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Thematic review of use of the wholesale investor exclusion

Findings from the FMA's thematic review of wholesale offers of financial products, along with guidance for offerors and those who provide confirmation for eligible investor certificates.

FMA
FINANCIAL MARKETS AUTHORITY
TE MANA TĀTAI HOKOHOKO

Contents

Summary

The Financial Markets Conduct Act 2013 (**FMC Act**) prescribes how offers of financial products can be made to potential investors, subject to a number of exclusions. One of these exclusions is for offers made to wholesale investors. Offers to wholesale investors do not require the standard disclosure, governance and financial reporting requirements that apply to regulated offers, on the basis that wholesale investors have sufficient knowledge and experience dealing in financial products to acquire the information they need to enable them to assess the merits of an offer, including the value and risks.

Background

In recent years, the Financial Markets Authority – Te Mana Tātai Hokohoko (**FMA**) has noted an increase in complaints and concerns raised about wholesale offers of financial products indicating increased investor participation. The FMA considers the reasons for this increased participation in wholesale offers include:

- the relatively low interest rate environment increasing investor demand for alternative high-yield investments;
- increased and widespread promotion of wholesale offers, with persistent advertising that reaches a wide range of potential investors, including through social media channels; and
- fewer retail offers have been brought to market in recent years.

The complaints caused us concern about how wholesale offers, particularly offers related to property development projects, are being advertised and the type of investors to whom they are offered. These concerns include:

- a significant number of investors have accessed wholesale offers by self-certifying as eligible investors, which is one type of wholesale investor;
- the potential for pressure to be applied on investors to 'self-certify' in relation to prior relevant experience;
- financial products are being advertised with relatively high fixed returns and as low risk, especially through typical 'retail' channels such as newspapers, billboards and social media. This is particularly noticeable with financial products sold in connection with property developments; and
- some offers are structured as an offer of units in a managed fund, where the invested funds are loaned to related parties to finance property development projects. This creates a conflict of interest, which an investor may not be aware of in the absence of disclosure.

As a result of these concerns, we undertook this thematic review of wholesale offers with a focus on offers made in connection with property syndication.

We focused on how the "eligible investor" category and associated certification was being used by investors and offerors,[1] and less on whether the "bright-line" tests and safe harbour certifications were being correctly applied. We reviewed:

[1] Relevant statutory provisions are set out in Appendix 1.

- advertising used to find and attract investors into "wholesale offers" of financial products;[2]
- how the wholesale investor exclusion is described in offer documentation and advertising materials;
- who provides investors advice about whether they fit within the wholesale investor exclusion criteria, especially by self-certification as an eligible investor;
- who confirms eligible investor certificates, and, specifically, whether those persons are related to, introduced by, or remunerated by the offeror; and
- whether there has been any use of hard-sell techniques to pressure investors to self-certify as eligible investors.

Findings and next steps

We found a number of undesirable practices in the market for wholesale offers, including:

- offers promoted through a broad range of advertising channels, rather than focusing directly on suitable investors;
- offerors using digital advertising strategies, for example Google AdWords, that may target people for whom the offer is not suitable;
- promotional materials advertising high fixed returns and downplaying risk;
- promotional materials that were not clear the offer was only available to wholesale investors;
- incomplete eligible investor certificates including some with grounds that were not capable of supporting the matters certified;
- evidence of non-compliance with requirements relating to confirmation of self-certification for eligible investor certificates;
- some instances of aggressive or "hard-sell" techniques, although this did not appear to extend to investors being pressured to self-certify as eligible investors.

These findings are set out in greater detail in this report, along with guidance for:

- wholesale investment offerors on when to rely on eligible investor certificates; and
- financial advisers, qualified statutory accountants and lawyers on when confirmation of an eligible person certificate is appropriate, and when it is not.

While our review focused on wholesale offers made in connection with property development, the findings above are applicable to all wholesale offers. Having set our expectations, we now expect a higher level of compliance in this space. This includes acting in ways that are properly focused on the outcome that, where the eligible investor certification is used, only investors with sufficient knowledge and experience in dealing in financial products are accepted into the offer.

The FMA has previously published answers to FAQs in the offer information section of its website, about:

- who can provide a signed confirmation of an eligible investor certificate;
- whether the offeror is required to independently verify information contained in an eligible investor certificate; and

[2] See section 7 of the FMC Act.

