

# Issuers' registers of regulated products and the FMA's discretion under section 224

This information sheet outlines the requirements relating to issuers' registers of regulated products under Subpart 4 of Part 4 of the Financial Markets Conduct Act 2013 (FMC Act). It also sets out how the FMA will exercise its discretion to authorise an issuer to decline a request for a copy of a register under section 224 of the FMC Act.

The requirements for issuers to maintain a register of financial products should not be confused with the requirement to maintain a register entry in the register of offers of financial products (known as the 'Disclose' register). This information sheet does not relate to the Disclose register.

## Understanding the requirements relating to issuers' registers of regulated products

Accurate and robust product registers underpin the confident participation of investors in financial markets. Entries in an issuer's product register evidence the property held by investors so there needs to be a high level of confidence in product registers. The requirements relating to financial product registers are therefore vital to promoting the purposes of the FMC Act.

Access to register information also contributes to the fairness and efficiency of financial markets. The requirement that product holders can be easily contacted about matters relevant to their holdings, helps hold issuers to account (including, for example, through potential takeover activity), and helps to protect and facilitate the exercise of investor rights. But the FMC Act also puts in place limits to that access.

The following is a summary of the relevant provisions in the FMC Act and the Financial Markets Conduct Regulations 2014 (sections 215 to 226 of the Act and clauses 107 to 111 of the Regulations). We encourage you to seek legal advice to ensure you comply with these requirements.

These provisions apply to issuers of regulated products under the FMC Act and therefore will only apply after an issuer has transitioned across to the FMC Act or made a new issue under the FMC Act. Until then, the relevant provisions in the Securities Act continue to apply.

## Issuers of regulated products must ensure registers are kept

Every issuer of regulated products (other than derivatives and category 2 products that are debt securities) must ensure that a register that meets the requirements of the FMC Act is kept in respect of those regulated products.

The register must be kept in New Zealand. It may be an electronic register, or kept in any other reasonable manner that the issuer thinks fit.



Each register must contain the following information in respect of every financial product entered in the register, and is prima facie evidence of those matters:

- the name and address of the holder
- the date on which the product was issued or transferred to the holder
- the nature of the product
- the amount of the product
- the due date of the product
- all other prescribed particulars, if any (none as at the date of this information sheet).

Every issuer of regulated products must send a notice to the Registrar of Financial Service Providers of the place where its regulated product registers are kept (unless the issuer is a company and its registers are kept at its registered office) and of any change in that place.

## Audit of registers

Every issuer of regulated products must ensure registers kept by, or on behalf of, the issuer are audited or reviewed by a licenced auditor or registered audit firm. The requirements for that (as provided for in the Regulations) are:

- that registers be audited (that is, not merely reviewed) in accordance with applicable auditing and assurance standards (eg, ISAE (NZ) 3000 *Assurance Engagements Other than Audits or Reviews of Historical Financial Information* and SAE 3100 *Compliance Engagements*).
- the audit determine whether, in the auditor's opinion, there is reasonable assurance that the register (or in the case of a registrar entity, the registers kept by it collectively), in all material respects, correctly contains the information referred to in section 217 of the FMC Act (as listed above).

Registers kept on behalf of one or more issuers by an entity (a 'registrar entity'), that carries on a business of maintaining registers of regulated products on behalf of issuers, must be collectively audited at least once a year. That collective audit, of the registers kept on behalf of issuers by a registrar entity, satisfies the requirement for those individual issuers to ensure that their registers are audited. Alternatively, if an issuer elects to do so, or if it keeps its own registers, an audit in respect of a particular register must be carried out (and completed) within four months after the issuer's balance date.

The materiality threshold for the audit opinion should be considered in the context of the nature, purpose and importance of registers (namely that the information required in respect of each product holder is not extensive, the records are prima facie evidence of the matters to which they relate, and there needs to be a high level of investor confidence in the integrity of financial product registers).

### Auditor's duty to report non-compliance

If the auditor of a financial product register considers at any time that the requirements of the FMC Act and Regulations relating to those registers are not being complied with, the auditor must, as soon as practicable, advise:

- the issuer and the FMA
- in the case of equity securities, the security holders at their next meeting if the non-compliance is material; or in the case of debt securities or managed investment products, the supervisor.



Note that other than in relation to the case of reporting to security holders in relation to equity securities, there is no materiality threshold for this reporting requirement.<sup>1</sup> It is, however, a protected disclosure (if made in good faith) for the purposes of Section 214 of the FMC Act.

