



Institute of Finance Professionals New Zealand Inc.

SUBMISSION

To: **Ministry of Economic Development**

Subject: **Submission on the Financial Markets
Conduct Bill**

Date: 6 September 2011

INTRODUCTION

1. INFINZ is the peak industry body for capital markets professionals in New Zealand. INFINZ has a membership of approximately 680 individuals drawn from across the capital markets and includes treasury professionals, investment analysts, fund managers, bankers, lawyers and students.
2. The objectives of INFINZ are:
 - To promote quality, expertise and integrity in the New Zealand finance and capital markets.
 - To promote the proper control and regulation of the New Zealand finance and capital markets.
 - To promote, support and improve the availability, relevance and standard of professional development and education of members and within the New Zealand finance and capital markets.
 - To provide a forum for members to meet, discuss and educate themselves on issues relating to the New Zealand finance and capital markets.
 - To work to ensure the New Zealand finance and capital markets are relevant and efficient and generally to add value to the operation of the New Zealand finance and capital markets.
 - To act as an advocate for its members wherever necessary to support and promote the objects.
 - To serve the investing public by ensuring the standards of members are maintained.

3. INFINZ formed a working group which prepared submissions on the Review of Securities Laws discussion document in August / September last year and has since worked with MED officials on aspects of the reform. We welcome the opportunity to provide submissions on the Exposure Draft. We are aware that several of our members have provided detailed submissions on Exposure Draft, so we have focused largely on the key matters in the legislation that impact on the key objective of promoting “the confident and informed participation of businesses, investors, and consumers in the financial markets” (an objective we strongly endorse).

4. INFINZ views Exposure Draft as a major improvement on existing financial markets legislation and as a sound legislative framework for building a strong capital market. Because some of the most important and difficult aspects of the framework have been left to the regulation-making stage, it is vital that the consultative approach adopted by MED is continued. INFINZ is committed to continuing its engagement in developing this framework and in helping to evolve other strong institutions in the domestic capital markets.

Clause number	Clause heading	Submission
Part 1	Preliminary provisions	
3	Main purposes	<p>We consider that the objectives for Exposure Draft in clauses 3 and 4 are both clear and appropriate and we also commend that explicit reference is made to these objectives in various parts of Exposure Draft concerning decisions and discretions.</p> <p>In fulfilling the objectives set out in the Exposure Draft, INFINZ hopes that at least as much attention is paid to achieving the positive visions underlying this legislation (most notably as set out in the report of the Capital Markets Development Taskforce) as to addressing past events. For example, we welcome the tangible legislative steps recently taken toward establishing a framework for New Zealand to become a domicile for international funds. The work in the Exposure Draft on Managed Investment Schemes is also a key part of that project.</p> <p>In relation to the retail debt and equity capital markets, it is an important time because those markets enjoyed strong growth during the GFC as most other markets around the world were closed. That is now no longer the case and there is very strong competition to the retail markets from international wholesale funding markets, such as the EMTN and USPP markets and emerging debt capital markets in Asia, while the equity market continues to struggle to gain ground against the dominance of private equity.</p> <p>INFINZ believes that the most significant issue is growing the appeal of</p>

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		<p>that market to high quality issuers and to domestic growth enterprises that are predominantly privately held and funded in New Zealand.</p> <p>Fundamentally, the New Zealand market remains small and illiquid according both to OECD comparators and to its potential. For example, of the top 200 companies in New Zealand, only 52 are listed on NZX, and only around 30% of the large productive enterprises in New Zealand are listed. Equally on the fixed interest / debt side, it is important to recognised that no market exists in a competitive vacuum. Strong issuers – who are the key to the market in terms of liquidity and reducing the risks from participation – are characterised by the choice they have in offering formats. The involvement of these sorts of issuers in the domestic retail market is crucial not just to the strength and vibrancy of that market but to retail investor outcomes.</p>
6	<p>Interpretation – “approved rating agency”</p>	<p>We submit that the Exposure Draft would be improved by recognising the role played by credit rating agencies (and by other similar third party analytical organisations, such as fund rating agencies) in providing an independent source of analysis and information with respect to issuers. This would make the regime consistent with recent Government policy in other areas of the financial markets, for example in relation to non-bank deposit takers, who are required to have an publish a credit rating (currently under Part 5D of the Reserve Bank of New Zealand Act 1989 and soon under the Non-Bank Deposit Takers Bill). If this is not done, there is a risk New Zealand could get into a situation such as occurred in Australia where rating agencies withdrew from the market as a result of regulatory issues, meaning that their credit ratings could no longer be disclosed to retail investors. This would be an adverse development both for the market and for investors.</p>
6	<p>Interpretation – “derivatives issuer”</p>	<p>This is a definition whose scope is unclear, particularly when combined with the definition of “in the business of”. For example, in the electricity hedging market the main gentailers (and sometimes also significant buyers or co-gen suppliers of electricity) enter into OTC hedging arrangements with each other, and not involving any bank or financial institution. This is not their only business or their principal business, but it is undertaken with some regularity so could be thought of as a “business” of them. This is mainly an issue to the extent that Exposure Draft imposes obligations on derivatives issuers otherwise than in the context of regulated offers (specifically, clause 428 which contemplates regulations relating to the holding and application of investor funds and property by derivatives issuers, regardless of whether the derivatives issuer is licensed or makes any regulated offer). To the extent this might reduce the incentives for gentailers and others to involve</p>

