to be exhaustive. When identifying related parties and transactions, issuers should consider the substance of relationships in addition to relevant accounting and legal definitions. Where material, issuers should ensure that details of related party relationships and any corresponding transactions and exposures are disclosed.

Information about the existence of related parties and related party transactions between you as issuer and related parties or your intention to enter into a transaction with a related party is likely to be material to a potential investor. These aspects may also raise key risks. This information should be disclosed if:

- it is material to an investor;
- disclosure is required by the Regulations; or
- failing to refer to it would result in the disclosure document being misleading.

If information about related parties or related party transactions is likely to be material to an investor, you should also consider disclosing it in any key information section of a disclosure document.

An entity may enter into transactions with related parties that it would not enter into with unrelated parties. Investors must be able to understand how related party transactions affect you and the benefits and risks which material related party transactions bring. Factors which you should consider disclosing where a material related party transaction is involved include those in Table VIII.

**Table VIII: Examples of information about related party transactions which may be material**

Topic	Factors for consideration
Context	The context in which the related party transactions were established. Why is the related party the appropriate entity or person to deal with?
Relationship	The nature of the relationship(s) between the parties, and any legal requirements the relationship raises.
Arm's length	Are the related party transactions at arm's length or on favourable terms?
Fairness between investors	Are there any factors which raise fairness or equity issues between investors?
Value	<p>The amount and impact of the related party transactions and the impact of not having the related party transactions in place. Consider:</p> <ul style="list-style-type: none"> <li>• whether any current outstanding balances are explicitly disclosed;</li> <li>• the amount of related party income generated;</li> <li>• the percentage of related party income as a proportion of total income;</li> <li>• related party costs as a percentage of total costs; and</li> <li>• a time series of related party costs so an investor can see the trend of such costs.</li> </ul>
Conflict of interest	How has any actual or perceived conflict of interest been handled?
Risk	The risks to you which the related party transactions bring, likelihood and severity and mitigation steps.
Process	Your processes for identifying and managing related party transactions and checking compliance with those processes.

## Credit ratings

Credit rating information will in some cases be material to investors; and if so, should be disclosed in your prospectus. Under the FMC Regulations issuers will be obliged to disclose certain credit rating information in their PDS if available. During the transition period, issuers making an offer under the 1978 Act should review the *FMC Act* requirements and consider whether it would be appropriate to include equivalent credit rating information in their offer documents. If you are a Deposit Taker, then you must meet the requirements of the Deposit Takers (Credit Ratings, Capital Ratios, and Related Party Exposures) Regulations 2010 as well as this guidance.

The credit rating and type of rating of related parties or third parties you deal with may also be material, depending on the circumstances. If a default by the third party or related party would have a material and adverse impact on you, then the third party's credit rating and type of rating (or that of the related party) may be material to an investor. If so, it should be disclosed.

Care needs to be taken when disclosing credit ratings. You need to ensure what you say about credit ratings, or what you omit to say about credit ratings, does not result in your disclosure documents being misleading or in your investment statement being deceptive or confusing.

We consider that Standard and Poor's Rating Services, Moody's Investors Service and Fitch Ratings and A.M Best (for insurers) are all recognised and reputable credit rating agencies. Particular care needs to be taken if you are referring to a credit rating issued by a rating agency other than one of these agencies. In this case, you should

consider including their credentials and history so readers can make their own assessment of the value of the credit ratings.

Similarly, if you propose to refer to an unsolicited credit rating prepared solely on the basis of publicly available data, you need to consider whether its inclusion may result in the disclosure document being misleading.

If you are disclosing a credit rating, you should disclose all information necessary to enable a prudent but non-expert investor to understand the credit rating and its significance. The factors in Table IX are topics you should consider disclosing.

**Table IX: Examples of information about credit rating which may be material**

Topic	Topics for consideration
Your rating information (including type of rating) – both for issuer and for the investment issue	<p>Rating, type of rating, its meaning, any material assumptions and qualifications, date issued, scale of potential ratings, agency which gave the rating, and any changes to rating over the last five years. The investment issue's credit rating should be more prominent than that of the issuer.</p> <p>If the credit rating relates to the issuer and does not apply to the investment issue, this should be explicitly stated. For example, where an entity is offering subordinated debt securities, it should be clear that any corporate (senior unsecured) credit rating does not apply to the offer.</p>
Clear	Ensure a reader can understand the significance and context of the rating.
Report by rating agency	<p>If a report was issued, whether:</p> <ul style="list-style-type: none"> <li>• the report is a report on the issuer or a report on the issue;</li> <li>• that report is available to potential investors; and</li> <li>• if so, how a copy of the report may be obtained.</li> </ul>
Third party rating information (including related parties of the issuer)	Rating, type of rating, meaning, date issued, scale of potential ratings, agency which gave the rating and relevance/implications for your business.



