New Zealand Banking Association
Te Rangapū Pēke

Submission

to the

Ministry of Business, Innovation and Employment

on the

Exposure Draft of the Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023

12 July 2023

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
PO Box 3043, Wellington 6140, New Zealand
www.nzba.org.nz

About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**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 eighteen 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.
   - KB Kookmin Bank Auckland Branch
   - Kiwibank Limited
   - MUFG Bank Ltd
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited

Contact details

3. 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

Sam Schuyt
Associate Director, Policy & Legal Counsel
sam.schuyt@nzba.org.nz

Introduction

4. NZBA welcomes the opportunity to submit to the Ministry of Business, Innovation and Employment (**MBIE**) on the Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023 (**the Amendments**).

5. NZBA supports the policy underpinning the Amendments – greater clarity about the type, form and methods that regulators expect to be adopted in relation to climate-related disclosure (**CRD**) record keeping will support Climate Reporting Entities (**CREs**) in making high-quality disclosures.

6. NZBA proposes several changes to the Amendments to ensure that clear, certain and practical requirements are established. This is important not just for our members, but for investors and stakeholders.

Non-applicability to voluntary climate-related disclosures

7. NZBA seeks confirmation that the Amendments do not apply to voluntary climate-related disclosures published by CREs prior to the introduction of mandatory climate statements and the entry into force of the Amendments. As currently drafted, the Amendments apply to "CRD Records" (see draft regulations 252A - D), a term which is introduced, but not defined, in Part 7A of the Financial Markets Conduct Act 2013 (**FMCA**). It would be useful to clarify that "CRD Records" only refer to records created by CREs for the purpose of publishing mandatory climate statements in accordance with Part 7A.

Location of CRD records

8. NZBA considers the suggested options for the location requirements for CRD records (i.e. CRD records/cloud servers should be kept in New Zealand alone, or Australia, New Zealand or the United Kingdom) are too restrictive, and are unnecessary in light of the current technological environment. NZBA agrees that it is most appropriate not to include a regulation in respect of location requirements for CRD records (as per 2.12 of the MBIE Consultation Paper).

9. This concern is particularly pertinent to the international banks that operate within New Zealand, as the board and higher levels of management and governance are often located overseas, and the justification/decision documentation they create in support of CRD might be retained in that overseas location. Similarly, international banks are likely to use internal systems/programmes hosted in multiple jurisdictions to support the preparation of their CRD. The New Zealand based arm of that bank is unlikely to be able to influence the location this data is kept in.

10. Similarly, where a bank contracts a global data provider as a third-party provider, its CRD data may be held in servers in various locations broader than UK, Australia and NZ. Data providers may also split their data between international servers for cyber security purposes.

11. We note the stated principal role of this proposed regulation is to facilitate the Financial Markets Authority's (**FMA**) inspection of records in the event a CRE was not complying with an obligation to provide records. On a practical level, NZBA believes that setting a requirement for the physical location of a cloud server will not enhance the FMA's

ability to access CRD records above the other legislative or regulatory requirements related to record maintenance and production.

12. In particular, there are existing statutory provisions that empower FMA in this area, supported by financial penalties for non-compliance, including a clear obligation on CREs to make CRD records available to the FMA (section 461Y, FMCA) and to ensure their outsourcing arrangements support this (regulation 252D). In the event a CRE is not complying with its obligations to make information available, we do not believe it would be any easier for the FMA to access information held on New Zealand or Australian based servers compared to those elsewhere in the world.

13. In drawing an analogy with the legal requirements for keeping accounting records, we acknowledge that section 456 of the FMCA currently limits the places where accounting records can be stored. This section is considered overly-restrictive by industry, and the FMA has recently commented that it has referred the matter to MBIE to consider legislative amendment.[1]

14. With that backdrop, NZBA strongly believes that MBIE should not perpetuate this overly restrictive position by also applying it in the CRD context (and particularly not by doing so by regulation, rather than statutory enactment). This is particularly so where restrictions of this nature have recently been raised as problematic in the accounting records context. There should be no restrictions on where CRD records are kept.

