

## Guidance note

FEBRUARY 2015

# Content and form of Disclose register information

### About this guidance note

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

Issuers and advisers who are required to produce a register entry for an offer of financial products under the Financial Markets Conduct Act 2013 (**FMC Act**).

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

Matters the FMA recommends you consider when producing your register entry. It does not prescribe a single 'best practice' approach to register entries as different approaches may be suitable for different businesses.

## About FMA guidance

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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 February 2015 and is based on legislation and regulations as at the date of issue.

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

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# Overview

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The FMA has published this guidance following an initial consultation paper issued in November 2014. The purpose of the guidance is to encourage issuers and their advisers to think about the content and form of their Disclose register entries so that the benefits of the new Financial Markets Conduct Act 2013 (FMC Act) offers regime can be maximised for investors and other users of the Disclose register.

We recognise that issuers may structure their Disclose register entries in different ways, due to the differences in their businesses and their particular offer of financial products. We encourage issuers and their advisers to use the flexibility in the FMC Act regime to develop appropriate market solutions, rather than using a 'one size fits all' approach.

As part of our surveillance activities, we will select register entries for review after registration using a risk based framework. We will update this guidance, if appropriate, as we see how market practice develops.

To help improve the quality of financial product offer information we are happy to work with issuers who intend to make offers under the FMC Act regime where good precedents don't already exist for such offers. We provide pre-registration guidance and feedback on both the draft PDS and the Disclose register entry information. Our approach is designed to help issuers feel more confident their offer information is likely to satisfy FMA expectations. More information about our pre-registration review of offer information [is available on our website](#).

## Disclose register entries are a key feature of the new regime

Under the new regime, unless any exclusions or exemptions apply, issuers of financial products will need to:

- Lodge a product disclosure statement (PDS) on the Disclose register;<sup>1</sup>
- Provide the information required by the Financial Markets Conduct Regulations 2014 (Regulations) on the Disclose register;<sup>2</sup>
- Provide all other material information relating to the offer not already in the PDS, on the Disclose register;<sup>3</sup>
- Provide evidence of their board's consent to the lodgement of the PDS and all other information required by the FMC Act or Regulations to be lodged on the Disclose register<sup>4</sup>.

There are three types of information on Disclose:

- Specific information that must be entered in a relevant field on the register entry (eg, name of the issuer, term of the offer);
- Other information specified by the Regulations to be uploaded on to the register entry (eg, constitutional documents, financial statements, material contracts);
- All other material information that is not contained in the PDS.

The Disclose register provides 'help text' for entering the specific information required by various fields. However, issuers will be responsible for the presentation of much of the information on their register entries, in particular the 'other material information'.

We encourage issuers to consider the following recommendations when determining how to present their 'other material information' on the Disclose register:

- Consider the main purpose and users of the Disclose register
- Information should be material to the offer
- Information should be organised in a way that is clear and not misleading.

## Consider the main purpose and users of the Disclose register

Effective disclosure for investors is a cornerstone of the FMC Act regime. A key purpose of the Act is to provide for timely, accurate and understandable information that is likely to assist persons with their decisions on financial products. The PDS provides certain information focused on the prudent but non-expert investor. The Disclose register is intended to provide online access to all other material information about an offer that is not included in

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<sup>1</sup> Section 57(1) of the FMC Act

<sup>2</sup> See schedules 2-7 of the Regulations

<sup>3</sup> Section 57(1)(b)(ii) of the FMC Act

<sup>4</sup> See Regulation 45 – although there is no prescribed format for the evidence of the board's consent, the Regulation says that it may be a statement signed by 2 directors of the issuer, or by one director if the issuer only has one director.

the PDS. Placing this information online makes offer documents and other information about financial products much more accessible to investors, their advisers, market analysts and commentators.

As you consider the content and form of the information you lodge on the register, you should consider your legal disclosure obligations in light of the overarching aim to ensure publicly available, high-quality, up-to-date information.

