FINANCIAL MARKET INFRASTRUCTURES (FMIS) GUIDANCE NOTE: OVERSEAS FMIS

July 2023

Reserve Bank of New Zealand
Te Pūtea Matua

FMA
FINANCIAL MARKETS AUTHORITY
TE MANA TĀTAI HOKOHOKO

Ref #20368231 v1.0

CONTENTS

1. INTRODUCTION

1. The Financial Market Infrastructures Act 2021 (the Act) sets out the New Zealand regulatory regime for financial market infrastructures (FMIs). This regime applies to operators of FMIs incorporated in New Zealand (New Zealand-based FMIs) and operators of FMIs incorporated in a jurisdiction other than New Zealand (overseas FMIs). The Reserve Bank of New Zealand (RBNZ) and the Financial Markets Authority (FMA) are collectively the 'regulator' of FMIs under the Act (except for pure payment systems, which are regulated solely by the RBNZ).

2. This guidance note sets out the ways the operator of an overseas FMI with a link to New Zealand (e.g., those FMIs providing services to a legal person incorporated or established in New Zealand) can be designated under the Act, and our approach to applying standards to an operator of an overseas FMI. Collectively, this is called the 'overseas equivalence framework'. This guidance note should be read in conjunction with the guidance on designation and the guidance on the systemic importance framework.

3. Under part 3 of the Act, FMIs (including overseas FMIs) may be designated by the Minister on the recommendation of the regulator, provided that:

   (a) if the regulator makes a recommendation to issue a designation notice on its own initiative, the regulator is satisfied that the FMI is systemically important; or

   (b) if the FMI has applied to the regulator to be designated:

   - the regulator considers it appropriate for subpart 5 of Part 3 of the Act to apply to the FMI (subpart 5 of part 3 sets out legal protections around settlement finality and certain other matters); and

   - in the case of a recommendation that proposes that the designation notice specify that the FMI is systemically important, the regulator is satisfied that the FMI is systemically important.

4. Section 31 of the Act provides that the regulator may, in accordance with section 34, issue standards if the regulator is satisfied that the standards are necessary or desirable for one or more purposes of the Act. A standard may impose requirements on operators of designated FMIs that apply to all operators of designated FMIs, a particular operator, or a class of operators.

5. Section 32(1)(b) of the Act requires the regulator to ensure that standards that are issued under the Act do not apply in an unreasonable way to a particular operator or designated FMI as a result of the operator being, or not being, subject to a relevant overseas standard.

6. The regulator has issued standards under section 31 of the Act (FMI Standards). The FMI Standards can be accessed on the internet websites of the RBNZ and the FMA.

7. Under the overseas equivalence framework, the FMI Standards (except for Standard 23B: 'Notifying the Regulator') will not apply to operators of overseas FMIs, provided that the conditions for overseas equivalence are met and the operator is complying with equivalent overseas standards issued under the law of their home jurisdiction. However, operators of overseas FMIs will continue to be subject to other applicable provisions of the Act, as well as any other applicable New Zealand laws.

8. This guidance note outlines:

   (a) the conditions for overseas equivalence; and

(b) how the regulator will assess the overseas FMI and their circumstances against the conditions; and

(c) how the overseas equivalence framework applies to the operator and the FMI after designation.

9. Under section 23 of the Act, when deciding whether to make a recommendation that an overseas FMI should be designated, the regulator may have regard to matters including:

(a) the relevant law or regulatory requirements in the home jurisdiction;

(b) the rules of the overseas FMI;

(c) the capability and capacity of the FMI's operators and the FMI;

(d) the financial resources of the operators of the FMI;

(e) the importance of the FMI to the financial system.

10. When the overseas FMI is designated, if the conditions for overseas equivalence are met, then its designation notice will specify that the FMI falls within the class of 'overseas-equivalent FMIs'. Apart from Standard 23B: 'Notifying the Regulator' (see below), the FMI Standards do not apply to 'overseas-equivalent FMIs'. The regulator expects that the conditions for overseas equivalence should continue to be met at all times following designation for the overseas FMI to retain this classification. If they are not, then the regulator may determine that it is necessary or desirable for one or more of the FMI Standards to apply to the operator of that FMI (subject to meeting the statutory tests, and following the process set out in part 3 of the Act). The regulator may do this by either amending the FMI's designation notice or issuing standards that apply to the particular operator of the FMI.

