

# Review of non-filing of financial statements

July 2014

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## Introduction

The non-filing of financial statements by some financial markets participants is a persistent problem and has prompted FMA to undertake a review of issuers' compliance with their financial reporting obligations.

The purpose of this report is to:

- remind directors of their statutory financial reporting obligations under the Financial Reporting Act 1993 (**FRA**)
- remind brokers and directors of the statutory filing obligations under the Securities Act (Contributory Mortgage) Regulations 1988
- inform market participants of the findings of our review and highlight areas of concern
- inform market participants of FMA's future focus in this area.

## Directors' statutory obligation to file financial statements

Under sections 10(1) and 18(1) of the FRA, the directors of an issuer must ensure that audited financial statements of the issuer, together with a copy of the auditor's report on those financial statements, are filed with the Companies' Registrar (Registrar) within five months and 20 working days of the issuer's balance date.

## The importance of timely filing

The key purpose of filing is to ensure timely, accurate and public financial reporting for the public and investors, and to provide FMA and other regulators and supervisors with the ability to oversee compliance. When companies fail to file or delay filing their financial statements, it limits the ability of investors to make informed investment decisions. Ensuring accurate and timely disclosure to investors and promoting compliance with reporting obligations is a key priority for FMA.

## Penalties

Where financial statements are not filed by the due date, under section 38(b) of the FRA, every director of the issuer commits an offence and is liable on conviction to a fine of up to \$100,000.

## FMA's review of issuers compliance with filing obligations for March 2013 balance dates

Based on data received from the Registrar, there were 416 limited liability companies that are financial markets participants with a 31 March balance date that had an FRA obligation to file financial statements for the year ended 31 March 2013 (March Balance Date Issuers). The deadline for filing these financial statements was 27 September 2013.

### Findings

A total of 305 (73 percent) of March Balance Date Issuers filed financial statements for the year ended 31 March 2013 on or before 27 September 2013. The remaining 111 (27 percent) failed to do so and were sent overdue reminders by the Registrar on 15 October 2013, stating that if the financial statements were not filed by 13 November, the Registrar would consider taking further action.

A total of 68 (16 percent) of March Balance Date Issuers filed their overdue financial statements during the period 30 September 2013 – 13 November 2013, leaving 43 (10 percent) of March Balance Date Issuers' financial statements outstanding at 13 November 2013.


### FMA regulatory response

- Following the serving of reminder notices to each entity, FMA initiated court prosecutions against the directors of 7 entities for failure to file, having reached the view that these entities presented the greatest harm to the market, including having a previous history of failing to file. Court proceedings were also initiated for one further entity with a September balance date who had persistently not filed financial statements.
- FMA made a recommendation to the Registrar to issue infringement notices to the directors of a further 13 entities under section 41B (1) of the FRA.

Prosecutions were initiated in order to hold offenders to account and deter future non-compliance by those in breach, and more generally, others in the market. From our review of the 43 entities referred to us, there were a number who in our view, were not issuers for the purpose of FRA, and in those cases we took no further action.

### Contributory mortgage brokers

Under Regulation 12 of the Securities Act (Contributory Mortgage) Regulations 1988 (**the Regulations**), contributory mortgage brokers are required to file an annual report with the Registrar within three months of their financial year. Under Regulation 41 of the Regulations, a contributory mortgage broker commits an offence if it fails to comply with Regulation 12. The maximum penalty on conviction is a \$5,000 fine.



FMA reviewed 20 entities that were registered as contributory mortgage brokers and found that 11 contributory mortgage brokers had not filed their annual reports by the due date. We initiated court prosecution against two of these brokers who we considered posed the greatest likelihood of harm to investors, as a result of failing to file their annual reports for the year ended 31 March 2013 with the Registrar by the due date of 30 June 2013.

### **Future focus**

In order to ensure that investors have key information available to them to enable them to make more informed investment decisions, the non-filing of financial statements and annual reports will continue to be a focus for FMA. There are a number of regulatory responses available to FMA when dealing with this breach and this may include further prosecutions.

Issuers and all financial markets participants need to ensure they understand their filing obligations and have the systems and processes in place to meet these requirements. The purpose of the filing requirements is to ensure that there is accurate and timely information provided to investors and the public to allow informed investment decisions to be made.

Under the Financial Markets Conduct Act (**FMC Act**) the filing requirements continue to apply, but there are some changes that will occur, including the requirement for financial statements to be filed within four months of the balance date of the entity. Failure to file financial statements continues to be an infringement offence, but the offence provisions now provide that liability sits with the FMC reporting entity rather than the directors. The maximum penalty that may be applied on conviction of the FMC reporting entity for failing to file financial statements is \$50,000. FMA will also have the authority to issue infringement notices against the FMC reporting entity that will require it to pay a \$7,500 fee.

The FMC Act also provides provisions for taking civil action against both an FMC reporting entity and its directors, if they contravene (or are involved in the contravention of) the filing obligations. If civil action is initiated, pecuniary penalties may be ordered up to a maximum of \$1 million for a director and \$5 million for the entity.<sup>1</sup>

If the filing requirements of the FMC Act applied to the 2013 filing, only 43 March Balance Date Issuers (10 percent) would have filed financial statements for the year ended 31 March 2013 within four months of the balance date. Achieving an improvement on this number will be a key area of focus when implementing the FMC Act.

For Contributory Mortgage Brokers, the existing law will continue to apply and they will continue to be required to file an annual report with the Registrar within three months of their financial year end.

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<sup>1</sup> Content updated as at 9 March 2015 to correct original text.



## Conclusion

FMA will continue to monitor the filing of financial statements and annual reports closely. If the compliance level remains low, and we believe statutory obligations have been breached, we will not hesitate to take appropriate action.