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		<p>themselves in the electricity hedging market, it would conflict with the policy in developing the electricity hedging market (an outcome of the 2010 Ministerial Review was that the Minister of Energy and Resources requested the five major generators with over 500 MW of capacity to develop an active market for exchange-traded electricity contracts – refer generally http://www.ea.govt.nz/our-work/programmes/market/hedge-market-development/).</p> <p>The easiest solution to this would be either: (1) to exclude situations where both parties to a derivatives transaction are wholesale investors; or (2) provide that clause 428 / 429 only apply to regulated offers, those who are required to be licensed, and those dealing in derivatives (noting that the existing Futures Industry (Client Funds) Regulations 1990 do not apply to principal-to-principal transactions or to a recognised clearing house and that obligations of the sort contained in those Regulations would not work in the context of electricity hedging and other OTC transactions).</p>
6	<p>Interpretation “governing document”</p>	<p>We note that “governing document” for debt securities is defined (correctly) as a “trust deed”. However, with the extension of the meaning of “debt securities” under clause 8(1)(b)(iii) to redeemable shares, this would need in some manner to include or refer to the Constitution of the issuer in respect of such instruments.</p>
6	<p>Interpretation – “underwriter”</p>	<p>We submit that a definition is required of “underwriter” in the light of the new policy of imposing liabilities and obligations upon underwriters in connection with retail offerings (under clauses 62 and 462(b)(iv)) and the fact that “underwriter” does not have an accepted market meaning.</p> <p>The U.S. retail securities regime has long featured liability for underwriters. The definition of that term under the Securities Act of 1933 (U.S.) – section 2(a)(11) – is:</p> <p><i>The term “underwriter” means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors’ or sellers’ commission. As used in this paragraph the term “issuer” shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common</i></p>

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		<p><i>control with the issuer.</i></p> <p>This is a reasonable starting point, but if the concept of underwriter liability is to be adopted, an important policy choice will arise (in terms of New Zealand conditions and practices) of whether this should extend to:</p> <ul style="list-style-type: none"> • Only the 'arrangers' and 'joint lead managers' for the offer – ie those who are engaged by the issuer to advise and assist with the offering process, including participation in due diligence • The arrangers, lead managers and co-managers for the offer – but noting that the latter group normally have very little part in the offering process and usually do not have privity with the issuer (usually the co-manager term is assigned in recognition of agreeing to take a firm allocation of a stipulated level) • All institutions who have engaged in the distribution process as intermediaries (as opposed to end subscribers), which will include the arrangers, lead managers and co-managers for the offer, but will also add in retail brokers, financial advisers and other intermediaries who will ultimately distribute the securities to their clients but who – like co-managers – will not have had any privity with the issuer or any involvement in preparing the offering documentation and other publicity or in the due diligence process.
7	<p>Meaning of financial product – derivatives and the Gambling Act 2003</p>	<p>You raised a query about whether provisions are needed to deal with the application of the Gambling Act 2003 to derivatives.</p> <p>In our view the law on this has always been clear and is well summarised by Hobhouse J in <i>Morgan Grenfell & Co v Wellwyn Hatfield District Council</i> [1995] 1 All ER 1. If anything, in our view, the Gambling Act 2003 made this position even more clear with its concepts of “seeking to win” and the fact that its content and context make it clear that it has nothing whatever to do with legitimate financial markets transactions, whether for hedging for investment purposes.</p> <p>It may be that some of the commentary in the market raising doubts about this matter arose from comments in the Select Committee report in relation to the Gambling Act 2003, which said:</p> <p><i>We acknowledge that such a broad definition of “gambling” can capture some transactions that are not generally considered to be “gambling” such as stock market investments. However, the</i></p>

