

AUGUST 2023

Consultation: Proposed guidance on winding-up requirements for registered schemes

The Financial Markets Authority – Te Mana Tātai Hokohoko (FMA) is considering guidance for Supervisors and (where there is no Supervisor) Managers of registered schemes on the requirements in section 212 (Initial steps in winding up of registered scheme) and section 213 (Winding-up report) of the Financial Markets Conduct Act 2013 (FMC Act).

Purpose of the proposed guidance

We have observed varying approaches to compliance with sections 212 and 213 of the FMC Act. We consider that some approaches are inconsistent with the overarching intention of the relevant provisions, which is to ensure scheme participants are given information about the assets held by the scheme and how they will be distributed in sufficient time to provide an opportunity to challenge the proposed distributions.

Lack of clarity on the expectations for how sections 212 and 213 are to be complied with has also led to increased engagement with Supervisors or Managers, resulting in inefficiency and increased costs.

By sharing our interpretation and clear expectations for compliance, we aim to facilitate more consistent market practice in applying the relevant provisions and ensure the purpose of sections 212 and 213 is met.

Have your say

We welcome your feedback on our proposed guidance in response to the specific questions in this paper, as well as any other general comments. You can provide feedback in writing using the feedback form provided at the end of this document. Submissions close at **5pm on 13 October 2023**.

Following consultation, we will review all feedback provided and consider any changes that may be required to the proposed guidance. The final guidance will be published along with a summary of how we considered the feedback received.

This consultation is for Supervisors and (where there is no Supervisor) Managers of registered schemes.

It seeks feedback on proposed guidance on winding-up requirements for registered schemes.

Proposed guidance

Background

A registered scheme¹ (**scheme**) entering a voluntary wind-up process or whose wind-up has been ordered by the Court must follow the requirements in sections 212 and 213 of the FMC Act.

The general purposes of sections 212 and 213 of the FMC Act are to:

- inform the FMA and, in the case of a KiwiSaver scheme or complying superannuation fund, Inland Revenue about commencement of the wind-up;
- determine the value of the net assets available for distribution on the commencement of wind-up² by preparing final financial statements (**financials**) that are audited as at the date the wind-up ‘takes effect’ (**wind-up effective date**);
- provide the audited financials and details of the intended distribution manner in a timely fashion to:
 - the FMA to allow for oversight of the winding up; and
 - scheme participants to provide an opportunity for challenge before all assets have been distributed;
- where permitted by the governing document, allow partial distributions to be made, where this is in the best interests of scheme participants, before the audited financials are provided to the FMA.

No.	Question
1	Do you agree with our view of the purpose of section 212 and 213? Please explain your view.

Section 212

For a registered scheme to begin the process of a voluntary wind-up, a resolution must be passed in accordance with the scheme’s governing document(s).

The resolution should clearly specify the wind-up effective date. This date may be the date of the resolution, a specified date in the future, or the date of a future specific event (e.g. when a sale and purchase agreement for the scheme’s assets is made unconditional, or when the settlement of the scheme’s assets occurs). The date chosen will often depend on the nature of the assets held by the relevant scheme and when and how they are to be realised.

If the resolution does not clearly state the wind-up effective date, then it will be taken to be the date on which the wind-up resolution was passed. However, in our view the wind-up effective date must not be the final distribution date of the scheme’s assets, as explained on page 4 of this guidance.

¹ Section 6 of the FMC Act.

² We note that the value of assets available for distribution may change during the wind-up process, for example as a result of wind-up costs, tax liability, and changes to the fair value of investments.

Example

A resolution states that following the sale of the Partnership's assets, the Partnership will be dissolved.

This resolution does not provide details on when the wind-up of the scheme is to take effect. As such we will consider the date on which the resolution was passed to be the wind-up effective date.

Example

A sale and purchase agreement has been entered into for the sale of the sole property held by a scheme. The wind-up resolution states that the wind-up will take effect on the settlement date of this sale and purchase agreement.

This example uses clear language to determine the wind-up effective date of the scheme. In this case where a scheme has a single asset, the use of the settlement date as the wind-up effective date provides participants with reliable information about the realised value of the scheme's asset.

Example

A scheme that holds equities in multiple jurisdictions converts the equities to cash and distributes this to the participants, with wind-up taking effect on the balance date of the scheme.

In the case where a scheme has multiple assets, the wind-up effective date could be a future date (i.e., the balance date of the scheme).

Providing a copy of any order or resolution to the FMA

Once the resolution is passed, the scheme's Supervisor or Manager must send a copy of the wind-up resolution to the FMA within 10 working days³. The Supervisor or Manager must ensure the minutes of the meeting at which the resolution was passed are finalised in a timely manner to enable the provision of the wind-up resolution to the FMA within the required timeframe.

