

Submission

to the

Financial Markets Authority

on

Draft amendments to the Securities Act (Registered Banks Futures Contracts) Exemption Notice 2007

20 June 2011

Submission by the New Zealand Bankers' Association to the Financial Markets Authority on draft amendments to the Securities Act (Registered Banks Futures Contracts) Exemption Notice 2007

About NZBA

1. Established in 1891, the New Zealand Bankers' Association is a non-profit unincorporated association funded by member banks. In conjunction with its members, NZBA develops and promotes the banking industry viewpoint in policy discussions and in the media. NZBA also facilitates good practices in the banking industry.
2. NZBA works with its members on a consensus basis to provide a range of services including:
 - Collective submissions on public policy and regulation which affect banks in relation to, for example, taxation, consumer credit, privacy, terrorism and money laundering
 - Development of the self-regulatory Code of Banking Practice
 - Communication on non-competitive industry issues.
3. Membership of NZBA is open to any bank registered under the Reserve Bank of New Zealand Act 1989. Currently twelve registered banks are members of the NZBA. Our members are:
 - ANZ National Bank Limited
 - ASB Bank Limited
 - Bank of New Zealand
 - Bank of Tokyo-Mitsubishi, UFJ
 - Citibank, N.A.
 - The Hongkong and Shanghai Banking Corporation Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - Southland Building Society
 - TSB Bank Limited
 - Westpac New Zealand Limited.

Preliminary comments

4. NZBA would like to thank the FMA for the opportunity to comment on the proposed changes to the Securities Act (Registered Banks Futures Contracts) Exemption Notice 2007 (the "Notice"). Furthermore, NZBA notes that the Notice is being updated proactively without an application from an industry participant and we appreciate that this is being done.
5. However, NZBA also advises that due to the short consultation period and late notice, assessing the impact of the proposed changes to the Notice has been

challenging. Members would have been able to provide more comprehensive feedback if they had been advised of this work earlier than 10 June.

Content of the Schedule

6. In making its submission, NZBA recognises that it is sensible to update these disclosure documents in light of changes to the regulatory environment, such as the Financial Advisers Act 2008 (FAA) coming fully into force on 1 July.
7. NZBA proposes several amendments to the wording of the Schedule to the Notice. We consider that these proposals would improve the accuracy and clarity of the Schedule and would make it more consistent with the comparable changes being made to the investment statement prescribed wording under the Securities Regulations 2009.
8. The Schedule content proposals are appended to this submission.

Transitional provisions

9. NZBA submits that the most important issue that must be resolved with the current draft of the Notice is the lack of transitional provisions. A transition period must be included in the amendments to the Notice, as it will be literally impossible for member banks to comply with the new requirements by 1 July.
10. Although the changes to the Schedule appear relatively straight forward in the sense that they simply require the replacement of one set of required text for another, they will take some time to make. Reasonable notice of any required changes is needed because:
 - external counsel must be engaged to review the new documents
 - senior level sign-off is required, and
 - the documents must be printed.
11. Given that some members have several dozen applicable products each, it is absolutely vital that there be appropriate transition provisions.
12. NZBA suggests that the best transition to the new regime would be to include a provision to the effect that the changes made by Regulation 6 (i.e. the new Schedule) do not apply to disclosure documents dated before 1 August 2011. This would allow banks to phase in the inclusion of the new Schedule to their disclosure documents as these roll over and are renewed and would minimise compliance costs. The 1 August effective date would also ensure that any documents made under the old Notice and that have already received approval to be printed will not be delayed. We understand that this approach will be taken for the amendments to the Securities Regulations 2009 that update the comparable paragraphs prescribed for investment statements.
13. If this submission is not accepted and the FMA decides that old disclosure documents must be updated, NZBA submits that a transition period of **six months**

should be provided to ensure that all steps in the approval process can be completed effectively.

14. If the secondary proposal is accepted, NZBA would be happy to discuss in more detail how such a transition period could work. Ideally, banks would be able to rely on disclosure made using either the old Notice or the amended one during the transition period, with the new requirements completely replacing the old at the end of the transition period. This would ensure a reasonable length of time to complete all updates and would also provide flexibility, allowing banks to phase in the provisions of the new documents early if they are able to do so.
15. Please feel free to contact me if you have any queries.

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Appendix – Suggested amendments to the Notice’s Schedule

All comments refer to the marked-up copy of the proposed new Schedule attached to this submission.

Comment 1

It is not necessarily true that all futures contracts are complex. In particular, some are almost identical to simple foreign exchange transactions but contain a minor hedging component. Therefore, this sentence should be removed or at least revised to the effect that some futures contracts are complex, rather than stating that the contracts in the document necessarily are.

Comment 2

Under the FAA, QFE advisers and AFAs are not the only types of financial adviser that can provide financial adviser services in respect of futures contracts. Under sections 19 and 20 of the FAA, relevant services can also be provided by registered persons and exempt providers in various circumstances, depending on whether the client is retail or wholesale and whether the service is a class service or a personalised service.

