



Financial Markets Conduct Amendment Regulations 2017

Patsy Reddy, Governor-General

Order in Council

At Wellington this 7th day of August 2017

Present:

Her Excellency the Governor-General in Council

These regulations are made under sections 543 and 548 of the Financial Markets Conduct Act 2013 and section 209C(6) of the Companies Act 1993—

- (a) on the advice and with the consent of the Executive Council; and
- (b) on the recommendation of the Minister of Commerce and Consumer Affairs made in accordance with section 549 of the Financial Markets Conduct Act 2013.

Contents

	Page
1 Title	2
2 Commencement	2
3 Principal regulations	2
4 Regulation 5 amended (Interpretation)	2
5 Regulation 19 amended (NBDT must give credit risk statement to investors if it does not have investment-grade credit rating)	3
6 Regulation 52B amended (Supplementary confirmation notice if PDS or fund opens after being closed)	3
7 New regulations 61B to 61F and cross-heading inserted	3

<i>Annual reports to be made available by e-reporting entities</i>		
61B	Interpretation	4
61C	What is an e-reporting entity	4
61D	Annual report to be publicly available	4
61E	Notice to shareholders	4
61F	Copies of annual report to be provided to shareholders on request	5
8	New regulation 72AA inserted (Civil liability for contravention of certain provisions in Schedule 8)	6
	72AA Civil liability for contravention of certain provisions in Schedule 8	6
9	Schedule 1 amended	7
10	Schedule 4 amended	7
11	Schedule 8 amended	8

Regulations

1 Title

These regulations are the Financial Markets Conduct Amendment Regulations 2017.

2 Commencement

These regulations come into force on 9 August 2017.

3 Principal regulations

These regulations amend the Financial Markets Conduct Regulations 2014 (the **principal regulations**).

4 Regulation 5 amended (Interpretation)

- (1) In regulation 5(1), revoke the definitions of **closed to all investment status**, **closed to new investors status**, and **open status**.
- (2) In regulation 5(1), insert in their appropriate alphabetical order:

closed to all investment status, in relation to a specified fund, multi-fund investment option, or life cycle investment option, means that the fund or option has, or should have, a closed to all investment status under clause 51(1)(ea), (ga)(iv), or (h)(iv) and (2) of Schedule 4

closed to new investors status, in relation to a specified fund, multi-fund investment option, or life cycle investment option, means that the fund or option has, or should have, a closed to new investors status under clause 51(1)(ea), (ga)(iv), or (h)(iv) and (2) of Schedule 4

life cycle investment option has the meaning set out in clause 1(1) of Schedule 4

life cycle stage has the meaning set out in clause 1(1) of Schedule 4

multi-fund investment option has the meaning set out in clause 1(1) of Schedule 4

open status, in relation to a specified fund, multi-fund investment option, or life cycle investment option, means that the fund or option has, or should have, an open status under clause 51(1)(ea), (ga)(iv), or (h)(iv) and (2) of Schedule 4

(3) In regulation 5(1), definitions of **specified life cycle stage** and **specified multi-fund investment option**, delete “(as defined in clause 1(1) of Schedule 4)”.

5 Regulation 19 amended (NBDT must give credit risk statement to investors if it does not have investment-grade credit rating)

Replace regulation 19(6)(a) with:

(a) BBB– or better by any of the following:

- (i) Standard & Poor’s;
- (ii) Fitch Ratings;
- (iii) Equifax Australasia Credit Ratings Pty Limited; or

6 Regulation 52B amended (Supplementary confirmation notice if PDS or fund opens after being closed)

(1) In the heading to regulation 52B, replace “**or fund**” with “**, fund, or option**”.

(2) Replace regulation 52B(1) with:

(1) This regulation applies if—

- (a) a PDS—
 - (i) has a closed for applications status; and
 - (ii) at the most recent confirmation date, had a closed for applications status; or
- (b) a specified fund in a managed fund, a multi-fund investment option, or a life cycle investment option that is covered by a PDS—
 - (i) has a closed to all investment status; and
 - (ii) at the most recent confirmation date, had a closed to all investment status.

(3) In regulation 52B(2)(b), after “fund”, insert “or option”.

7 New regulations 61B to 61F and cross-heading inserted

After regulation 61A, insert:

Annual reports to be made available by e-reporting entities

61B Interpretation

In this regulation and regulations 61C to 61F,—

annual report has the same meaning as in section 209C of the Companies Act 1993

e-reporting entity has the meaning set out in regulation 61C

shareholder has the same meaning as in section 96 of the Companies Act 1993.