Similarly, if a Court has ordered the wind-up, a copy of the court order must be provided to the FMA by the Supervisor or Manager within 10 working days⁴.

³ Section 212(1)(a) of the FMC Act

⁴ Section 212(1)(a) of the FMC Act

Section 212(1)(b) of the FMC Act sets out additional requirements for KiwiSaver schemes or complying superannuation funds.

Section 213

Once the wind-up effective date has passed, the obligations under section 213 of the FMC Act come into effect. The person who was the Supervisor or Manager of the scheme immediately before the scheme was wound up must ensure that:

- a) Within 4 months after the wind-up effective date, the financials as of the wind-up effective date are prepared and audited⁵.
- b) The audited financials are prepared in accordance with generally accepted accounting practice⁶.
- c) The audited financials are provided to the FMA, and to every person who was a scheme participant immediately before it was wound up, within 20 working days after the audit is completed⁷.
- d) When the FMA and the scheme participants receive a copy of the audited financials, they are also advised in writing as to the manner in which the remaining assets (if any) as at the wind-up effective date are to be distributed⁸ (e.g. if the scheme has surplus or reserve assets, the manner in which these are to be equitably allocated across the scheme participants must be explained).

During this process, if the governing document allows, the Manager or Supervisor can make partial distributions of assets at any time before the FMA receives the financials and information set out in (d) above⁹. However, the Manager or Supervisor should ensure that any partial distribution is in the best interests of scheme participants.¹⁰ The FMA considers that the Manager or Supervisor will need to hold an appropriate proportion of scheme assets undistributed until the financials have been provided to all scheme participants. This is to ensure that the scheme assets are distributed in a fair and equitable manner, and that scheme participants have the information and opportunity to challenge the proposed manner of distribution.

The Supervisor or Manager must also advise the FMA of the date on which the final distribution of assets is completed¹¹.

Supervisors or Managers can request that the FMA extends the time period within which the scheme is required to comply with any of the requirements under s213¹².

Impact of wind-up effective date on the financials

In our view, the wind-up effective date must not be immediately before or on the date of the final distribution of the scheme's asset(s). Given our view on the purposes of sections 212 and 213, we expect Supervisors or Managers to provide scheme participants and the FMA with advice on how the scheme assets will be distributed, along with a copy of the audited financial statements, *at the commencement* of the wind-up process¹³ and not after all the assets have been distributed. As noted above, this ensures that scheme

⁵ Section 213(1)(a) of the FMC Act

⁶ Section 213(1)(a) of the FMC Act

⁷ Section 213(1)(b)(i) of the FMC Act

⁸ Section 213(1)(b)(ii) of the FMC Act

⁹ Section 213(1)(c) of the FMC Act

¹⁰ Section 143(1)(b) and 153(1)(b) of the FMC Act.

¹¹ Section 213(1)(d) of the FMC Act

¹² Section 213(2) of the FMC Act

¹³ For example, this may be when no new members will be accepted or when steps begin to be taken to realise the scheme's asset(s).

participants receive information about the wind-up in sufficient time to challenge the proposed distribution, if needed. This challenge could be on the basis that the proposed distribution plan does not comply with the governing document or is inequitable.

No.	Question
2	Do you agree with our view that the date of final distribution of the scheme's assets cannot be taken to be the wind-up effective date? Please explain your view.

Clarification on financial statements required under Part 7 of the FMC Act

Financial statements that are provided for scheme wind-ups under section 213 differ from the financial statements that are prepared under Part 7 of the FMC Act. We are considering whether any relief from Part 7 may be appropriate for schemes in wind-up, given the possibility of overlapping reporting requirements.

In the interim and given Part 7 obligations continue to apply for schemes in wind-up, where possible Supervisors or Managers may want to manage the wind-up process with regard to the timing of the annual balance date, to avoid preparing multiple sets of financial statements. If this is not possible, we encourage Supervisors or Managers to promptly engage with us to see if any individual, tailored relief may be available.

Determining whether final distribution of assets is completed

The final distribution of assets will not be taken to have been completed until all scheme participants have been paid their final entitlements or the remaining funds have been transferred to the Treasury (for schemes that were set up as trusts) or Inland Revenue (if set up otherwise). This ensures that 'Gone No Address' funds continue to be protected where scheme participants cannot be reached. It also enables scheme participants to easily confirm any unclaimed monies that may be owed to them, given the publicly available information on unclaimed monies held by the Treasury and Inland Revenue.

If a Supervisor or Manager considers that any entitlements payable to a scheme participant do not need to be paid to the Treasury or Inland Revenue to enable completion of the final distribution of assets, we expect the Supervisor or Manager to explain to us their reasons for this view. We may also require a supporting legal opinion.

