

FINANCIAL MARKETS CONDUCT BILL
SUBMISSION ON EXPOSURE DRAFT
AMP

Clause Number	Clause heading	Submission
Part 1	Preliminary provisions	
Section 6	'continuous disclosure obligation'	The words 'an obligation under' should be added after the word 'means'.
	'governing document'	For managed investment schemes, this is very broadly drafted. 'Instruments that govern the activities of the scheme' could potentially include investment management agreements, administration agreements, custody arrangements etc. Only the core governing document that directly affects the rights of investors of the scheme (e.g, the trust deed or participation deed under the current regime) should be caught. The 'governing document' definition therefore needs to be refined to reflect this.
Section 9	'managed investment scheme'	As a managed investment scheme is a crucial concept in the Bill, it would be beneficial for 'scheme' to be defined – e.g. the definition in the Financial Advisers Definitions Regulations as 'any agreement, arrangement, or understanding (whether express or implied), whether or not legally enforceable, and irrespective of substance or form'.
Section 10	Definitions of issued and issuer	It is confusing from these definitions if each contribution to a financial product that is continuously open to contributions (particularly managed investment schemes) is to be treated as an issue or not. Paragraph 10(1)(a) would appear to make the original offer the issue. However, subsection 10(1)(a) is 'subject to subsection (2)' and subsection (2) commences 'Despite subsection (1)(a)' when it would appear to be simply clarifying subsection (1)(a). Subsection (5) clarifies that a financial product that allows multiple contribution is a single financial product so it would be clearer if subsection (2) commenced 'The following are issues of financial products' and 'subject to subsection (2)' in section 10(1)(a) was removed. (Under the Securities Act a unit in a unit trust is a security. Unit trusts that are continuously open to contribution are little different from defined contribution superannuation schemes. The definitions should avoid any interpretation that a managed investment product that allows multiple contributions is other than a single financial product, particularly given the Securities Act background. If the intention is that each contribution to some financial products is to be treated as an issue, subsection (2) should be reworded to specifically include these products by regulation.)
Part 2	Misleading or deceptive conduct or false or misleading representations	
		We support the inclusion of these provisions in the Bill on the basis that it will incorporate relevant provisions in a single piece of legislation.
Part 3 and schedules 1 and 2	Disclosure offers of financial products	
Section 24	Issue Offers that need	Section 24 provides that an offer of financial products for issue requires disclosure under the Financial Markets Conduct

AMP

Clause Number	Clause heading	Submission
	disclosure	<p>legislation unless an exclusion under Part 1 of Schedule 1 applies.</p> <p>In addition, section 35 provides for certain situations when the requirements at section 34 for a PDS to be given need not be complied with.</p> <p>However, the concern is that neither of these options (and no other option within the Bill) exists to provide relief for the requirement of disclosure in relation to financial products pre-existing the investment statement or PDS regime which contain an option to convert. For example, it is common in the industry for whole of life insurance policies issued prior to the 1997 investment statement regime to contain an offer to convert to an endowment policy. That conversion option, as a matter of contract law between the insurer and the policyholder, can be exercised at any time. For a policyholder who wishes to exercise the power to convert now, there is arguably a requirement for the life insurer to prepare an investment statement for that endowment policy, in order to comply with the requirement that the policyholder receives an investment statement before subscribing for that security.</p> <p>It may be possible to interpret section 30 of the Bill (which relates to the treatment of offers of renewals or variations) as applying in this situation. For example, the power to convert and exercise of that power may be interpreted as an existing term and condition of the financial product and accordingly its exercise is not a variation requiring disclosure (section 30(2)). Alternatively, it could be considered that it is a variation of the original financial product within the terms of section 30(1) in which case Schedule 1, Part 1, clause 24 may provide relief. However, if this is to be the intention of the section 30, we submit that section 30 should be expanded to make it clear that this section does apply to financial products such as whole of life insurance products with a conversion option.</p> <p>Alternatively, we submit that such products should be granted relief under their own exclusion as permitted by section 24 of the Bill. This could be included by adding into Schedule 1, Part 1, a further relief for life insurance policies issued under the Securities Regulations 1983 or earlier, where there is a existing contractual right to convert to a separate security prior to the introduction of this Bill.</p>
Section 35	Certain situations in which section 34 does not need to be complied with	<p>See the comments on section 10 above. If managed investment product open to multiple contributions can be treated as multiple issues, a PDS should specifically not need to be provided if an investment statement has been provided. Alternatively, this could covered by regulations under subsection 35(c).</p>
Section 40	Meaning on material information	<p>Neither option for defining 'material information' is consistent with the purpose of a PDS set out in section 33 – to assist a prudent but non-expert person to decide whether or not to acquire a financial product.</p> <p>The purchase decision is for the individual to make based on their circumstances and what would be reasonable to consider in those circumstances. Option A moves from an individual choice to some sort of assessment of demand of the financial product. Information that, for good reasons, encouraged some purchasers while discouraging others, may not affect demand but may very well affect individual choices. At the very least the concept of demand is unclear. Is it overall demand or</p>

