FMA
FINANCIAL MARKETS AUTHORITY
TE MANA TĀTAI HOKOHOKO

10 AUGUST 2021

Consultation paper: Proposed financial reporting exemptions for FMC reporting entities in liquidation, receivership or voluntary administration

About this consultation

Various types of businesses operating in New Zealand's financial markets are classified as "FMC reporting entities" under the Financial Markets Conduct Act 2013 (**FMC Act**). This means they must prepare financial statements that comply with generally accepted accounting principles (GAAP), have them audited by a licensed auditor and lodge them annually with the Companies Office.

When an FMC reporting entity becomes insolvent, normally an external administrator (such as a liquidator, voluntary administrator or receiver) is appointed. Under our insolvency laws an external administrator has to prepare financial statements, usually every six months, which are available to creditors and investors.

At present, the FMC Act requires insolvent FMC reporting entities to continue producing audited financial statements, in parallel with the external administrators' reports. We have been told this provides limited benefit, and the additional costs may greatly outweigh the benefit. Investors and creditors can get the key financial information they need from the more regular external administrators' reports.

We are therefore considering a class exemption for insolvent FMC reporting entities from certain FMC Act financial reporting obligations. We welcome your feedback on the proposals discussed in this paper. In addition to your general feedback, we have included specific questions in this paper. Please use the form at the back to provide feedback.

This consultation is for investors, creditors, company directors, insolvency practitioners, lawyers, accountants and auditors.	It asks for feedback on our proposed class relief from certain financial reporting obligations for insolvent FMC reporting entities.

If you have any questions, please email questions@fma.govt.nz or call us on 0800 434 566 (or +64 3 962 2698 if calling from outside New Zealand).

Submissions close at 5pm on Wednesday 6 October 2021.

After the consultation closes, we will consider all submissions, finalise our policy proposals and, if an exemption is granted, work to get it in place.

Contents

FMA's exemption powers

To grant an exemption under the FMC Act, the FMA must be satisfied that the exemption is necessary or desirable in order to promote one or more of the purposes of the FMC Act. The extent of the exemption also cannot be broader than is reasonably necessary to address the matters that gave rise to the exemption.

The purposes of the FMC Act are:[1]

- to promote the confident and informed participation of businesses, investors, and consumers in the financial markets
- to promote and facilitate the development of fair, efficient, and transparent financial markets
- to provide for timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products or the provision of financial services
- to ensure that appropriate governance arrangements apply to financial products and certain financial services that allow for effective monitoring and reduce governance risks
- to avoid unnecessary compliance costs; and
- to promote innovation and flexibility in the financial markets.

[1] See sections 3 and 4 of the FMC Act.

Background and problem definition

About financial reporting duties

All FMC reporting entities must comply with the financial reporting requirements in Part 7 of the FMC Act. These entities are specified in section 451 of the FMC Act. In summary they are:

- an issuer of a regulated financial product
- an entity licensed under Part 6 of the FMC Act (other than an independent trustee of a restricted scheme)
- a licensed supervisor
- a listed issuer in New Zealand
- an operator of a licensed financial market (other than an operator licensed under an equivalent overseas-regulated market)
- a recipient of money from a conduit issuer (an agency generating funds used by a third party)
- a registered bank
- a licensed insurer
- a credit union
- a building society
- a person that is an FMC reporting entity under clause 27A of Schedule 1 of the FMC Act.

Broadly, Part 7 requires FMC reporting entities to prepare and file annual financial statements (and group financial statements) with the Registrar no later than 4 months from their balance date. The financial statements must be signed by 2 directors (or the sole director, if there is only one), comply with GAAP standards, and be audited by a licensed auditor.

The Part 7 requirements we are considering granting exemptions from are:

- section 460 (Financial statements must be prepared)
- section 461 (Group financial statements must be prepared)
- section 461D (Financial statements must be audited)
- section 461H (Financial statements must be lodged with Registrar of Financial Service Providers, more commonly known as the Companies Office).[2]

[2] Out of scope is section 461A (Financial statements for registered schemes and funds).