## Section D reminders

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Prospectuses must identify and explain material information about the investment offer.

Issuers and directors should consider:

- Does your prospectus identify and explain the material information set out in this section D?
- If not, are you able to articulate in detail why the matter is not considered to be material or does not require inclusion?
- Have you considered if there is any other material information which should be disclosed?
- Overall, does each document provide balanced disclosure of the benefits and the risks?
- If you have any material related party transactions, are these fully explained?
- If applicable, have you disclosed credit rating information as outlined in the examples provided in Table IX?
- Have you looked at the equivalent disclosure requirements under the *FMC Act* and considered whether equivalent information should be included in your prospectus to the extent appropriate?

## Section E: Financial information

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### Key points

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- Financial information is a key component of disclosure documents.
- This includes information relating to past or prospective financial performance, financial position and cash flows.
- The minimum requirements for disclosure of past financial information of an entity with a trading history are prescribed by law.
- Additional past financial information can be included if you ensure the disclosure document remains clear, concise and effective and it is material, there is a reasonable basis for it and it is not misleading on its own or in context of the whole document.
- In this section, we also highlight factors to consider when deciding whether, and how, to disclose prospective financial information.
- The *Regulations* prescribe when and what type of prospective financial information must be included in disclosure documents.
- Significant care is required when the period covered by the prospective financial information would be longer than the period to the end of the current financial year and the following financial year. Where you disclose information that is not presented or calculated in accordance with generally accepted accounting practice (non GAAP financial information) you should also refer to FMA's guidance note [Disclosing Non-GAAP financial information](#).
- We are actively encouraging issuers to apply a 'clear concise and effective' test to the presentation of financial information to ensure financial information is accessible to the reader.

### General comments

Financial information is a key component of disclosure documents. It includes any information:

- relating to your past or prospective financial performance, financial position and cash flows including financial metrics (for example liquidity or price earnings ratios);
- that may or may not have been prepared in accordance with generally accepted accounting practice (GAAP);
- that may be audited or not; and
- that is presented in narrative, graphs or formal financial statements.

For the purposes of this guidance note, we use the term *financial information* to describe this broad category of information.

The *Regulations* prescribe disclosure of specific *financial information*.

You may include other *financial information* except to the extent that such information is prohibited by the *Regulations* or would result in the disclosure documents being misleading or confusing. We encourage the use of

brief introductory comments to the *financial information* sections such as explanations headed ‘How we make money’.

Any *financial information* disclosed should be:

- disclosed in a clear, concise and effective way (subject always to compliance with your mandatory financial reporting requirements); and
- with appropriate cautions where information is incomplete or uncertain so that the information is not misleading or deceptive.

Where you disclose information that is not presented or calculated in accordance with GAAP (non GAAP financial information) you should also consider FMA’s guidance note *Disclosing Non-GAAP financial information*. Section D of that guidance specifically deals with disclosure of non-GAAP financial information in offer documents including pro-forma information.

## Past financial information

The minimum requirements for disclosure of past *financial information* for issuers with a trading history are prescribed by law.

- A prospectus must:
  - contain or refer to the issuer’s latest financial statements and, where required by the *Regulations*, interim financial statements. If an entity has not previously registered financial statements under the Financial Reporting Act (for example because it was privately owned and is now doing an IPO) these financial statements should be prepared and audited as if they were to be registered. We consider that these financial statements should be prepared on the same basis as the financial statements it would have to register as an issuer – that is Tier 1 accounting requirements of the External Reporting Board’s Accounting Standards Framework “XRB A1” (for example NZ IFRS in full). This ensures that investors will receive ongoing financial reporting on the same basis as the issuer’s reporting in the offer document, and be able to compare the issuer’s performance with other issuers.
  - contain summary financial statements, compiled from annual financial statements, which (except in the case of a KiwiSaver or superannuation scheme prospectus) must comply with *FRS- 43*. These summary financial statements must relate to the previous five accounting periods and comply with GAAP. We consider:
    - The most recent two periods of summary information should be derived from the full financial statements required to be included or referred to in the offer document (being the current year and the comparative figures) - that is information in accordance with Tier 1 (see above).
    - For the remaining three accounting periods the issuer will need to extract the information for the summary financial statements from financial statements prepared under the GAAP it used for that period. This could be Tier 1 accounting requirements such as NZ IFRS in full or another Tier such as NZ IFRS with disclosure concessions.
- Where a short form prospectus is used, either:
  - a copy of the issuer’s latest financial statements and the auditor’s report on them must have previously been sent to the holders of securities of the same class as those securities held by persons to whom the offer is made; or
  - they must be included in, or attached to, each copy of the short form prospectus distributed by the issuer.
- A simplified disclosure prospectus must:

- refer to:
  - the latest financial statements for the issuer complying with and registered under the Financial Reporting Act 1993;
  - the accounting period covered by those statements;
  - the date of registration of the financial statements; and
  - how a copy of those financial statements may be obtained; or
- include a copy of those latest financial statements.
- An investment statement must:
  - refer to any prospectus (or disclosure statement for debt securities issued by a registered bank) and the fact that financial statements (if any) are available;
  - explain how to get a free copy; and
  - explain where they are registered.

Additional past *financial information* can be disclosed if you ensure:

- the disclosure document remains clear, concise and effective; and
- the past *financial information* is:
  - material;
  - reliable (there is a reasonable basis for it); and
  - not misleading, on its own or in the context of the whole document.

The information in Table X explains factors to be considered when disclosing past *financial information*.

**Table X: Examples of factors to consider on past *financial information***

Topic	Factors for consideration
Clear, concise and effective	<p>Clearly explain the nature of the past <i>financial information</i> being used:</p> <ul style="list-style-type: none"> <li>• Distinguish between <i>financial information</i> prepared in compliance with GAAP and other (non-GAAP) <i>financial information</i> including pro-forma information, and consider FMA’s guidance on <i>non-GAAP financial measures</i>.</li> <li>• Distinguish between audited and unaudited <i>financial information</i>. Disclose any relevant audit report modifications.</li> </ul>
Not misleading	<p>Past <i>financial information</i> should be presented in a balanced way. For example:</p> <ul style="list-style-type: none"> <li>• Any disclosure of returns should disclose the basis on which those returns are calculated (for example gross of fees and taxes or net of fees and taxes).</li> <li>• Do not ‘cherry pick’ certain financial measures, performance benchmarks or periods to give a more favourable impression. Instead, consider disclosing:</li> </ul>

Topic	Factors for consideration
	<ul style="list-style-type: none"> <li>– Corresponding profits alongside any revenue growth information</li> <li>– Operating expenses as well as operating revenue</li> <li>– Investing and financing cash flows alongside operating cash flows</li> <li>– For funds, consider disclosing: <ul style="list-style-type: none"> <li>▪ the impact of fees, unusual income, rebates and related party transactions on returns</li> <li>▪ why any benchmarks used are appropriate (for example calculated on the same basis as returns with similar risks and assets to the offer to explain performance results)</li> <li>▪ where interests or units are denominated in another currency returns in New Zealand dollars</li> <li>▪ where you have a high risk strategy that could potentially result in a higher return, and you choose to mention the higher return, the high risk strategy so the return information is taken in context</li> <li>▪ returns for the fund since inception – that is, presenting returns without excluding periods of poor performance</li> </ul> </li> <li>– For KiwiSaver schemes, information consistent with quarterly disclosure statements.</li> <li>– Explanations for any entity specific measures and if and why they differ from industry practice.</li> <li>• Explain your performance – consider commenting on key management decisions, relevant market conditions and underlying economic factors that had a significant impact on results.</li> <li>• Use appropriate and prominent cautionary notes. For example, noting that past performance is not necessarily indicative of future performance. Any statement giving the impression investors could expect substantially the same returns in future may be misleading.</li> <li>• Important disclaimers and explanations should be given adequate prominence. It may be misleading to disclose disclaimers or calculations in small print, footnotes or locate these on a different page or section of an offer document.</li> </ul>

## Prospective financial information

The *Regulations* prescribe the prospective *financial information* you must include in disclosure documents. (This varies for each type of security; for example offers of debt securities and of interests in superannuation schemes are not required to include this - refer to Table XVII at the end of this document for further details.) For some types of security, you must include prospective *financial information* unless, in the opinion of the directors, it would likely to be deceiving or misleading to include it. In that case, you must disclose that you have omitted it and the reason for omitting it.

Where required by the *Regulations*, prospective financial statements must comply with *FRS-42*. The principles of *FRS-42* should also be considered in relation to any other prospective *financial information* published in conjunction with prospective financial statements.