2. DESIGNATION OF OVERSEAS FMIS

11. This section sets out the conditions for overseas equivalence and clarifies how the regulator will assess overseas FMIs against the conditions for overseas equivalence. The conditions are designed to ensure that the New Zealand financial system is protected.

Conditions for overseas equivalence

12. The conditions for overseas equivalence are listed below. All conditions must be satisfied for the regulator to recommend that an overseas FMI be specified in its designation notice as falling within the class of 'overseas-equivalent FMIs'. The conditions are that:

(a) adequate cooperation arrangements are in place between the New Zealand regulator and the FMI's home regulator; and

(b) the FMI's home jurisdiction has an FMI regulatory framework that is broadly equivalent to that in New Zealand, and which is part of an independent legal system, which the regulator is satisfied has a well-founded reputation for integrity; and

(c) the regulator is satisfied that the operator is compliant with the broadly equivalent regulatory framework in the FMI's home jurisdiction.

Cooperation arrangements

13. Adequate forms of cooperation arrangements could include a memorandum of understanding or other bilateral agreement with the overseas FMI's home jurisdiction regulator, or the RBNZ and/or FMA being members of a multilateral supervisory college arranged by the overseas FMI's home jurisdiction regulator.

A memorandum of understanding or other bilateral regulator agreement

14. Cooperation arrangements enable both the regulator and the FMI's home jurisdiction regulator(s) to communicate with each other on matters of mutual interest such as ongoing supervision, crisis management and enforcement, and to consult the other regulator before taking certain actions, such as enforcement action. Adequate cooperation arrangements also enable both the regulators to make all reasonable efforts to provide the other regulator with any information that it considers is likely to be of assistance to the other regulator in securing compliance with requirements applicable in their jurisdiction.

Membership of a supervisory college

15. Membership of an international supervisory college by the regulator, whether that is the RBNZ, the FMA, or both, also constitutes sufficient cooperation between the regulator and the FMI's home jurisdiction regulator.

A broadly equivalent regulatory framework

16. As noted above, section 31 of the Act provides that the regulator may issue standards that apply to all operators of designated FMIs, a particular operator, or a class of operators, if the regulator is satisfied that the standards are necessary or desirable for one or more purposes of the Act. With this in mind, under the overseas equivalence framework, the regulator's focus will be on achieving broadly equivalent protection for the New Zealand financial system as would be provided if the operator of the overseas FMI had to comply with the FMI Standards. The assessment will focus on whether the home jurisdiction's regulatory regime is broadly equivalent to the regulatory framework applying to operators of New Zealand based designated FMIs, that is, the FMI Standards. The regulator will not take a line-by-line approach to this assessment, but rather assess the relevant home jurisdiction's regulatory regime as a whole.

17. As part of assessing the home jurisdiction regulatory regime against the FMI Standards, the regulator will assess whether that overseas jurisdiction has broadly implemented the relevant international standard for FMI regulation: the Principles for Financial Market Infrastructures (PFMIs) issued by the Committee on Payments and Market Infrastructures (CPMI) as a technical committee of the International Organisation of Securities Commission's (IOSCO).

18. The regulator, in assessing the home jurisdiction's regulatory regime, will have regard to any recent independent peer assessments (for example a Financial Sector Assessment Programme (FSAP) review carried out by the International Monetary Fund (IMF), or recent Level 2 peer assessment carried out under the CPMI-IOSCO monitoring programme for the implementation of the PFMIs (known as a Level 2 assessment).

19. Where independent assessments do not rate a regime as being broadly consistent, but the regime is close to broadly consistent, the regulator may assess other factors such as whether the overseas FMI's rules and procedures can make up for any deficiencies in the home jurisdiction's regulatory regime.

20. In addition to recent independent assessments against the PFMIs for the purposes of determining whether the home jurisdiction regulatory regime is broadly equivalent, the regulator may consider other relevant documents such as:

    (a) FMI contingency plans/business continuity plans or equivalent,

    (b) home jurisdiction cyber risk management regulations;

    (c) the practices that the operator has in place regarding cyber risk management, and risks associated with critical service providers.

