

# Guidance Note: Pre-prospectus publicity - some practical guidance for issuers and their advisers.

September 2012

## About this guidance note

This guidance note is intended for issuers of securities, their directors and advisers. It sets out the Financial Markets Authority's (FMA) view on the boundaries of pre-regulated offer publicity/advertising (also commonly referred to as 'pre-prospectus publicity'), as required by the Securities Act 1978 (Act) and FMA's policy on the scope of pre-prospectus publicity it will support by exemption.

Changes will come into force when the Financial Markets Conduct Bill is enacted and comes into effect. It is not possible to future proof this guidance note because there can be no certainty about the final legislation until the Parliamentary process is complete. This guidance note therefore refers to current requirements and will be updated when we know the new pre-prospectus publicity requirements.

## Status of this guidance note

We are issuing this guidance note to describe our intended approach and the issues we will consider when reviewing publicity (including advertisements) distributed in connection with an offer of securities to the public before a prospectus has been registered and/or when an investment statement or other disclosure document is finalised<sup>1</sup> for that offer - and exemption applications in relation to pre-prospectus publicity. This guidance note has no other legal status; it is not binding on the courts or third parties. We provide examples for illustration. The examples are not exhaustive and do not impose or imply particular rules or requirements.

Every issuer must comply with all legal requirements for disclosure including in relation to pre-prospectus publicity. We do not repeat all legal requirements in this guidance note.

This guidance note does not constitute legal advice. We encourage you to seek your own professional advice to find out how the legislation discussed and any other applicable laws apply to you, as it is your responsibility to determine your obligations.

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<sup>1</sup> A prospectus and/or an investment statement is not always required. For example, section 5(2C) of the Act exempts registered banks from the requirement to prepare a prospectus for debt securities issued by a bank. Other exemptions from the requirement to prepare a prospectus or investment statement have been granted by FMA in specific circumstances.

## Introduction

Publicity /advertisements concerning offers to the public have the potential to influence the way that consumers think about financial products and how they expect them to perform - but financial products can often be complex and consumers may not have a clear understanding about how they work. Therefore the policy underlying the Act and the stance adopted by FMA is that the authoritative disclosure documents for any offer to the public should be the registered **prospectus** and the **investment statement**<sup>2</sup>. The investment statement must refer to the prospectus.

It is in these documents that investors should find the information that enables them to make an informed decision about the product.

As a consequence, the purpose behind the restrictions in the Act on **pre prospectus publicity and pre prospectus advertising** is to ensure that investors are not persuaded to ignore the prospectus - or to make investment decisions before they have had the opportunity to give due consideration to its contents or the information in the investment statement for the product. Investment decisions should not be unduly influenced by information selectively provided to the market prior to registration of a prospectus and/or the investment statement being available.

However, there are some provisions in the Act which will permit some limited pre-prospectus publicity/ advertising. These recognise the fact that issuers may wish to seek preliminary indications of interest or may have a commercial need or a regulatory obligation to provide information to the public about a potential offering before the prospectus is registered. FMA also has some discretion to permit other information to be disclosed in pre prospectus publicity/ advertising.

The purpose of this note is to provide some guidance to issuers of the matters they need to address before commencing any pre-prospectus publicity/advertising.

## Advertisements

Section 2A of the Act defines an advertisement (among other features) as a form of communication that **contains or refers** to an offer of securities to the public for subscription or that is **reasonably likely to induce** persons to subscribe for securities of an issuer that have been, or are to be, offered to the public for subscription.<sup>3</sup>

As a starting point, therefore, a communication that does not contain or refer to an offer of securities will only be an 'advertisement' for purposes of the Act if it is **reasonably likely to induce** persons to subscribe for securities and that have been, or are to be, offered to the public for subscription.<sup>4</sup>

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<sup>2</sup> (except where those disclosure documents are not required, because of an exemption).

<sup>3</sup> The communication must also have been authorised or instigated by, or on behalf of, the issuer of the relevant securities or have been prepared with the co-operation of, or by arrangement with, that issuer; and must have been, or is to be, distributed to a person.