- the level of experience that is required for an investor to qualify as an eligible investor.

The FAQs indicated that the offeror need not independently verify the information in the certificate. The FMA's view on this has not changed. However, the guidance provided in this report supplements the FAQs by describing what the offeror does need to do.

Findings

Advertising materials and avenues

Advertising of wholesale offers is regulated by the fair dealing provisions in Part 2 of the FMC Act. These provisions prohibit conduct that is, or is likely to be, misleading or deceptive, and unsubstantiated representations (amongst other things).

We found the following in relation to certain wholesale advertising materials reviewed:

- Offerors and associated parties use a range of advertising channels, including mainstream channels such as Facebook, Instagram, YouTube, LinkedIn, media outlets (newspaper print and online), billboards and radio. This contrasts with the channels through which wholesale offers have previously been made, such as direct approaches to a range of institutional investors, high-net-worth individuals and individuals with existing relationships with market participants.
- Some offerors advertised high fixed returns and downplayed risk, including through reference to guarantees and other security. This is similar to the concerns that led to the FMA issuing a direction order to Du Val Group NZ Limited and Du Val Capital Partners Limited on 4 October 2021, and a stop order to The One Management GP Limited on 6 May 2022.
- Offerors make extensive use of digital advertising strategies to target audiences. One way of doing this is through services such as Google AdWords, which offerors use to track certain search terms and then ensure advertising of their offer is displayed prominently on websites and social media used by the person who has entered the search terms. Another way is by using search engine optimisation where the offeror pays to ensure the advertising of their offer is at or near the top of the list of results produced by a specified internet search, on the basis most people using search engines do not go to any of the results past the second page.
- Most offerors employing these strategies use keywords and search terms relevant to their offer, such as “private equity” and “property investment”. However, we found several examples of offerors seeking prominent advertising of their offers to people who had used search terms including “sharesies nz” and “personal term deposit rates”. We consider this approach of targeting people who are searching for investments of a significantly different nature to the wholesale offer increases the likelihood of those people being misled. This risk is compounded where the offeror is also advertising high fixed returns and downplaying risk, as described above.

Guidance for wholesale investment offerors

Offerors should:

- when using mainstream advertising channels, take extra care to ensure the audience is not misled;
- ensure the overall impression of an advertisement is not misleading or deceptive;

- ensure any qualifications to headline representations are proximate, prominent, and effective so that the representation does not mislead or deceive, especially where promotional materials are advertised through mainstream channels;
- not make misleading comparisons between different financial products, for example, between an investment in a managed fund and an investment in a bank term deposit;[3] and
- not undertake any advertising practice that could lead an investor to draw comparisons between dissimilar financial products, especially if influencing potential investors to do so appears to be the intention of the practice.

Description of the wholesale investor exclusion

In relation to how the wholesale investor exclusion is described in offer documentation and advertising materials, we found:

- Promotional materials that did not make it clear the offer was only available to wholesale investors. We consider this omission could be misleading, deceptive or confusing, and a form of bait advertising. In registering interest in a wholesale offer, investors who do not qualify as wholesale investors provide personal information to the offeror that could be used for a future retail investment offer or other purposes.
- Statements describing the offer as available to "wholesale and eligible investors". An eligible investor is one type of wholesale investor under the FMC Act. Our 2021 guidance note on Advertising offers of financial products under the FMC Act notes the term "eligible investor" can have a plain English meaning that is different from its definition in the FMC Act, and therefore its use could be misleading, deceptive or confusing, depending on the context and audience. The use of "eligible investor", in conjunction with "wholesale investor", could give the impression that an offer is available to someone other than a wholesale investor when it is not.

Guidance for wholesale investment offerors

Offerors should ensure that all advertising of a wholesale offer clearly states that it is open to wholesale investors only. The statement should be made in a sufficiently prominent manner to bring it to the attention of the audience.

To avoid engaging in misleading, deceptive or confusing conduct, offerors should not use the term "eligible investor" or similar alongside the term "wholesale investor".

[3] See our guidance note Advertising offers of financial products under the FMC Act for more guidance on this.