Other forms of prospective *financial information* may be included if it would not be misleading to do so. In making this assessment, you should consider whether an intending investor is likely to understand the relevance and reliability of prospective *financial information* to the offer.

Prospective *financial information* is inherently more risky to disclose because it is uncertain and is based on assumptions. But it can inform potential investors of the likely financial outlook affecting the investment. Directors should in all cases, after seeking advice on the legal requirements, form their own view on the materiality of prospective *financial information* for the particular offer.

If you do include prospective *financial information* you should ensure it is:

- material;
- reliable because there is a reasonable and supportable basis for it, i.e. it is based on reasonable assumptions;
- not misleading, on its own or in the context of the whole document or, where it is included in an investment statement, that it is not deceptive or confusing; and
- unambiguous about material risks; for example:
  - For managed investment products:
    - risks associated with a particular asset class; and/ or
    - risks specific to the proposed investment strategy.
  - For other securities:
    - risks specific to the proposed business strategy.

### Long term forecasts

Extra care is required when the period of any prospective *financial information* is beyond one year. The ability to forecast accurately beyond one year is more uncertain and in some circumstances too uncertain. When this is the case it is generally better to describe the expected outlook for the issuer in general narrative rather than as forecast *financial information* (such as a description of a business plan).

Some industries and issuers, such as forestry, use long term cash flow models to present the expected long term returns. Such information, appropriately presented, can be useful to investors, so if you do provide long term return forecasts we recommend providing more detailed explanations including:

- Information on the model (for example whether it is an industry standard model) and how reliable projections using the model have proved;
- Prominent and strong warnings as to the limitations of the forecasts and that returns to investors may be significantly different to the forecasts;
- Sensitivity analysis on key assumptions in the model;
- Discounted financial measures to enable investors to compare the return with other long term investment options.

### Expert's report

In addition to any specific requirements, we consider that having prospective *financial information* supported by an investigating accountant's or expert's report is advisable. It can provide a reasonable basis for including prospective *financial information* and can reduce the likelihood that the prospective *financial information* will mislead investors.

As any investigating accountant's or expert's report is likely to be material to an investor, you should include a copy of the accountant's or expert's report in the prospectus. When prospective *financial information* forms part of the investment statement, the investment statement should also contain a reference to where such a report can be found. You should also disclose any material connection between the accountant or other expert and the issuer or other potential conflict of interest on the part of the accountant or expert.

The information in Table XI sets out factors to be considered when disclosing prospective *financial information*.

**Table XI: Factors to consider when disclosing prospective *financial information***

Topic	Factors for consideration
Investigating accountant's or expert's report	<p>An investigating accountant's or expert's report, which:</p> <ul style="list-style-type: none"> <li>• is from an independent expert or independent accountant;</li> <li>• has reviewed the information used to support the report;</li> <li>• meets relevant professional standards;</li> <li>• identifies the assumptions relied on; and</li> <li>• confirms the information and assumptions are not unreasonable</li> </ul> <p>This may provide directors with a reasonable basis for disclosure, although the report itself is not obligatory.</p>
Contracts	Contracts which lock in key revenue, supply or expenses may provide a reasonable basis for disclosure.
Assumptions	<p>All significant assumptions should be expressly stated and have a reasonable basis. This is particularly relevant to forecasting returns, exchange rates and performance against benchmarks.</p> <p>We recommend disclosing quantitative information on the sensitivity of assumptions, especially for long term forecasts.</p>
Presentation	Prospective <i>financial information</i> should be displayed in a balanced way, with significant assumptions and any limitations placed with the information.
Warning	<p>Disclosure should make it clear the prospective <i>financial information</i>:</p> <ul style="list-style-type: none"> <li>• is predictive;</li> <li>• may be affected by a range of factors; and</li> <li>• may ultimately differ materially from actual results.</li> </ul>
Directors' and promoters' estimates	Estimates by the directors of the issuer and promoters without a reasonable and supportable basis are not appropriate.

## Section E reminders

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Financial information is a key component of disclosure. You must disclose some financial information and you have the option of disclosing additional financial information.

Prospective financial information must in some circumstances be disclosed unless, in the opinion of the directors, inclusion would likely to mislead. In other circumstances, prospective financial information may be included voluntarily provided it is not misleading.

Issuers and directors should consider:

- Is your disclosure of past financial information clear, concise, and effective (subject always to compliance with your mandatory reporting obligations)?
- Is it appropriate or necessary for you to disclose prospective *financial information*?
  - If so, is the prospective *financial information*:
    - material?
    - reliable?
    - not misleading?

