NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Financial Markets Authority

on the

Update of Guidance Note: Effective Disclosure Consultation Paper

14 November 2014

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Submission by the New Zealand Bankers' Association to the Financial Markets Authority on the Update of Guidance Note: Effective Disclosure Consultation 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 strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following fourteen registered banks in New Zealand are members of NZBA:
   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of New Zealand
   - Bank of Tokyo-Mitsubishi, UFJ
   - Citibank, N.A.
   - The Co-operative Bank Limited
   - Heartland 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.

Background

3. NZBA is grateful for the opportunity to submit on the consultation paper in relation to an update of the June 2012 Guidance Note: Effective Disclosure (the Guidance Note).

4. The process around the development of the Guidance Note was a good example of policy development that actively involved the industry. NZBA commends the ongoing commitment to meaningful consultation and engagement and appreciates the invitation to participate in this consultation in relation to an update of the Guidance Note.

5. The following submission makes some brief comments on the proposed changes to the Guidance Note.

6. If you would like to discuss any aspect of the submission further, please contact:

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General

NZBA commends the approach taken by FMA in relation to updating the Guidance Note. In particular, we support the stated intention to make the minimal changes required to reflect the impact of the transitional provisions of the Financial Market Conduct Act 2013 and Financial Market Conduct Regulations 2014 (the FMC Regime). However, as discussed below, in order to clearly delineate between the current and new regimes, we suggest that guidance relating to each regime be kept as separate as possible to avoid additional work in relation to documents that will be phased out.

In addition, we welcome the pre-registration review process being implemented by FMA.

NZBA submits that the update to the Guidance Note should include an effective date of 1 July 2015. This would enable market participants to implement any additional requirements introduced by the changes to the Guidance Note. This is particularly relevant to the sections which have undergone the most change, such as the financial information section.

We note that in Table X on page 43 the topic 'Not misleading' introduces a new specific sub-heading for 'funds', but then subsequently includes additional fund related items below this. NZBA submits that these fund-related items should be incorporated into the 'funds' sub heading.

Interaction between Securities Act and FMC Act Regimes

As noted above, we appreciate the pragmatic approach to updating the Guidance Note to assist with the transition into the FMC Regime. However, NZBA is concerned that in reading in aspects of the FMC Regime (presumably intended to encourage consideration of the eventual transition into the FMC Regime), the Guidance Note seems to infer that issuers should prepare offer documents that are a hybrid of the requirements of both the FMC Regime and the existing Securities Act 1978 (Securities Act) regime.

This is particularly the case where the checklists at the end of the sections in the Guidance Note ask directors and issuers to consider whether their approach is aligned with the requirements of the FMC Act. This raises difficulties for directors and issuers as this may be read as effectively requiring FMCA compliant disclosures, such as an PMCA prescribed key information summary, to the extent that these are not contradictory to the requirements of the Securities Act. We note that many issuers have already taken on board the suggestions in the Guidance Note, and Investment Statements incorporate a key information summary-like disclosure at the front. Suggesting that issuers should amend these disclosures to reflect

the prescribed FMCA disclosures requires more due diligence than FMA may appreciate, and is effectively a repetition of work that issuers will already be undertaking in order to transition fully to the FMCA disclosure regime. Issuers should be entitled to rely on Securities Act disclosures for the transition period, noting that most issuers are likely to transition to the full FMCA regime as soon as they practicably can.

As noted above, while we understand the rationale for encouraging market participants to ready themselves for the FMC Regime, we submit that such references should be removed from the Guidance Note to clearly delineate current requirements from future requirements.

Issuers' and Directors' Responsibilities

Paragraph 15 of the Guidance Note states that "…directors must retain the key role of designing and monitoring the due diligence process." However, directors are unlikely to play an active role in both the design and monitoring of a due diligence process. Instead, directors should consider the appropriateness and effectiveness of the due diligence processes, including challenging or suggesting changes to the processes. Therefore, directors should more appropriately be required to ensure that these processes are in place, appropriate, and functioning effectively without having to actively engage in the development and maintenance of the processes. On this basis NZBA submits that in order to accurately reflect the role of a director, paragraph 15 should be amended to read "…directors must retain the key role of *approving and having ongoing oversight of* the due diligence process."

Further, paragraph 17 of the Guidance Note encourages issuers to use a risk register to record relevant risks. In the context of a registered bank, risk registers maintained for the purposes of operational frameworks are likely to be comprehensive, complex and contain risks that are largely irrelevant to the particular offer being made. On this basis, we submit that the words "to use a risk register" be removed from paragraph 17. This retains the requirement that issuers record their assessment of the likelihood and potential impact of all relevant risks as part of their due diligence process, but allows flexibility as to how this is presented.

Other Comments

In paragraph 42, we suggest that the first sentence should read "[t]he investment statement must not be inconsistent with the prospectus, but this doesn't mean it should repeat the same content as is contained in the *prospectus*."

In paragraph 121, we note that the reference to the Financial Reporting Act 1993 should be updated to refer to the Financial Reporting Act 2013.