NEW ZEALAND
BANKERS ASSOCIATION

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Submission by the New Zealand Bankers' Association to the Financial Markets Authority on the Consultation Paper: Request for Feedback – Guidance Note: Effective Disclosure

About NZBA

1. The New Zealand Bankers' Association (NZBA) works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes which contribute to a safe and successful banking system that benefits New Zealanders and the New Zealand economy.

2. The following thirteen registered banks in New Zealand are members of NZBA:

   - ANZ National Bank Limited
   - ASB Bank Limited
   - Bank of New Zealand
   - Bank of Tokyo-Mitsubishi, UFJ
   - Citibank, N.A.
   - The Co-operative Bank
   - The Hongkong and Shanghai Banking Corporation Limited
   - JPMorgan Chase Bank, N.A.
   - Kiwibank Limited
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited.

Introduction

3. NZBA supports the Financial Markets Authority (FMA) promoting the confident and informed participation of business, investors and consumer in the financial markets, and consultation on effective disclosure in support of FMA's purpose.

4. FMA has indicated to NZBA that the objective behind the draft guidance is to:

   a. provide suggestions as to how to address the disclosure requirements prescribed by law, so as to improve the accessibility of disclosure for investors; and

   b. encourage issuers and directors to consider the entirety of disclosure within an offer document, rather than take a 'tick box' approach to disclosure.

5. NZBA further understands that FMA is concerned about specific issues in the market and wants to address identified disclosure deficiencies in some sectors. NZBA's member banks view disclosure seriously and are committed to producing quality disclosure documents. NZBA is therefore in favour of raising the quality of disclosure among sectors where it is deficient.

6. However, the current draft guidance is problematic. If finalised in its current form it will:

   a. create uncertainty about its legal status and therefore about how to use it;

   b. result in longer disclosure documents containing large amounts of immaterial information, which will confuse investors, contrary to FMA's objectives; and

   c. lead to significant compliance costs among issuers, with a particular impact on smaller issuers.

7. The framing of the guidance as a set of new legal requirements creates significant issues. Further to this, there are technical problems with the draft guidance, which will cause the disclosure of immaterial matters.

Summary of recommendations

8. NZBA submits that the draft guidance should be amended to:

   a. remove the 'compliance' language and rework the guidance as non-binding suggestions for issuers to consider, rather than as requirements;

   b. make explicit that issuers may make their own assessments of how to discharge their legal obligations;

   c. clearly indicate which provisions of the Securities Act 1978 (Act) or the Securities Regulations 2009 (Regulations) form the foundation of the FMA's guidance on each point;

   d. remove the implementation timeframes;

   e. distinguish between the sections that apply to prospectuses and those that apply to investment statements; and

   f. reflect the varying nature of different offers and different types of products, so that guidance regarding disclosure is better targeted.

9. FMA might also consider reframing the 'clear, concise and effective' section of the draft guidance as a 'plain language' guide, unrelated to new or existing legal obligations.

10. FMA should also extend its deadlines for analysing submissions and updating the draft guidance, and should consult on the next iteration of the guidance.

Comment

11. NZBA has identified a number of technical issues with the draft guidance. Many of these relate to matters that the draft guidance suggests should be included in disclosure documents in situations where the information would not in fact be material to the offer, or is not required under the Act or Regulations. Others relate to apparent inconsistencies and tensions between different sections of the draft guidance. Examples include:

    a. no distinction is made between investment statements and prospectuses, when they clearly have different purposes, intended audiences and legal requirements;

    b. the draft does not distinguish adequately between different products, which have different needs and material information; and

c. the draft does not adequately explain how it interacts with the Act, Regulations and exemption notices.

12. NZBA outlines a range of such issues in its responses to the questions in the consultation paper, below. Addressing these points will make the draft guidance more useful to issuers trying to prepare quality disclosure.

Underlying issue: nature and status of the draft guidance

Unclear status of the draft guidance

13. The underlying issue with the draft guidance is its apparent status. FMA has indicated at the meeting with NZBA held on 9 February that the document is intended to be guidance only, and this is also reflected in the discussion on page 1 of the draft guidance. However, the document can be read as some combination of:

    a. rew requirements from FMA which are additional to existing legal obligations set out in the Act, Regulations and exemption notices; and

    b. FMA's interpretation of the existing issuer and director obligations, particularly their interpretation of what is considered to be 'material information'.