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		<p><i>current legislative approach is to exclude some specified transactions from the Gaming and Lotteries Act. [There followed a footnote reference to what is now section 40 of the Securities Markets Act 1988] If further types of financial transactions are to be excluded, we consider this should occur in financial statutes, which would deal with new financial products as they are introduced into the market.</i></p> <p>The issue with this is that formulations and presumptions such as those set out in the <i>Morgan Grenfell</i> case are not particularly amenable to statutory treatment, or at least not in a way that does not either miss the point of the judgment to be made between valid commercial transactions on the one hand and illegal unlicensed gambling transactions on the other. If an approach is taken along the lines of section 40 of the SMA, the risk is that it obfuscates the position more by suggesting that whether or not a purported derivatives transaction is a gambling transaction should turn on the form of that derivative and the parties to it, which surely cannot be the case (and is not the case under the <i>Morgan Grenfell</i> line of authority).</p> <p>As a result, we do not see how “financial statutes” can improve the position as set out in the common law. Perhaps the most pragmatic solution is to record some sort of statement about this in an explanatory note or in other statutory materials in connection with the Exposure Draft.</p>
8(1)(b)(iii)	<p>Definition of debt security – redeemable shares</p>	<p>INFINZ notes the extension of the definition of “debt security” in clause 8 of the Exposure Draft to include “a redeemable share in an entity”. INFINZ accepts the logic for treating holders of redeemable shares, which have a fixed repayment amount and either a fixed repayment date or prepayment on demand by the investor. Such redeemable shares are analogous to and the economic equivalent of other forms of debt security such as subordinated debt securities. INFINZ submits a definition of redeemable shares is required to reflect the concept described above.</p>
10	<p>Definition of “issued” – managed investment scheme</p>	<p>An issue arises throughout the Exposure Draft in relation to the use of the term “issued” in relation to managed investment schemes. Under the current Securities Act 1978 a managed funds product, such as a unit in a unit trust, is considered to be issued to a person when that person receives that product. This means that where an existing investor in a managed fund subscribes for further securities in that fund, there must be a registered prospectus and current investment statement for that product.</p>

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		<p>Under the Exposure Draft's definition of "issued", it is unclear whether subsequent issues of certain managed investment products to existing investors require fresh disclosure. Clause 10(1)(a) of the Exposure Draft provides:</p> <p><i>(a) a financial product is issued to a person when it is first issued, granted, or otherwise made available to a person (subject to subsection (2)):</i></p> <p>Clause 10(2)(a) of the Exposure Draft makes it clear that subsequent issues of interests in KiwiSaver Schemes and superannuation schemes do not need fresh disclosure to members of those schemes:</p> <p><i>(a) a managed investment product that is an interest in a superannuation scheme or KiwiSaver scheme is issued to a person when the person becomes a member of the scheme:</i></p> <p>However, it remains unclear whether subsequent issues of financial products in other kinds of managed investment require fresh disclosure. The existence of clause 10(2)(a) seems to indicate that fresh disclosure is required. We consider that it would be preferable if a new provision were inserted into clause 10 making this clear.</p>
Part 3	Disclosure of offers of financial products	
33, cl 2 of Schedule 2	Purpose of PDS / register	<p>INFINZ notes that the PDS, like the current investment statement, will continue to be a document targeted at retail investors, and that the purposes of the Register of Securities include to:</p> <p><i>assist any person to perform a financial adviser service (within the meaning of the Financial Advisers Act 2008) or to otherwise comment on an offer of financial products</i></p> <p>Together, the PDS and register entries are to contain all material information relating to the regulated offer.</p> <p>INFINZ welcomes the explicit reference to the mandatory disclosures serving the purposes of securities analysts and financial intermediaries. Given the importance of this, and the concern that the register could become an unstructured dumping ground for information by risk-averse issuers, INFINZ would recommend including this purpose in Subpart 2, rather than in the Second Schedule.</p> <p>INFINZ also strongly supports the apparent policy of more targeted disclosure, depending on the nature of the product and the audience. The market has been ill-served by the prescriptive, one-size-fits-all approach of the Securities Act.</p> <p>The PDS/Register framework represents a significant opportunity to</p>