If you are obliged to disclose prospective financial information but have chosen not to do so, have you stated it is not included and explained the reasons why the directors believe it would be misleading to include it?



## Section F: Sector specific issues

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### Key points:

- In Section D we gave examples of matters we believe are likely to be material to an investor considering whether or not to invest in a security.
- In this section, we identify factors we believe are likely to be material in relation to specific categories of offerings.
- These factors should not be considered an exhaustive list of matters to be considered. They should not automatically be included just because they are mentioned in this guidance note. If a matter identified is not material to a potential investor in your particular offer, you do not need to include it.

### General comments

We have identified factors we believe are likely to be material in relation to specific categories of offerings:

- managed funds that is, KiwiSaver Schemes, unit trusts and superannuation schemes;
- debt securities including finance company deposits, debentures and other forms of deposit; and
- property-related investments.

The factors in this section F are in addition to the other more general issues identified for consideration in this guidance note. They are not exhaustive. If information identified is not likely to be material to a potential investor in your particular offer, you do not need to include it.

### Managed funds – investment performance and costs disclosure

#### Calculating investment performance

A managed fund prospectus must disclose:

- the investment performance of the scheme, or of each fund within the scheme, over each of the preceding five years; and
- a statement of the basis on which that was calculated<sup>24</sup>.

You should disclose investment performance and fund performance adequately and accurately. Good practice suggests this information should be disclosed in a clear, concise and effective way.

A fund's financial performance may be affected by a number of factors as well as investment returns such as:

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<sup>24</sup> Clause 6(6), Schedule 4, Regulations (Unit Trusts); clause 6(8), Schedule 5A, Regulations (KiwiSaver Schemes); clause 4(7), Schedule 6, Regulations (Superannuation Schemes)

- level of fees charged to the fund;
- non-recurring non-investment income;
- fees and expenses rebated to the fund; and
- related party transactions on terms which are not arms' length.

You should consider identifying these factors and disclosing their nature and effect on investment performance. Not doing so could cause the prospectus to be misleading.

Issuers of KiwiSaver schemes and issuers of other managed funds should also refer to FMA's guidance on [KiwiSaver performance fees](#).

### Investment mandates and practices

A managed fund prospectus must disclose the scheme's (or the fund's) objectives and policy, and a statement specifying how those can be changed<sup>25</sup>. If you have unlimited investment discretion, you should clearly disclose that fact and consider making a disclosure of your actual investment intentions for the prospectus's duration. This disclosure should enable potential investors to identify the nature of the fund, the risks, and the returns.

In the context of investment mandates and practices, you should consider whether it is appropriate to disclose the identity of any underlying fund managers. The managed fund's name and any fund descriptions should fairly reflect the true nature of the fund's investment objectives and policy. For example, carefully consider whether it is appropriate to describe a fund as 'conservative' in light of the risk profile of its portfolio of investments. Similarly, carefully consider the use of the term 'diversified' if the asset classes held by the fund are limited.

If you are promoting a fund on the basis of its short term returns, you should consider whether these returns are consistent with the fund's long term returns. If not, then it may be misleading to focus potential investors on the short term returns.

### Disclosure of direct and indirect costs

Managed fund disclosure documents must make certain disclosures about charges that are or may be payable from the fund<sup>26</sup>. These are direct costs.

You should also consider whether it is appropriate to disclose any indirect costs incurred through investment in other entities or schemes (intermediate entities, whether related or unrelated). This is particularly important where the direct costs are prominently disclosed. We recognise in some cases it may not be possible to access the exact details of indirect costs, especially where multiple 'tiers' are involved. In these cases, consider disclosing a range of costs. Managed fund providers should have an understanding of direct and indirect costs in order to make prudent investment decisions.

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<sup>25</sup> Clause 6(5), Schedule 4, Regulations (Unit Trusts), clause 6(7), Schedule 5A, Regulations (KiwiSaver Schemes), clause 4(6), Schedule 6, Regulations (Superannuation Schemes)

<sup>26</sup> Clause 7(2), Schedule 13, Regulations

## Debt securities

### General comments

Since 2006, a significant proportion of the finance company sector in New Zealand has collapsed. Experience since then has shown the true nature and risks of investments were not adequately disclosed by many finance companies.

We have a strong focus on increasing standards of disclosure and access to the information investors need to make informed decisions about investing in debt securities. While many of our comments relating to debt securities are general, we recognise not all factors identified will be material to all offers of debt securities. As with other aspects of this guidance note, it is for issuers and directors of issuers to judge whether a factor is material in the context of a particular offer.