14. On NZBA's reading, the draft guidance reads as though it is intended to create new obligations, due to:
    a. the frequent use of words such as 'must', 'require' and 'comply' [1];
    b. the inclusion of a compliance timetable; and
    c. the inclusion of 'current requirements' in Section A and then additional requirements set out in Sections B – E, suggesting that B – E are not simply interpretations of current law, as they are in addition to 'current requirements'.

15. NZBA understands that this interpretation, which appears contrary to the stated intention of FMA in creating this document, is widely held in the market. In addition, while the Financial Markets Authority Act 2010 gives FMA ability to issue guidance, such guidance would not be binding. Accordingly, the language in the document should be realigned with FMA's intentions and their powers, for the reasons detailed below.

Consequences of compliance language

16. If the draft guidance were finalised in its current form, directors are not likely to exclude much or all of the matters in Sections C, D and (for some products) E even when that information is not material (or even relevant) to an offer in order to ensure that they comply completely with the law, taking a 'tick box' approach, contrary to FMA's objectives. Directors and issuers are not likely to exclude information that the regulator has indicated is likely to be material to investors, irrespective of its actual materiality. This reflects the exposure to liability that directors have under the Act.

17. In addition, while the draft guidance explicitly relates to both disclosure documents, no distinction is made between information that is expected to be reflected in investment statements and prospectuses. This suggests that FMA expects the

[1] For example: "We therefore require disclosure documents to be clear, concise, and effective." (Page 8 of draft guidance).

information to be included in both documents, regardless of their different purposes. Accordingly, issuers will include all matters in both documents. This will lead to lengthy investment statements and significant duplication. This is contrary to FMA's stated goal in drafting the guidance.

18. Overlaying apparent new requirements on top of the existing obligations in the Act and Regulations will make interpretations more difficult. The compliance language in the draft guidance will encourage directors to engage more external counsel to assist with disclosure preparation. New 'requirements' will invariably have this effect, which will be heightened by the fact that the there is a degree of tension (and apparent contradiction) between the provisions of some sections. 'Loan-to-value ratio', for example, is required content on pages 30 and 31 for some products but is jargon to be avoided on page 9.

19. Additional counsel will create extra costs for issuers, with a review by external counsel costing approximately $20-30,000. For smaller issuers this will be a significant additional cost.

20. The current draft guidance would seem to require offer documents to be updated and reissued in the event of a change to even a minor detail (for example a senior manager's salary) during the life of the disclosure document. Printing and distribution costs can be between $250,000 and $750,000 for some products, for which one million customers might be affected. Similarly, if the draft guidance is finalised in its current form, many issuers of continuously issued products will feel obliged to prepare new investment statements for existing products due to the apparent new requirements, despite the fact that there has been no material adverse change. This will again involve the printing and distribution costs above in addition to the costs of actually revising the content to reflect the guidance.

21. If the disclosure requirements are too onerous some offers will simply not occur or will be made as private offers, particularly among smaller issuers. This will be to the detriment of New Zealand's investors and capital markets.

22. Even in the case of large issuers, the task of reviewing and reprinting offer documents that are already compliant is a significant administrative burden with no corresponding benefit to investors.

23. To address these issues, **NZBA recommends** that the draft guidance be amended to:

    a. remove the 'compliance' language and rework the guidance as non-binding suggestions for issuers to consider, rather than as requirements;

    b. make explicit that issuers may make their own assessments of how to discharge their legal obligations; and

    c. clearly indicate which provisions of the Act or Regulations form the foundation of the FMA's guidance on each point.

24. NZBA notes that this is the approach taken in ASIC Regulatory Guide 228, which appears to have been drawn on for the development of the draft guidance. See in particular RG 228.7-.9.

Implementation timeframes

25. NZBA is concerned at the implementation timeframes in the draft guidance.

26. Guidance cannot impose new legal obligations or require implementation by a certain date because it is not mandatory. Accordingly, guidance would not be expected to have an effective date by which an affected party would be required to 'comply'.