Eligible investor certificates

To qualify as an eligible investor, a person must certify in writing that they:[4]

a) have, in relation to an offer of financial products, previous experience in acquiring or disposing of financial products that allows them to assess:
   i. the merits of the transaction or class of transactions (including assessing the value and the risks of the financial products involved);
   ii. their own information needs in relation to the transaction or those transactions; and
   iii. the adequacy of the information provided by any person involved in the transaction or those transactions; and

b) understand the consequences of certifying themselves to be an eligible investor.

To meet the eligible investor requirements, the person must state in the certificate the grounds for this certification. In relation to a wholesale offer of financial products, these grounds should demonstrate a connection between the investor's prior relevant experience in acquiring or disposing of financial products, and the transaction to which the certificate relates.[5] Where the stated grounds are not relevant to the certification, the certificate will not meet the legislative requirements.

This does not mean an offeror must verify the information in the certificate. However, the offeror must ensure the experience is relevant, and where the grounds stated are not capable of supporting the matters certified they should be disregarded when deciding whether or not to rely on the certificate. A certificate that does not meet the requirements of clause 41(1) in Schedule 1 of the FMC Act will mean the person does not qualify as an eligible investor.

Our review identified a range of irrelevant and vague grounds on eligible investment certificates, including (verbatim):

- Sale of farm
- Term deposit / KiwiSaver
- Rental properties
- Build, bought and sold properties
- Invested in shares & real estate
- Experience in investment

There will be circumstances where extensive and broad investment experience (i.e. buying and selling financial products, not simply holding them) over a long period will be relevant grounds for the certification. There will be other circumstances where limited but specific experience will be relevant. Where the stated grounds do not include sufficient detail to identify the relevance of investment activity to the matters certified, further information is required before the certificate will meet legislative requirements.

The FMA's review has identified numerous tick-box options for 'would-be' eligible investors to select from when stating the grounds for certification that refer only to prior investment activity. Without further detail, it is not clear that the experience enables the investor to assess the merits of the relevant transaction, and so further information will be required before the certificate can be relied upon.

[4] Clause 41 of Schedule 1 of the FMC Act.
[5] Clause 41(2) of Schedule 1 of the FMC Act.

The offeror is not entitled to rely on the wholesale investor exclusion where the offeror knows that the investor does not, in fact, have the prior experience certified.[6] This may be because the offeror is aware of a fact or circumstance about the investor that contradicts the certification given, or the grounds stated in the certificate are not relevant to the certification.

Where an offeror relies on an eligible investor certificate in circumstances where the offeror is not entitled to, the offeror will have made an offer of financial products to a retail investor without the required disclosures under Part 3 of the FMC Act. This can potentially result in civil or criminal liability.

Grounds for certification

In reviewing the grounds for certification stated in eligible investor certificates, we found a number of certificates fell short of what is required because the grounds supporting the certificate were insufficient. For example, we saw eligible investor certificates where:

- **no grounds for certification** were stated at all.
- **the grounds for certification** did not refer to any past acquisition or disposal of financial products. For example, experience in building and selling real estate was given as the grounds for previous experience in acquiring or disposing of financial products that allowed a person to assess the merits of a wholesale offer in a managed investment scheme.
- **the grounds referenced dissimilar financial products** to those being offered. For example, investing in KiwiSaver and retail bank products (for example, term deposits) was regarded as relevant grounds to support certification in relation to a managed investment scheme with a different value proposition and risk profile.

In reviewing formats of eligible investor certificates, we found several offerors provided investors with pro-forma certificates,[7] where relevant grounds could be selected from a 'tick-box' list of pre-populated financial products. In most instances, these lists included financial products different to the financial products being offered, most importantly in terms of risk (for example, KiwiSaver). We are concerned some offerors are endeavouring to create what appear to be sufficient grounds to support certification, when no grounds exist. We are concerned investors who would not otherwise qualify as wholesale investors are self-certifying as eligible investors when there are no grounds for them to do so. Where this self-certification is encouraged by the offeror, there is an increased chance investors will invest without adequately understanding the risks involved and the value offered.

Guidance for wholesale investment offerors

Where generic and vague grounds are stated in an eligible investor certificate, the FMA considers they are not relevant or sufficient to meet the requirements of the FMC Act and, as a result, the person who has completed that certificate will not be an eligible investor.