61C What is an e-reporting entity

- (1) An FMC reporting entity is an **e-reporting entity** for an accounting period if the entity—
 - (a) is a company that is required by section 208 of the Companies Act 1993 to prepare an annual report for that period; and
 - (b) is an issuer of equity securities that are regulated products.
- (2) Any other FMC reporting entity is an **e-reporting entity** for an accounting period if the entity—
 - (a) is a company that is required by section 208 of the Companies Act 1993 to prepare an annual report for that period; and
 - (b) has elected under section 209C(3) of the Companies Act 1993 to comply with regulations 61D to 61F in relation to that annual report.

61D Annual report to be publicly available

- (1) An e-reporting entity for an accounting period must make its annual report for that period available in accordance with this regulation.
- (2) The report must be available, free of charge, on an Internet site maintained by, or on behalf of, the entity in a way that ensures that—
 - (a) the report is prominently displayed on the site; and
 - (b) members of the public can easily access the report at all reasonable times.
- (3) The report must—
 - (a) be made available on the site as soon as practicable after it is prepared (but in any event not later than 20 working days after it is prepared); and
 - (b) remain available for at least 5 years after it is first made available.
- (4) This regulation applies for the purposes of section 97 of the Act.

61E Notice to shareholders

- (1) An e-reporting entity for an accounting period must send a notice to every notifiable shareholder of the entity.

(2) A person is a **notifiable shareholder** for an accounting period if—

- (a) the person is a shareholder of the entity on the last date by which the notice for that period must be sent under subclause (4); and
- (b) either—
 - (i) the entity has not previously sent the shareholder a notice under this regulation; or
 - (ii) the entity was not an e-reporting entity for 1 or more accounting periods since the shareholder was last sent a notice under this regulation.

(3) The notice must set out the following:

- (a) a statement to the effect that the entity's annual report for the accounting period is or will be publicly available on an Internet site maintained by, or on behalf of, the entity;
- (b) the URL of that site;
- (c) a statement to the effect that the entity's annual reports for all future accounting periods for which it is an e-reporting entity will be publicly available on that site as required by regulation 61D;
- (d) a statement to the effect that the shareholder may, at any time, request a free copy (as a hard copy or an electronic copy) of the most recent and future annual reports.

(4) The notice must be sent—

- (a) not less than 20 working days before the date fixed for the entity's annual meeting of shareholders for the accounting period; or
- (b) if the entity is not required to hold an annual meeting of shareholders for that period, not more than 20 working days after the annual report for the period is prepared.

(5) The notice may be—

- (a) sent on behalf of the entity by another person (such as the person who maintains the entity's share register); and
- (b) combined with a notice given under this regulation by 1 or more other e-reporting entities.

(6) The notice may be sent electronically if section 391(3A) of the Companies Act 1993 allows the entity to send notices to the shareholder by electronic means.

(7) This regulation applies for the purposes of section 96 of the Act.

61F Copies of annual report to be provided to shareholders on request

(1) If a shareholder of an e-reporting entity requests an annual report from the entity, the entity must—

- (a) send its most recent annual report to the shareholder as soon as practicable after receiving the request; and
- (b) send its annual report for each future accounting period to the shareholder as soon as practicable after the report is prepared.

(2) The annual reports must be sent to the shareholder as a hard copy or an electronic copy as requested by the shareholder.

(3) Subclause (1)(b) ceases to apply if any of the following occurs:

- (a) the shareholder revokes the request;
- (b) the person ceases to be a shareholder;
- (c) the entity is not an e-reporting entity for 1 or more accounting periods.

(4) This regulation applies for the purposes of section 96 of the Act.

8 New regulation 72AA inserted (Civil liability for contravention of certain provisions in Schedule 8)

After regulation 72, insert:

72AA Civil liability for contravention of certain provisions in Schedule 8

(1) The following provisions in Schedule 8 of these regulations are prescribed to be Part 3 offer provisions and to give rise to civil liability under section 101(3)(l) of the Act:

- (a) clause 7 (offeror must not breach \$2 million aggregate limit);
- (b) clause 20 (issuer must give notice to licensed market operator and be in compliance with continuous disclosure and financial reporting obligations);
- (c) clause 21 (obligation to correct defective notice);
- (d) clause 22 (further requirements for offers of debt securities);
- (e) clause 24(1) and (3)(a) (offeror must provide limited disclosure document and comply with ongoing disclosure duties);
- (f) clause 25(1)(a) and (2) (limited disclosure document must comply with Schedule 9 and requirements that apply to equivalent PDS);
- (g) clause 30(1) and (3)(a) (offeror must provide limited disclosure document and comply with ongoing disclosure duties);
- (h) clause 31(1)(a) and (2) (limited disclosure document and register entry);
- (i) clause 33 (offeror must provide limited disclosure document for variations);
- (j) clause 34(2)(a) and (b)(i) (content of limited disclosure document for moratorium or change of issuer);
- (k) clause 35 (content of limited disclosure document for other variations);

- (l) clause 36 (supplementary disclosure to correct deficiency for renewal offers):
- (m) clause 38 (limited disclosure document and register entry requirements):
- (n) clause 42 (offeror must comply with section 80 of Act).

