

Fair dealing provisions – transitional arrangements for advertising

Issuers and third parties who advertise in order to promote offers during the period 1 April 2014 to 30 November 2016 ('transition period') need to be aware of new FMC Act fair dealing provisions and how they apply.

What's changing?

From 1 April 2014, new fair dealing provisions under Part 2 ([sections 19-23](#)) of the Financial Markets Conduct Act 2013 (FMC Act) came into force.

They provide for "fair dealing" in conduct relating to "financial products" and "financial services". The law makes it an offence to engage in misleading or deceptive conduct in relation to financial products or to make false, misleading or unsubstantiated representations about financial products.

Once FMC Act offers are permitted, there are some specific rules for advertisements that apply to regulated offers (see sections 89-92). But largely the fair dealing obligations will replace the prescriptive requirements relating to advertisements in the Securities Act and Part 3 and 4 of the Securities Regulations.

What does this mean for people who advertise FMC offers?

The fair dealing obligations are more principles-based and less prescriptive than the Securities Regulations. However, it is important to note that the standards haven't been lowered. The same sorts of considerations are likely to apply in assessing whether an advertisement is misleading or deceptive.

The fair dealing requirements apply more generally than the Securities Act, and they're relevant to conduct relating to financial products by persons "in trade", not just issuers or promoters as was the case under the Securities Act (the FMC Act doesn't use the term promoter). If the conduct is in relation to dealing in quoted financial products it doesn't matter if the dealing is in trade or not.

What's an "advertisement"?

There is a new definition of "advertisement" in the FMC Act. In relation to an offer or intended offer, it is any form of communication made to the public or a section of the public for the purpose of promoting the offer.

This is a change from the Securities Act, where an advertisement is a form of communication that contains or refers to an offer or is reasonably likely to induce persons to subscribe for securities.

Whether or not a communication is an advertisement is important because there are specific statutory requirements for issuers and "associated persons" to comply with in sections 89-92.

Advertisements fall within the definition of "restricted communications". Restricted communications are authorised or instigated by or on behalf of the offeror, issuer, service provider or an associated person and either refer to an offer/intended offer or are reasonably likely to induce persons to invest. FMA can make stop orders if restricted communications are false or misleading or inconsistent with disclosure documents.



Pre-offer advertising

The Securities Act does not permit pre-prospectus advertising unless the advertisement contains certain information and nothing else (see our [guidance note – Pre-prospectus publicity – some practical guidance for issuers and their advisers](#)).

The FMC Act allows more flexibility for issuers to advertise prior to a PDS being lodged. They will be permitted to add information about their business provided the advertising is not misleading or deceptive under the fair dealing obligations (see section [91](#)).

Fair dealing impacts both Securities Act and FMC Act offers during the transition period

The fair dealing provisions [apply broadly](#) to promotion of offers under both Securities Act and FMC Act. However, this is subject to the important carve-outs below.

Carve-out for Securities Act liability for misleading advertisement

Clause 13 of Schedule 4 FMC Act says that if the conduct in question contravenes or leads to liability under [sections 55A to 57](#) or section [58](#) of the Securities Act (civil and criminal liability for distribution of an advertisement or a registered prospectus that includes an untrue statement) the conduct does not also contravene the fair dealing obligations.

This exception means that if an issuer or a promoter distributes a Securities Act advertisement that contains misleading information or omits important information, the Securities Act will apply rather than the fair dealing provisions in Part 2.

Carve-out for Securities Act prospectuses and investment statements

The fair dealing obligation that prohibits unsubstantiated representations (irrespective of whether they are misleading or not) is found in section [23](#) of the FMC Act. However, section 23 does not apply to prospectuses and investment statements (see clause 14 of Schedule 4 of the FMC Act).

Issuers and promoters advertising Securities Act offers are still subject to the advertising regime under the Securities Act. It is unlikely that an advertisement could breach fair dealing provisions but not be misleading under the Securities Act requirements and therefore the Securities Act will prevail as intended by the clause 13 carve-out.

However, third parties engaging in conduct relating to Securities Act offers (for example, brokers and financial advisers) are subject to fair dealing obligations.

Fair dealing applies to excluded offers

During the transition period there are a number of offers that are excluded from Securities Act disclosure obligations. These offers are exempt from Part 2 of the Securities Act and the Securities Regulations, including the advertising requirements of regulation 30.

The “excluded offers” include offers via a licensed crowd funding or peer to peer lending platform, small offers, financial products of the same class as quoted financial products and employee share schemes.

From 1 December 2014 when the FMC Act comes fully into force, the same types of offers will still be excluded from the disclosure obligations and the requirements that relate specifically to advertising in the FMC Act.



There are also statutory restrictions against advertising in relation to the Small Offers and Small Schemes exclusions. One of the conditions of relying on these types of offers or intended offers is that they cannot be advertised and care must be taken that all communications are made only to persons who meet the definitions in the exclusions. (See Schedule 1 clauses 13 and 17 of the FMC Act).

Issuers relying on the new exclusions, as well as third parties, need to take care their promotional materials in relation to the offer are clear and not misleading. They also need to be aware of the restrictions around advertising certain types of offers.

The FMA can require warnings on offer documents or other material that is misleading to prospective investors.

Where can I find more information?

Our website has additional information on [fair dealing](#) requirements. We have also published a [summary](#) of Schedule 1 exclusions under the FMC Act.