The offeror should, when relying on an eligible investor certificate, ensure:

[6] Clause 42(1) of Schedule 1 of the FMC Act.

[7] It is common for offerors or promoters to provide pro-forma eligible investor certificates, for example, because eligible investor certificates require a statement about the offer to which it applies on the certificate. See clause 41(5) of Schedule 1 of the FMC Act.

- all requirements of certification have been completed;
- the grounds stated are relevant and support the certification of previous experience in acquiring or disposing of financial products that is relevant to an assessment of the financial products on offer; and
- there is no reason to believe the person does not have the previous experience certified.

If using a pro-forma eligible investor certificate, offerors should provide free-form text boxes so investors can articulate the grounds for certification themselves (which we regard as clear evidence for the investor understanding or not the financial products they are about to acquire). Accordingly, offerors who do provide pre-populated lists including irrelevant grounds for certification may not be able to rely on the investor's certification.

An offeror should have adequate record-keeping practices to ensure it is able to provide certificates relied on.

We are prepared to take regulatory action where incomplete or insufficient certification is relied on.

Provision of advice and confirmation of self-certification

To qualify as an eligible investor, a financial adviser, qualified statutory accountant, or lawyer must sign a written confirmation of the investor's certification. Under clause 43 of Schedule 1 of the FMC Act, the professional adviser must not confirm a certification unless, having considered the grounds for certification, they:

a) are satisfied the investor has been sufficiently advised of the consequences of certification; and

b) have no reason to believe that the certification is incorrect, or that further information or investigation is required as to whether the certification is correct.

Considering the grounds for certification requires the professional adviser to exercise professional judgment before confirming (b) above. Where the grounds stated in a certificate are irrelevant to the wholesale offer under consideration, further information or investigation will be required before the certificate can be confirmed.

Where the grounds describe prior investment activity in general terms, the professional adviser will need to consider if further information or investigation is required as to whether or not the certification is correct. Where the grounds include specific details of prior investment activity with similar features to the relevant transaction, that will support confirmation. For example, prior investment activity may have features similar to:

a) the offer's investment structure (for example, an investment in a Limited Partnership);

b) the type of financial product offered (for example, a managed investment product); and

c) the primary business activity carried on by the offeror (for example, financing property development).

A professional adviser must not confirm certification where there are no stated grounds, or where the grounds stated are irrelevant or otherwise insufficient, in which case further information or investigation is required. A breach of this obligation may cause the professional adviser to be involved in a contravention of a civil liability provision of the FMC Act.[8]

Eligible investor certificates can be distinguished from other safe harbour certificates[9] used in relation to the wholesale investor exclusion, as the law provides for certainty where an investor claims to qualify, together with supporting grounds. This is not the case with the eligible investor certificate, where the investor must certify as to the relevant matters and a professional adviser must sign a written confirmation of the certification.

An offeror cannot rely on an eligible investor certificate if they knew, or had reasonable grounds to believe, that the financial adviser, qualified statutory accountant, or lawyer:[10]

a) was an associated person[11] of the offeror, provider, or other relevant person; or

b) had, within the two years immediately before the relevant time, provided professional services to the offeror, provider, or other relevant person, or a related body corporate of the offeror, provider, or relevant person.

We found:

- no indication, from the documents provided, that offerors or related parties advised investors about whether they met the criteria to be eligible investor;
- evidence of one offeror supplying a preferred professional adviser for investors to have their eligible investor certificates confirmed, which may mean the offeror could not rely on the certificates;
- multiple instances of professional advisers confirming certifications where no grounds were stated in the eligible investor certificate; and
- three instances of a professional adviser confirming their own eligible investor certificate.

Guidance for financial advisers, qualified statutory accountants, and lawyers confirming eligible investor certificates

Financial advisers, qualified statutory accountants or lawyers who confirm eligible investor certificates must:

- consider the grounds for an investor qualifying for the certification set out in the certificate;
- be satisfied that the investor has been sufficiently advised of the consequences of certification; and
- have no reason to believe the certification is incorrect or that further information or investigation is required as to whether or not the certification is correct.

