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Fair dealing in advertising and communications – crowdfunding and peer-to-peer lending

This guidance note is for licensed crowdfunding and peer-to-peer lending platforms, and companies that offer financial products through these platforms

This note gives guidance on the application of the fair dealing requirements in Part 2 of the FMC Act.

About FMA guidance

Our guidance:

- explains how we interpret the law
- describes the principles underlying our approach
- gives practical examples about how to meet obligations.

Guidance notes: provide guidance on a topic or topic theme. Issuing guidance is just one of the ways we can be transparent and share our intended approach with the market. Guidance notes are not binding, but they help market participants to be confident they understand our approach and how we interpret, and intend to apply, the law relating to their responsibilities.

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

You might also like to check the reports and papers on our website. For example, our monitoring reports describe actual practice we are seeing and our comments on this.

Document history

This version was issued in March 2018 and is based on legislation and regulations as at the date of issue.

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Overview of statutory requirements

Introduction

The aim of this guidance is to ensure licensed crowdfunding and peer-to-peer lending platforms understand their obligations when advertising or communicating with customers.

The Financial Markets Conduct Act 2013 (FMC Act) introduced new responsibilities for companies offering financial products and financial services, related to their conduct and advertising practices. Part 2 of the FMC Act requires fair dealing in relation to these products and services ('fair dealing requirements').

The fair dealing requirements apply to offers of financial products made through licensed crowdfunding and peer-to-peer platforms, even though they are not 'regulated offers' under the FMC Act¹. The requirements apply to the licensed service providers operating these platforms as well as the offeror or issuer of the financial products.

We encourage platforms and issuers to not only meet the standards set out in this guidance, but to consider how their conduct and advertising helps customers make appropriate investment decisions.

Who should read this guidance

This guidance applies to licensed crowdfunding and peer-to-peer lending platforms, and companies that offer financial products through these platforms. It is also useful for anyone else who is promoting, or informing customers and the public about, licensed crowdfunding or peer-to-peer products or services (including market commentators, investment bankers and lawyers).

A licensed **crowdfunding service** acts as an intermediary between investors, and companies issuing shares – providing the facility (such as a website) where the offer of shares is made. Crowdfunding must be arranged through a licensed crowdfunding service provider if an offeror wants to take advantage of the lighter disclosure obligations that apply to crowdfunded share offers to the general public.

A licensed **peer-to-peer lending service** matches people who want loans with people who are potentially willing to fund those loans. Generally, peer-to-peer lending services are intermediaries between their borrowers and lenders. When the intermediary service is licensed, borrowers can issue debt securities to the general public (investors) through the service without having to supply product disclosure statements.

What is fair dealing?

The fair dealing requirements in the FMC Act are broad principles that prohibit:

- misleading or deceptive conduct
- false or misleading representations
- unsubstantiated representations
- offers of financial products in the course of unsolicited meetings.

¹ See section 6 of Schedule 1 of the FMC Act.

What this guidance applies to

The fair dealing requirements apply to all aspects of licensed crowdfunding and peer-to-peer lending services. This guidance only focuses on communications made for the purpose of promoting, or informing customers about, an offer of financial products or financial services. Communication can be via any medium, including:

- the internet, including social media and professional networking sites
- magazines and newspapers
- radio and television
- outdoor advertising, including billboards, signs at public venues, and transit advertising
- mobile phone messages
- product brochures and promotional fact sheets
- direct mail (eg written letter or email)
- group presentations, seminars and advertorials
- newsletters and updates
- forums where issuers and investors can communicate
- offer information that is updated during an offer period.

Targeted advertising

The fair dealing requirements apply to general brand-related, profile-raising and customer-focused marketing by licensed crowdfunding and peer-to-peer lending platforms. Depending on the circumstances, the fair dealing requirements might also apply to advertising by a company that will soon raise money through a crowdfunding platform. For example, where an issuer does not usually advertise but then decides to heavily advertise before a particular offer, the issuer and platform service provider should carefully consider whether the advertising communication is for the purpose of promoting the offer and, if so, whether it is compliant with the fair dealing requirements.

Disclosure statements are subject to different requirements

Crowdfunding and peer-to-peer lending licensees must ensure every retail customer receives a disclosure statement about their services. While the fair dealing requirements do not apply to these disclosure statements, section 427 of the FMC Act prohibits false or misleading statements in disclosure statements and the omission of required information.

The fair dealing requirements *do* apply to any disclosure documentation provided to investors by any issuer using a crowdfunding service or borrower using a peer-to-peer lending service.

Territorial scope

The fair dealing requirements apply to the conduct of any person in or outside New Zealand when that conduct relates to an offer of financial products or services made in New Zealand².

² The fair dealing requirements also apply to certain 'restricted communications' made to persons outside New Zealand from within New Zealand (section 33 of the FMC Act).