Number	Consultation question
1	Do you agree that these are the FMC Act provisions which are relevant to this consultation? If not, please explain your reasons.
2	We are not proposing any relief from the requirement in section 455 of the FMC Act to keep proper accounting records, even if the reporting entity is insolvent. Do you agree with our approach? If not, please explain your reasons.

Purpose of FMC Act financial reporting duties

Financial reporting is a core element of the disclosure of business and financial information to stakeholders. Its objective is to provide financial information about the reporting entity that is useful to existing and potential investors, lenders, and other creditors in making decisions about providing resources to the entity. While other parties, such as regulators and the general public, may find financial reports from FMC reporting entities useful, the reports are not primarily directed toward those other parties.

However, once an FMC reporting entity becomes insolvent the information needs of investors, lenders and other creditors change. They generally have two main concerns – how much am I going to receive, and how long will it take?

Overview of financial reporting duties under various New Zealand insolvency regimes

Liquidation

Where an FMC reporting entity is placed in liquidation, the liquidation processes set out in the Companies Act 1993 (**Companies Act**) will normally apply for companies and most other types of legal entities. In summary, the liquidator has to prepare an initial report soon after their appointment including:

- a brief summary of the reasons for commencing the liquidation
- a summary of the actions the liquidator proposes to take in the liquidation and, if practicable, the estimated dates on which those actions will be taken
- if practicable, the estimated date of completion of the liquidation
- for an insolvent liquidation, a statement of the company's financial affairs
- for a solvent liquidation, a statement that the liquidation is a solvent liquidation, and all creditors will be paid in full within 12 months of the commencement of liquidation.[3]

The statement of the entity's financial affairs that a liquidator has to prepare for an insolvent liquidation is not as comprehensive as the financial statements that need to be prepared under the FMC Act. Because the entity is no longer a going concern, various aspects of financial reporting become irrelevant, such as the future financial prospects of the business. However, the liquidator's statement does give readers the key information they need regarding the present financial position of the insolvent entity.

[3] Section 255(2) (c)(ii) Companies Act and regulation 6 Companies (Reporting by Insolvency Practitioners) Regulations 2020

After the initial statement of affairs, the liquidator has to prepare and send to the Companies Office a six-monthly statement of affairs. These must include the reasons for any material differences between the information included in the updated statement and the information included in the previous statement.

The work of liquidators is not normally audited. However, from September 2020 all liquidators must be licensed under the Insolvency Practitioners Regulation Act 2019. The purpose of this legislation is to regulate insolvency practitioners and to establish an independent oversight system in order to promote quality, expertise, and integrity in the profession of insolvency practitioners. Under this Act only a person who meets the prescribed minimum standards and who is otherwise a fit and proper person to hold a licence can become a liquidator. There are ongoing competence requirements. If these are not met, or the liquidator's work is not carried out with reasonable care, diligence, and skill, then their licence can be cancelled. So although there is no audit requirement, there are some protections for investors and creditors.

Voluntary administration

A voluntary administration is different to a liquidation. The object is for the business of an insolvent company to be administered in a way that:

- maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- if it is not possible for the company to continue in existence, results in a better return for the company's creditors and shareholders than would result from an immediate liquidation of the company.

The voluntary administrator must call a watershed meeting shortly after their appointment (normally within 20 working days) to determine the future of the company. For the purpose of this meeting the voluntary administrator has to supply a report about the company's business, property, affairs, and financial circumstances.[4] This reporting is not as in-depth as the financial statements which need to be prepared under the FMC Act, and this is not unreasonable given the short period of time between the administrator's appointment and the watershed meeting.

What happens after a watershed meeting depends on whether the creditors vote to return the company to the directors, place the company in liquidation, or enter into a deed of company arrangement (DOCA). If the company is returned to the directors, then FMC Act reporting duties still apply. If the company is placed in liquidation, then FMC reporting duties continue to apply, in parallel with liquidation reporting. If there is a DOCA then FMC reporting duties continue to apply plus the administrator has to file six monthly financial statements with the Companies Office.