[8] Section 533 of the FMC Act.
[9] Clause 44 of Schedule 1 of the FMC Act.
[10] Clause 42(2) of Schedule 1 of the FMC Act.
[11] 'Associated person' has the meaning given to it by the definition in section 12 of the FMC Act.

Where a financial adviser, qualified statutory accountant or lawyer fails to meet the requirements above, they may also breach their duties and obligations under the rules of professional conduct that govern them.

If we become aware of a qualified statutory accountant, or lawyer who has confirmed a certificate without stated grounds or where the grounds stated are not relevant, we will consider referring this to the relevant professional body. In the case of financial advisers, we will consider their duties under sections 431I to 431P of the FMC Act, including compliance with the Code of Professional Conduct.

Guidance for wholesale investment offerors

An offeror should have processes in place to verify that the financial adviser, qualified statutory accountant or lawyer who has confirmed an eligible investor certificate:

- is not an associated person of the offeror; or
- has not, within two years of the offer, provided professional services to the offeror or a related party.

Hard-sell techniques

The FMC Act provides for civil and criminal liability on a person who incites, counsels, or procures an investor to give an eligible investor certificate that the person knows to be false or misleading in a material particular.[12]

We found aggressive or "hard-sell" techniques were used to sell financial products. Some undesirable practices and incentives were noted across advertising and sales functions, including advertising that emphasised it was easy to self-certify as an eligible investor. However, we did not find evidence of hard-sell techniques being used to pressure investors to self-certify as eligible investors.

If we become aware of evidence of such conduct, we are highly likely to take enforcement action.

Guidance for wholesale investment offerors

Offerors should be very careful how they reference eligible investor certificates when engaging with potential investors who may not qualify as eligible investors, to avoid knowingly inciting, counselling or procuring an investor to give an eligible investor certificate that is false or misleading in a material way.

[12] Clause 47(2) of Schedule 1 of the FMC Act.

Appendix: Relevant statutory provisions

Part 3 of the FMC Act - Disclosure of offers of financial products

39 Issue offers that need disclosure

An offer of financial products for issue requires disclosure to an investor under this Part unless an exclusion under Part 1 of Schedule 1 applies.

40 Sale offers that need disclosure

An offer of financial products for sale requires disclosure to an investor under this Part only if disclosure is required under Part 2 of Schedule 1.

41 Meaning of regulated offer and of regulated product

(1) In this Act, regulated offer—

(a) means an offer of financial products to 1 or more investors where the offer to at least 1 of those investors requires disclosure under this Part (regardless of whether or not an exclusion under Schedule 1 applies to an offer to 1 or more other investors); but

(b) does not include an offer of financial products to 1 or more investors if—

(i) the only investors who are able, under the terms of the offer, to acquire the products are investors to whom disclosure under this Part is not required; and

(ii) all of the investors who acquire the products under the offer are investors to whom disclosure under this Part is not required.

(2) In this Act, regulated product means—

(a) a financial product offered under a regulated offer; or

(b) a managed investment product in a registered scheme (whether or not there has been a regulated offer).

50 PDS must be given if offer requires disclosure

(1) This section applies if an offer of financial products is made to a person (A) to whom disclosure under this Part is required.

(2) A person must not accept an application, or issue or transfer the financial products to A, if a PDS for the regulated offer was not given to A before the application was made.

(3) In this section, application means an application for the financial products that is made by A.

(4) See sections 39 and 40 and Schedule 1, which contain provisions relating to when an offer of financial products to a person requires disclosure under this Part.

53 Offence to knowingly or recklessly contravene section 50

(1) A person who contravenes section 50 commits an offence if the person knows that, or is reckless as to whether, the offer of financial products to A requires disclosure under this Part.

(2) A person who commits an offence under subsection (1) is liable on conviction,—

(a) in the case of an individual, to imprisonment for a term not exceeding 5 years, a fine not exceeding $500,000, or both; and

(b) in any other case, to a fine not exceeding $2.5 million.

Schedule 1 of the FMC Act - Provisions relating to when disclosure is required and exclusions for offers and services

3 Offer to wholesale investor

(1) An offer of financial products to a wholesale investor does not require disclosure under Part 3 of this Act.

(2) A person is a wholesale investor if—

(a) the person is an investment business (see clause 37); or

(b) the person meets the investment activity criteria specified in clause 38; or

(c) the person is large (see clause 39); or

(d) the person is a government agency (see clause 40).