AMP

Clause Number	Clause heading	Submission
		<p>assessed from an individual perspective? The PDS applies to both listed and non-listed financial products so the 'demand' criterion is not generally appropriate.</p> <p>Also, there are some financial products that have investors who do not commonly invest in financial products, for example KiwiSaver. The PDS should be appropriate to such investors.</p> <p>'Material information' should therefore be reworded to 'information that a reasonable person would expect to influence a prudent but non-expert person to decide whether or not to acquire a financial product.'</p>
Section 47	Waiting period restriction does not prevent offeror from acting under another PDS	This section should refer to both another PDS or Investment Statement to cater for the initial lodgement of a PDS under this Act.
Section 53	Replacement PDS	<p>Section 53 makes a replacement PDS the PDS from the date of lodgement 'to events that occur after the lodgement'. However, section 47 allows the offeror to continue to accept applications on the previous PDS. If the previous PDS under which an offer was accepted was deficient in any way, without a reference to the provisions of section 47 section 53 would seem to imply that the purchaser would have no recourse as the replacement PDS is the PDS.</p> <p>Paragraph 53(1) should end '(unless reliance is placed on another PDS in terms of section 47 in which case the other PDS is the PDS for events that occur after the lodgement).'</p>
Section 55	Consents needed for lodgement	It may be difficult to get every director's consent to the lodgement, particularly if timeframes are short or directors are overseas. Regulations should prescribe for a similar mechanism to the current 'agent authority' mechanism under which a director can sign a written authorisation for another director to sign the prospectus on his or her behalf.
Section 58	When register entry may be amended	There is no time limit within which the Registrar needs to update the register entry. This section should require the Registrar to update the register entry within 2 working days.
Section 69	Prohibition of offers in the course of unsolicited meetings	<p>On the basis that it is the offer of financial products at a meeting situation that is to be restricted, 69(1)(b) should be deleted. A telephone call would meet the 'meeting' criteria of subsection (2). However, an email would be an electronic communication but the recipient can respond in their own time – much like any print advertisement.</p> <p>For simplicity paragraphs 69(3)(b) and (c) should be combined to allow any offer of a financial product to be made by a person who is able to under the Financial Advisers Act. The FAA covers the classes of adviser who can provide advice on the various products and the circumstances of the advice.</p>
Section 80	Duty to notify relevant matters and provide certain documents and information to Registrar	10 working days may be a more realistic time limit under section 80(1)(a), but this will depend on the nature of the prescribed change under section 80(2) which is not yet defined but will be defined in regulations.