<sup>4</sup> This note does not apply to research reports that are prepared in respect of an issuer by analysts and distributed, in confidence, before the registration of the prospectus for a proposed public offer only to institutional investors and financial advisers employed by the lead managers and brokers engaged by the issuer to act on that proposed public offer. The FMA is of the view that such reports are not advertisements and where such reports are distributed only in this manner, as this distribution does not form part of the offer to the public (see section 3(2) of the Act) which may be later made by the issuer.

## Pre-prospectus publicity under the Act

### General prohibition on pre-prospectus publicity/advertising

Section 33(1) of the Act prohibits the offering of securities to the public unless the offer is made in, or accompanied by, a registered prospectus or an investment statement, or is in an 'authorised advertisement'. An 'authorised advertisement' in relation to an offer of securities to the public, is an offer which is contained in an investment statement (or which refers to one). Accordingly, since an investment statement must refer to a registered prospectus, offers of securities to the public under the Act can only be made if there is a registered prospectus for the offer<sup>5</sup>.

The term 'offer' is defined in the Act to include 'an invitation, and any proposal or invitation to make an offer' – and when used as a verb, the term has a corresponding meaning.<sup>6</sup>

This therefore gives s33 (1) a wide application and effectively prohibits advertising of an offer of securities to the public before a prospectus is registered for the offer. This would prohibit any communication of any offer of securities to the public, or any proposal to make an offer of securities to the public, or any request for applications for securities.

**However**, the Act does permit advertisement of proposed securities offerings to the public where the advertising falls within:

- a statutory exemption permitting pre-prospectus communications; or
- an exemption granted by FMA.

## Exemptions

A **statutory exemption is contained in section 5(2CA) of the Act** which allows issuers to advertise an offer of securities to the public before a prospectus is registered, provided that the advertisement states that: '(i) the issuer is considering making an offer of securities to the public; and (ii) no money is currently being sought and that no applications for securities will be accepted or money received unless the subscriber has received an investment statement' (or where applicable, a copy of the simplified disclosure prospectus for the offer).

However, the information that can be provided in the advertisement is limited (for example, information about the securities being offered, terms of the offer, the class of persons to whom the offer will be made and the timing of the offer). Any discussion of the business of the issuer or its prospects is not permitted under the section 5(2CA) exemption.

The Act also treats certain statements or reports as not constituting an offer of securities (section 3(7)). These are statements or reports made to or for the purposes of a shareholders' meeting of the issuer or to a stock exchange in compliance with the requirements of that stock exchange. The Act allows these statements or reports to be made prior to the registration of a prospectus.

Generally Part 2 of the Act, and therefore the pre-prospectus publicity restrictions, do not apply to an offer made **only** to persons of the kind described in section 3(2) of the Act.

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<sup>5</sup> (unless an exemption applies)

<sup>6</sup> Section 2(1) of the Act

In addition, **FMA has the power to grant exemptions**. FMA has the ability to exempt any person or class of persons from compliance with Part 2 of the Act or any regulation (including section 33 of the Act). In granting any exemption, FMA must be satisfied that:

- the exemption would not cause significant detriment to subscribers for the relevant securities who are members of the public in New Zealand; and
- the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the exemption.

FMA may therefore permit information to be included in the advertisement which is wider than that permitted by the statutory exemption, provided this is consistent with the policy of the Act. For example, FMA must ensure that the information investors receive about the offer is controlled, so retail investors are not inclined to make their investment decisions based on the information they receive in the marketing information, rather than the offer documentation.

FMA seeks to exercise this power in a manner which is both pragmatic and practical while at the same time providing information that is as, if not more, useful for investors. Below are some examples of exemptions that have been given.

You can find information about how to apply for an exemption on our website: see <http://www.fma.govt.nz/help-me-comply/issuers/exemptions/>

## Examples of exemptions granted

### Information to inform and educate investors

Several exemptions have been granted in the past, which were broader than the statutory exemption, to allow a brief description of the issuer's business to be included (particularly where the entity has not previously issued securities to the public). For example, exemptions have been granted to Goodman Fielder Limited, Momentum Magazine Group Limited and Goodman Fielder New Zealand Limited which permitted the inclusion of some limited information about the business of these issuers, including details about the brands, trademarks and logos they used.