(3) A person is also a wholesale investor, in relation to an offer of financial products, if—

(a) the person is an eligible investor (see clause 41); or

(b) in relation to an offer of financial products for issue or sale,—

(i) the minimum amount payable by the person on acceptance of the offer is at least $750,000; or

(ii) the amount payable by the person on acceptance of the offer plus the amounts previously paid by the person for financial products of the issuer of the same class that are held by the person add up to at least $750,000; or

(iii) it is proposed that the person will acquire the financial products under a bona fide underwriting or sub-underwriting agreement; or

(c) in relation to an offer of a derivative for issue or sale, the notional value of the derivative is at least $5 million (see clause 49).

(4) In calculating the amount payable, or paid, for financial products for the purposes of subclause (3)(b) (i) or (ii), any amount payable, or paid, must be disregarded to the extent to which it is to be paid, or was paid, out of money lent by the offeror or any associated person of the offeror.

35 Meaning of retail investor and retail service

(1) A person is a retail investor, in relation to an offer of financial products, the supply of a discretionary investment management service, or any other relevant transaction, if the person is not a wholesale investor in relation to the offer or service.

(2) A service is a retail service if that service is supplied—

(a) to a retail investor; or

(b) to a class of investors where there is at least 1 retail investor in that class.

36 Meaning of wholesale investor

A person is a wholesale investor,—

(a) in relation to an offer of financial products, when the person is a wholesale investor under the definition of that term in clause 3; or

(b) in relation to the supply of a discretionary investment management service or any other relevant transaction, if (at the relevant time) the person—

(i) is an investment business (see clause 37); or

(ii) meets the investment activity criteria specified in clause 38; or

(iii) is large (see clause 39); or

(iv) is a government agency (see clause 40); or

(v) is an eligible investor (see clause 41).

41 Eligible investors

(1) A person (A) is an eligible investor, in relation to a relevant transaction or class of relevant transactions, if—

(a) A certifies in writing, before the relevant time,—

(i) as to the matters specified in subclause (2) or (2A) or (3) or (4) (as the case may be); and

(ii) that A understands the consequences of certifying himself, herself, or itself to be an eligible investor; and

(b) A states in the certificate the grounds for this certification; and

(c) a financial adviser, a qualified statutory accountant, or a lawyer signs a written confirmation of the certification in accordance with clause 43.

(2) In relation to an offer of financial products (or a class of those transactions), A must certify that A has previous experience in acquiring or disposing of financial products that allows A to assess—

(a) the merits of the transaction or class of transactions (including assessing the value and the risks of the financial products involved); and

(b) A's own information needs in relation to the transaction or those transactions; and

(c) the adequacy of the information provided by any person involved in the transaction or those transactions.

(2A) In relation to the supply of a financial advice service or a client money or property service (or a class of those services), A must certify that A has previous experience in acquiring or disposing of financial advice products that allows A to assess—

(a) the merits of the service or services to be provided (including assessing their value and the risks involved); and

(b) A's own information needs in relation to the service or services; and

(c) the adequacy of the information provided by any person involved in the service or services.

(3) In relation to the supply of a discretionary investment management service (or a class of those services), A must certify that A has previous experience in acquiring or disposing of financial products that allows A to assess—

(a) the merits of the service or services to be provided (including assessing its value and the risks involved); and

(b) A's own information needs in relation to the service or services; and

(c) the adequacy of the information provided by any person involved in the service or services.

(4) In relation to any other relevant transaction (or a class of those transactions), A must certify as to A's experience and other matters prescribed for the purposes of this subclause.

(5) The certification must specify the offer of financial products, market service, or other relevant transaction or class of relevant transactions to which it applies.

(6) In relation to the supply of a financial advice service or client money or property service (or a class of those services), the certification under subclause (1)(a)(ii) must include a certificate that A understands that the competency standards and requirements of the code of conduct will not be applicable (if relevant) and that the financial adviser or provider may not be a member of an approved dispute resolution scheme.