15. Although the above is NZBA's strongly preferred position, if data location restrictions are to be retained, NZBA would encourage FMA to use its existing powers (section 556, FMCA) to grant an exemption from the location requirements where a CRE can demonstrate (for example):

    (a) adequate data ownership; and

    (b) controls and retention policies for CRD records enabling timely retrieval of information into New Zealand.

16. Such an approach is in line with that taken by the Commissioner of the Inland Revenue in relation to tax records in s 22(2BA) and (8) of the Tax Administration Act 1994, and the parallel IRD guidance in IRD SPS21/02.

CRD records kept by another person

17. NZBA considers it would be useful to clarify the intended scope of regulation 252D. We propose a drafting amendment (as marked below) to reflect the fact that CREs cannot control what legal obligations apply to another person:

> "252D CRD records kept by another person
>
> If a climate reporting entity arranges for any of its CRD records to be kept by another person, it must ensure that ~~the other person is under all legal obligations necessary~~ **it has entered into appropriate contractual or other arrangements with the other person so as** to ensure the climate reporting entity can comply with its obligations to keep and make available CRD records in accordance with the Act and these regulations."

[1] See the FMA's February 2023 'Guidance and expectations for keeping proper accounting records submission Report' (https://www.fma.govt.nz/assets/Consultations/Submissions-report-Accounting-records-guidance.pdf) at page 3.

18. The approach we propose would also be consistent with the licence conditions that apply to CREs who are managers of registered schemes in respect of record keeping and outsourcing: these conditions require managers to have appropriate contractual arrangements in place with outsource providers on behalf of the manager.[2]

FMA 'educative and constructive' approach

19. NZBA is concerned about the lack of recognition of the FMA's previously articulated "educative and constructive" initial approach to CRD record keeping. The FMA's September 2022 "Initial Approach" to CRD record keeping acknowledged that there is a short lead time to prepare for the new regime, that quality of data and reporting would improve as the regime evolved, and that there would be higher expectations for record keeping processes that had been established for some time.[3]

20. NZBA acknowledges that the FMCA already requires CREs to keep CRD records for the first CRE reporting year onwards (s 461V(1)), and that the Amendments cannot dilute this obligation. However, as drafted, the Amendments do not appear to acknowledge the flexible, educative approach that regulators have previously signalled they would apply in the early stages of the CRD regime. NZBA also recognises that the FMA has published its monitoring approach and plan for 2023 to 2026,[4] which provides some detail about its approach to the CRD regime in the first few years of its application. However, this plan provides minimal guidance specifically related to CRD record keeping.

21. Without some recognition of the need to develop capability and capacity for record-keeping among CREs, NZBA's member CREs may be incentivised to focus on the strict legal requirements in respect of record-keeping, at the expense of the 'bigger picture', and the potential to develop more innovative approaches. Such changes would also encourage CREs to actively engage with the FMA to identify problems and solutions related to CRD record keeping.

22. NZBA recognises that it may be appropriate for this approach to be reflected in the FMA's record-keeping guidance, as opposed to the Amendments themselves. NZBA will provide similar comments to the FMA as part of the consultation on its draft guidance related to CRD record keeping.

Conclusion

23. NZBA is happy to provide further detail on any of the above submissions if useful.

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2 See the FMA's standard conditions for managed investment scheme manager licences (https://www.fma.govt.nz/assets/Compliance/160331-Standard-conditions-for-MIS.pdf) at page 2.

3 https://www.fma.govt.nz/assets/Information-sheets/Climate-related-disclosure-Record-keeping-initial-monitoring-approach.pdf

4 https://www.fma.govt.nz/assets/Guidance/Crd-monitoring-plan-2023-2026.pdf