Potential investors may believe these investments offer capital stability and consistent, ongoing returns. That is not always the case. It is important disclosure on risks associated with debt securities is made so a potential investor can make an informed decision.

You should disclose material risks relevant to debt securities which enable potential investors to understand the risks and decide whether to invest.

Material information may include considerable detail about the issuer and its directors and *senior management*. Potential investors may need to judge the issuer's capability, and that of its directors and *senior management*, from the skills and experience they bring. This includes their track record such as involvement with any failed issues. The time and effort they can contribute to the issuer may also be material.

Factors for consideration in relation to specific types of debt securities are set out below.

### Unlisted debentures and other forms of deposit

Offers of unlisted debentures, notes and other forms of deposit are used in many different ways as a source of finance for a diverse range of entities and individuals and as an investment for an investor.

But these offers contain particular risks. Investors cannot assess and then monitor performance or value to external benchmarks such as a securities market, or on other indices relevant to debt issues. Exit opportunities, other than on-selling opportunities, are prescribed and may be very limited if the issuer is in financial difficulty. If funds are on-lent for example, in the case of property-related developments, there are usually liquidity challenges and valuation risks. Potential investors therefore need good disclosure to make informed investment decisions.

### All debt securities

Factors for consideration are set out in Table XII.

**Table XII: Example information about debt securities which may be material**

Topic	Factors for consideration
Capital ratios	<ul style="list-style-type: none"><li>• Ratio of equity to total assets.</li><li>• Deposit takers should also disclose the minimum capital ratio requirements and their actual capital ratio, and also comply with any regulatory disclosure requirements for deposit takers.</li></ul>

Topic	Factors for consideration
Liquidity	<ul style="list-style-type: none"> <li>• An analysis of liabilities and when they fall due compared to expected cash flows from financial assets.</li> <li>• Disclosure of assumptions such as re-investment rates.</li> <li>• Comparison of assumptions regarding re-investment rates against historic rates.</li> <li>• Details of committed funding facilities (and any conditions on their use) and other sources of liquidity.</li> <li>• Risk-based assessments of lower than expected liquidity. This should address your ability to meet debt obligations on time.</li> </ul>
Rollovers	The process you will use and how investors will receive information that will enable them to make an informed decision on whether to dispose of or re-invest their investments when they become due for repayment.
Trust deeds	<ul style="list-style-type: none"> <li>• Any financial covenants.</li> <li>• Any waivers of breaches of the trust deed granted by trustees.</li> </ul>
Loan portfolios	<p>For debt offers made by entities that are lenders:</p> <ul style="list-style-type: none"> <li>• your lending practices including the credit quality of typical borrowers and the type of security required to support loans;</li> <li>• a maturity analysis of existing loan portfolios, assumptions underlying this analysis and any risks identified by this analysis; and</li> <li>• analysis of the loan book by number of loans, borrower type, impaired assets, type of lending, past due status, security, geographic location, product type (interest only/amortising loans), restructured loans, rollovers of loans treated as new loans, accrual of interest not payable until maturity, capitalised interest and any significant exposures to particular borrowers or groups of related entities.</li> </ul>
Related party transactions	<p>Your approach to related party transactions including:</p> <ul style="list-style-type: none"> <li>• any trust deed provisions such as definition of <i>related parties</i> and limitations on related party transactions;</li> <li>• any waivers or exemptions granted by trustees;</li> <li>• number and value of loans to related parties;</li> <li>• value of those loans as a percentage of total equity;</li> <li>• processes for assessing and approving loans which will be related party transactions;</li> <li>• policies applicable to related party transactions such as interest rates, security and loan-to-valuation ratios; and</li> <li>• any other related party exposures such as guarantees.</li> </ul>
Subordination	The priority of the investment in an insolvency and any payment priorities in place.

Topic	Factors for consideration
Valuations	<p>Where funds are lent for property-related transactions, provide full details of:</p> <ul style="list-style-type: none"> <li>• valuations including the name of the valuer, date of valuation and assumptions;</li> <li>• your lending principles including loan-to-valuation ratios;</li> <li>• the contestability of the process by which the valuer was chosen and any relationship with the issuer or other factors which may undermine the valuer's independence.</li> </ul>
Debt and interest cover ratios	Pro-forma information on levels of debt and debt financing costs, both before and after the offer is made.

## Property-related disclosure documents

### Mortgage schemes

If you wish to issue disclosure documents about an offer relating to a mortgage scheme, factors for consideration are set out in Table XIII.