27. **NZBA therefore recommends** that the timeframes should be removed from the draft guidance.

28. In any case, the current 1 May 2012 deadline will be highly problematic. The lead time between the finalisation of the guidance (26 March) and the date on which new offers must 'comply' with the guidance (1 May) is only five weeks. This short period creates significant problems for issuers planning on dating an offer document in May, June or even July. The December 2012 deadline is also not achievable for issuers with multiple products and offer documents due to the volume of work required.

29. The process of having changes to an offer document approved in a large corporation like a bank or fund manager can be up to three months. This reflects the *purely administrative tasks* involved in circulating offer documents for review and consideration, preparation of content requirements and obtaining various signoffs from all the relevant areas involved in preparation of offer documents for the issuer. Any time spent assessing the guidance and making consequential changes to offer documents will be additional.

Specific comments

Section B – Clear, concise and effective

30. Guidance for issuers on writing accessible disclosure is useful and the suggestions under the banner 'clear, concise and effective' are broadly reasonable objectives for disclosure documents. However, the draft guidance presents 'clear, concise and effective' as a legal test to be satisfied. The actual legal requirements are for disclosure not to be false, misleading, deceptive or confusing, depending on the type of document.

31. Section B therefore needs to be rewritten as suggestions as to matters to consider when complying with the existing legal obligations, not new legal standards. Any interpretation of the law in the guidance should clearly leave room for issuers to make their own assessment about whether their document is false, misleading, deceptive or confusing. 'Clear, concise and effective' should not be presented as a new test or a binding interpretation.

32. An alternative approach would be to simply reframe the 'clear, concise and effective' section as a guide to issuers on how to write plain language disclosure. This would need to state clearly that it neither creates nor derives from legal requirements and is only intended as a potential tool for issuers interested in making their documents meet best practice standards.

33. Giving issuers this space is vital, as there is conflict between the obligations in the law and elements of Section B, if these are read as new requirements or a required interpretation. For example, it is possible for a document to fail the draft 'clear' test due to containing a long or technical explanation, while needing that explanation in order to provide complete, accurate information to investors and avoid being

misleading. Technical terms are sometimes needed to achieve precision or to meet requirements prescribed at law.

34. It also needs to be clear which components apply to investment statements and which apply to prospectuses. The two documents must meet different legal tests and have different audiences. NZBA recognises that retail investors can request a copy of the prospectus (though in practice they almost never do) but notes that the Act specifically states that the investment statement is intended for 'prudent but non-expert' investors, while no such provision applies to the prospectus. Appropriately, market practice is therefore that the prospectus is targeted at professional analysts, while the investment statement is designed for retail investors.

35. This distinction will be increased under the forthcoming Financial Markets Conduct Bill. The proposed new regime contemplates a single Product Disclosure Statement, which is more closely aligned with the existing investment statement, supported by detailed information available in an online registry.

36. **NZBA recommends** that the guidance be amended to account for this difference.

Sections C – E – information requirements

37. Many of the matters set out in sections C to E would not be material to some offers, and could cause conflict with the provisions in Section B by creating superfluous disclosure. These sections also do not take into account or discuss the existing exemption regime. It is unclear how issuers who have the ability to rely on exemptions would be expected to apply the guidance.

38. NZBA recommends that the draft guidance be amended to reflect the varying nature of different types of issuer, offer and product, so that guidance regarding disclosure is better targeted. Addressing technical points in the draft guidance to clarify the types of information that might be material to different types of offer will improve its usefulness.

39. However, it would be impossible for the guidance to accommodate all possible types of offer. Therefore, it should be made clear that issuers should make their own assessment of what is material to their offer and can use the guidance to help them, rather than being subject to new requirements or a 'one-size-fits-all' interpretation of the law that cannot possibly fit all offers.

40. As recommended above, these sections should be redrafted to refer directly to existing legal obligations. It should be made clear that any discussion of the legal requirements is a potential approach to satisfying these, rather than a required interpretation. The guidance should not introduce additional matters for inclusion in offer documents, but should be limited to discussion of how to consider and address existing prescriptions.

