

**FINANCIAL MARKETS CONDUCT BILL  
SUBMISSION ON EXPOSURE DRAFT**

**PwC**

Clause Number	Clause heading	Submission
<b>Part 1</b>	<b>Preliminary provisions</b>	
6	Interpretation	"Working days" is not defined. There may be some confusion regarding public holidays in different parts of the country.
<b>Part 2</b>	<b>Misleading or deceptive conduct or false or misleading representations</b>	
<i>No comments</i>		
<b>Part 3 and schedules 1 and 2</b>	<b>Disclosure offers of financial products</b>	
40	Meaning of material information in this Part	We favour Option B due to its reference to "persons who commonly invest", which we believe is a more appropriate standard than Option A because of the more robust information that would be required by "persons who commonly invest" than for other people.
41(1)(b)	Consent of person to whom statement attributed	Currently: "... the person has consented to the statement ..." Suggested change: "...the person has consented <b>in writing</b> to the statement ..."
52(1)	Supplementary document	We do not understand the meaning or implication of "... to events that occur after lodgement."
54(3)	Registrar must notify FMA of lodgement of supplementary document or replacement PDS	This subclause provides that Section 46 does not apply to a supplementary or replacement PDS. Unless the FMA reviews the supplementary or replacement PDS <i>before</i> it is issued, then we see that the waiting period in Section 46 is still necessary to allow the FMA review. Therefore we suggest the exception in this subclause should be reconsidered.
Schedule 1, clause 25(1)(b)	Misleading or deceptive statements and omissions	Currently: "... an omission from the disclosure document ..." Suggested change: "... <b>a material</b> omission from the disclosure document ..."  We believe that there are likely to be some omissions that may not be so serious as to warrant sanction under this clause.
Schedule 1, clause 35(1)(b)	Meaning of large	Currently: "... in each of the relevant periods, the total turnover of the period and the entities controlled by the person exceeded ..."  Suggested change: "... in each of the relevant periods or <b>the last 24 months</b> , the total <b>consolidated</b> turnover of the period and the entities controlled by the person exceeded ..."  The reference to "the relevant periods" (2 most recently completed financial years) is potentially too restrictive and out of date as this may not include the results for up to 11 months of the current financial year. A reference to the last 24 months allows more up-to-date financial information to be used.  The turnover should be the "consolidated" turnover, which includes the elimination of intercompany transactions, rather than just "turnover", which may be interpreted as <i>gross</i> turnover before any eliminations.

Clause Number	Clause heading	Submission
Schedule 1, clause 43(3)	Offences relating to certificates	The maximum fine of \$50,000 appears low given the potential significance of the offence. Is there a reason that in other areas the fine is referenced to the gain made or loss avoided, but not for this offence?
<b>Part 4 and schedule 3</b>	<b>Governance of financial products</b>	
205	Financial statements to be audited	<p>Currently: "...must ensure that its financial statements are audited at least once a year by a qualified auditor."</p> <p>Suggested change: "...must ensure that its financial statements are audited <del>at least once a year</del> by a qualified auditor".</p> <p>"Financial statements" should be defined by reference to the Financial Reporting Act (FRA) Section 8.</p> <p>The reason for the suggested change is that only the <i>annual</i> financial statements should be audited, so by referencing to the FRA this removes any confusion about the clause possibly applying to <i>month-end</i> or <i>interim</i> financial statements.</p> <p>Furthermore, some annual financial statements may cover a period of more or less than 12 months if there is a change in balance date, therefore the audit would not strictly happen every <i>12 months/year</i> in this case.</p>
<b>Part 5</b>	<b>Dealing in financial products on markets</b>	
<i>No comments</i>		
<b>Part 6</b>	<b>Licensing and other regulation of market services</b>	
<i>No comments</i>		
<b>Part 7</b>	<b>Enforcement and liability</b>	
<i>No comments</i>		
<b>Part 8</b>	<b>Regulations and exemptions</b>	
512	FMA may designate financial products and offers	<p>We suggest you should consider whether guidelines are necessary for specifying what types of offers should be designated as "equity", "debt", "managed investment product" or "derivative". In particular, what features of a financial product make is necessary to impose the supervision and disclosure requirements for one type of securities rather than for another?</p> <p>It appears that the rules-based definitions of financial products (clause 8) and the FMA's designation powers (clause 512) have been formulated with an outcome in mind. The principal outcomes that appear to be relevant: the disclosures in the Product Disclosure Statement; different ongoing disclosure requirements after issuance of the securities; and, different regulatory requirements (e.g., requirements for a trustee or custodian, or the licensing of managers), however, because the rationale for the different outcomes is not clearly described in the Bill (nor in the February 2011 Cabinet Paper preceding this Bill), it is not possible to determine whether the proposed rules that comprise the definitions are appropriate. In other words, it is not possible to determine whether the definitions will achieve</p>

## PwC

Clause Number	Clause heading	Submission
		<p>what they set out to achieve. If there is no guidance, then there is a risk that the FMA's designation powers will also fail to achieve the intended purpose of the different classifications.</p> <p>Take the example of property investment: The investing vehicle could be a listed company (e.g. DNZ), a listed property trust (e.g. Kiwi Income Property Trust), or a unit trust. Each of these entities may do essentially the same thing and expose the investor to similar risks and rewards. Yet, it appears that the intention is that the legislation will put them into different boxes: the listed company into equity, the unit trust into managed investment scheme and the listed property trust probably into managed investment scheme as well (although you might argue it shares more in common with the listed company than the unit trust). Our question is why? What are the particular features of these different entities and the securities they issue that lead them to be regulated in different ways, and what regulatory consequences are being imposed on each of them?</p>
<b>Part 9 and schedule 4</b>	<b>Miscellaneous provisions</b>	
<i>No comments</i>		