Receivership

If an FMC reporting entity is placed in receivership the provisions of the Receivership Act 1993 will apply. Not later than 2 months after their appointment, a receiver must prepare a report on the state of affairs with respect to the entity in receivership, including the finances.[5] A copy of the report must be sent to the Registrar. After the initial statement of affairs, the receiver has to prepare and send to the Registrar six monthly statements of affairs.

[4] Section 239ACZB(3) of the Companies Act and regulation 5 Companies (Reporting by Insolvency Practitioners) Regulations 2020
[5] Section 24A(2) of the of the Receiverships Act 1993 and regulation 11 Companies (Reporting by Insolvency Practitioners) Regulations 2020

Other

There are other forms of external administration, but these are reasonably rare and therefore we consider that any overlap of financial reporting duties in these situations can be dealt with on a case-by-case basis.

In the rest of this paper, wherever we refer to 'external administration' we are referring to an insolvent liquidation, voluntary administration, and receivership. Wherever we refer to 'external administrators' we are referring to liquidators, administrators in a voluntary administration, and receivers.

What are the problems we are seeking to address?

Simply put, the problem is that the FMC Act reporting duties do not cease once an FMC reporting entity becomes insolvent. Those duties continue for the entity while the external administrators of the entity are subject to a separate financial reporting regime outside of the FMC Act. For example, for a company in liquidation, there is a separate financial reporting regime under the Companies Act 1993 with the details of the regime in the Companies (Reporting by Insolvency Practitioners) Regulations 2020. This dual financial reporting is required under current law until the insolvent entity ceases to exist. In view of this problem, we are considering whether:

- FMC Act financial reporting duties impose unnecessary compliance costs on an insolvent entity.
- Such compliance costs materially reduce the returns available to investors and creditors without any significant benefit to them.
- The financial reporting regimes under the Companies Act and Receiverships Act for the various forms of external administration provide sufficient transparency and information for existing investors and creditors.

We believe other significant problems are:

- Directors of a company subject to some form of external administration remain in office but cease to have their normal powers, functions, and duties other than those required or permitted to be exercised by law. They also no longer control the company records. As such, directors are not really in a position to be able to oversee the preparation of and sign the financial statements required under the FMC Act. External administrators are also unable or unwilling to sign the financial statements because they are not directors and do not want to assume any potential liability.
- Compliance with Part 7 of the FMC Act will not normally be considered by the external administrator to be a priority or to further their principal duties. For example, in a liquidation the liquidator's principal duty is to take possession of, protect, and realise the entity's assets, and distribute the proceeds of the realisation of the assets to its creditors.[6]
- It is practically unlikely an insolvent FMC reporting entity can comply with the FMC requirement to submit financial statements which have been audited, given it is unlikely a licensed auditor would accept the appointment or sign off on an audit if the entity is insolvent. Also, the costs of an audit can be substantial for an FMC reporting entity. We have looked at audit costs disclosed in financial statements recently filed with the Companies Office. Some representative examples are as follows: major reporting entity $2 million per annum; medium sized reporting entity $500,000 per annum; and small reporting entity $40,000 per annum.

[6] Section 253 Companies Act

- Even if an auditor did accept the appointment and was prepared to sign off on an audit of an insolvent entity, significant costs (additional to those outlined above) could be incurred by the auditor so they can get assurance that the financial statements provide a true and fair view.

Number	Consultation question
3	Do you have any comments on the basic problem caused by dual reporting requirements?
4	Do you think that FMC Act financial reporting duties impose unnecessary compliance costs on an insolvent entity? Please give reasons for your answer. Please give us an estimate or range for the average compliance costs (broken down into direct and indirect costs) for your FMC reporting entity to comply annually with its FMC financial reporting duties.
5	Do you think that FMC Act financial reporting compliance costs materially reduce the returns available to investors and creditors without any significant benefit to them? Please give reasons for your answer.
6	Do you think the financial reporting regimes under the Companies Act and Receiverships Act for the various forms of external administration provide sufficient transparency and information for existing investors and creditors? Please give reasons for your answer.
7	Do you agree with our assessment of the four other significant problems? Please give reasons for your answer.
8	Please estimate or comment on the additional costs which may be incurred by the auditor where they are prepared to sign off on an audit of an involved entity, so they can get assurance that the financial statements provide a true and fair view, given the entity is insolvent.