The prohibition of offers made at unsolicited meetings applies to offers received in New Zealand, regardless of where the issue or transfer occurs or where the issuer is located³.

Our intervention powers

We have a wide range of powers to address breaches of the fair dealing requirements. These powers allow us to issue orders requiring advertisers to comply with the law, including amending or taking down non-compliant advertising material. The FMA may publish these orders.

A breach of the fair dealing requirements is also a civil liability offence with a potential pecuniary penalty. Crowdfunding and peer-to-peer lending services can also be ordered to pay compensation to people who have suffered a loss as a consequence of a breach of the fair dealing requirements.

³ Section 34 of the FMC Act

Expected standards of advertising and communications

Advertisements and other communications can influence the way consumers think about financial products and services, and how they expect them to perform. Consumer knowledge of financial markets and products varies widely. Financial products can be complex, and your customers need to have a clear understanding about how they work. You should minimise the risk of misunderstandings which may lead to poor customer outcomes.

While we do not review or approve offers made through licensed crowdfunding and peer-to-peer lending platforms, these are our expectations when platforms, offerors and lenders market and promote offers and their businesses to customers.

Don't bury the important bits

The most prominent part of a communication will be the main message consumers take away from it. People reading, seeing or hearing advertising material can make decisions based on their first or overall impression.

Therefore, when you prepare advertising materials, consider the following:

- Warnings, disclaimers and qualifications should be prominent enough to effectively convey key information to an average person at first glance. If the communication is an audio advertisement, it should be read at a comprehensible speed for the average listener. If the overall impression an advertisement provides is misleading, it will be in breach of the fair dealing requirements no matter what the fine print says.
- When information is omitted it can make an advertisement misleading or deceptive. Be careful not to omit any material information that gives a skewed impression of your products or services.
- Statements about future aspirations should be presented as 'something that might happen' rather than 'something that will happen'.
- The form and context of statements and representations can influence whether they are seen as false, misleading, deceptive or confusing. Think carefully about whether a particular media channel is suitable for providing balanced information to consumers.
- Any warnings, disclaimers and qualifications required should not be inconsistent with other content in an advertisement.

Peer-to-peer lenders must be careful when referring to an 'investment rate of x%' if this rate may change. We will ask you to amend advertising if it is not clearly stated that the advertised rate could change.

Radio advertising might not be appropriate where potential investors require detailed information about an offer.

If an issuer claims to be expecting a secondary market for its shares to become available, it must have plans to launch one, or be able to prove one will launch shortly.

Be careful when comparing products or services

Comparisons should only be made between products or services that have sufficiently similar features. Where an advertisement compares dissimilar products or services, the differences should be made clear. Comparative advertising claims should be supported by easy-to-understand documented evidence for the target audience (and others who might reasonably be expected to see it). Comparative information must be current, complete and accurate.

Peer-to-peer lenders should not state or imply that their borrower creditworthiness, lending criteria, asset class, returns and interest rates are comparable to those of banks or traditional financial institutions. In particular, debt products offered by peer-to-peer lenders have very different risks to bank term deposits and are not sufficiently similar to be compared.

If a platform compares itself to its competitors, it should compare 'like with like' rather than overlooking relevant similarities or differences to make itself look better than other platforms.

Peer-to-peer lending platforms

A peer-to-peer platform that highlights positive comparisons with other platforms without identifying the differences in risks might mislead consumers. All differences should be clearly explained.

If a platform claims it is 'different from other peer-to-peer lenders' we expect their website to explain how.

Be careful to balance risk and reward

You should give a balanced message about the returns and risks of the financial product or service. Also keep in mind that higher-risk products are likely to require more prominent and detailed warnings.

We have noticed a tendency for messages to emphasise the benefits, returns and rewards of investing through a platform, and understate the risks. This can create unrealistic expectations of a product or service. Making implications about benefits that are not guaranteed should also be avoided.

On peer-to-peer lending websites, where 'frequently asked questions' about the safety of investor funds emphasise how a provider mitigates risks, we expect the section to also go into detail about risks such as early repayment risk and default risk.

Crowdfunding providers often detail how investors are able to get returns. Any information about returns should also include a statement noting that investors may not receive any return on their investment.

Substantiate your claims

Any statement you make should be able to be substantiated. A representation must be based on fact, rather than just conveying an opinion.

If any claims are included in the offer information on a platform, the source should usually be cited, and links provided to additional information where applicable. This applies where licensees or issuers promote characteristics of investors or issuers using their services.

We will ask platforms to amend phrases such as ‘rigorous checks’, ‘quality borrowers’ and ‘disruptive companies’ if no information is provided to substantiate the wording.

Avoid potentially confusing terminology

Terms and phrases should not be used where their actual meaning is inconsistent with the meaning commonly recognised by customers.

Industry concepts and jargon should be avoided unless they are sufficiently explained and will be understood by the audience. Terminology should also be consistent across a licensee’s website so there is no ambiguity.