We encourage Supervisors and Managers to be proactive and consider whether tracing 'Gone No Address' scheme investors prior to the wind-up effective date is feasible. This may assist in expediting the wind-up process.

How we intend to apply this guidance

For scheme wind-ups that are underway when this guidance is finalised, we intend to adopt a pragmatic approach to its application. Otherwise, we expect Supervisors and Managers to consider the matters set out in the guidance and ensure they comply with sections 212 and 213.

Where a Supervisor or Manager has not met the expectations set out in this guidance, we will engage with them to understand the alternative approach taken before forming our view on whether it complies with sections 212 and 213. If we determine that there is non-compliance, we may consider issuing a fine and/or infringement notice under sections 213(4) and (5) of the Act respectively.

We encourage you to engage with us promptly if you have any questions about how to meet the expectations set out in this guidance.

Appendix 1 – Sections 212 and 213 of the FMC Act

212 Initial steps in winding up of registered scheme

- (1) If a registered scheme is to be wound up, the supervisor or (if there is no supervisor) the manager must, within 10 working days after a winding-up resolution or an order by the court that the scheme be wound up is made,—
 - a) give a copy of any order or resolution to the FMA; and
 - b) in the case of a KiwiSaver scheme or a complying superannuation fund,—
 - i. give a copy of any order or resolution to the Commissioner of Inland Revenue; and
 - ii. give notice to the Commissioner of Inland Revenue of the name, tax file number, and address of each member of the registered scheme.
- (2) See [sections 50 to 52](#) of the KiwiSaver Act 2006 (which set out the effect of notice to the Commissioner of Inland Revenue in relation to members of a KiwiSaver scheme) and [subpart 3](#) of Part 2 of that Act (which relates to the transfer of members' interests to another KiwiSaver scheme).
- (3) A supervisor or manager that contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding \$50,000.
- (4) The offence in this section is an infringement offence (see [subpart 5](#) of Part 8).

213 Winding-up report

- (1) The person who was the supervisor of the relevant registered scheme or, if there was no supervisor, the person who was the manager of the relevant registered scheme immediately before the scheme was wound up—
 - a) must, within 4 months after the date on which the winding up takes effect, ensure that final financial statements of the scheme, showing the financial position of the scheme as at the date on which the winding up takes effect, are prepared in accordance with generally accepted accounting practice and audited; and
 - b) must, within 20 working days after the final financial statements have been audited, ensure that—
 - i. a copy of those financial statements is sent to the FMA and to every person who was a scheme participant immediately before it was wound up; and
 - ii. the FMA and the scheme participants are advised in writing as to the manner in which the remaining assets (if any) of the scheme are to be distributed; and
 - c) may make a partial distribution of assets of the scheme at any time before a copy of the final financial statements is sent to the FMA under paragraph (b) (unless prohibited by the governing document); and
 - d) must inform the FMA of the date on which the distribution of the assets is completed.
- (2) The FMA may, by giving notice to the relevant person, extend the time period within which a person must comply with any of the requirements set out in this section.
- (3) A person that contravenes—
 - a) subsection (1)(a) commits an offence:
 - b) subsection (1)(b) commits an offence:
 - c) subsection (1)(d) commits an offence.
- (4) A person that commits an offence under subsection (3) is liable on conviction to a fine not exceeding \$50,000.
- (5) Each offence in subsection (3) is an infringement offence (see subpart 5 of Part 8).

Consultation questions

No.	Question
1	Do you agree with our view of the purpose of section 212 and 213? Please explain your view.
2	Do you agree with our view that the date of final distribution of the scheme's assets cannot be taken to be the wind-up effective date? Please explain your view.
3	Are there any aspects of the proposed guidance you think are unclear or need to be improved? If so, please explain what these are and provide your suggested wording or approach to address these.
4	Are there any aspects of the proposed guidance you do not agree with, or you think should not be included? Please give reasons for your view.
5	Are there any aspects of the proposed guidance you think may have unintended consequences?
6	What impact (if any) might the proposed guidance have on compliance costs for the scheme?
7	Are there any additional areas you consider the proposed guidance should address? If so, please provide details.
8	Are the examples useful? Are there any examples that you would like to see changed, clarified, or omitted? Are there any additional examples that should be included? If so, please provide your suggested wording.
9	Do you have any comments on the length, format, or presentation of the proposed guidance? If so, please provide details.
10	Do you have any other comments on the proposed guidance?

Feedback form

Consultation: Proposed guidance on winding up requirements for registered schemes

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 guidance on winding up requirements for registered schemes: [your organisation's name]** in the subject line. **Submissions close on 5pm on 13 October 2023.** Thank you.

Date: Number of pages:

Name of submitter:

Company or entity:

Organisation type:

Contact name (if different):

Contact email and phone:

Question number	Response
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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.