Other problems may arise where there is an external administration:

- Time constraints — for example, a voluntary administrator is required to complete a number of tasks within a short timeframe. It may be extremely difficult for a voluntary administrator to complete these tasks and prepare or obtain the financial and other reports required under the FMC Act.
- Human resource constraints — in light of the entity's time and financial constraints, the administrator has limited human resources available. The efforts of the administrator will be directed to meeting the needs and objectives of the administration.

These problems may be worsened by the fact that preparation of financial reports for an entity under administration may be more difficult and considerably more costly than for most entities. Where an entity has gone into external administration after the reporting date, it will often be difficult and time-consuming to determine the realisable values of the company's assets and liabilities for recognition or disclosure in the financial reporting and still meet the normal reporting deadlines. This is especially true if there is no active and liquid market for the entity's assets.

Finally, the FMC Act financial reporting provisions may be practically unenforceable if the reporting entity is insolvent. For example, because of the moratorium on legal proceedings that applies to companies in administration or insolvency,[7] FMC Act financial reporting duties cannot be enforced without the consent of the administrator/liquidator (which is unlikely to be granted) or the permission of the court (which would be likely to be opposed by the administrator/liquidator if consent was withheld).

Number	Consultation question
9	Do you agree with our assessment of these other problems? If you do not agree, please explain your reasons.
10	Do you think there are any other problems we need to consider? If so, please outline them.
11	Do you think there are any other current or emerging issues we should take into account as part of our process for considering the introduction of relief?

[7] For example section 248(1)(c) Companies Act

Issues and feedback

Our preferred option

Having considered all the options, our preferred option involves offering three types of relief:

Type of relief	Summary
1. Exemption relief	Relief from certain financial reporting duties by way of a class exemption, for all insolvent FMC reporting entities (except managed investment schemes) to which a liquidator is appointed, subject to certain conditions.
2. Deferral relief	Relief from certain financial reporting duties, for all FMC reporting entities (except managed investment schemes) to which a voluntary administrator or receiver is appointed, for a period of 12 months from the appointment of the external administrator, subject to certain conditions.
3. Case-by-case relief	Provide individual relief on a case-by-case basis from the financial reporting duties in situations not covered by 1 and 2 above where similar policy considerations apply and the exemption criteria under the FMC Act are met.

We note our preferred option is similar to the approach taken in Australia.[8] In the next part of the paper we give more detail around our preferred option and seek your views on the option and its parameters.

Issues considered

We have outlined four issues in this paper, and for each have included an explanation of the issue, a proposal for addressing the issue, and the rationale for our approach. The issues are:

1. Whether our preferred option for relief is the best option.
2. The scope of the relief, in particular the scope of any class exemption.
3. The conditions for any relief.
4. The factors which are relevant in deciding whether it may be appropriate to grant relief on a case-by-case basis.

We would appreciate your feedback on the issues, and our proposals to address them.

[8] https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-174-relief-for-externally-administered-companies-and-registered-schemes-being-wound-up/

Issue 1: Whether our preferred option for relief is the best option

Description of problem

In 2020, out of approximately 570 FMC reporting entities, there were 28 entities (all companies) which were in liquidation and did not file annual audited financial statements as required by the FMC Act. Out of these 28 entities, 18 of the entities were related companies. There were no financial reporting entities in liquidation that did file annual audited financial statements in 2020. The numbers are similar for 2019.

In 2020 there was 1 FMC reporting entity in receivership (a company) that did not file annual audited financial statements. The number for 2019 was 0.

In 2020 there were no FMC reporting entities in voluntary administration which did not file annual audited financial statements as required by the FMC Act. The number for 2019 was 0.

