

# FMA consent to governing document amendments under clause 26, Schedule 4 of the FMC Act

---

This information sheet is an application guide for those who wish to seek FMA consent to governing document amendments under clause 26, Schedule 4 of the FMC Act.

## Overview

Clause 26 of Schedule 4 of the Financial Markets Conduct Act 2013 (**FMC Act**) enables debt issuers and MIS managers to amend a governing document with FMA consent where those changes are necessary or desirable for ensuring compliance with the FMC Act. It is an alternative way for the issuer/manager to amend governing documents rather than making amendments under the governing document's own amendment provisions (which may otherwise require investor consent).

---

Governing documents play an important part in shaping and ensuring the effectiveness of the overall accountability framework. Product providers (including trustees of restricted schemes), together with supervisors (where relevant) have a shared responsibility for ensuring governing documents are effective, fit for purpose and give supervisors the tools they need to effectively supervise offers.

---

Existing governing documents will need to be reviewed and, as necessary or desirable, amended to ensure they are effective and fit for purpose, and otherwise comply with the FMC Act.

We expect most of these changes can be made by the product provider and the supervisor without investor consent. For example, updates to include provisions already deemed to be included by the FMC Act, are in the nature of a consolidation or conforming of the governing document rather than an amendment. These changes can likely be made without investor consent. Similarly, many other changes that do not adversely affect investors are likely to be able to be made without investor consent.

Where FMA consent is sought we expect amendments to have been negotiated and agreed by the product provider and supervisor (where relevant) and for legal and other advisers to have been involved before sending the document to the FMA.

## When changes need to be made

There is a two year transition period from 1 December 2014 to 1 December 2016 for full FMC Act compliance, however, an 'effective date' can be selected anytime between those dates for earlier transition to the new regime.

The changes you make to your governing document to meet the requirements of the FMC Act should be made with effect from your effective date to ensure that the governing document continues to comply with existing legislation until then.



Before your effective date, you must ensure that a copy of your governing document that meets the following requirements is lodged with the Registrar:

- For debt securities, sections 104 to 106 of the FMC Act.
- For managed investment schemes, sections 135 to 137 of the FMC Act.

Failure to comply with that requirement may give rise to civil liability under the FMC Act.

See our information sheet on [transition for Managed Investment Schemes](#) for more information about transition to the FMC Act.

## Pre-conditions

The FMA has set the following pre-conditions for requests for FMA consent to changes to governing documents under clause 26 of Schedule 4 of the FMC Act:

1. The changes for which FMA consent is sought must otherwise require security holder or member consent.
2. The product provider and supervisor (where relevant) have each provided a certificate to the FMA (supported by a solicitor's certificate, where appropriate, to the product provider or supervisor):
  - a. Confirming that the changes for which FMA consent is sought could otherwise only be made with security holder or member consent
  - b. Confirming the substance of the changes for which FMA consent is sought
  - c. Identifying the clause amendments that effect those changes
  - d. Confirming that the amendments are accurately drafted to effect those changes
  - e. Confirming that the amendments for which FMA consent is sought are necessary or desirable to ensure, or in connection with ensuring, that the governing document complies with the requirements of the FMC Act
  - f. Confirming that for any amendments or differences in the replaced governing document other than those for which FMA consent is sought, the procedures of the existing governing document and where applicable the existing governing legislation for amendments have been complied with.

The reasons for these pre-conditions are:

- to ensure the most efficient means is used for effecting changes to governing documents (e.g. if changes can be made with the consent of the supervisor then they should be made that way); and
- to ensure the FMA can efficiently assess applications.

Please contact us if you believe FMA consent is appropriate, but these pre-conditions cannot be met.



## Application process

Please send us a cover letter or email stating that you wish to apply for FMA consent under Clause 26 of Schedule 4 of the FMC Act. You must acknowledge that the FMA will charge a fee based on FMA's hourly rate for assessing the application, and attach or enclose:

- The governing document marked-up to show the changes for which FMA consent is sought
- A certificate from the product provider and, where relevant, the supervisor, covering the matters set out in the pre-conditions section above.

### Submitting an application

An application can be sent to us:

- In hard copy to either FMA office – see our website for our [office details](#).
  - For applications relating to KiwiSaver or superannuation schemes, please mark them to the attention of the KiwiSaver and Superannuation Team
  - For all other applications please mark them to the attention of the Head of Legal, Compliance.
- By email to – [compliance@fma.govt.nz](mailto:compliance@fma.govt.nz)
  - Please put 'Governing document amendments' in the subject line then mark your application to the attention of the appropriate team as above.

### Processing your application

A number of factors will affect the time it takes to process an application, including the number of applications we are processing at the time and the complexity of the particular application. For some applications we may also undertake a more detailed review.

You should allow between three to six weeks for us to process your application. We will let you know when you apply how long it is likely to take.

Fees apply to applications for FMA consent to governing document amendments in accordance with Financial Markets Conduct (Fees) Regulations 2014. These are based on hourly rates of \$178.25 per hour for specified employees and \$230 per hour for members of the FMA (both inclusive of GST). We will invoice you once we have completed our review.