

Submission

to the

Financial Markets Authority

on the

Consultation paper:
Proposed guidance on
advertising offers of
financial products under the
Financial Markets Conduct
Act 2013

16 February 2021

About NZBA

1. The New Zealand Bankers' Association (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.
2. The following seventeen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - China Construction Bank
 - Citibank N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - Industrial and Commercial Bank of China (New Zealand) Limited
 - JPMorgan Chase Bank N.A.
 - Kiwibank Limited
 - MUFG Bank Ltd
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited

Introduction

3. NZBA welcomes the opportunity to provide feedback to the Financial Markets Authority (**FMA**) on its Consultation paper: Proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013 (**FMCA**) (**Consultation Paper**). NZBA commends the work that has gone into developing the Consultation Paper.

General

4. We are supportive of, and are generally in agreement with, the guidance.
5. We provide comments and responses below to the questions posed in the Consultation Paper.

Reponses to Consultation Paper questions

6. Question 1 General Scope - We note that the guidance appears to be limited to “financial products” (i.e. debt securities, equity securities, managed investment products and derivatives) and agree that this is appropriate.
7. Question 2 Short form advertising - In relation to regulated offers, while we acknowledge the requirements of section 92, we consider that for short-form or space restricted advertisements a ‘click through’ approach that provides a clear link to the information, should be available. We note a click-through approach should not be used to try and correct a misleading first impression in short-form or space restricted advertisements, but the proposed guidance should not seek to limit the ability for a click through approach to be used where the advertisement provides a clear link to additional or important information.
8. In our view removing the ability to rely on the ‘click through’ rules will prohibit certain types of advertising methods from being utilised, which could ultimately lead to poor outcomes for certain customer segments. Many digital banners, search words and other forms of digital/online advertising have strict limitations in word count or size/scaling, and by requiring the inclusion of all disclosures on the advert it may effectively mean that this form of advertising is not feasible. Certain customer segments are much more likely to be reached by this form of advertising relative to others, so by being unable to reach customer segments via these methods may mean that these customer segments miss out on being informed of offers or products that may be appropriate for them.
9. We propose that the ‘click-through’ option remains, so long as the webpage that is being linked through to contains all the relevant information and disclosures a customer will require to make an informed decision on that offer/product and the advertisement itself still adheres to all the relevant requirements (not misleading or false, etc). We would also highlight that we are not aware of any evidence of investor detriment as a result of current market practice.
10. It is a good customer experience to be presented with a brief and simple message that enables a customer to decide whether they wish to read more about the financial product. As long as the short-form advertisement on its own is not misleading and the customer cannot, for example, click straight through to an application form before receiving all relevant information, we believe the fair dealing requirements can be met in relation to short-form advertisements.
11. Question 4 Offers restricted to wholesale investors – It is our strong view that a statement as proposed, and the proposed related requirements (such as “immediately and prominently clear”), are matters more appropriately addressed through the legislative process.
12. However, if FMA decides to provide an example of the wording in the final guidance it should be clear that this is only guidance and not prescribed wording i.e. “could include wording to this effect”.

13. We note that currently a wholesale product must include selling restrictions in order to qualify as a wholesale product. With bonds for example, these are usually included at the end of a terms sheet. Often a bond may only be sold to certain classifications of wholesale investors. Adding a statement at the start of a terms sheet in our view adds little value for an investor (the benefit is that they know for certain it is a wholesale offer by reading one page, instead of say three pages).
14. Conversely it could potentially create a risk that an investor reads the proposed statement on the first page, and then fails to read the selling restrictions (which provide more detail around which classifications of wholesale investors may buy the product).
15. Question 5 Miscellaneous – We note that a large portion of the proposed guidance is a summary of the relevant requirements of the FMCA. Whilst this summary is useful, we believe the proposed guidance could be enhanced by more practical guidance and examples aimed at assisting issuers to comply with the requirements. For example, practical guidance on when a communication is distributed to a person outside of New Zealand would be more useful than a reference back to the applicable section of the FMCA. In the paragraphs below we comment on specific matters in the proposed guidance.
16. Page 5: The paragraph beginning “The purpose of the...” could be enhanced by also reflecting the FMA’s main objective as set out in the FMCA.
17. Page 5: The paragraph beginning “Please note that much...” potentially confuses the scope of the guidance. This should be removed as we understand the intention of the guidance is not to cover financial services.
18. Page 6: The section headed “Regulated offers are subject to specific disclosure requirements” could be enhanced by also stating what a regulated offer and financial product are.
19. Page 8: (Advertising which is likely to mislead or confuse, without actually being misleading or confusing, is sufficient to breach the fair dealing provisions) – we recommend additional information is provided on how FMA would assess whether advertising is “likely to mislead or confuse” given the subjective nature of this assessment.
20. Page 9: (communications to existing customers are also advertisements) – we are concerned that this could hinder communicating information to customers about their existing products and do not agree that the types of communications discussed should be deemed advertisements. We consider that the example provided in the draft guidance, of “monthly updates to investors, highlighting the performance of their fund” is factual information, not an advertisement. Sending out quarterly updates or providing on-going fund performance or other product information/developments to existing customers is already addressed under the Fair Trading Act requirements to ensure that the communications are not misleading.
21. Page 9: We do not consider that providing information about the issuer in isolation from the specific financial products will amount to an advertisement that would necessarily require compliance with sections 89-92 of the FMCA.

22. Page 10: Towards the end of the first paragraph the terms “supply or potential supply” are used. For the sake of certainty we would prefer the FMCA terms “offer or intended offer” be used.
23. Page 10: In the first sentence of the third paragraph the use of the word “verifiable” imposes a subtly different obligation to “substantiated”, which is the legislative requirement under the FMCA. We recommend deleting the word “verifiable” from this sentence.
24. Page 10: The second sentence of the third paragraph begins “Information should also be presented in such a way that it will be readily understood by the target audience...”. It is difficult, if not impossible, for an author to ensure information will be readily understood by the target audience. Accordingly, we consider the appropriate test is that the communication needs to be “capable of being understood based on reasonable grounds”.
25. Page 10: The following paragraph should include clarification to the effect that different messaging to different target markets is not precluded: *Advertisements must give consistent information across different communication channels, so that people receive the same impression of a financial product regardless of the source (e.g. radio vs. print advertising). We also recommend that this paragraph commence “Where practicable ...”.*
26. Page 11: We agree with the premise that you should take care when comparing different products, however, we do not consider the example “comparing non-bank financial products to registered bank term deposits” to be helpful. For instance, a comparison of these products could be comparing the differences as noted earlier in the section.
27. Page 12: We have concerns around a focus on FRS-42 and NZ GAAP in the “Forecast returns” section, as we do not consider that will be as applicable for managed funds. In relation to KiwiSaver, the Financial Markets Conduct Regulations 2014 provide a projected returns methodology for member statements. We suggest the following be included:

Advertisements for financial products must only include information on forecast returns based on reasonable forward-looking assumptions – for example, for multi asset class funds, forecast returns must not be derived exclusively from historical returns but should be based on a forward looking methodology incorporating a reasonable estimate of long term fair value. This ensures that asset classes or portfolios of assets that are expensive or above fair value have lower forecast returns.

We also recommend the following statement in the “Forecast returns” section be amended to read:

The basis of any forecast return should be made clear (where practicable), and references to where any further information on the underlying assumptions can be found should be included.

Contact details

28. If you would like to discuss any aspect of this submission, please contact:

Antony Buick-Constable
Deputy Chief Executive & General Counsel
antony.buick-constable@nzba.org.nz