This is consistent with the policy behind the statutory exemption – that investors are provided with information where it will assist them to recognise the issuer and the terms of the intended offer. However, detailed information about aspects of the business of the issuer or its future prospects is more appropriately reserved for disclosure in the prospectus – this will go beyond the information necessary to inform the public about the intention to make the offer of securities and risk investors being prematurely influenced in their investment decision.

FMA has also granted exemptions in relation to Fonterra Co-operative Group Limited's '**Trading Among Farmers**' programme<sup>7</sup> and the New Zealand Government's Share Offers (**Government Share Offers**)<sup>8</sup>. In each case FMA considered it was in the public interest to permit the issuer to provide additional information to prospective investors about the proposed offer in their pre prospectus advertising.

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<sup>7</sup> [http://www.fma.govt.nz/laws-we-enforce/legislation/exemption-notices/current-exemption-notices/securities-act-exemptions/securities-act-\(fonterra-co-operative-group-limited\)-exemption-notice-2012/](http://www.fma.govt.nz/laws-we-enforce/legislation/exemption-notices/current-exemption-notices/securities-act-exemptions/securities-act-(fonterra-co-operative-group-limited)-exemption-notice-2012/)

<sup>8</sup> [http://www.fma.govt.nz/laws-we-enforce/legislation/exemption-notices/current-exemption-notices/securities-act-exemptions/securities-act-\(mixed-ownership-model-companies,-crown-pre-offer\)-exemption-notice-2012/](http://www.fma.govt.nz/laws-we-enforce/legislation/exemption-notices/current-exemption-notices/securities-act-exemptions/securities-act-(mixed-ownership-model-companies,-crown-pre-offer)-exemption-notice-2012/)

In the case of the Trading Among Farmers programme, FMA considered it appropriate to allow Fonterra to provide information about the proposed investment structure in communications that are advertisements (because they contained or referred to offers of securities), prior to the registration of its prospectus. FMA considers that the provision of this additional information is appropriate as it will allow shareholders to be informed and therefore better able to participate in consultation on the proposals, as well as helping them to understand the new structure.

In the case of the Government Share Offers, the proposed offers of shares are part of the Government's mixed ownership model programme. Given the public debate and the wide variation in the extent of experience and knowledge that interested persons might have in relation to investing in securities under the programme, FMA considered it appropriate to allow information about: the programme; the nature of the business of the issuers; and of a general educational nature about investment in securities to be included within communications distributed by or on behalf of the Crown that are 'advertisements' (because they contain or refer to offers of securities) prior to registration of the relevant prospectus. FMA was able to broaden the information that can be disclosed because some of the target investors will have a limited understanding about investment in shares/Government Share Offers, which is likely to include several share offers over an extended time period. Importantly, the exemptions do not relieve the issuers from liability if an advertisement is deceiving, misleading or confusing.

## **Brand related/profile-raising prior to an offering**

We have received a number of questions regarding FMA's interpretation of the pre-prospectus publicity restrictions in circumstances in which an offer is being considered or planned by an issuer.

FMA considers that the Act does **not** restrict an issuer from carrying out its usual brand related, profile-raising or customer focussed advertising prior to its making of an offering of securities to the public.

The Act would, however, restrict the use of brand/profile advertising which:

- **contains or refers to** the intended offer of securities to the public or to the securities which are to be offered to the public;
- appears **in association with** an advertisement that refers to the public offer; or
- is otherwise **reasonably likely to induce** persons to subscribe for the securities.

This means that any brand related, profile raising or customer focussed marketing undertaken by an issuer prior to prospectus registration that makes no mention of any proposed public securities offering and cannot be said to relate to securities which are to be offered to the public, is generally permissible by the Act.

However, when this type of marketing material appears **in association** with an advertisement which refers to securities to be offered to the public or a proposed offering of securities, then both advertisements are treated as a single advertisement<sup>9</sup> and would together constitute an offer to the public which would therefore be required to comply with the Act.

No guidance is provided in the legislation and to date the courts have provided limited guidance, on when two advertisements are to be regarded as appearing **in association** with one another.

