Response to submissions on proposed guidance on substantial product holder disclosures

September 2017

Response to submissions on proposed guidance on substantial product holder disclosures

In May 2017, we publically consulted on our proposed guidance about the disclosure obligations of persons who have a substantial holding in the quoted voting products of listed issuers ('substantial product holders' or 'SPH').

We received 21 submissions and would like to thank all of those who gave feedback.

Summary of key changes to the guidance note

Having considered the feedback we received, our existing guidance note will change. Below we outline the key changes:

Disclosures by individuals who manage funds

This section has changed substantively and now says that because the law in this area is unclear, we will engage with MBIE to consider whether the law can be clarified.

As an interim solution, to ensure individuals who manage funds are clear on what their SPH disclosure obligations are and to ensure there is consistency in disclosures to the market, we have made some revisions to this section. Individuals are not expected to make SPH disclosures for financial products they may control through the funds they manage solely because:

- That particular fund has a 5% holding in a listed company; or
- The 5% threshold is met when their personal holdings are combined with the holdings in the fund they manage.

Timeliness

We have inserted a new paragraph in this section making it clear the obligation to disclose information to the market arises at the point the transaction is agreed (when the trade takes place), not when the transaction is settled. This is consistent with previous guidance we have issued[1].

[1] https://fma.govt.nz/assets/Reports/141201-fma-review-of-market-disclosures.pdf

Feedback themes and our response

Below, we set out the key themes in feedback together with our response (italicised):

Disclosures by individuals who manage funds

- The majority of submitters considered our proposed interpretation of the 'relevant interest' provisions[2] took a strictly interpretative approach without regard to the purposes of the FMC Act and/or SPH disclosure regime. Submitters suggested that, under a purposive approach, only the firm has a 'relevant interest' in the financial products it holds. This is because the proposed guidance would produce outcomes that would not advance the purposes of the FMC Act – including producing meaningless disclosures that would likely confuse or mislead the market, create regulatory uncertainty and complexity, and/or result in unnecessary compliance costs.

  We acknowledge our proposed interpretation can result in undesirable outcomes. However, we consider the purposive interpretations submitted, strain the ordinary meaning of the words in the relevant provisions. We disagree with those who argue an employee should never be viewed as having 'power' or 'control' over financial products purchased in their employer's name because this would be inconsistent with New Zealand case law[3]. However, submissions show the law is unclear in relation to the requirement for disclosures by individuals who manage funds, so we will engage with MBIE to consider whether it can be clarified.

- Some submissions noted our proposed interpretation was inconsistent with the principles of agency law. Numerous submitters felt the inclusion of the directors' carve-out in section 238(1)(f) indicated the principles of agency law were intended to apply to the SPH regime.

  We are not persuaded that the section 238(1)(f) exclusion is evidence that directors (and therefore, by extension, employees) are not intended to be captured by the SPH regime. First, the list in section 238(1) is prefaced by the words "merely because", so the circumstances described are not themselves determinative. Secondly, when the carve-out was implemented, there was no consideration given to whether it should extend beyond directors who are caught by the 'relevant interest' provisions solely because they are a director of the company to other agents of the company.

---

[2] Sections 235-238 of the FMC Act

[3] *Mercury Energy Ltd v Utilicorp NZ Ltd* [1997] 1 NZLR 492 considered the meaning of "power" in the context of the equivalent provisions in the Securities Markets Act 1988.

- There was no support for requiring individuals who manage funds to make SPH disclosures where they do not also have a personal holding. However, a small number of submissions showed varying degrees of support for disclosure where an individual has a personal holding in the same listed issuer as the fund he/she manages. Some considered an exemption should be granted so only individuals who have a personal holding over a certain threshold (expressed either as a dollar amount or a percentage) are required to disclose.

  We agree there is little benefit in requiring individuals to disclose where they do not have a personal holding. Whilst we can see some benefits in requiring an individual who manages funds to make a disclosure where they also have a personal holding, we are currently not persuaded that we should take this approach, as it would increase complexity and we have not seen evidence that the disclosures would be actively used.

- The majority of submitters did not believe the proposed guidance would help prevent the 'mischief' identified. Whilst a considerable number acknowledged a conflict of interest can arise in circumstances where the individual managing the funds has a personal holding, most felt this mischief was best managed through appropriate policies and procedures, rather than through the SPH regime.

  We agree conflicts of interest can be managed through policies, procedures and controls, and we could potentially incorporate this as part of our ongoing monitoring of licensed fund managers. However, we would also need to consider the position in relation to wholesale fund managers and whether we wish to monitor their policies and procedures as well. This is something we may consider further in future.

- Almost all submissions highlighted the practical difficulties in applying our guidance to what are often complex arrangements, including the use of outsourcing arrangements. Therefore, many submitters requested further guidance on what constituted the requisite 'power' or 'control' if we proceeded with the initial draft of the guidance.

  We agree the proposed approach could be practically difficult to implement. Having considered the submissions, we do not consider further guidance on what constitutes 'power' or 'control' will provide a sufficient degree of certainty to the market. Such guidance is still likely to be interpreted differently by market participants given the variety and sometimes complex arrangements which exist.

- Some commented the proposed guidance would have broader implications beyond fund management firms – namely, that it is illogical to distinguish individuals who manage funds from other employees, and so the guidance would extend to all employees who have the power or control over their employer's financial product holding.

  We agree the proposed interpretation would have had the wider-ranging implications above.

Timeliness

Four submitters requested we amend this section of the guidance and extend the timeframe for filing from one to two business days. This would align with the position in Australia.

> *The relevant provisions in the FMC Act[4] are clear that disclosure must be made as soon as the person knows, or ought reasonably to know, that a disclosable event has occurred. This means disclosure must be made immediately. This differs to the equivalent provisions in the Australian legislation[5]. Therefore, we have retained the section of our guidance outlining that generally disclosure must be made within one business day.*

[4] Sections 276 -279 of the FMC Act.
[5] Section 671B of the Corporations Act 2001.