AMP

Clause Number	Clause heading	Submission
Part 4 and schedule 3	Governance of financial products	
Section 113	Registration requirements for superannuation schemes	<p>The requirements of section 113 are not the same as those of the Superannuation Schemes Act (SSA), in particular:</p> <ul style="list-style-type: none"> • The purpose under paragraph (1)(b) is the principal purpose under the SSA; • Scheme membership is not restricted under the SSA as it is under Paragraph (1)(c). Other superannuation schemes can also be members and there is no restriction on residence of scheme participants. <p>As, unlike a KiwiSaver scheme, a superannuation scheme receives no particular benefits or subsidies over other MISs, there appears to be no policy reason for imposing the additional restrictions in this section. The registration requirements for superannuation schemes should be no more restrictive than under the SSA.</p> <p>There are some superannuation schemes that permit early withdrawals either to a very limited class of employees or to individuals on a case by case basis. These may not fall clearly within defined classes such as financial hardship or leaving an employer. This can be achieved without deviating from the principal purpose of the scheme. These superannuation schemes would be in breach of sections 113(1)(b) and (d).</p> <p>As an alternative to carrying on the existing regime for all superannuation schemes, we submit that there should be a “grandfathering” provision to permit existing superannuation schemes who meet the requirements under current legislation to continue in operation.</p> <p>We also submit that the New Zealand criteria are too restrictive and should include members who are employees of New Zealand companies but who are not New Zealand citizens and reside outside of New Zealand.</p>
Section 117	Contents of governing document for registered scheme	<p>Section 117(1)(f) requires the governing document of a registered scheme to ‘provide adequately for’ the fees that can be paid.</p> <p>As a scheme manager cannot know for certain the future costs of administering a scheme or investing scheme assets (e.g. regulatory, tax or investment management fee changes), there needs to be an ability for a manager to change fees. If the governing document is very prescriptive, then the FMA will need to approve fee increases as a fee increase will, prima facie, have a material adverse effect on scheme participants in terms of section 121.</p> <p>‘Provide adequately for’ does not provide sufficient clarity as to how prescriptive the governing document’s coverage of fees needs to be. Subsection 117(1)(f) should be reworded to ‘the types of fees than can be paid out of the scheme property to any manager, investment manager, administration manager, supervisor or custodian and how those fees may be changed’.</p> <p>A new section 117(g) should be inserted to include ‘any rights any manager, investment manager, administration manager, supervisor or custodian to be indemnified out of the scheme property (and any other matters required by section 118).</p> <p>If ‘provide adequately for’ is interpreted narrowly and the governing document is prescriptive, then there would need to be much more guidance in the Bill for how the FMA would</p>

AMP

Clause Number	Clause heading	Submission
		exercise its consent under section 121 in relation to fee increases – e.g. the KiwiSaver Act's coverage of unreasonable fees.
Section 121	Changes to governing document	<p>For 'defined benefit schemes' written consent by all members is required for changes to the governing document that may adversely affect participants. This differs from the current Superannuation Schemes Act 1989 requirement (section 9). However, only special resolution consent is required for changes to the governing document for schemes other than 'defined benefit schemes'.</p> <p>This does not appear to recognise that there may be defined contribution schemes or hybrid schemes which fall outside the 'defined benefit scheme' definition and this lowers the threshold for changes to the governing document of those schemes. These types of schemes can include those with reserve accounts, those that defer vesting of employer contributions, and those that provide for insured benefits or total and permanent disability benefits. Such schemes share essential features with defined benefits schemes and should therefore continue to be subject to the current Superannuation Schemes Act 1989 requirement for written members consent to changes to the governing document which would have the effect of adversely affecting entitlements.</p> <p>We also note that approval is required for changes that affect the members' benefits, whether that benefit is attributable to membership before or after the date of the amendment. This significantly expands the current Superannuation Schemes Act 1989 provision (section 9) under which approval is only required for changes that affect benefits attributable membership up to the date of the amendment. We question why this change was considered necessary and submit that the provision should be reverted to the Superannuation Schemes Act 1989 position. We do not see any compelling reason to modify the status quo and the considerable case law that has accumulated.</p>
Section 122	Power to make FMA and court-approved changes to governing documents	Subsection 122(1)(a) should be changed to the amendment or replacement being 'necessary or desirable' as simply being 'necessary' can be a high test to meet.
Section 133	Manager must report contravention or possible contravention of issuer obligations	To avoid unnecessary compliance costs there needs to be a higher likelihood of contravention of issuer obligations before the manager needs to report to the supervisor. 'May have contravened' should be replaced with 'is likely to contravene' and 'possible' in paragraph (a) replaced with 'probable'.
Section 135	Requirement to have a supervisor	Paragraph 135(2) requires the trustees of a restricted scheme to contract an external person to hold scheme assets as custodian. This will impose further costs on restricted schemes (in addition to the need to appoint an independent trustee) and is inconsistent with Cabinet's decision to 'grandfather' existing workplace schemes (paragraph 181 of the February 2011 Cabinet Paper). Restricted schemes should not be required to have separate custodians of scheme assets – the trustees already have legal ownership of scheme assets.
Section 138	Trustee duty to refuse to act on wrongful directions	This provision corresponds to section 12(1)(c) of the Unit Trusts Act 1960. However, it expands on this provision by providing that the Supervisor must not act on a manager's instruction where it is manifestly not in the best interest of the

