Crowdfunding services for property investments – meeting the eligibility criteria

This information sheet is designed to help crowdfunding services offering property investment ('property crowdfunding') meet the eligibility criteria for a licensed crowdfunding service in New Zealand.

What do we mean by property crowdfunding?

Property investments can be offered through crowdfunding in several ways, subject to a crowdfunding service provider's terms and conditions. In this information sheet 'property crowdfunding' refers to crowdfunding services designed for bringing offers to the market from companies set up to raise funds to invest in identified properties.

In other jurisdictions this type of service often goes beyond matching companies with investors and may include identifying investment properties, setting up the offering companies and issuing shares, organising the purchase of the property, and arranging a contract with a property manager.

Eligibility criteria for crowdfunding services

The Financial Markets Conduct Regulations 2014 place limitations and restrictions on the licensing regime for crowdfunding services, to provide for appropriate investor rights and protections while supporting the Financial Markets Conduct Act (FMC Act) purposes of promoting innovation and flexibility in the financial markets and avoiding unnecessary compliance costs.

To be licensed, a crowdfunding service must meet a number of eligibility criteria, set out in regulation 186. One of these is that *'the service is designed primarily for offers by persons other than the provider and its associated persons'* (the non-association test).

To comply with the non-association test we would expect a crowdfunding licence applicant to be able to demonstrate:

- the service is open to people not associated with the service provider to make an offer
- the ordinary use of the service does not result in an association between the service provider and the companies making offers.

When is the service provider associated with a company making an offer?

The FMC Act definition of 'associated person' includes relationships involving effective control, acting 'in concert', and an association with the same third person[1].

[1] The full definition of 'associated person' is contained in section 12 of the FMC Act.

The following are examples of situations that could create an association between the service provider and the company making an offer. As a result, the non-association test would not be met and the service would be ineligible for a licence. These are examples only. Service providers should carefully consider whether other features of their service could give rise to an association with companies making offers.

Control of the offering company

Companies offering shares through a crowdfunding service should ordinarily have no association with the service provider or its associated persons. An association could exist if the service provider or an associated person:

- establishes the offering company so the offering company will generally act according to their wishes, or
- appoints the director(s) to the company or
- is a significant shareholder of the company.

Association with or through the property manager

The management of the investment property is a key component of property crowdfunding. If the design of a service creates an unavoidable association between the service provider and the property manager for all offers, it would not meet the non-association test.

The property manager will generally be associated with the offering company because it has an element of control over the material activities of the company. If the property manager is also associated with the service provider, then the service provider will be associated with the offering company. Associations that could exist between the service provider and the property manager include:

- if the service provider itself acts as the property manager, or
- if the service provider or associated persons have common shareholders, directors or managers with the property manager, or
- if the service provider nominates one property manager that must be appointed for all offers made through the service such that they are acting ‘in concert’, or
- if the terms of the property management agreement are set by the service provider such that the service provider has a substantial degree of influence over the manager’s activities, or
- if the service provider derives any ongoing monetary benefit from the property management arrangements such that the service provider and property manager are acting ‘in concert’.

If a service provider helps offerors to find a property manager as part of its service, we would expect the provider to be able to impartially recommend more than one property management company.

A property manager associated with the service provider may be included on a recommended panel of property managers, provided the association is very clearly disclosed to the offeror and investors. The panel should not comprise companies or people that are all associated with the service provider. We would review over time whether, in practice, an associated property manager was used for most offers.

When can a service provider be associated with a company making an offer?

A service provider, or its associated people, is permitted to be associated with a company making an offer through the service if the service is not designed primarily for that purpose. In particular, a service provider may wish to make initial offers to show how the service works and generate interest. However, they should not be the primary users. Therefore a licence applicant should be able to demonstrate a clear plan for actively advertising the service and realistically attracting offers from other non-associated parties.

We do not intend to impose bright-line rules on the number or value of offers that can be made by the provider or associated people. We will, however, closely monitor their use of a service to determine compliance with the non-association test over a period of time.

Avoiding creating a managed investment scheme

The crowdfunding licensing regime has fewer protections than other types of offer and has been limited in the regulations to offering shares in a company. An important feature for equity investors is their ability to appoint the company's directors to act on their behalf, to hold management to account, and to vote on critical and strategic matters. If any feature of a crowdfunding offer removes investor control, it raises issues that have been addressed in the FMA's Consultation paper: Class designation of shares to managed investment products in a MIS[2] and could result in the offer in substance constituting a managed investment scheme.

Service providers should seek to ensure that for any property investment offer made through the service:

- shareholders retain key voting rights over their investment
- shareholders retain control over the property manager and the terms of the property management agreement.

Where to find more information

Information and resources about becoming a licensed crowdfunding service provider are available on the FMA website here. We also recommend contacting us directly to discuss any structure you might be considering for a property crowdfunding service. Please email Helena.Lewis@fma.govt.nz.

[2] The FMA is currently reviewing submissions to this consultation. It is likely that we will designate shares in investment companies as managed investment products under some circumstances.