42 Offeror may not rely on eligible investor certificate in certain circumstances

(1) Clause 41 does not apply to an offer of financial products, the supply of a market service, or any other relevant transaction if the offeror, provider, or other relevant person, before the relevant time, knew that A did not in fact have previous experience of the kind referred to in clause 41(2), (2A), (3), or (4) (as the case may be).

(2) Clause 41 does not apply to an offer of financial products, the supply of a market service, or any other relevant transaction if the offeror, provider, or other relevant person knew, or had reasonable grounds to believe, that the—

(a) financial adviser, qualified statutory accountant, or lawyer referred to in clause 41(1)(c) was an associated person of the offeror, provider, or other relevant person; or

(b) financial adviser or qualified statutory accountant referred to in clause 41(1)(c) had, within the 2 years immediately before the relevant time, provided professional services to the offeror, provider, or other relevant person, or a related body corporate of the offeror, provider, or relevant person.

(3) Clause 41 does not apply to an offer of financial products, the supply of a market service, or any other relevant transaction if the certificate was given more than 2 years before the relevant time.

43 Confirmation of certification

(1) A financial adviser, a qualified statutory accountant, or a lawyer (A) must not confirm a certification of a person (B) under clause 41 unless A, having considered B's grounds for the certification,—

(a) is satisfied that B has been sufficiently advised of the consequences of the certification; and

(b) has no reason to believe that the certification is incorrect or that further information or investigation is required as to whether or not the certification is correct.

(2) A may be the financial adviser, qualified statutory accountant, or lawyer of B (but does not need to be).

44 Safe harbour if certificate given

(1) The purpose of this clause is to provide certainty (subject to clauses 45 to 46) to—

(a) an offeror (or other relevant person) that a person is a wholesale investor of the kind referred to in clause 3(2); or

(b) a provider (or other relevant person) that a person is a wholesale investor of the kind referred to in clause 36(b)(i) to (iv).

(2) A person (A) must be treated as being a wholesale investor as referred to in subclause (1)(a) or (b) (as the case may be) if A—

(a) certifies in writing that A—

(i) is a wholesale investor within the meaning of clause 3(2) or 36(b) (as the case may be); and

(ii) understands the consequences of certifying himself, herself, or itself to be a wholesale investor; and

(b) states in the certificate—

(i) the paragraph in clause 3(2) or the subparagraph in clause 36(b) that is claimed to apply to A; and

(ii) the grounds on which A claims that the paragraph or subparagraph applies; and

(c) gives a copy of the certificate to the offeror, provider, or other relevant person.

(3) A certificate under this clause ceases to be effective for the purposes of subclause (2) on the date that is 2 years after the date on which it was given.

45 Offeror or provider may not rely on safe harbour certificate if knows A was not in fact wholesale investor

(1) Clause 44(2) does not apply to an offer of financial products to A if the offeror, before the financial products are issued or transferred to A under the offer, knows that A was not in fact a wholesale investor within the meaning of clause 3(2) at the time the certificate was given.

(2) Clause 44(2) does not apply to the supply of a discretionary investment management service to A if the provider, before the investment authority is granted for the service, knows that A was not in fact a wholesale investor within the meaning of clause 36(b) at the time the certificate was given.

(3) Clause 44(2) does not apply to any other relevant transaction entered into with A if the relevant person, before the relevant time for that transaction (rather than the relevant time for the certificate), knows that

A was not in fact a wholesale investor within the meaning of clause 3(2) or 36(b) at the time the certificate was given.

46 Other provisions relating to certificates

(1) A certificate under clause 41 or 44 is effective only if the certificate—

(a) is in a separate written document; and

(b) is in the prescribed form (if any); and

(c) contains the prescribed information (if any); and

(d) is otherwise given in the prescribed manner (if any).

(2) If a person gives written notice to an offeror, provider, or other relevant person that the certificate under clause 41 or 44 is revoked, the offeror, provider, or relevant person may not rely on the certificate in respect of any subsequent offer, service, or transaction.

47 Offences relating to certificates

(1) Every person commits an offence who gives a certificate under clause 41 or 44 knowing that it is false or misleading in a material particular.

(2) Every person (A) commits an offence who incites, counsels, or procures any person to give a certificate under clause 41 or 44 that A knows is false or misleading in a material particular.

(3) Every person who commits an offence under this clause is liable, on conviction, to a fine not exceeding $50,000.

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