NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Ministry of Business, Innovation and Employment

on the

Financial Markets Conduct Regulations Discussion Paper

8 March 2013

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Submission by the New Zealand Bankers' Association on the Financial Markets Conduct Bill Regulations Discussion Paper

About NZBA

1. 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 Limited
   - 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.

3. As a general note, the high level submissions in this document are supported by the more detailed submissions of our member banks. If you have any questions about this submission, or would like to discuss any aspect of it further, please contact me:

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General comment

4. NZBA is grateful for the chance to make some comments on the Financial Markets Conduct Regulations Discussion Paper.

5. NZBA supports the Financial Markets Conduct Bill and the proposed regulations, which represents a significant modernisation of New Zealand's financial markets regulation. A number of our members are providing more detailed submissions. This submission focuses on a smaller number of policy issues that are of significance to member banks as a whole.

Derivatives

6. A key area of ongoing concern is the derivatives regime. While NZBA recognises that there has been further work undertaken in this area, additional changes need to be made to ensure the regulations effectively deals with derivatives.

7. The discussion document fails to recognise the unique nature of derivatives. The handling of derivatives needs to be rethought in recognition that these products are unique, and often customised, and thus cannot easily be likened to other products such as a MIS.

8. Two areas where this is particularly important are:
   - the terminology used to describe requirements applicable to derivatives, and
   - the disclosure regime.

9. With regards to the terminology, as previously stated in our submissions to MBIE and the Select Committee, many of the definitions currently employed draw on existing securities legislation. Due to the uniqueness of derivative products and the international nature of derivatives markets, this approach leads to interpretation difficulties when applied to derivatives. We strongly believe that this needs to be re-examined. We also note that individual banks have submitted on this point in greater detail.

10. With regards to the disclosure regime, thought needs to be given to how disclosure can be effectively tailored to suit derivative products, which are often customised making generic disclosure difficult. This issue is also addressed in greater detail in bank submissions.

Licensing and prudential regulation

11. Another area of concern remains the licensing regime. As per our submissions and letters to the Select Committee, the industry feels strongly that in cases where information is already disclosed to the Reserve Bank as part of prudential regulation, if similar information is required for licensing purposes, it should be taken as proven.

12. This point was accepted by the Select Committee, and the report suggested that these concerns would be addressed in the details of the regulations.

13. The paper noted that some requirements could be taken as complied with. NZBA believes, however, there are many more licensing criteria that should also be taken as confirmed. NZBA strongly urges officials to reconsider at this matter, and bank members are happy to work with officials.

Templates for PDS

14. NZBA notes that the templates for PDSs have not yet been released. NZBA asks that the templates, once prepared, are released well in advance of them taking effect. This would allow banks to mock up draft PDS documents, which would enable them to identify and raise any issues with the form and/or content of the proposed PDSs early.

15. With regards to the form of the PDS requirements, NZBA believes the same approach should be adopted as for the KiwiSaver Periodic Disclosure Regulations, whereby a form for simple products is prescribed in regulations. This would make it easier for the market to implement, and would help ensure greater comparability across the sector.

Ongoing Disclosure

16. NZBA has a number of submissions regarding the disclosure aspects of the discussion document.

17. NZBA strongly supports the policy position that disclosure in the PDS avoids the need to include matters that quickly become out of date (and potentially confuse/mislead investors or result in disclosure duplication).

18. In the MIS space, for example, matters such as asset holdings and performance returns should be covered in periodic reporting, with a reference in the PDS. Additionally, other details such as management personnel can be covered by reference to a website (or by contacting the issuer).

19. In addition, a more considered approach to ongoing disclosure is required. We question the need for annual reports given that a robust periodic reporting regime will be included in the regulations.

20. As an example, in the case of MIS the issuers already prepare audited financials which will be filed on the relevant register entry under FMCB. NZBA sees no additional value to investors from preparing and providing summary financials for Superannuation and KiwiSaver schemes in annual reports.

21. Finally, NZBA believes a supplementary PDS should be permissible under the regulations. We understand that any such provision would need to be matched with a maximum length for supplementary documents, and a maximum number of times an issuer can amend without being required to produce an entirely new PDS. Nonetheless, allowing supplementary PDSs would be beneficial to the industry while not impacting on the quality of information received by investors.

Consent to PDS

22. NZBA believes it is unnecessary to require all directors to consent to or sign each PDS on issue. A lesser requirement would still provide the same accountability, while reducing the burden on issuers.

23. In addition, NZBA notes that there has been ongoing speculation by various law firms that despite the defence provisions contained in the Bill, the regime will still necessitate personal review of each PDS for a MIS by directors. As far as we are aware, this is not what MBIE intended and as such we recommend that this issue is re-examined.

MIS/KiwiSaver disclosure

24. NZBA believes the proposed exemption under clause 10 should be extended to regular investments by unit trusts where the unitholder received the investment statement or PDS on initial investment. There is little reason to distinguish Superannuation and KiwiSaver schemes, and this is in line with the regime's focus on periodic disclosure. Any other material matters recorded on a register should adequately inform investors who are making regular and ongoing investment.

25. NZBA also believes a MIS should be able to produce an annual investor statement analogous to KiwiSaver schemes. It should not be necessary to give a statement of holdings, or transactions, every 6 months. Annual information is sufficient in most cases, and in cases where investors would like additional information, they can request more frequent or detailed information from the issuer.

26. In addition, NZBA believes that this may be an opportune time to address a specific KiwiSaver industry issues. There is an ongoing issue regarding bankruptcy and superannuation savings. NZBA believes money in superannuation and KiwiSaver funds should not be seized by the Official Assignee unless money is deliberately diverted to avoid an OA claim. This is more consistent with international precedent, and supports the incentives to save for your retirement.

DIMS disclosure

27. The industry continues to have concerns around the proposed regime for DIMS disclosure. The regime seems to be based on the assumption that disclosure can be equivalent to a MIS disclosure. Given the individualised nature of DIMS products, this is not appropriate. NZBA believes that this needs to be considered further, and member banks are happy to work with officials on this point.

Disclosure of litigation

28. An ongoing area of significant concern is the proposal that as part of licensing requirements all participants must report on a large number of events, including any pending civil action in New Zealand or elsewhere. NZBA is concerned that this could be excessively wide, and seems out of step with Australian requirements.

29. This requirement could be refined in such a way as to provide the same information, while reducing the quantity of disclosure. In particular, the disclosure of litigation should be subject to a materiality requirement, and linked to events that could impact on the performance of functions or on the entity's financial position. NZBA is happy to discuss this further with officials.