Next steps

41. The timeframe that FMA has set for finalising the guidance will not allow for further consultation. It would be of concern to NZBA if FMA were to issue guidance that differs materially from the current draft without seeking further input from the industry. Furthermore, in this submission NZBA raises a number of issues and addressing them (along with issues raised by other submitters) could require substantial time. It is not clear that two weeks will be sufficient to allow FMA to undertake an assessment of those submissions and complete its internal procedures to issue revised guidance.

42. FMA has indicated that the guidance arises from a request by some issuers that FMA provide an indication of the approach they should take once pre-vetting has ended. NZBA recognises that the end of the pre-vetting process puts some pressure on FMA to provide that guidance in a short timeframe. However, it is more important that the final guidance be fit for purpose. Given that large portions of the guidance might have to be redrafted in light of industry submissions, **NZBA recommends** that FMA should:

    a. consult on the next iteration of the draft guidelines; and

    b. extend its timeframes in order to ensure that FMA staff have time to complete a thorough analysis.

43. NZBA notes that FMA has the ability to provide assistance to issuers case-by-case where an issuer is struggling to comply with its obligations, which could be used in the interim period.

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
	1	NZBA agrees that the guidance should apply only to investment statements and prospectuses. However, the guidance should indicate which of FMA's recommendations relate to one or both of the documents. Interpretations and FMA recommendations should be linked directly to the underlying legal obligations, clarifying which interpretations apply to which disclosure documents. If any of Sections C – E are intended to apply to investment statements, this needs to be made clear. The guidance in Sections C – E will cause investment statements to be significantly longer than they are currently, which would risk making them less accessible to investors and would be contrary to the statutory requirement that the investment statement be "succinct". NZBA also notes that the contents of the prospectus are largely prescribed and cannot easily be drafted in plain English. The cost associated with attempting to do this will be out of proportion to any benefit to investors.	Clarify: • exactly which legal obligations underpin the recommendations • that the guidance is not a binding interpretation and does not create new requirements • that issuers may take their own view on how their legal obligations apply to their business and circumstances NZBA notes that this flexible approach is taken in ASIC Regulatory Guide 228. See in particular RG228.25: *"These tools are not mandatory and will not always be appropriate. You should analyse how best to word and present your information in your particular circumstances."* See also RG228.28 and RG228.29. • which components of the guidance apply to investment statements and which	

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
		It needs to be clear that the guidance is intended to assist issuers in considering their obligations and does not bind issuers. Where the guidance simply provides a guide as to how to write accessible disclosure, the different audiences of investment statements and prospectuses need to be factored into the guidance. NZBA also notes that much of the draft guidance has drawn on ASIC Regulatory Guide 228 (RG228) to a significant degree. NZBA notes that RG 228 applies only to prospectuses, which are not required for all offers, excluding for example small offers and bank debt.	components apply to prospectuses.	
	2	No. 'Clear, concise and effective' is appropriate as a helpful guide for how to write accessible disclosure but should not be framed as a 'standard' or requirement, as it is not the legal test set out in the existing regime. This point is expanded on in NZBA's covering note to this submission.	See answer to question 1. Clarify that 'clear, concise and effective' is not a legal test.	
	3	Guidance on how to use plain language is useful to issuers to help them ensure that their disclosure documents are accessible to investors. However, issuers have a legal obligation to ensure that their disclosure documents are not false or misleading. In some instances this will require the	The plain language techniques should be clearly framed as suggestions for how to write clear disclosure and should not be presented as a requirement.	

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
		use of technical terms and definitions. This is particularly true in the case of prospectuses which are not required to be written for 'prudent but non-expert investors', like investment statements are. Although unsophisticated investors can request a prospectus, it is rare for them to do so. Their primary audience is financial analysts and other professionals. As such, avoiding the use of technical terms in the prospectus could make prospectuses less useful to their primary audience. Also, short sentences, appropriate layout, the active tense and other plain language techniques are all sensible objectives for issuers. However, it is unreasonable to suggest that using occasional long sentences, the passive voice, etc, will necessarily make a document false, misleading, deceptive or confusing.		
	4	It is not clear what is meant by the concept in the draft guidance that certain content must be 'prominent and easily accessed.'	Clarify what is meant by 'prominent and easily accessed'.	
	5	The basic legal requirement is that disclosure not be misleading or deceptive. Branding and images should be permitted so long as they do not mislead or deceive. Images and brand information can in fact be engaging for investors and encourage them to keep reading.	See answer to question 1. Reframe this section to state that branding and other images must not mislead investors, as this reflects the legal requirements.	