(2) The following provisions in Schedule 8 of these regulations are prescribed to be Part 3 offer provisions and to give rise to civil liability under section 101(4)(ga) of the Act:

- (a) clause 4 (offeror must provide warning statement):
- (b) clause 5 (offeror must obtain acknowledgement):
- (c) clause 10 (offeror must provide description of scheme, warning, and access to annual report and financial statements):
- (d) clause 14 (offeror must provide description of plan and access to annual report and financial statements):
- (e) clause 18 (small offer warning):
- (f) clause 24(3)(b) (offeror must provide limited disclosure document and comply with ongoing disclosure duties):
- (g) clause 25(1)(b) (limited disclosure document must comply with Schedule 9 and requirements that apply to equivalent PDS):
- (h) clause 30(3)(b) (offeror must provide limited disclosure document and comply with ongoing disclosure duties):
- (i) clause 31(1)(b) (limited disclosure document and register entry):
- (j) clause 34(2)(b)(ii) (content of limited disclosure document for moratorium or change of issuer):
- (k) clause 43 (limited disclosure document must be provided on request).

9 Schedule 1 amended

In Schedule 1, after clause 34, insert:

Part 4
Provisions relating to Financial Markets Conduct Amendment
Regulations 2017

35 Transitional arrangement for e-reporting until 2018

An FMC reporting entity that is an e-reporting entity under regulation 61C(1) may elect not to comply with regulations 61D to 61F in relation to the annual report for an accounting period that ends on or before 31 December 2017.

10 Schedule 4 amended

(1) In Schedule 4, clause 51(1)(ga)(iii), replace “relates:” with “relates; and”.

- (2) In Schedule 4, after clause 51(1)(ga)(iii), insert:
 - (iv) the status of the option (see subclause (2));
- (3) In Schedule 4, clause 51(1)(h)(iii), replace “stages:” with “stages; and”.
- (4) In Schedule 4, after clause 51(1)(h)(iii), insert:
 - (iv) the status of the option (see subclause (2));
- (5) In Schedule 4, clause 51(2), after “(1)(ea),”, insert “(ga)(iv), and (h)(iv),”.
- (6) In Schedule 4, clause 51(2)(a), after “53(1)(a)”, insert “or 52(1)(ga)(ii) or (h)(ii)”.
- (7) In Schedule 4, clause 51(2), after “fund”, insert “or option” in each place except in the example in paragraph (e).
- (8) In Schedule 4, after clause 53, insert:

53AA Limited fund information for certain defined benefit schemes

- (1) Despite clause 53, the register entry for a limited information scheme—
 - (a) is required to contain the information set out in clause 53(1)(a), (b), (c)(i) and (ii), and (d) to (h), to the extent that it is applicable for the scheme; but
 - (b) is not required to contain the other information referred to in clause 53.
- (2) For the purposes of subclause (1)(a), clause 53(1)(d) applies as if the scheme were a fund for which a fund update that complies with clause 63 is required.
- (3) In this clause, **limited information scheme** means a defined benefit scheme to which regulation 56(1) and (2) does not apply because of regulation 56(2A).
- (9) In Schedule 4, after clause 54(2A), insert:

(2B) Subclause (1)(d) does not apply to a limited information scheme (as defined in clause 53AA).

11 Schedule 8 amended

- (1) In Schedule 8, replace clause 24(3), with:
- (3) A must comply with the following provisions (including any regulations relating to those provisions) in respect of the financial products issued or transferred to B:
 - (a) section 97 of the Act;
 - (b) sections 96 (other than for a breach of regulation 51) and 100 of the Act;
 - (c) sections 95, 96 (for a breach of regulation 51), and 98 of the Act.
- (3A) For the purposes of subclause (3), the provisions referred to in that subclause apply with all necessary modifications as if the financial products were regulated products.
- (2) In Schedule 8, replace clause 25(1) with:

- (1) The limited disclosure document must comply with the following provisions (including any regulations relating to those provisions) as if the limited disclosure document were an equivalent PDS and the offer were a regulated offer:
 - (a) sections 57(1)(a) and 60 of the Act;
 - (b) section 62 of the Act;
 - (c) sections 49 and 61(1) of the Act.
- (3) In Schedule 8, replace clause 30(3) with:
- (3) A must comply with the following provisions (including any regulations relating to those provisions) in respect of the financial products issued or transferred to B:
 - (a) section 97 of the Act;
 - (b) sections 96 (other than for a breach of regulation 51) and 100;
 - (c) sections 95, 96 (for a breach of regulation 51), and 98 of the Act.
- (3A) For the purposes of subclause (3), the provisions referred to in that subclause apply with all necessary modifications as if the financial products were regulated products.
- (4) In Schedule 8, replace clause 31(1) with:
- (1) The limited disclosure document must comply with the following provisions (including any regulations relating to those provisions) as if the limited disclosure document were an equivalent PDS and the offer were a regulated offer:
 - (a) sections 57(1)(a) and 60 of the Act;
 - (b) section 62 of the Act;
 - (c) sections 49 and 61(1) of the Act.
- (5) In Schedule 8, replace clause 34(2)(b) with:
 - (b) comply with the following provisions (including any regulations relating to those provisions) as if the limited disclosure document were an equivalent PDS and the offer were a regulated offer:
 - (i) sections 57(1)(a) and 60 of the Act;
 - (ii) section 62 of the Act;
 - (iii) sections 49 and 61(1) of the Act.

Michael Webster,
Clerk of the Executive Council.

Explanatory note

This note is not part of the regulations, but is intended to indicate their general effect.

These regulations amend the Financial Markets Conduct Regulations 2014 (the **principal regulations**) and come into force on 9 August 2017.

The amendments are in 4 broad groups relating to annual reports, confirmation notices, civil liability, and minor technical changes.

Annual reports

New regulations 61B to 61F provide an alternative process for FMC reporting entities (as defined in the Financial Markets Conduct Act 2013 (the **FMC Act**)) to distribute their annual reports. Under the Companies Act 1993, the process for distributing annual reports to shareholders is a largely paper-based process. That Act was amended in 2016 to allow the principal regulations to establish an alternative process to allow annual reports to be made available and distributed electronically. *New regulations 61B to 61F* establish the new process.

Companies that are issuers of equity securities may use the new process for their 2017 annual report, and must use it from 1 January 2018. Other FMC reporting entities can choose to use the new process or continue to use the process under the Companies Act 1993. Under the new process, a company has to make its annual reports available on its website and give a hard copy or an electronic copy to shareholders who ask for one.

Confirmation notices

Currently, regulation 52B of the principal regulations requires that, if a product disclosure statement (a **PDS**) has a closed status, a confirmation notice must be lodged before its status can be changed to open. A confirmation is also required before a closed specified fund covered by a PDS changes its status. As a PDS may also relate to multi-fund investment options or life cycle investment options and their status may also change, regulation 52B is amended to also require a confirmation notice before changes are made to the status of those investment options.

Civil liability

Under section 101(3)(l) and (4)(ga) of the FMC Act, contravention of a prescribed provision of the principal regulations may give rise to civil liability and a pecuniary penalty. *New regulation 72AA* prescribes the relevant provisions of the principal regulations for this purpose. Those listed in *new regulation 72AA(1)* attract a maximum penalty of \$1 million for an individual or \$5 million for any other person. Those listed in *new regulation 72AA(2)* attract a maximum penalty of \$200,000 for an individual or \$600,000 for any other person.

Clauses 24(3), 25(1), 30(3), 31(1), and 34(2)(b) of Schedule 8 of the principal regulations require compliance with various provisions of the FMC Act. Those clauses are amended so that non-compliance with the specified provisions will give rise to civil

liability with different levels of maximum penalties. Having different levels of liability is now possible as a result of amendments to the FMC Act being made by the Regulatory Systems (Commercial Matters) Amendment Act 2017, which will commence on the same day as these regulations.

Minor technical changes

The rest of these regulations make changes to the principal regulations to address minor technical issues that have emerged as industry participants begin to operate under the new financial markets conduct regime.

Credit ratings agencies

Under the principal regulations, different requirements apply to non-bank deposit takers depending on whether they have an investment-grade credit rating, which is defined by reference to each registered credit rating agency. Equifax Australasia Credit Ratings Pty Limited has recently been registered as a credit rating agency. The definition of investment-grade credit rating is therefore amended to include it.

Information disclosure for defined benefit retirement schemes

The principal regulations require the manager of a managed fund to make certain information about fund performance publicly available each quarter. Defined benefit retirement schemes are exempt from this requirement because that information is not relevant for participants in those schemes. Under Schedule 4 of the principal regulations, the information that must be recorded in the register of offers of financial products also includes fund performance information. Schedule 4 is also amended so that defined benefit schemes are also exempt from the need to record this information in the register.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*: 8 August 2017.

These regulations are administered by the Ministry of Business, Innovation, and Employment.