While the numbers are small, we believe there is a problem which needs to be addressed.

For companies and other types of entities, such as building societies and credit unions, which become insolvent or are placed in administration, there are practical and legal problems complying with the financial reporting obligations in FMC Act, as outlined on pages 6 and 7 of this paper.

In terms of assessing the nature of the harm posed by the problem, we note the following key points:

- An insolvent company is normally unable to produce quality audited financial information.
- There is potential harm to investors and creditors if overlapping regimes apply that are likely to increase compliance costs and reduce the overall recovery for creditors and investors but not result in reduced risks or increased benefits for investors and creditors.
- There is legal uncertainty created for directors of insolvent FMC reporting entities which do not file financial statements as required by the FMC Act – for example exposure to a penalty of up to $1 million each under the FMC Act, and defence costs.

Number	Consultation question
12	Do you agree that compliance with the financial reporting duties by an entity under external administration imposes unnecessary compliance costs? If not, why not? Are there any other factors that we should consider?
13	Do you have any comments on our harm assessment?

What is our preferred option for relief?

Having considered all the options, our preferred option is to:

1. Grant relief from the financial reporting duties in sections 460, 461, 461D and 461H of the FMC Act by way of a class exemption: (a) to all FMC reporting entities (except managed investment schemes) to which a liquidator is appointed; and (b) subject to certain conditions. The effect of the proposed exemption is that the financial reporting duties are cancelled.

2. Grant relief from the financial reporting duties in sections 460, 461, 461D and 461H of the FMC Act: (a) to all FMC reporting entities (except managed investment schemes) to which a voluntary administrator or receiver is appointed; (b) for a period of 12 months from the appointment of the external administrator; and (c) subject to certain conditions. The effect of this proposed type of relief is that financial reporting duties are deferred but must still be complied with at a later date.
3. Provide individual relief on a case-by-case basis from the financial reporting duties in sections 460, 461, 461D and 461H of the FMC Act in situations not covered by 1 and 2 above where similar policy considerations apply and the exemption criteria under the FMC Act are met. Any relief would be available on application and at the FMA's discretion, and we may impose conditions on such relief.

Rationale for relief

Why is this our preferred option?

As mentioned on page 2 of this paper, we can grant an exemption under the FMC Act, if we are satisfied that the exemption is necessary or desirable in order to promote one or more of the purposes of the FMC Act. The purposes of the FMC Act include "to avoid unnecessary compliance costs". We are considering whether unnecessary compliance costs currently arise from the existing parallel financial reporting regimes when a financial reporting entity is insolvent.

In determining whether costs are not needed, one factor to consider is whether the costs likely to be incurred by the FMC reporting entity are proportionate to the value of the financial and other reports for the users of the reports. Users of the financial and other reports, such as creditors, members, potential creditors and employees, clearly have an interest in the financial and other affairs of an entity that has entered administration. However, they also have an interest in the preservation of the entity's limited assets and its possible revitalisation. It may be unlikely that they would want the entity's resources unnecessarily depleted in order to provide them with information about the company's financial and other affairs, when such information is publicly available through other sources.

Another purpose of the FMC Act is to enable timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products. Where an FMC reporting entity is insolvent, its financial products are generally no longer on sale, and there is no market for investors to trade those products. The preferred option is not inconsistent with that purpose, and also avoids creditors and investors getting duplicate information.

Another purpose of the FMC Act is to promote flexibility in financial markets. In our view during the initial period after the appointment of an external administrator, compliance with the financial reporting duties will create significant burdens for the FMC reporting entity and its administrators. The preferred option is likely in our view to promote flexibility – it will allow external administrators in appropriate cases to focus on a rescue or turnaround plan immediately after their appointment, rather than being diverted at a critical time to FMC reporting duties.

Number	Consultation question
14	Do you have any comments on the rationale for our preferred option?
15	Are there large or complex insolvencies where this rationale should not apply? If so, please provide an explanation.

What are our other options for relief?

The main options are:

- Status quo
- Law reform
- No action decision by FMA in individual cases[9]
- Individual exemption under section 556 of the FMC Act.