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		<p>achieve targeted disclosure that minimises compliance costs that add no value, but supports the requirements of the securities analyst / financial intermediary sector which, INFINZ submits, is a vital component in achieving a strong, credible and well-informed market.</p> <p>Although the greater part of formulating this precise framework is going to be left to the regulating-making stage, we consider that it is important that as early as possible, including during the Select Committee process, there is engagement on what outcomes are intended to be achieved from the mandatory disclosure regime, including how it can be used to support and enhance the financial intermediary sector, and also on the proposed format for the various forms of PDS for different financial products.</p>
40	Material information	<p>INFINZ supports adoption of Option B, as opposed to Option A, in relation to the meaning of Material Information, which is consistent with New Zealand case law and practice.</p>
Subpart 4	Ongoing disclosure and updating of registers	<p>As with the rest of the disclosure regime, the ongoing disclosure requirements remain to be developed in regulations. Although compliance cost is always a consideration that will require a careful balance in framing requirements, INFINZ in principle welcomes the opportunity to develop the Register of Securities as a platform for issuers to disclose meaningful information to the market. Publication of that information will also make it easier for the media and commentators/analysts to be more aware of what is happening with an issuer and therefore better disseminate that information.</p>
41	Consent of person to whom statement is attributed	<p>The new provisions in relation to “statements”, replacing the existing provisions of the Securities Act concerning statements by “experts”, raise the issue of how credit ratings agencies will be treated under the Bill. It is highly unlikely that rating agencies will entertain signing section 41 consent forms, with the liability consequences attached to that under clause 462(b)(v), so the choice is likely to be a straightforward one between explicitly facilitating the place of credit ratings and fund ratings in the retail market, or ending up in the same position as Australia, where credit ratings are not permitted to be disclosed to retail investors.</p> <p>INFINZ strongly submits that the latter would not be an acceptable outcome in New Zealand. First, it is contrary to Government policy, as evidenced for example in Part 5D of the Reserve Bank of New Zealand Act 1989 and in the new Non-Bank Deposit Takers Bill. Secondly, credit rating agencies provide an invaluable source of independent analysis on issuers.</p>

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		<p>The image of credit rating agencies was tarnished as a result of the ratings given to CDOs and subprime mortgage securitisations during the GFC and, with less justification, as a result of sovereign credit rating controversies in relation to Greece and the United States. However, the performance and methodologies with respect to corporate credit ratings have withstood the challenges of the GFC, such that ratings remain an important analytical tool both for investors and for regulators.</p> <p>INFINZ submits that provision should be made not just for credit rating agencies, but for fund rating agencies such as Morningstar.</p> <p>A further matter that would be useful would be to make it explicit that rating reports are not “advertisements” and so can be freely made available to investors. They should not be because they are not ‘instigated by’ the issuer, but assertions are sometimes made to the contrary.</p>
45-46	Waiting period	<p>It is not clear to INFINZ why the policy decision has been made to move away from pre-vetting of offering documents to the situation where they may be reviewed by regulators following launch and a stop order made if they are deficient. There were shortcomings in the previous pre-vetting regime, most notably that it applied only to the investment statement and not the prospectus, but it is unclear why New Zealand would have adopted the Australian approach which has held back the debt capital market there because of issues around uncertainty of execution and the very adverse reputation consequences that would flow from needing to pull an offer that has been announced to the market.</p> <p>This is a critical issue that we submit needs to be urgently addressed, not just in relation to the Bill but in relation to the corresponding changes to the Securities Act (which does not necessarily require a legislative change but a continuation of the pre-vetting practice).</p> <p>If a stop order were to be issued post-launch, it would do a devastating amount of damage to the credibility of the domestic market and to its appeal to the sort of high quality issuers that it is vital to attract to it. Importantly, this is not necessary to achieve the objective of enabling the FMA to require high disclosure standards, an objective that INFINZ strongly supports.</p>
Subpart 3	Advertising and publicity	<p>INFINZ welcomes the principles-based approach to advertising regulation, but submits that there would be merit in continuing the explicit prohibition on any statement that a security is “safe or free from risk” (refer regulation 36 of the Securities Regulations 2009).</p>

