

FINANCIAL MARKETS CONDUCT BILL
SUBMISSION ON EXPOSURE DRAFT
Nexx New Zealand Limited

Introduction

1. This submission is from Nexx New Zealand Limited (“Nexx”), an Auckland based company. We are available to meet with ministry officials to discuss this submission if desirable, and can be contacted at:

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Attention: Ben Milsom

We have no objections to this submission being published on the MED website.

2. Nexx is a start-up company that is bringing to the New Zealand market a person-to-person lending platform. We feel that person-to-person lending has significant potential to give both borrowers and investors a fairer deal by bringing increased competition to the New Zealand market and setting new standards in transparency, flexibility and social responsibility.
3. Broadly, we think that MED’s proposed regulation model of a ‘licensed intermediary’, with a strict and comprehensive licensing regime is an appropriate one for person-to-person lenders. We think that by creating a regime that moves compliance efforts largely from the borrower to a centralised intermediary means that a person-to-person lending service can be a viable one, with the right balance of flexibility and stringent standards of conduct to give confidence to investors.
4. We appreciate that much of the detail that relates to person-to-person lending will emerge in regulations, but we had some feedback on the proposed draft as it stands, which is included below.

Clause Number	Clause heading	Submission
Part 1	Preliminary provisions	
		None
Part 2	Misleading or deceptive conduct or false or misleading representations	
Clause 19	False or misleading representations	<ul style="list-style-type: none">• With respect to person-to-person lending (or any licensed intermediary), the expansive wording in clause 19 may prove problematic given that in making representations about the potential creditworthiness of a borrower, we rely heavily on information that is provided by both external credit agencies and the

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		<p>borrower themselves. Perhaps in the case of licensed intermediaries, there needs to be an explicit due-diligence defence such that where they are caught under clause 19 by virtue of being someone “in connection by any means of the issue...” that the compliance burden of avoiding misleading and deceptive statements under all eventualities is not too burdensome. Further, by having such an expansive wording, entities such as credit reporting agencies who may have their credit scoring information republished on a person-to-person lending site may not wish to provide this information given that they might be held to be connected to the issue “by any means” and thus be liable for false statements provided by the members who contribute information to a credit bureau that they have no ability to verify or control. To capture both of these situations, a specific exemption that applies only to information gathered from either the issuer or third party information providers might apply in a person-to-person lending (or other intermediary) scenario.</p>
<p>Part 3 and schedules 1 and 2</p>	<p>Disclosure offers of financial products</p>	
<p>Clause 26/Schedule 1 clause 6</p>	<p>Meaning of regulated offer and of regulated product</p>	<ul style="list-style-type: none"> • Our reading of the relationship between schedule 1, clause 6 and clause 26 of the main draft is such that where an offer is made using a licensed intermediary, it will be excluded from the disclosure, governance and advertising requirements in part 3 that refer to ‘regulated offers’. However, we think that there might be an opportunity for a borrower to inadvertently create a ‘regulated offer’ through clause 27 if they agree to take subscriptions to their loan by means other than through a licensed intermediary, or by using more than one intermediary. We think that the wording in clause 6(1)(a) of schedule 1, to avoid any compliance problems for borrowers, should be worded “offer is made solely through a licensed intermediary”. This is also important to avoid liability under clause 71 in the situation where a financial product “is to be” a regulated offer by virtue of any ‘parallel offering’ made by the borrower.
<p>Schedule 1, clause 6</p>	<p>Offers of Financial Products through intermediaries</p>	<ul style="list-style-type: none"> • We have some concern that the phrase “offer is through a licensed intermediary” in clause 6(1)(a) coupled with the broad definition of offer in 6 might cause an undue restriction of the licensed intermediary’s ability to promote or advertise potential loans that are listed on the site. This promotion might be either on the person-to-person operators own site, or through external advertising, but would be undertaken themselves and not as the offeror. We are concerned that they would themselves be “inviting applications for the issue of a financial product” and thus, might be conceived as making fresh offer that is not exempted from part 3 because it would not be “through a licensed intermediary”. We think that the wording in clause 6 of schedule 1 should be worded “offers through or by a licensed intermediary”.

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Clause Number	Clause heading	Submission
Clause 74	Advertising and publicity before PDS is lodged	<ul style="list-style-type: none"> This clause may be construed as not restricted to regulated offers as it refers only to the time period before a PDS is lodged and not one for which there exists a requirement that a PDS will be filed.
Part 4 and schedule 3	Governance of financial products	
		None
Part 5	Dealing in financial products on markets	
Clause 293	Exemptions	<ul style="list-style-type: none"> We think that the exempt limit for licensing of a financial product licence is too low. We would suggest that providing a small exchanges exception could lead to the development of new, innovative exchanges, especially in areas that are not currently served well by New Zealand capital markets, but that such a small cap might create a 'risk of success' such that if a market was established and worked well, this cap would be rapidly reached and a market operator might have to cease operations to complete any compliance activities, creating market uncertainty and risk for participants. We think that a limit of \$5m and 1000 transactions would be a limit such as to avoid any negative impact on the capital markets as a whole in case of failure, but enough 'headroom' to allow for the development of innovative new markets.
Part 6	Licensing and other regulation of market services	
		None
Part 7	Enforcement and liability	
Clause 431	Meaning of contravene	<ul style="list-style-type: none"> The broad scope of the contravention provision might prove problematic for licenced person-to-person operators who might unwittingly allow for a contravention of a specific provision in the act (notably as relates to the situation discussed above where a borrower offers a debt security outside of the person-to-person platform). Licensed intermediaries might require a specific provision or exemption from liability provisions where a breach was not caused by their own intentional act or negligence, and instead was merely a conduit for the breach to occur.
Part 8	Regulations and exemptions	
		None
Part 9 and schedule 4	Miscellaneous provisions	
		None