Number	Consultation question
16	What do you think of these other options for relief?

Issue 2: Scope of the relief

Description of issues

In respect of the scope of the relief we believe there are four main issues:

- Is a class exemption from the financial reporting duties in sections 460, 461, 461D and 461H of the FMC Act appropriate for all FMC reporting entities to which a liquidator has been appointed regardless of their individual financial and operational circumstances?
- In the case of the appointment of a voluntary administrator or receiver, what is the appropriate period of deferral relief? Should it be 6 months as in Australia currently, 12 months – or 24 months as has recently been proposed in Australia?[10]
- Is the deferral relief from the financial reporting duties in sections 460, 461, 461D and 461H of the FMC Act appropriate for all entities to which a receiver has been appointed regardless of their individual financial and operational circumstances?
- Should exemption and deferral relief be confined to entities which are incorporated in New Zealand and subject to New Zealand insolvency laws?

Proposed scope of relief

Our preferred approach to these issues is:

- We do not think relief would be appropriate for any entities to which an interim liquidator (sometimes called a provisional liquidator) has been appointed. Entities in provisional liquidation should be treated the same as entities in voluntary administration or receivership.

  Furthermore, class order relief by way of exemption should not apply to those entities where the liquidator has confirmed the entity is solvent – for example where, under the Companies legislation, a

[9] https://www.fma.govt.nz/assets/Policies/160824-Regulatory-response-guidelines-policy.pdf
[10] https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-337-externally-administered-companies-extending-financial-reporting-and-agm-relief/

liquidator has filed a statement that the liquidation is a solvent liquidation, and all creditors will be paid in full within 12 months of the date of the commencement of liquidation.[11]

Other than these two situations, class order relief by way of exemption from the financial reporting duties seems appropriate for all entities to which a liquidator has been appointed.

- In the case of the appointment of a voluntary administrator or receiver, our starting point is that an appropriate period of deferral relief is 12 months from the date of appointment of the external administrator. For example, if the appointment is made on 1 July 2022 and the entity's financial statements for the year ended 30 September 2022 are due for filing on 31 January 2023 then the deadline for filing is extended to 30 June 2023.
- The deferral relief for an entity to which a receiver has been appointed does not appear to be appropriate if the entity is solvent.
- In the case of both exemption relief and deferral relief, we think relief should not be given for any financial statements which are overdue for filing as at the date of the appointment of the external administrator. In appropriate cases we could look at granting relief on a case-by-case basis to the entity – but we query whether relief should extend to the directors if they have not done everything practicable to ensure the entity met its duties while they were in control of the entity.
- Our starting point is exemption and deferral relief should be confined to entities which are incorporated in New Zealand and subject to New Zealand insolvency laws.

Rationale for scope of relief

We consider:

- The proposed exemption relief for entities in liquidation, other than entities in provisional liquidation or solvent liquidation, is in our view appropriate in the circumstances and will avoid unnecessary compliance costs. Provisional liquidation has some similarities with voluntary administration – the company is in a holding pattern until its future is decided. In the case of a solvent liquidation, there should be sufficient money to pay for the compliance costs associated with FMC reporting duties.
- Having regard to the experience in Australia, the appropriate period of deferral relief is 12 months for a voluntary administration or receivership. There they have found the current six-month deferral period for companies in external administration to comply with the financial reporting duties may not always be sufficient, particularly for more complex or larger external administrations. We believe 12 months is a reasonable time period for the relevant external administrator to progress the external administration. If more time is required, then the external administrator would be able to apply to us to extend the deferral period.
- Where a receiver has been appointed primarily for purposes other than dealing with an insolvent entity – for example, for the purpose of resolving a deadlock between the main security holder and the directors regarding the future direction of the entity – it is our view that deferral relief is inappropriate.
- The relief is primarily intended to benefit the FMC reporting entity and its external administrators, rather than excusing directors from past breaches of their reporting duties. On this basis, we think relief should be available to the entity only if financial statements are due to be filed after the appointment of an external administrator. For example, a financial reporting entity's balance date is 31 March and its financial statements are due for filing by 31 July. An external administrator is appointed on 1 December

[11] Regulation 6 of the Companies (Reporting by Insolvency Practitioners) Regulations 2020

2021. The relief will be available in respect of the financial statements due on 31 July 2022. However, relief will not be automatically available if the financial statements for the previous year were not filed on or before 31 July 2021.