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
	6	NZBA recognises that each disclosure document must as a whole satisfy the legal requirements that they not be false/misleading/deceptive/confusing (depending on the type of disclosure document). However, it is not clear precisely what 'effectiveness' means in this context. This section should not be framed as a new requirement and should refer instead to the existing legal obligations, leaving issuers space to make their own assessments of how best to comply with their legal obligations.	See answer to questions 1 and 2.	
Section C of draft guidance		This Section appears to be guidance on what might be material to an offer, therefore needing to be disclosed in a prospectus.	See answer to question 1. Also, amend Section C to target it at the types of product of concern to FMA, rather than attempting to cover all products in a 'one size fits all' manner.	
	8	The business model of the issuer will be material to some offers but not to others. The information appears to be primarily aimed at issuers of equity and some types of non-bank debt products. Banks are subject to comprehensive prudential supervision, ensuring that they have appropriate governance structures, etc, in place. Investors can have confidence in the prudential supervision framework and will not benefit from long descriptions of business models in disclosure documents	See answer to question 1. In addition, FMA should clarify the types of products for which this information is more likely to be material. This should exclude bank products, KiwiSaver schemes, other superannuation schemes and unit trusts.	

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
		relating to general bank deposit products like term deposits or cash PIEs. Including this information will just make disclosure longer and less accessible to investors. As well as several Securities Act exemption notices, this point is recognised in the Financial Markets Conduct Bill, which contains an extensive exemption for bank products from the disclosure regime. Similarly, in the case of KiwiSaver schemes, other superannuation schemes and unit trusts the business model is probably not relevant to investors. The statement of investment objectives/policies of the scheme would be more relevant and is already required content for the prospectuses of these types of securities. As every offer is different, it would be impossible to nuance this section of the guidance sufficiently to cover all possible situations. Therefore, this section should be reframed to clarify that it is not intended to bind issuers, instead suggesting content that will often be material to some offers.		
	9	The current regime creates some specific requirements for disclosure of structural or business information. This, and information that is otherwise material, is required to be disclosed. It is not appropriate to prescribe additional information.	See answer to questions 1 and 8.	
	10	See answer to question 8.	See answers to questions 1 and 8.	

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		NZBA also notes that: • the table should not refer to "requirements" and • the use of tables plus compliance language likely to encourage a "tick the box" approach. These comments also apply to the other tables in the draft guidance.		
	11	NZBA does not agree that this information should be required across all products. While it might be relevant to an IPO, for example, many of these matters will not be material in respect of other types of offer, such as bank deposit products. As noted above, banks are licensed and their directors must be approved by the Reserve Bank, making this information less material to investors. Including this information in banks' disclosure documents will make them longer without any benefit to investors. NZBA also notes that some information about the senior management, such as salary, is private.	See answer to question 1. The guidance should also make clear which types of offer, or under what general circumstances, these matters are more likely to be material.	
	12	These matters will not be material to all offers. The guidance needs to clarify that issuers have the discretion to determine for themselves whether any of these matters are material to their offer.	See answer to question 1. The guidance should also make clear which types of offer, or under what general circumstances, these matters are more likely to be material.	
	13	See response to question 11 above.	See answer to question 1.	

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
		Not all 'senior management' will be material to every offer of securities. Senior management involved in separate parts of the business (like human resources) might be irrelevant. The senior management is not relevant to all types of offer. In particular, the prudential supervision framework imposed on registered banks means that this information will be immaterial and of little benefit to investors. Listing all of an individual's shareholdings (particularly indirect holdings) will potentially make disclosure documents very long indeed and will not usually be useful to investors. Only in a limited range of circumstances, where independence might be undermined, will a director's or senior manager's shareholdings be material to an offer. Remuneration will not always be material to an offer. Presumably this section is intended to cover situations where remuneration creates perverse incentives for directors and senior managers. Example of the types of remuneration that are more likely to be material should be provided. The Reserve Bank imposes rules on banks relating to the independence of directors, making these provisions less likely to be material to bank products.	The guidance should also make clear which types of offer, or under what general circumstances, these matters are more likely to be material. 'Senior management' should be limited to those members of senior management directly linked to the offer. Clarify which types of shareholding arrangements are more likely to be material and therefore require disclosure. Clarify which types of remuneration arrangements are more likely to be material to an offer. Remove the section on honesty.	