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<sup>9</sup> Section 2A(6) of the Act.

The term 'in association' was briefly considered in *R v Graham* [2012] NZHC 265, a Lombard Finance case, where it was alleged that an untrue statement had been made in a promotional DVD that was an 'advertisement'. The judge determined that the DVD by itself did not constitute an advertisement for the purposes of the Act, since it did not refer to a specific offering of securities to the public. However, in considering whether the DVD could be regarded as an advertisement as a result of being made available with the issuer's investment statement the judge concluded that this would be the case if 'those circumstances reasonably suggest the prospect of both items being considered together, and those circumstances are intended to be covered by s2A(6)'. Issuers might usefully consider whether they have created, or allowed any circumstances to arise, where there is a reasonable prospect that the public are considering both brand advertising and offer advertising, in conjunction with each other.

FMA considers it is more likely for association to arise where there is physical or temporal proximity of the advertisements in the same publication, the advertisements are physically distributed together or where TV or radio advertisements are published over a concentrated period of time.

An 'association' may also arise if there is implicit cross-referencing of one to the other. Similarly, if an issuer were to commence, radically change the content, or materially increase the intensity of, its brand relating advertising in the period shortly before prospectus registration or an announcement of an offer of securities to the public.

For example:

- Issuer A places a brand or product advertisement in a daily newspaper. The advertisement also mentions that A will shortly be seeking to raise capital from the public by offering bonds to members of the public.

FMA considers this will be an 'advertisement' for purposes of the Act.

The advertisement contains or refers to the intended offer of debt securities to the public. It may not be published unless the advertisement contains only the information permitted by s5 (2CA) of the Act.

- Issuer B places a brand or product advertisement in a magazine which describes B's business and shows images of its business assets or people using B's services. In the same magazine, B also places an advertisement, advertorial or interview that refers to an upcoming offer of shares to the public.

FMA considers the brand advertisement is an 'advertisement' for purposes of the Act.

The two advertisements appear 'in association' with each other. They cannot be published unless the advertorial and the brand advertisement contains only the information permitted by s5(2CA) of the Act.

- Issuer C regularly engages in advertising on TV, on radio and in the print media as part of its general brand/product advertising campaign. C decides to raise capital from the public by issuing debt securities. C continues to advertise on TV, on radio and in the print media with its usual frequency and intensity. The advertisements do not refer to the proposed offer of debt securities. At the same time, C releases a media statement about its upcoming offer of debt securities limiting the information provided to that permitted by s 5(2CA) of the Act.

FMA considers that the brand/product advertisements are unlikely to be 'advertisements' for purposes of the Act.

They are not published 'in association' with advertisements that refer to the offer and are not reasonably likely to induce persons to subscribe for the debt securities.

- Issuer D has never advertised its brand/products on TV or has advertised only on an occasional basis. D decides to offer shares to the public in August 2012. In July 2012, D undertakes an intense and high profile brand/product TV advertising campaign. The advertisements do not refer to the proposed offer of shares.

FMA considers the TV advertisements may well be advertisements for D's offer of shares. The change to the pattern of D's advertising profile and the intensity of the coverage indicates they may be reasonably likely to induce members of the public to subscribe for the shares.

The TV advertisements should not be run prior to registration of the prospectus, and from registration of the prospectus would need to comply with the rules in the Act and Securities Regulations 2009 on securities advertisements.

### **Other legal obligations still apply**

If pre-prospectus advertising is not an 'authorised investment', other legal obligations will still apply in the event a communication is misleading, deceptive, or may confuse investors.

Under the section 5(2CA) exemption, FMA retains power to prohibit distribution of the advertisement under section 38B of the Act and the section 58 strict liability criminal offence still applies if the advertisement contains an 'untrue statement'.

In addition, section 9 of the Fair Trading Act, sections 11 and 13 of the Securities Markets Act 1988, section 242 of the Crimes Act 1961, and section 377 of the Companies Act 1993 contain prohibitions applying to a broad range of persons from making misleading, or (in the case of the criminal provisions), false statements.

Section 34 of the Financial Advisers Act 2008 prohibits financial advisers from engaging in misleading or deceptive conduct when providing financial adviser services.