FMA
FINANCIAL MARKETS AUTHORITY
TE MANA TATAI HOKOHOKO - NEW ZEALAND

# When one-off, or occasional issuers, are required to register on the Financial Service Providers Register

**August 2014**

This information sheet clarifies when one-off or occasional issuers must register on the Financial Service Providers Register (FSPR) under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (in addition to any disclosure obligations that they may have under the Financial Markets Conduct Act 2013).

## Should one-off or occasional issuers of securities register on the FSPR?

There has been uncertainty as to whether one-off, or occasional, issuers of securities are required to register as financial service providers under the FSP Act. This is because:

- Issuing securities falls within the FSP Act definition of a financial service under the FSP Act;
- Section 11 of the FSP Act prohibits any person from "being in the business of" providing a financial service unless that person is registered on the FSPR;
- Section 48(3) of the FSP Act provides an exemption for one off or occasional issuers that are required to register on the FSPR from the requirement to belong to a dispute resolution scheme; and
- The existence of the section 48(3) exemption for one off issuers from the obligation to be a member of an approved dispute resolution scheme has given rise to a perception that one off issuers may normally be in scope of the regime and thus be required to register.

## Generally not – unless the exceptions apply

FMA's position is that one-off, or occasional issuers, will generally not be required to register as financial service providers on the FSPR. One-off or occasional instances of issuing by a business that otherwise is not a financial service provider would not normally be sufficient to constitute being in the business of providing a financial service.

There will however, be some exceptions to the general rule. These will be subject to the section 48(3) exemption and would arise where the issuing of securities is closely tied to the core business of the issuer.

For example depending on the specific facts the following may be caught:

- Special purpose vehicles where it has been set up with the sole purpose of issuing;
- Cooperatives and industrial and provident societies, where shareholding is closely linked to participation in the core activities of the business (not every cooperative or industrial and

provident society will necessarily be caught, the facts will need to be considered in each case); and

- Sophisticated schemes that issue in order to create a particular legal effect, which the business of the scheme then relies upon.

## Further discussion

"Being in the business of providing a financial service" is a term that is clarified in section 6 of the FSP Act as meaning "carrying on a business of providing or offering to provide a financial service (whether or not the business is the provider's only business or the provider's principal business)". The term "carrying on business" has been considered in various different contexts. Generally assessing whether a person is carrying on business as a result of issuing will require an assessment of a range of different factors:

- Whether the intent is to make a pecuniary profit from the activity;

- The frequency with which issuing occurs ("carrying on" tends to suggest repeat activity, rather than isolated instances);

- The context of whether the activity is being carried out by a commercial entity in a commercial manner (e.g. by employees from business premises) is relevant;

- Whether issuing is a purely capital raising activity, or whether the issuing serves some other purpose that is linked to the core business activities of the issuer.

Against those factors most businesses whose core business is in a field unrelated to financial markets and who are issuing on a one-off or on an occasional basis merely to raise capital would not be caught.

However, there will be some situations where the occasional or even one off issuing of shares is so closely bound to the core commercial activity of an entity that it should properly be regarded as being in the business of being a financial service provider. As noted above, examples are entities such as cooperatives and industrial and provident societies and some sophisticated business structures where shares are issued to create a particular legal effect and the legal effect is then closely tied to the business activities of the entity going forward.

In these cases, while these businesses are required to register, they would likely be able to take advantage of the section 48(3) exception from the obligation to join an approved dispute resolution scheme. Section 48(3) exempts persons from having to become a member of an approved dispute resolution scheme if the person is:

> *(i) … is in the business of providing financial services only because it is an issuer or promoter participating in 1 or more offers of securities to the public; and*
> *(ii) doing so is not its only or principal business.*