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Part 4	Governance of financial products	
Subpart 2	Governance of offers of debt securities	<p>INFINZ supports the continuation of the existing requirement in the Securities Act 1978 to have a trust deed and a licensed supervisor in respect of regulated offers of debt securities. The role of a supervisor in relation to debt securities has recently been reinforced in the non-bank deposit-takers regime in the Reserve Bank of New Zealand Act 1989. Supervisors (or trustees, to use the current language) serve a useful role in terms of collective representation for investors and a focal point for monitoring their interests.</p> <p>In Part 4, Subpart 2 – Governance of debt securities, INFINZ believes that the Exposure Draft needs to expressly address the dual regulation of non-bank deposit-takers under Part 5D of the Reserve Bank of New Zealand Act 1989 (soon to be replaced by the Non-Bank Deposit Takers Bill) and under the Exposure Draft.</p> <p>A policy decision should be made as to whether the Reserve Bank or the FMA is to have primacy in the regulation, and power to give directions to issuers and their supervisors. It is important that this matter is addressed because in certain overseas jurisdictions, during the global financial crisis, there was tension leading to confusion and inaction where prudential supervisors took a different view to conduct supervisors. Specifically, in a crisis prudential supervisors may prioritise differently public disclosure compared to rehabilitation, in contrast to conduct supervisors.</p> <p>INFINZ submits that, where the two regimes overlap the Reserve Bank as the specialist prudential regulator with responsibility in this area should take primacy over the FMA.</p> <p>In relation to the extended definition of debt security under clause 8 to include redeemable shares, INFINZ considers that Holders of redeemable shares have the same need for collective representation as do bondholders, given that the directors of the issuer will be appointed by the ordinary shareholders, not by the holders of redeemable shares. The directors of the issuer, generally act in the interests of the ordinary shareholders.</p> <p>However, given that redeemable shares will be constituted by the Constitution of the issuer, we recommend that the references to “trust deed” in subpart 2 be amended to be references to a “governing document” in a similar way to the approach which has been taken in relation to managed investment schemes. In that way it would allow, in relation to redeemable shares for the Constitution of the issuer, to contain the required provisions and to provide for the role of the</p>

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		supervisor.
Subpart 3	Registration of Managed Investment Schemes	<p>INFINZ welcomes the approach of creating a single overarching governance framework for managed investment schemes, rather than the historical approach of separate legislation for each sub-category. Having said that, it is important that with the repeal of that historical legislation, key protections and mechanisms tailored to the various regimes are not lost. In the limited time available, we have not undertaken such a review, but we request that, if they have not already done so, officials consider carefully the effects on limited partnerships, unit trusts, superannuation schemes, and KiwiSaver schemes.</p> <p>The introduction of limited partnerships under the Limited Partnerships Act 2008 has been a useful addition to the array of investment structures available in New Zealand. A key feature of this regime has been its comparability to limited partnership models in other jurisdictions, making it easily understandable by foreign investors, as well as being attractive to New Zealand investors. It is important that none of this is lost in the implementation of the new regime. Limited Partnerships will, it appears, fall within the definition of managed investment schemes, which is appropriate given the need arising for collective representation. But in the limited time available, we have not been able to confirm that the provision of the Exposure Draft will not impact on the benefits and international recognition of the limited partnership model.</p>
109	Need to register MIS	<p>Clause 109 of the Exposure Draft creates a mechanism to require registration of managed investment schemes for regulated offers of managed products and to permit registration of other managed investment schemes. INFINZ supports this valuable flexibility, which we can see may facilitate, in the future, the use of New Zealand domiciled managed funds for offer into overseas markets.</p> <p>In light of that, INFINZ supports the MED's tentative conclusion in its request for submissions and commentary document that all registered MIS would be required to publicly file audited financial statements under the Financial Reporting Act, whether or not they engaged in regulated offers.</p>
125, 126A	General duties applying in exercise of manager's functions	<p>In clauses 125 and 126A of the Exposure Draft, proposed duties of the manager are set out. INFINZ supports the duties proposed in relation to the manager's functions. In addition, we draw your attention to the duty contained in the Unit Trusts Act 1960 in section 12(1)(a) of that Act. It seems to INFINZ that it would be appropriate to continue to</p>