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
		It is unclear what, aside from legal or disciplinary history, which is a separate section already, would pertain to the honesty of a director or senior manager. Refining these points would be useful but the primary change that should be made is to clarify that issuers may exercise their own judgement about what is material in relation to their offer.		
	14	Under the Regulations, risks must be disclosed in the investment statement and are explicitly required in prospectuses for some products, or generally, if they are material to the offer. It should be made clear that this section does not create any new obligations.	See answer to question 1.	
	15	At law, investment statements must contain certain 'principle risks' and prospectuses must include any risks that are material. It is not appropriate for FMA to suggest that it would be misleading or deceptive for issuers to disclose less than is required by law. This section should be revised to refer back to the existing legal requirements and to clarify that issuers may make their own assessments of how to comply with their legal obligations.	See answer to question 1. Reframe to link back to existing legal requirements. Remove any suggestion that issuers should disclose less than is required by law.	
	16	With regards to 'balance' in the context of risks: in accordance with their legal obligations, issuers must	Amend as appropriate and see answer to question 1.	

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
		disclose all matters required by the regulations. Beyond ensuring that disclosure documents are not misleading, deceptive, etc, it is the place of advisers to provide a balanced assessment of an offer, rather than the issuer. In the context of some products, such as bank debt and managed funds, much of this information in table VII will not be material. Including it is likely to confuse investors and cause them to disengage. Including a list of "topics considered" will encourage issuers to cover the topics listed and adopt a 'tick-box' approach, rather than focus on those areas that are material to their particular offer. It is not clear what a 'risk model' is. Explaining a detailed risk evaluation process is likely to confuse investors and would not often be relevant to their decision to invest.	Target this section at the types of product for which this information is more likely to be material.	
	17	Related party transactions will not always be material. For example, cash PIEs necessarily involve related party transactions but disclosing these will lead to lengthy, complex documents without providing investors any new, useful information.	See answer to question 1. This section should outline the types of offer for which this information is more likely to be material, targeting the guidance more effectively.	
	18	The definition of NZ IAS 24 is very broad and might have unintended consequences. For example, an individual would be a related party in relation to an entity if any "close	Reconsider the reference to the definition in NZ IAS 24.	

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
		member of that person's family" forms part of the key management personnel of that entity's parent company. Paragraph 45 of the guidance note says that issuers are not expected to take an "overly technical approach". However, the next sentence requires disclosure in NZ IAS 24 would apply to a transaction. NZBA understands that the guidance note is intended to induce disclosure of structures where relationships exist but are hidden from view, which NZBA supports. However, registered banking groups are subject to extensive regulatory and reporting requirements. It therefore should not be necessary to disclose all related party transactions within wholly owned subsidiaries of a banking group. Doing so will add length and complexity to disclosure documents without commensurate benefit to investors.	Provide guidance on FMA's view of when this information might be material to a particular offer.	
	20-21	Credit ratings will *in some instances* be material to an offer. This will not always be the case. For example, a corporate credit rating would not be relevant to a debt security where recourse is limited to a specified class of assets. As noted above, it should be made clear that issuers should make their own assessments of materiality in relation to their offer.	See answer to question 1.	

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	23-26	Issuers should not be limited in what they are able to disclose, provided they meet the requirements in the law, including not to mislead, deceive, etc.	See answer to question 1.	
	30	This statement is not required at law and should not be required in guidance. In particular, the Regulations state that investment statements do not need to refer to matters that have not been included or state that the matter is not applicable.	This section should be removed from the guidance.	
	31	The concept of including a 'key information section' in all disclosure documents is not appropriate. Including it in both the investment statement and prospectus would create significant duplication. Also, the investment statement must by law consist of a summary of important information so it would not make sense to disclose similar information again at the beginning. Similarly, it would not help investors to receive an investment statement-like document at the start of the prospectus, when they must already receive an investment statement by law. The key information section will make disclosure longer for little benefit. Also, mandating the inclusion of a key information section in	See answer to question 1.	