**Table XIII: Example information about mortgage schemes which may be material**

Topic	Factors for consideration
Liquidity	<ul style="list-style-type: none"> <li>• An analysis of liabilities and when they fall due compared to expected cash flows from financial assets.</li> <li>• Short term commitments.</li> <li>• Details of committed funding facilities and other sources of liquidity.</li> <li>• Risk-based assessments of lower than expected liquidity. This should address your ability to meet debt obligations on time.</li> </ul>
Scheme borrowing	If you also intend to borrow against the funds invested, disclose lending policies and any potential for short term debt issues.
Rollovers	The process you will use, how investors will receive information and any other material information.
Loan portfolios	<p>For offers where you will on-lend funds:</p> <ul style="list-style-type: none"> <li>• your lending practices including disclosing security for loans;</li> <li>• the maturity profiles of existing loan portfolios and any risks that arise because of this;</li> <li>• lending for developments;</li> <li>• any issues relevant to contractual maturity compared with expected maturity;</li> <li>• diversification of lending by type of property, geographic location and any maximum lending to particular borrowers; and</li> <li>• number of loans, rollovers and capitalised interest.</li> </ul>

Topic	Factors for consideration
Related party transactions	<p>Your approach to related party transactions including:</p> <ul style="list-style-type: none"> <li>• number and value of loans to related parties;</li> <li>• value of those loans as a percentage of total assets;</li> <li>• related party limits in any trust deed (including the trust's definition of related parties if applicable and any waivers or exceptions granted by trustees);</li> <li>• processes for assessing and approving loans which will be related party transactions; and</li> <li>• policies applicable to related party transactions such as interest rates, security and loan-to-valuation ratios.</li> </ul>
Valuations	<p>Full details of:</p> <ul style="list-style-type: none"> <li>• policy concerning and details of valuations;</li> <li>• your lending principles including loan-to-valuation ratios and how you intend to treat loans for development purposes; and</li> <li>• the contestability of the process by which the valuer was chosen and any relationship with the issuer or other factors which may undermine the valuer's independence.</li> </ul>

### Property schemes

If you wish to issue disclosure documents about an offer relating to a property scheme, factors for consideration are set out in Table XIV.

**Table XIV: Example information about property schemes which may be material**

Topic	Factors for consideration
Gearing ratio	<ul style="list-style-type: none"> <li>• Total interest bearing liabilities to total assets, both for any existing properties and for any new purchases.</li> <li>• Your interest rate hedging policy.</li> </ul>
Liquidity	<ul style="list-style-type: none"> <li>• An analysis of liabilities and when they fall due compared to expected cash flows from financial assets.</li> <li>• Disclosure of assumptions.</li> <li>• Details of committed funding facilities and other sources of liquidity.</li> <li>• Risk-based assessments of lower than expected liquidity. This should address your ability to meet debt obligations on time.</li> </ul>
Scheme borrowing	If you also intend to borrow on the funds invested, disclose lending policies and any potential for short term debt issues.
Interest cover ratio	Earnings to expected interest expense, both for any existing properties and for any new purchases.

Topic	Factors for consideration
Rollovers	The process you will use, how investors will receive information and any other material information.
Loan portfolio diversification	<p>For offers where you will on-lend funds:</p> <ul style="list-style-type: none"> <li>• your lending policies and practices including disclosing security for loans;</li> <li>• the maturity profiles of existing loan portfolios and any risks that arise because of this;</li> <li>• lending for developments;</li> <li>• any current or historical information about irrecoverable loans; and</li> <li>• diversification of lending by number of loans, type of property, geographic location and any maximum lending to particular borrowers.</li> </ul>
Related party transactions	<p>Your approach to related party transactions including:</p> <ul style="list-style-type: none"> <li>• number and value of loans to related parties;</li> <li>• value of those loans as a percentage of total assets;</li> <li>• processes for assessing and approving loans which will be related party transactions;</li> <li>• any limits on related party transactions in the trust deed; and</li> <li>• policies applicable to related party transactions such as interest rates, security and loan-to-valuation ratios.</li> </ul>
Valuations	<p>Full details of:</p> <ul style="list-style-type: none"> <li>• policy concerning and details of valuations;</li> <li>• your lending principles including loan-to-valuation ratios and how you intend to treat loans for development purposes; and</li> <li>• the contestability of the process by which the valuer was chosen and any relationship with the issuer or other factors which may undermine the valuer's independence.</li> </ul>

## New investment companies

For an offer made by a newly-formed investment company, which will invest but where the investment strategy has not been finalised or executed at the time of the disclosure documents being issued, material information may include considerable detail about the directors and the *senior management*. Potential investors should be able to judge the capability and capacity of all of these people in order to make an investment decision.