AMP

Clause Number	Clause heading	Submission
		<p>investors. The current requirement is that the Trustee must not act on a manager's instruction where it is manifestly not in the interests of unitholders. The reasoning behind including the word 'best' is unclear. However, it significantly raises the standard of oversight that will be required by Supervisors such that the Supervisor would be second-guessing the manager's investment decisions, even where they fall within the SIPO. Such decisions fall within the preserve of the fund manager, and provided the direction falls within the scope of the SIPO, the governing document and the law, such investment decisions should not be second guessed in this way. We therefore suggest the disjunctive 'or' between section 138(1)(a) and (b) be changed to the conjunctive 'and'.</p>
Section 147	Actuarial examination of defined benefit scheme or life benefit scheme	<p>As a defined benefit scheme will often be a restricted scheme there may not be a supervisor (as provided in section 111). 'If any' should therefore be added to the end of paragraph 147(4)(b).</p> <p>'Business of life insurance' in paragraph (1)(b) should be defined and be consistent with the definition of 'life insurer' under the Insurance (Prudential Supervision) Act.</p>
Section 153	Additional restrictions on transactions of restricted scheme	<p>This section should allow for FMA approval of breaches of the 5% threshold (e.g. where it is exceeded on initial registration or inadvertently breached).</p> <p>For the situation where a restricted scheme is provided or sponsored by a fund manager (such as AMP) for its employees, the 5% threshold should be able to be exceeded to the extent that the scheme provider and the fund manager have an arms-length relationship (ie. each party is acting independently and in its best interests).</p>
Part 6	Licensing and other regulation of market services	
Section 370	Inclusion of DIMS as a licenced service	<p>All requirements governing the provision of DIMS should be in the FAA. The approach of splitting the governance of DIMS between the two pieces of legislation is confusing and inconsistent. If a declaration is made under subpart 3 of Part 8 to require a DIMS provider to be licenced there is the potential for inconsistent interpretation between the two Acts.</p> <p>The FAA regulates the financial services of financial advice, investment planning, DIMS and broking. The FMCA is principally focussed on financial products and the conduct of markets in those products. It is more consistent to have all service regulation in one place.</p> <p>The FAA already has the concept of personalised and non-personalised services (but see the comments on section 415 below).</p> <p>(A person cannot provide a DIMS unless permitted to by section 17 of the FAA. If regulation of DIMS is split between the two Acts, section 17 of the FAA would need to have an exception for DIMS Services provided under the FMCA.)</p>
Section 370(2)	Exemption from licencing	<p>To avoid duplication of licencing requirements, the exemptions in clause 370(2) should extend to persons that are required to have a licence under either the Insurance (Prudential Supervision) Act or registered under the Reserve Bank of New Zealand Act.</p>

AMP

Clause Number	Clause heading	Submission
Section 382	FMA list of licensees	For the public to have a single point for information on all financial service providers, the register of financial service providers under the Financial Service Providers (Registration and Dispute Resolution) Act should include all the information that is proposed under clause 382.
Section 415	Meaning of provider of discretionary investment management service	<p>Under subsection (2) a DIMS is personalised if the mandate has been tailored to take account of the financial situation or goals of a named investor. However, unlike financial advice, a DIMS as is not inherently about personal circumstances – it is simply a delegated authority to buy and sell financial products. If that authority is for an identifiable individual, it should be classified as personalised with governance of the service consistent with other personalised services under the FAA. As the Bill is presently drafted, a simple delegation by an individual without taking account of goals would be a class DIMS and regulated under the FMCA rather than the FAA. (This is also an issue with the FAA.) The proposal is that financial advice under the FAA be extended to advice on whether to obtain or withdraw from a DIMS. That advice could conceivably not cover personal circumstances or goals but simply the benefits of using a skilled DIMS provider.</p> <p>It is more consistent for a DIMS provided to an individual to be treated as personalised and covered by the FAA (an example of the potential for difficulty in interpretation in separating the regulation of DIMS between two Acts).</p> <p>Definitions for ‘investment authority’ and ‘investment mandate’ have not been provided so we cannot comment on consistency (e.g. sections 420 and 421).</p>
Section 420	Requirement for agreed investment mandate with retail investor	This section could reasonably apply to both retail and wholesale investors.
Section 421	Action that must be taken on limit breaks	This section would appear to apply to both wholesale and retail investors. On the basis that a limit break with a wholesale investor would be a matter for agreement directly with the investor, only limit breaks for retail investors should be reported to the FMA.
Section 426	Requirement for custodian	It is not clear what ‘custodian requirements’ are. Are they those set out in subsection (2), do they include section 427 and/or will they be specified in regulations?
Part 8	Regulations and exemptions	
Section 513	Procedural requirements	<p>Subsection (1)(c) requires the FMA to consult with persons that the FMA considers will be substantially affected by the declaration. However, subsection (2) provides that failure to consult does not affect the validity of the declaration.</p> <p>Given the potential impact of a designation change on the issuer there needs to be provision for review or appeal of an FMA declaration.</p>