Terms like ‘safe’, ‘relatively secure investment’, ‘limited poor returns’, ‘guaranteed’, ‘inflation proof’, ‘recession proof’ and ‘highly liquid’ can give the impression that investors are immune to losing their investment and that returns are guaranteed. These terms should be avoided.

Communicating performance information

Communications that include past performance information should make it clear that past performance is not indicative of future performance.

Projections and forecasts about future performance should be based on reasonable assumptions and state there is no guarantee they will actually happen. You should also avoid ‘cherry-picking’ past performance information to create a misleading picture for consumers.

You should check regularly that the past performance information on your website is current. If it is out of date, it could then be false or misleading.

If an issuer presents the possibility of a ‘liquidity event’ and an ‘exit strategy’, the offer documents can create the impression that these future events will definitely happen in the short term and that investors would be able to exit their investment. We recommend issuers avoid this type of information if they are not certain these events will happen.

Advertising is misleading when graphics cover only a short time period, or financial information from a volatile time period. This does not provide potential investors with adequate information to make an investment decision.

Be consistent

All communication channels should contain consistent information, so different investors receive the same information regardless of delivery channel. Consistency of information ensures any advertisement is not false or misleading because information is omitted.

Your website should communicate information consistently, and the same terminology should be used in both issuer and investor information.

Take care when advertising in more than one language. Information provided in each language should be consistent, so that a reader of one language does not receive different information or only part of the intended message.

Communicating costs clearly

Where an advertisement refers to fees or costs, it should give an accurate impression of the total cost the customer is likely to pay, including all indirect fees or costs. The cost should be shown in NZ dollars and be inclusive of GST.

Consider your audience

There will usually be a specific audience you are trying to reach. The people you actually reach (anyone who comes across your advert) could be a larger group. An advertisement should be appropriate for, and likely to be understood by, both of these groups, unless the offer can only be accepted by your target audience.

Products that are less common, or not easily understood, are likely to require additional information or warnings to help customers understand the offer.

Advertisements should not state or imply a product or service is suitable for a particular type of customer unless you have assessed its suitability for that type of customer.

A peer-to-peer lender that offers both secured and unsecured loans should explain the difference between these, as well as the implications for investors.

If a crowdfunding licensee offers a wholesale investment service alongside its licensed service, care should be taken if prompting investors to certify their wholesale investor status. If the licensee does prompt investors to certify their status, the licensee must provide information about being a wholesale investor. We expect this communication to include information about the eligibility criteria.

Licensed and unlicensed services

Information on your website, or any other advertising, should clearly distinguish between licensed and unlicensed services. It should also advise what this means for investors. Otherwise, investors could be misled and believe there is regulatory protection or oversight when there is not.

If a peer-to-peer lender refers to its past success, including winning a number of awards, it should be made clear if these awards were for a service offered before they became a licensed peer-to-peer lender.

Using testimonials or recommendations

Advertisements should only include testimonials from investors that are genuine, current and relate to the person's direct experience. Claims made by a person in their testimonial should be verifiable and true. Permission should be sought before referencing well-known people or organisations.

In general, we do not consider it is in the best interests of investors to promote investing on the basis of other people's decisions. Investors should consider whether an investment is appropriate for their personal circumstances, taking into account factors such as their risk profile, tolerance and financial objectives. We therefore discourage the use of testimonials.

Issuers should describe other investors carefully. If reference is made to ‘some very smart people’ that have already invested, this could be taken to mean that people are ‘smart’ for choosing to invest in the offer. This could be misleading – or even false. It would also be difficult to substantiate.

Use of logos

Any organisation’s logo or other motifs (including a royal seal or compliance industry logos) should not be used without the consent of the owner, or in any way that could be misleading.

Licensees’ websites should not display the FMA logo, as this can create a misleading impression that we have in some way endorsed their service or provided advice.

Be clear about availability

If a product is only available to a certain type of client, any advertisement should make that clear and should not be distributed more widely than necessary. Be careful not to misrepresent the availability or popularity of a product in order to entice customers.

If an advertisement claims an offer has ‘limited availability’ or is a ‘rare investment opportunity’ the promoter must be able to substantiate the statements.

Other relevant guidance

This guidance is part of our broader focus on conduct and the standards we expect of participants in financial markets. Compliance with these standards is the minimum we expect from platforms and issuers in order to consistently deliver good outcomes to their customers. This guidance should prompt advertisers to examine how they think about their advertising and communications, to ensure they consistently deliver good outcomes for their customers. For more on good conduct, see [A guide to the FMA's view of conduct](#).

All crowdfunding and peer-to-peer lending licensees are required to have a fair dealing policy. Additionally, they need to show their client on-boarding processes meet with the fair dealing obligations under the FMC Act. Find more information about the standards we expect of licensees in the licensing guides for [crowdfunding](#) and [peer-to-peer-lending](#) providers or ask your point of contact within the FMA any specific questions.