## Information should be material to the offer

The new offers information regime does not require a PDS to contain all material information relevant to an offer. Instead, the Disclose register entry and the PDS must together contain all material information about an offer.

Under the FMC Act, any information relating to an offer will be 'material information' and must be lodged on the Disclose register (or contained in the PDS, which is itself on the Disclose register) if it is information that a reasonable person would expect to, or be likely to, influence someone who commonly invests in financial products when deciding whether to acquire the financial products on offer. The information must relate to the particular financial products on offer or the particular issuer, rather than to financial products generally or issuers generally<sup>5</sup>.

Issuers with securities listed on certain NZX markets should note that the definition of 'material information' in section 59 of the FMC Act is similar, but not identical, to the definition of 'material information' used by those markets in relation to listed issuers' continuous disclosure obligations. In particular, the FMC Act definition does not explicitly focus on whether the information would have a material effect on the price of the issuer's securities. However, we expect any information that is 'material information' for the purposes of the relevant NZX listing rules to also be 'material information' for the purposes of the FMC Act. NZX has published an [updated guidance note on the NZX continuous disclosure rules](#) which is available on its website.

In our [guidance note on effective disclosure](#), which was updated in December 2014, we have suggested factors likely to be material to certain offers. That guidance note focuses on offers made under the Securities Act 1978 during the transitional period; however it may assist issuers to identify what information may be material to their FMC Act offer.

It is not possible to produce a definitive list of factors that will always be material to an offer. Issuers should use a due diligence process to help them identify all the information material to their offer. The primary purpose of the due diligence process should be to identify issues and ensure the offer information, in both the PDS and the Disclose register entry, is accurate and not misleading. It is important to adapt the due diligence process to fit the circumstances of the issuer and the offer. Once the due diligence process has identified all material information relating to an offer, the issuer can then decide what information to put in the PDS (taking into account the prescribed information that the Regulations require to be included in the PDS) and what information to put in the Disclose register entry.

Issuers are responsible for ensuring that Disclose register entry information is presented so that it is not false or misleading<sup>6</sup>.

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<sup>5</sup> Section 59 of the FMC Act

<sup>6</sup> Part 2 and section 82 of the FMC Act

## Information should be organised in a way that is clear and not misleading

Information may be false or misleading because of the form or context in which the statement or information is published, or by omission of any other information that is material in the form and context in which the information is published<sup>7</sup>. This affects both how information within individual documents is presented and how the documents are presented within the Disclose register entry. For example, where a document is given a title that doesn't reflect its content, this may be misleading to an investor who is looking for certain information relating to that offer.

## Consider how the information is structured across documents

When you upload your offer to the Disclose register you will first be asked to answer mandatory questions about the nature of the offer. You will then be asked to upload the governing documents relating to your offer, followed by the financial information, which will usually be in the form of financial statements and any tables required by the Regulations. A number of these have specific document labels that should be used.

Following that, there will be a function to enable you to upload all other material information. This function will allow you to add any number of additional documents. A short description of what the document contains will need to be added. This description, and the filename of the document, is displayed to Disclose register users.

*Write clear descriptions of what each document contains in the short 'description' field*

Appendix 1 contains a screenshot example of how these descriptions will appear.

Documents uploaded to the 'other material information' section of the register will appear in the order they have been uploaded. There is currently no ability to change the order these documents are displayed in. Documents that are no longer up-to-date can be archived and will then be removed from the current list of 'other material information'. Archived documents will be grouped separately with a show/hide function.

There is a risk that where related information is spread across multiple documents relevant information could be 'buried', leading to information that is misleading in its published context. This could expose issuers to liability and leave investors and their advisers unable to find information to assist with their decision making.

There is also a risk that if one large, unorganised pdf is uploaded that contains different types of information, the relevant information could be buried.