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
		disclosure documents would require an amendment to the Regulations.		
	32	As outlined in more detail above, the matters listed as requirements will not be material to all offers. The categories should be more tightly targeted to issues identified in the market and should make clear that issuers can make their own assessment of what will be material to their offer.	See answer to question 1. Target provisions appropriately.	
	34	MED is currently consulting on and considering the requirements for periodic reporting of investment performance, costs and returns. While the guidance note relates to offer document disclosure, it should be aligned to the requirements for periodic and annual disclosure. It is premature to include guidance on KiwiSaver investment performance and costs disclosure at this time.	Align the guidance note recommendations with the KiwiSaver periodic disclosure regulations, once finalised.	
	36	This section appears to be focussed on finance companies. As outlined above, banks are already subject to effective prudential regulation, including disclosure under the 'general disclosure statement' regime. As such, many of the matters in this section will not be material to bank debt products. This section should be focussed on the specific types of issuer and security of concern to FMA.	See answer to question 1. Focus the guidance on the types of issuer and security for which these matters are most likely to be material.	
	38	See responses above. In particular, NZBA considers that Table XII is not workable for bank debt securities.	See answer to question 1. Focus the guidance on the types of issuer and security for which these matters are most likely	

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		Liquidity – it is not clear whether this provision is intended to apply at the product level or the issuer level.	to be material. Clarify liquidity section.	
	43	See cover letter to this submission.		
	44	See cover letter to this submission, including the comments about the implementation timetable.	Remove the timeframes from the draft guidance.	
	45	NZBA agrees that the guidance should not apply to advertisements.		
	47	Guidance can have the benefits highlighted by FMA. However, in its current form, the draft guidance would be more likely to confuse issuers as to their obligations and cause disclosure documents to become longer and less engaging.		
	49	As outlined above and in the NZBA cover letter, the draft guidance is likely to have a range of negative effects: • issuers will be uncertain as to how to comply with their legal obligations; • issuers will seek additional external advice when preparing disclosure documents (contrary to FMA objectives); • disclosure documents will become longer and will contain information that is not material; • there will be increased duplication between		

Guidance note para/table	Consultation paper question	Submission	Recommendation	Statutory reference (if applicable)
		investment statements and prospectuses; and • issuers of continuously issued securities might feel obligated to rewrite their investment statements in order to reflect the guidance, even though these still contain all of the legally required information and are not misleading, deceptive, etc. The costs of legal advice on preparing a disclosure document can be $20-30,000. Although big issuers like banks can accommodate this cost, it could be prohibitive for smaller issuers and does not bring any commensurate benefit. These costs may lead some issuers to forgo an offer or else to increase reliance on private offers. The cost of printing a new investment statement can be $750,000, in addition to the cost of actually reviewing the documents. The sign-off process for this review can take three months or more, on top of the time needed to actually conduct the review of the documents. For documents that already comply with the law, such as those of NZBA's member banks, this will not assist investors and will be a waste of resources.		

Submission summary

44. NZBA submits that the draft guidance should be amended to:

    a. remove the ‘compliance’ language and rework the guidance as non-binding suggestions for issuers to consider, rather than as requirements;

    b. make explicit that issuers may make their own assessments of how to discharge their legal obligations;

    c. clearly indicate which provisions of the Securities Act 1978 (Act) or the Securities Regulations 2009 (Regulations) form the foundation of the FMA's guidance on each point;

    d. remove the implementation timeframes;

    e. distinguish between the sections that apply to prospectuses and those that apply to investment statements; and

    f. reflect the varying nature of different offers and different types of products, so that guidance regarding disclosure is better targeted.

45. FMA might also consider reframing the ‘clear, concise and effective’ section of the draft guidance as a ‘plain language’ guide, unrelated to new or existing legal obligations.

46. FMA should also extend its deadlines for analysing submissions and updating the draft guidance, and should consult on the next iteration of the guidance.