AMP

Clause Number	Clause heading	Submission
Part 9 and schedule 4	Miscellaneous provisions	
Section 575	Former enactments apply if no prospectus is required	<p>On the basis that an exemption from registering a prospectus is granted on reasonable grounds, the period for allowing issues under the Securities Act where no prospectus is required should be consistent with prospectus issues. A period of 2 years should be allowed consistent with section 578.</p>
Section 585	Reregistration process for existing schemes	<p>The transition of schemes from their former legal structures into registered managed investment schemes may result in a transfer or deemed transfer of scheme assets. This would trigger New Zealand and overseas tax liability. Even though New Zealand tax liability could and should be dealt with in transitional provisions that, for example, deem there not to have been any transfer of assets, such provisions are unlikely to be effective under overseas tax law. We are particularly concerned about the position of WINZ, which is a GIF.</p> <p>Accordingly, and to avoid the potentially large and unwarranted overseas tax liability, existing GIFs should be grandfathered, and allowed to continue to be governed by the Trustee Companies Act 1967. These grandfathered GIFs could still fall under the MIS regime and become subject to its requirements but would remain legally structured as GIFs under the Trustee Companies Act 1967.</p> <p>There are a number of transitional issues that need to be considered for the re-registration of schemes as managed investment schemes;</p> <ul style="list-style-type: none"> ➤ Governing document changes and investor consents ➤ Tax (discussed above) ➤ Further disclosure <p>A mechanism for the efficient updating of governing documents to come into compliance with the new regime needs to be considered. The section 122 provision for FMA approved changes only applies to registered schemes. A scheme cannot be registered until the governing document meets the requirements of Part 4 and the directors have certified this. So the current drafting renders the section 122 mechanism unavailable as a transitional measure.</p> <p>We therefore suggest provisions similar to those contained in the Superannuation Schemes Amendment Act 1990 in respect of transition. This allowed Trust Deeds to be amended with the consent of the Government Actuary (now FMA) for the purposes of coming into compliance with a new structure, regardless of any other rules to the contrary that would prohibit such changes or impose additional compliance hurdles. This dealt with the problem that would have otherwise arisen: the need to obtain the consent of the very large number of members of these schemes.</p> <p>The Superannuation Schemes Amendment Act 1990 also provides a model for dealing with NZ tax issues arising in respect of those schemes that are not grandfathered under existing legislation (as suggested above). These provisions deemed there to be no NZ tax liability arising as a result of the transition or transfer over to the new governance regime.</p> <p>Any transitional provisions should also make it clear that on reregistration under the MIS regime, there is no need to make full disclosure to those investors under the new disclosure regime. The fundamental nature of the investment will not</p>

AMP

Clause Number	Clause heading	Submission
		have changed. There is therefore no compelling need for full disclosure to again be made to investors. The transitional provisions should make this clear.
Schedule 4	Financial Reporting Act amendments	Many funds at the retail level will invest a significant portion of their assets into one or more underlying wholesale funds associated with the retail fund provider. Currently, it is unclear whether the underlying fund will become subject to the Financial Reporting Act 1993 as a 'recipient of money from a conduit issuer' under section 4A of that Act. While the industry view has generally been that the underlying wholesale funds do not fall within this definition, the Financial Reporting Act (HSBC Global Investment Funds and HSBC Portfolios) Exemption Notice 2010 notice has made the position unclear. The draft Bill provides an opportunity to clarify whether underlying wholesale funds are intended to be caught by these rules.