21. Should there be no recent independent assessments and other relevant documents are not available to aid the regulator's assessment of whether the home jurisdiction regulatory regime is broadly equivalent, the onus will be on the operator of the overseas FMI to satisfy the regulator that the home jurisdiction is broadly equivalent to the New Zealand FMI Standards.

22. The home jurisdiction's regulatory regime must also be part of an independent legal system where there is separation of powers, and which the regulator is satisfied has a well-founded reputation for integrity.

Compliance with the broadly equivalent regulatory framework in the home jurisdiction

23. The regulator will use a range of sources to assess equivalence of the overseas FMI's rules and practices, and compliance with the broadly equivalent regulatory framework. These include, where relevant:

    (a) the operator's self-assessment against the PFMIs;

    (b) regulatory assessments prepared by other regulators that have been published or otherwise shared with the regulator;

    (c) an assurance (or negative assurance) from the overseas regulator;

    (d) the lack of evidence of any existing non-compliance;

    (e) the FMI's rules and procedures.

24. It is anticipated that Standard 23B: 'Notifying the Regulator' will normally apply to any designated FMI classed as an 'overseas-equivalent FMI' in its designation notice. Should the appropriate criteria be met then all other FMI standards will not apply. Standard 23B includes requirements to notify the regulator of contraventions of home jurisdiction requirements and outages. It also includes requirements to put in place methods for monitoring for these events. See the guidance for Standard 23B: 'Notifying the Regulator' for more details on the requirements in the standard.

25. The guidance material for Standard 23B provides detail on how operators of overseas FMIs should interpret the requirements in Standard 23B.

26. Section 32(1)(b) of the Act requires the regulator to have regard to any relevant overseas standards for the purpose of ensuring that a proposed standard will not apply to a particular operator or designated FMI in an unreasonable way (as compared with other operators or designated FMIs) as a result of the particular operator or designated FMI:

    (a) being subject to the relevant overseas standard; or

    (b) not being subject to the relevant overseas standard.

27. We anticipate that Standard 23B: 'Notifying the Regulator' will not apply to a particular operator or designated FMI in an unreasonable way for the purposes of section 32(1)(b), given the fundamental nature of the obligations in Standard 23B, and the fact it also permits reporting via the home jurisdiction regulator or a relevant supervisory

college. However, the regulator will assess this for each individual operator, and may take a different approach to whether (and if so, how) the requirements in Standard 23B should apply in individual cases if section 32(1)(b) of the Act requires this.

28. Finally, it should be noted that where non-compliance with an obligation imposed by a broadly equivalent regulatory regime is identified, the regulator may, at its discretion, waive the need to comply with that requirement for a period (thereby allowing the FMI to continue to qualify as an "overseas-equivalent FMI"). It is anticipated that this kind of waiver will only be used for minor or rare instances of non-compliance, and only where the regulator is satisfied that steps are being taken to remedy the non-compliance within a reasonable time period.

3. INFORMATION TO BE PROVIDED

29. Section 149 of the Act provides, amongst other things, that an application or submission made to the regulator must be made or given in the way required by the regulator (and that this extends to requirements around the information that must be provided with the application or submission).

30. The information needed for the regulator to make an assessment of overseas equivalence will be prescribed under section 149, but is likely to include the following information:

    (a) all information that an applicant seeking to be designated under the Act is required to provide the regulator under the designation guidance;

    (b) the name and contact details of a contact person at the home regulator;

    (c) a self-assessment against the PFMIs;

    (d) their FMI contingency plans (or equivalent);

    (e) evidence of a home jurisdiction's broad equivalence with the PFMIs if a recent independent assessment, such as an FSAP report or CPMI-IOSCO, is unavailable:

    (f) information identifying a link to New Zealand (e.g., providing services of the FMI to a legal person incorporated in New Zealand, the overseas FMI's activities carried out in New Zealand etc.).

31. If the regulator is unable to assess whether the equivalence framework applies to an operator of an FMI that is an overseas FMI because it does not receive adequate information, the regulator will need to determine whether it is necessary or desirable for one or more of the FMI Standards to apply to that operator (subject to meeting the statutory tests, and following the process, set out in the Act).