You should consider the materiality of the following information on all directors and *senior management*.

- Their relevant skills, experience and expertise. This could include their qualifications and employment history. It should portray a balanced view of their corporate and professional history. You should make very detailed disclosure including all of the requirements of Table VI for directors and *senior management*.
- Anticipated availability: how much time has each person committed to working in your business?

## Section F reminders

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We have identified factors that may be material for some categories of offerings.

Issuers and directors should consider:

- Does your offer fall into one of these categories:
  - Managed funds?
  - Debt securities?
  - Property related offers?
  - New investment companies?
- If so, have you considered the relevant factors in this Section F for materiality?



# Glossary of terms

In this guidance note, any term defined in the *1978 Act*, the *Regulations*, *FMC Act* or the *FMC Regulations*, has the same meaning as in that legislation.

Other defined terms, as shown in italics, are:

**Table XVI: Glossary of terms**

<i>Term</i>	Meaning
<i>1978 Act</i>	Securities Act 1978.
<i>Brand information</i>	Logos, entity names and all other images or words which relate to your business name, brand, or other business identity.
<i>Financial information</i>	Information about your past or prospective financial performance, financial position and cash flows (whether audited or not), including the requirements prescribed by the <i>Regulations</i> .
<i>FMA Act</i>	Financial Markets Authority Act 2011.
<i>FMC Act</i>	Financial Markets Conduct Act 2013.
<i>FMC Regulations</i>	Financial Markets Conduct Regulations 2014
<i>FRS-42</i>	Financial Reporting Standard 42 Prospective Financial Statements issued by the External Reporting Board.
<i>FRS-43</i>	Financial Reporting Standard 43 Summary Financial Statements issued by the External Reporting Board.
<i>GAAP</i>	Generally accepted accounting practice (as defined in section 3 of the Financial Reporting Act 2013)
<i>Mortgage schemes</i>	Any offer of investment where the core business of the scheme is to on-lend funds to a borrower(s) secured by way of mortgage over real property (whether or not this is a first mortgage).
<i>Deposit Taker</i>	A licensed NBDT as defined in section 4 of the Non-bank Deposit Takers Act 2013.
<i>PDS</i>	A product disclosure statement, as defined under the <i>FMC Act</i> .
<i>Property schemes</i>	Any offer of investment where the core business of the scheme is to invest in real property and that has, or is likely to have, at least 50% of its assets invested in real property and/or unlisted property schemes.

<i>Term</i>	Meaning
<i>Regulations</i>	Securities Regulations 2009.
<i>Senior management</i>	The chief executive of an entity (regardless of title) and all management who report directly to the chief executive.
<i>Transitional period</i>	The period of up to two years following 1 December 2014 during which offers of financial products may still be made under the 1978 Act, pursuant to the transitional provisions in the <i>FMC Act</i> .

## Further information

You can access more information from these sources:

Table XVII: Further information sources

Issue	Source of information
Prescribed requirements for prospective <i>financial information</i> :	<p><i>Regulations</i></p> <ul style="list-style-type: none"> <li>• Regulations 14 and 28</li> <li>• Equity securities: Schedule 1 clause 28(2)</li> <li>• Debt securities: Schedule 2, clause 22(2)</li> <li>• Participatory securities: Schedule 3, clause 7 (2) to (5) and clause 25(2)</li> <li>• Units in unit trusts: Schedule 4, clause 18(5)</li> <li>• Life insurance policies: Schedule 5, clause 12(6)</li> <li>• KiwiSaver schemes: Schedule 5A clause 14(5)</li> <li>• Superannuation schemes: Schedule 6 clause 12(5)</li> </ul>
Prospective financial statements prepared in accordance with <i>FRS 42</i>	<ul style="list-style-type: none"> <li>• Equity securities: Schedule 1, section 11 (1)</li> <li>• Participatory securities: Schedule 3, clause 7 (6)</li> </ul>
Disclose material matters which are not disclosed elsewhere	<ul style="list-style-type: none"> <li>• Equity securities: Schedule 1, clause 26</li> <li>• Debt securities: Schedule 2, clause 20</li> <li>• Participatory securities: Schedule 3, clause 23</li> <li>• Units in unit trusts: Schedule 4, clause 20</li> <li>• Life insurance policies: Schedule 5, clause 14</li> <li>• KiwiSaver schemes: Schedule 5A, clause 16</li> <li>• Superannuation schemes: Schedule 6, clause 14</li> </ul>

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