There is no one 'correct' way to present the 'other material information' on the Disclose register. It will depend on the nature of the issuer and the relevant offer. The following are some suggested approaches issuers could consider:

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<sup>7</sup> Section 13 of the FMC Act

- a. Issuers should use the short-form descriptions to clearly describe each document. The filename of each document should also reflect its contents. This will help users identify and locate relevant information. This information is searchable by people using the register.
- b. Where 'other material information' is grouped together in one or more documents, the grouping should follow a logical order. Issuers can consider the frequency with which particular information may need to be updated when deciding how to group information in different documents.
- c. In future, if certain types of additional documents are commonly uploaded to the Disclose register, provision may be made to allow issuers to identify a document as one of those types when it is uploaded. This will aid comparability of register entries, so we encourage issuers to use this facility as and when it becomes available.
- d. Information that supplements specific information in the PDS can be combined into a single document provided it does not exceed the 20 megabyte size limit. The short description field can identify the document as supplementing the PDS. The document can include a clear contents page and be structured in the same order, and with the same headings, as the PDS.
- e. Where there are a large number of documents, a short summary explaining what documents have been uploaded may be useful. This summary document could organise the information into a logical order. It may include the filenames for each of the documents uploaded, and a brief description of the information in each document that matches the short form description used on the register.
- f. Issuers should try not to include information that is not material to the offer. Including non-material information or documents could lead to information being misleading within the context it is published.

In some circumstances, information in a PDS or on the register can be simplified by including a link to information contained somewhere else, such as an internet site. However, information can only be 'incorporated by reference' in this way if the Regulations specifically permit it. There are very limited circumstances where incorporation by reference is permitted. For example where a non-bank deposit taker makes a continuous offer of category 2 debt securities, the selected financial information table may be incorporated by reference into the PDS so that it can be updated without needing to update the whole PDS, however the up-to-date information must still appear in the Disclose register entry.

## Preparing and presenting uploaded documents

Our [guidance note on effective disclosure](#), which was updated in December 2014, sets out techniques to help issuers prepare and present disclosure documents in a clear, concise and effective way.

These techniques can also assist the preparation of Disclose register documents.

Some documents, such as accounts and fund updates, will not be prepared specifically for the Disclose register. However, the information contained in these documents must still be correct and not misleading.

## Keeping the register entry up-to-date

Information specified under the Regulations must be kept updated while the offer is open.

More broadly, the FMC Act focuses on up-to-date information for investors by prohibiting issuers from continuing to offer financial products if the information on their register entry has become false or misleading; is likely to mislead; or if circumstances have arisen that would have been required to be disclosed on the register entry had they arisen earlier, if such matters are materially adverse from the point of view of an investor<sup>8</sup>.

We encourage issuers to think about how they intend to meet this on-going disclosure obligation. We recommend issuers maintain an appropriate and effective due diligence process to ensure information on the Disclose register is updated when necessary.

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<sup>8</sup> Section 82 of the FMC Act

## Appendix – Example of how documents appear on the disclose register

### View an offer – equity

ABC ISSUER (OFR10166)

Offer maintenance services\*

Offer    Participants    **Documents**    Filings

PDF Extract

#### Offer documents

##### Product disclosure statement 1

Product disclosure statement (PDS)

[Product disclosure statement 1.pdf](#) 11-Nov-2014 13:13:46

#### Governing

Directors consent

[Directors consent.pdf](#) 11-Nov-2014 13:13:46

#### Financial statements

#### Other material information

##### Other material information 1

###### Description

Agreement for sale and purchase of real estate between ABC Issuer and DEF Properties Ltd dated 20 Nov 2014 (Wellington business premises-leaseback)

Other material information

[Sale and Purchase agreement ABC and DEF Properties.pdf](#) 11-Nov-2014 13:13:46

##### Other material information 2

###### Description

Licensing software agreement between ABC Issuer and XYZ Ltd dated 1 April 2012 (XYZ grants ABC rights to use customised XYZ products)

Other material information

[Licensing software agreement ABC and XYZ.pdf](#) 11-Nov-2014 13:13:46

##### Other material information 3

###### Description

Additional information on ABC financing arrangements and directors' remuneration as at 1 December 2014

Other material information

[All other material information as at 1 December 2014.pdf](#) 11-Nov-2014 13:13:46

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