In respect of exemption and deferral relief being confined to entities which are incorporated in New Zealand and subject to New Zealand insolvency laws, we consider this makes sense as we are very familiar with the financial reporting required under New Zealand insolvency laws and it would not be feasible for the relief to accommodate a variety of overseas financial reporting and insolvency laws.

Number	Consultation question
17	Do you have any comments on the scope of our proposed relief for entities in liquidation?
18	Do you agree that we should allow a deferral relief period of up to 12 months? If not, why not?
19	In what circumstances do you consider it is not appropriate for us to extend the 12-month deferral period for an externally administered entity?
20	What do you think of our proposals in respect of the situation where financial statements are overdue for filing at the time of appointment of an external administrator? Do you agree that we should deal with these situations on a case-by-case basis, and that directors should not be relieved of their obligations if they have not acted reasonably?
21	Do you think the exemption and deferral relief should be confined to entities which are incorporated in New Zealand and subject to New Zealand insolvency laws? If not, why not? If you consider relief should be extended to entities which are incorporated in another overseas jurisdiction, please provide detailed information about the insolvency regime in that jurisdiction and its reporting requirements.

Issue 3: Conditions for relief

Description of issues

1. What conditions should we include in the proposed exemption for insolvent FMC reporting entities in liquidation? Some conditions will be expected. For example, if the liquidation is terminated and the company is returned to the control of the directors, then the relief is terminated. Also, it may be sensible to include a condition that the exemption only applies to the extent it is not reasonably practicable for directors to comply with the FMC obligations. Other conditions are more debatable. For example, if an entity does not have its FMC market licence cancelled then they still need to comply with the financial reporting duties. What if the licence is suspended?
2. What conditions should we include in the proposed financial reporting deferral relief? Should we have conditions similar to Australia[12], as set out in the Schedule to this paper?

[12] ASIC Corporations (Externally Administered Bodies) Instrument 2015/251.

Proposed scope of conditions

Class Exemption

We are considering imposing a condition of any class exemption to require the insolvent entity to:

- lodge with the Companies Office a notice which explains the financial reporting exemption relief
- include in the liquidator's initial statement of affairs a notice which explains the financial reporting exemption relief in a prominent place
- publish a notice which explains the financial reporting exemption relief in a prominent place on the entity's website (if any), and in a place that is readily accessible to the entity's members on a website maintained by the liquidator
- if the entity is listed on a prescribed financial market, provide a copy of the notice that explains the financial reporting exemption relief to the operator of that financial market
- have adequate arrangements in place to answer, within a reasonable period of time and without charge, any reasonable questions asked by a member of the company, or security holder (if any) about the financial reporting for the liquidation
- if the entity holds an FMC market licence, apply to us to have the licence cancelled before the due date for the financial reporting duty, if they wish to rely on the relief.

We are also considering imposing a condition of any class exemption that if the liquidation is terminated and the entity is returned to the control of the directors, then the relief is terminated

Deferral Relief

We are considering imposing a condition of any financial reporting deferral relief that during the period of the deferral, the entity must:

- lodge with the Companies Office a notice which explains the financial reporting deferral relief
- include in the external administrator's initial statement of affairs a notice which explains the financial reporting deferral relief in a prominent place
- publish a notice which explains the financial reporting deferral relief in a prominent place on the entity's website (if any), and in a place that is readily accessible to the entity's members on a website maintained by the external administrator
- if the entity is listed on a prescribed financial market, provide a copy of the notice that explains the financial reporting deferral relief to the operator of that financial market
- have adequate arrangements in place to answer, within a reasonable period of time and without charge, any reasonable questions asked by a member of the entity, or security holder (if any) about the financial reporting for the external administration
- prepare and lodge their outstanding financial statements at the end of the deferral period.