More generally see our [Information sheet on reporting duties under Part 4 of the FMC Act](#).

## Register requests

Every issuer of regulated products (other than investment products in respect of a superannuation scheme, workplace savings scheme, or KiwiSaver scheme; and in some circumstances, continuously offered debt securities) must ensure that every register of regulated products kept by, or on behalf of, the issuer is available for public inspection. Issuers are also required to provide a copy of, or an extract from, a regulated product register on request. These requirements only relate to the information required to be held by the FMC Act and not to any other information that might be held on the register.

A register of managed investment products in respect of a superannuation scheme, workplace savings scheme, or KiwiSaver scheme must be available for inspection by the supervisor of the scheme. The issuer is also required to provide a copy of, or an extract from, the register to the supervisor on request.

### New provisions

Section 224 of the FMC Act is equivalent to section 52 of the Securities Act 1978 (Rights of inspection of registers of securities and to copies of registers and deeds) and to section 218 of the Companies Act 1993. Under both the Companies Act and Securities Act any person (not just a security holder) is entitled to inspect registers and to request copies of registers. The FMA and most issuers have interpreted those sections as being without qualification, so issuers have not been able to decline requests for copies of registers. These Acts are also silent on the use of information from product registers.

The FMC Act introduces restrictions on a person's ability to obtain copies of, or extracts from, regulated product registers, and on the use of information from those registers.

Under section 224 of the FMC Act, when a person makes a request to an issuer for a copy of, or an extract from, its register of product holders (other than a request for information about that person), they must state their reasons for making the request, including the purpose for which they intend to use the information. The issuer can then elect to provide a copy of the statement of reasons to the FMA. If the issuer does that, it does not have to comply with the request if, within 10 working days, the FMA gives written notice to the issuer that it is not required to comply.

Under Section 225, information about a person obtained from a regulated product register must not be used to contact or send material to that person, unless:

- it is relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to those interests, or
- it is approved by the issuer that keeps the register.

It also prohibits the information being used for any purpose other than the purpose disclosed in the statement under section 224(1).

Contravention of these restrictions could give rise to administrative orders (for example, direction orders) or civil liability under the FMC Act.

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<sup>1</sup> In this regard we note that Officials accepted the submission on the exposure draft of the FMC Bill that there be a materiality threshold for reporting non-compliance to meetings of shareholders. This dispels a possible alternative interpretation that the requirement is to advise of the non-compliance and whether is it material.



## FMA's discretion to authorise declining a register request

The FMA will consider using its discretion under section 224 to authorise declining a register request if there is a risk the person making a register request will not comply with their obligations at law when using the requested information, where there is a risk of investor harm, or where the request is vexatious or frivolous.

The discretion is often discussed in the context of 'low ball' or unsolicited offers. However, the law does not prohibit unsolicited offers and in fact permits and regulates them.

Unless prohibited by regulations under the FMC Act, issuers cannot decline register requests for the purposes of making an unsolicited offer, unless the FMA exercises its discretion. The FMA believes it would be inconsistent with the scheme and purpose of the FMC Act to authorise an issuer to not comply with a register request solely on the basis that the purpose of the request is to make an unsolicited offer to investors. The FMC Act expressly contemplates and regulates unsolicited offers and it contributes to the efficiency of markets to allow offers to be made to investors.

## Infringement offences

Infringement offences, under the FMC Act, will arise if the following requirements relating to the keeping and maintaining of regulated products are not met:

- the requirement to keep registers
- the requirement that registers contain the information referred to in section 217
- the requirement that the registers be audited
- the requirement an issuer notify the Registrar of Financial Service Providers of the location of its regulated product registers
- the requirement that a register be available for inspection in accordance with the requirements of the Act
- the requirement to provide a copy of, or an extract from, a register on request.

## Intersection with the Companies Act

Section 226 of the FMC Act expressly provides that if a provision of sections 221 to 225 of the FMC Act is inconsistent with a provision in the Companies Act 1993, the provision of sections 221 to 225 prevails.

## Start planning now

We encourage you to plan and be ready for the new regime. Plan what you need to do to ensure you can properly meet your requirements under subpart 4 of Part 4 of the FMC Act.

## Where can I find more information?

For more general information about the FMC Act, visit [our website](#). You can also subscribe to receive FMA Updates for the latest news.