Rather than trying to explain all of these permutations to investors, it would be more user-friendly to avoid this level of detail and replace the paragraphs indicated in the attachment with words to the effect of:

“A person advising you on derivatives or futures contracts should be either—

“an entity that is authorised to carry on the business of dealing in futures contracts (an authorised futures dealer), including an employee of the authorised futures dealer; or

“a financial adviser.

“Financial advisers are regulated by the Financial Markets Authority (FMA) to varying levels, depending on the type of adviser and the nature of the services they provide. Some financial advisers are only allowed to provide advice on a limited range of products.”

The above has also had the reference to the Financial Advisers Act removed for the sake of brevity but this could be re-inserted if considered important. The above wording would also be more consistent with the approach taken in the current amendments to the Securities Regulations 2009.

Comment 3

Including these words makes it unclear whether the “adviser” is the same person as the futures dealer. Presumably the intention is to recommend that investors ask the suggested questions to the authorised futures dealer. This is made clearer by removing the words “your adviser”.

Comment 4

Under the FAA, “exempt providers” do not have to be registered. Therefore, it is more correct to signal that most financial advisers will be registered. This is the approach we understand is taken by the current amendments to the Securities Regulations 2009.

Comment 5

The indicated words should be removed, as they incorrectly imply that QFE advisers are not financial advisers. Removing this phrase is consistent with the approach we understand is taken by the current amendments to the Securities Regulations 2009.

4 Interpretation

Clause 4(1) is amended by revoking the definition of **Regulations** and substituting the following definition:

“**Regulations** means the Securities Regulations 2009”.

5 Exemptions

Clause 5(b) is amended by omitting “regulation 8” and substituting “regulation 23”.

6 New Schedule substituted

The Schedule is revoked and the Schedule set out in the Schedule of this notice substituted.

Schedule

cl 6

New Schedule substituted

Schedule

cl 7(1)(c)

**Form of disclosure information that
must be included at front of disclosure
document**

Important information: The information in this section is required under the Securities Act (Registered Banks Futures Contracts) Exemption Notice 2007.

Decisions to enter into derivative or futures contracts are very important. They often have significant consequences. Read all documents carefully. Ask questions. Seek independent advice before committing yourself.

Choosing a product

When deciding whether to enter into a derivative or futures contract, consider carefully the information under the following headings that can be found on the pages noted below:

[Table of contents to be included here, including headings to assist the reader to identify the information that is disclosed for the purpose of complying with clause 7(1)(e) of the exemption notice]

Schedule —*continued*

In addition to the information in this document, important information can be found in the current disclosure statement of [*registered bank's name to be included here*] that is published pursuant to the Reserve Bank of New Zealand Act 1989. You are entitled to a copy of that disclosure statement on request.

Financial advisers can help you make financial decisions

Using a financial adviser cannot prevent you from losing money, but it should help you make better decisions about entering into derivative or futures contracts.

Financial advisers are regulated by the Financial Markets Authority (FMA) to varying levels, depending on the type of adviser and the nature of the services they provide. Some financial advisers are only allowed to provide advice on a limited range of products.

Comment 1 ←

The products covered in this disclosure document are complex derivative or futures contracts. A person advising you on these products should be either—

- an entity that is authorised to carry on the business of dealing in futures contracts (**authorised futures dealer**), including an employee of the authorised futures dealer; or
- an authorised financial adviser or a QFE adviser (within the meaning of the Financial Advisers Act 2008).

→ Comment 2

When seeking or receiving financial advice, you should check—

- the type of adviser you are dealing with;
- the services the adviser can provide to you;
- the products the adviser can advise you on.

A financial adviser who provides you with personalised financial adviser services under the Financial Advisers Act 2008 may be required to give you a disclosure statement covering these and other matters. When dealing with an authorised futures dealer, you should ask your ~~adviser~~ ^{your} about these matters. You should also think about how any adviser you use is paid, and any conflicts of interest the adviser may have.

→ Comment 3

Financial advisers (or the financial service provider they work for) and authorised futures dealers must have a complaints process in place and must also belong to a dispute resolution scheme if they

Schedule —continued

provide services to retail clients. So if there is a dispute over a service that has been provided, you can ask an independent person to resolve it.

Comment 4 → Most

Financial advisers (or the financial service provider they work for) and authorised futures dealers must also be registered on the financial service providers register. You can search for information about registered financial service providers at <http://www.fspr.govt.nz>

You can also complain to the FMA if you have concerns about the behaviour of an authorised futures dealer, a financial adviser, or a QPE adviser.

→ Comment 5

FMA regulates conduct in financial markets

The FMA regulates conduct in New Zealand's financial markets. The FMA's main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets.

For more information about investing and financial advisers, go to <http://www.fma.govt.nz>

Dated at Wellington this day of 2011.

Chairperson.

Statement of reasons

This notice, which comes into force on 1 July 2011, amends the Securities Act (Registered Banks Futures Contracts) Exemption Notice 2007 by—

- updating references to the Securities Regulations 1983 with references to the Securities Regulations 2009; and
- amending the information that must be included in a disclosure document under the principal notice in line with the require-