We are also considering imposing a condition of any deferral relief that if the external administration is terminated early and the entity is returned to the control of the directors, then the relief is terminated.

Rationale for conditions

The proposed new conditions are intended to ensure that investors and creditors still have access to adequate information about the entity notwithstanding the proposed financial reporting relief.

Number	Consultation question
22	Do you agree that we should include provisions relating to the early end of an external administration, where the entity is returned to the control of the directors? Are there any other situations you consider should bring about an early end to the exemption relief or the deferral period?
23	Do you have any other comments on the proposed conditions?
24	Are there any other conditions you consider we should include?

Issue 4: Factors for individual relief

Description of issue

What factors are relevant for granting relief on a case-by-case basis for any situation outside the proposed class exemption and deferral relief?

Proposed factors

We propose to consider granting individual relief, on a case-by-case basis, for any situation outside the proposed class exemption and deferral relief. An application will be required, and we would need to be satisfied that the relevant statutory test under the FMC Act is satisfied before we could grant any exemption. We anticipate that such relief will be rarely required. When deciding whether to grant this relief, we may consider factors such as:

- the financial position of the entity
- the time, financial and human resources available to the external administrator
- the extent to which a depletion of resources will occur and whether this may affect the survival of the entity
- the availability and willingness of the directors to assist in complying with the FMC Act
- whether additional time is required to substantiate appropriate carrying values for assets and liabilities
- whether it is likely that the members have any residual economic interest in the entity
- other complexities or legal impediments that may prevent compliance.

This is not an exhaustive list of factors, and other factors may be considered where relevant. We may impose conditions on this relief.

Rationale for proposed factors

Before we give further relief, we must consider each entity individually to determine whether such relief is justified. In particular, we need to be satisfied that requiring the entity to comply with its financial reporting duties would create unnecessary compliance costs or that providing relief would further one of the other purposes of the FMC Act.

Number	Consultation question
25	Do you have any other comments on the factors we have listed? Are there any other factors you consider we should include on the list?

Schedule

Extract from clause 8 of the ASIC Corporations (Externally Administered Bodies) Instrument 2015/251.

Deferral of financial reporting obligations

(1) A company in relation to which a relevant external administrator has been appointed does not have to comply with any of the following obligations under Part 2M.3 of the Act in relation to a financial year or half-year of the company:

(a) …

(b) …

(c) ….

(d) lodge reports with ASIC under subsection 319(1) within the time required by subsection 319(3);

(e) lodge half-year reports with ASIC under subsection 320(1) within the time required by that subsection; where, but for this subsection (1), the obligation would otherwise have arisen within 6 months after the date of appointment of the relevant external administrator.

This subsection (1) applies until the last day of the deferral period.

(2) The company also does not have to comply with an obligation under Part 2M.3 of the Act of a kind specified in subsection (1) in relation to any earlier financial year or half-year of the company but only to the extent that Part would have imposed, but for this subsection (2), a continuing obligation on the company from the date of appointment of the relevant external administrator. This subsection (2) applies until the last day of the deferral period.

(3) The company:

(a) must comply with any obligation to which subsection (1) or (2) applies by no later than the last day of the deferral period; and

(b) must have adequate arrangements in place to answer, within a reasonable period of time and without charge, any reasonable questions asked by a member of the company about the relevant external administration.

Feedback form

Consultation paper: Proposed financial reporting exemptions for FMC reporting entities in liquidation, receivership or voluntary administration

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Proposed financial reporting exemptions for FMC reporting entities in liquidation, receivership or voluntary administration: [your organisation's name]' in the subject line. Thank you. **Submissions close at 5pm on 6 October 2021.**

Date: Number of pages:

Name of submitter:

Company or entity:

Organisation type:

Contact name (if different):

Contact email and phone:

Question number	Response

Feedback summary – *if you wish to highlight anything in particular*

Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

Thank you for your feedback – we appreciate your time and input.