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		apply that duty.
138(1)	Duty of supervisor to refuse to act on wrongful direction	<p>In clause 138(1) of the Exposure Draft each of the words “must” should be replaced with the word “may”. To mandatorily require supervisors and custodians to refuse to act on a wrongful direction would be commercially unworkable. Many situations may arise where a transaction would be in breach of a governing document or a statement of investment policy and objectives, through no fault of the manager, and to default on the transaction would unreasonably disrupt the market. The better solution, rather than a mandatory prohibition, would be to provide a mechanism permitting a supervisor to require a transaction to be unwound after the event.</p>
153	Additional restrictions on transactions of restricted scheme	<p>Clause 153 imposes additional restrictions on transactions of restricted schemes. INFINZ considers that this provision is likely to give difficulties in practice, and does not support what it sees as a partial reversion to the “authorised list” approach which was rejected by the changes introduced by the Trustee Amendment Act 1988 which introduced the prudent person approach to investments. That was a profoundly positive reform. While INFINZ understands the concern which officials may have that superannuation funds may be invested into a related party of, for example, the employer, we consider that the issue has been adequately addressed by the introduction of the independent trustee requirement. An independent trustee will have duties under the Trustees Act 1956 (as amended) to act prudently in relation to any investments and is therefore able to make the value judgement on a case-by-case basis as to whether the level of investment is appropriate or not. This is a far superior approach than a partial return to the “authorised trust” approach.</p>
172	Duty of auditor to report to supervisor	<p>Clause 172 of the Exposure Draft is an important provision which INFINZ supports. However, in its current drafting, it does not address the question as to what the auditor’s duties are and to whom they are owed. This is particularly important in the context of both debt securities and managed investment schemes, because if the auditor owes its duties to the issuer (which means the company or other entity issuing the debt securities or acting as manager of the managed investment scheme), rather than to the investors, the auditors may exclude the supervisor and investors from reliance.</p> <p>In this regard, we note that for continuous debt issuers, clause 9(2)(c) of the Securities Regulations 2009 currently implies a provision into debt security trust deeds requiring the issuer to ensure that the terms of audit engagement are such that the auditor confirms that the audit opinion is</p>

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		<p>for the benefit of the trustee. We consider that a similar provision should be brought across into the Exposure Draft and apply not only to continuous debt, but also to non-continuous debt and registered managed investment schemes.</p> <p>We also consider that it would be better if this provision was not expressed as an implied provision in trust deeds but rather that as an affirmative statutory statement to the effect that, regardless of the terms of engagement of the auditor, every audit opinion by the auditor of a debt security issuer or a registered MIS is for the benefit of the Supervisor and the investors on whose behalf that Supervisor acts.</p>
Part 6	Licensing and regulation of market services	
413	Changes to client agreement	<p>INFINZ submits that a blanket prohibition on changing a client agreement without prior written consent of all concerned will be impracticable for any service or product that has more than a handful of clients. If this concept is to be included, there will need to be some practical accommodations around customary matters such as changes prompted by regulatory change.</p>
Part 7	Enforcement and liability	
462	Compensatory orders	<p>INFINZ envisages that this aspect of the Bill will be hotly debated, particularly in relation to the extension of liability to underwriters and persons who make statements. INFINZ is supportive of raising standards in the market and acknowledges that accountability is an important part of that. The clarifying of the due diligence defence is a strong advance on current law and this is also an area where education or even assistance in the form of frameworks or other published material would be useful, as there are undoubtedly varying practices in the market and evidently some confusion about the place of due diligence in promoting full and clear disclosure, as opposed to being merely an exercise in risk mitigation.</p> <p>As with any initiative that involves a significant change in market practices and norms, this will need to be closely considered and consulted upon to ensure that the best outcomes are achieved. Observations we would make at this time are:</p> <ul style="list-style-type: none"> • The introduction of underwriter liability is a change in the law as the position has been that arrangers are unlikely under existing law to be “promoters” as defined. • Other jurisdictions which have underwriter liability (notably the United States) also have highly evolved and formalised (and,



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		<p>unfortunately, expensive) means of mitigating these liabilities. For example, in the U.S. the management of such liability is to a great degree delegated to advisers through the requirement for formalised “10b-5” legal opinions and equally formulaic “comfort letters” prepared by the auditors.</p> <ul style="list-style-type: none"> • If liability is to be extended to underwriters, that term will need to be defined and that definition should reflect a deliberate policy choice based on the structure of the market (as it is and as we wish it to be) and an analysis of the costs and benefits of the different approaches. • To attempt to extend liability to credit rating agencies as makers of “statements” is almost certain to be counterproductive, leaving us in the same position as Australia where credit ratings are not permitted to be disclosed in retail offers.
474	Infringement offences	<p>INFINZ submits that some further thought should be given to the infringement offence framework, particularly in the light of the way that section 60 of the Securities Act is structured. In particular, the provisions appear to leave an ambiguity about who has responsibility within a corporate framework (which is going to be applicable the vast majority of the time in this context) – something that was dealt with reasonably clearly in the predecessor provision.</p>