



LOWNDES JORDAN
BARRISTERS & SOLICITORS

FINANCIAL MARKETS CONDUCT BILL

IMPLICATIONS FOR RETAIL UNIT TRUST MANAGERS

OVERVIEW

The Ministry of Economic Development (**MED**) has released an exposure draft of the [Financial Markets Conduct Bill](#) (**Bill**) for consultation. The Bill was borne out of the securities law reform process which has been underway for some time now, and sets out the framework for the regulation of our financial markets going forward (much of the detail of the new regime will be set out in regulations which are to be developed over the coming year). The Bill rewrites and consolidates a number of pieces of legislation, including the Securities Act, Securities Markets Act, Unit Trusts Act, Superannuation Schemes Act, Securities Transfer Act and parts of the KiwiSaver Act.

Submissions on the exposure draft are due by **6 September 2011**. The MED has said that it will continue to consult informally over the coming months, and the Select Committee process (early 2012) will provide another opportunity to make submissions on the Bill.

This newsletter focuses on what the new regime will mean for managers of retail unit trusts. The proposals have been known to the market for some time, so we set out a high level recap of the practical elements of the new regime as it has been further developed through the Bill, explain the intended timing for its introduction and the proposed transitional provisions, and then provide a suggested roadmap to help fund managers prepare for the introduction of the new regime.

THE NEW REGIME - GOVERNANCE

A unit trust will constitute a "managed investment scheme", and will need to be registered. The trust's manager and supervisor will each need to be licensed.

The trust deed for a unit trust will be required to address a range of prescribed matters. Most current trust deeds should already go a long way to complying with these requirements (because they already contain much of the detail that is proposed to be required). However, it will, of course, be necessary to carefully work through the requirements to ensure that existing trust deeds are compliant – there are several areas which have been given particular attention in the new regime, such as related party transactions, changes in managers and supervisors, indemnification, and the making of amendments to the trust deed. Trust deeds will also need to be consistent with the proposed provisions on managers' and supervisors' prescribed functions and duties.

Greater formality around investment policies has been proposed. Every fund will need a Statement of Investment Policy and Objectives, which will need to be lodged with the registrar. In prescribed circumstances (still to be detailed), investment policy limit breaks will need to be reported to the fund's supervisor (who in turn will be required to report the break to the Financial Markets Authority (**FMA**)).

OFFER DOCUMENTS, ADVERTISEMENTS AND DISTRIBUTION

Instead of preparing a prospectus and investment statement, managers will need to prepare a product disclosure statement (**PDS**) and lodge other information relating to an offer on a new Register of Offers of Financial Products. Together, the PDS and register entry must contain all material information relating to the offer. The Bill sets out two alternatives for what constitutes "material" information:

- **Option A:** information that a reasonable person would expect (if disclosed) to have a material effect on the demand for the product on offer.

- **Option B:** information that a reasonable person would expect to influence, or be likely to influence, persons who commonly invest in financial products in deciding whether or not to acquire the product on offer.

The form and content of the PDS and register entry will be prescribed by regulations. Assuming the approach signalled earlier this year is adopted, the PDS will have two parts: a short (two page) key information summary up the front, followed by the main body which will contain more detailed information about the product. The Bill requires managers to ensure that the information in the PDS is worded in a clear, concise, and effective manner.

Advertisements must state the identity of the manager, that there is a PDS for the offer and where and how it can be obtained, and that a person should consider the PDS in deciding whether to invest. Advertisements must not be inconsistent with the PDS or register entry, and will be subject to the general prohibitions on misleading or deceptive conduct, and false or misleading representations. Certification of advertisements will no longer be required.

The Bill proposes prohibiting the offering of products in the course of, or because of, unsolicited meetings, telephone calls or electronic communications otherwise than in limited prescribed circumstances.

ONGOING OBLIGATIONS

As well as continuing to ensure the accuracy of PDSs, managers will need to, among other things:

- keep the register updated and comply with ongoing disclosure obligations (for example quarterly reporting of holdings, returns and fees and charges); and
- report any investment policy limit breaks (as noted above), as well as any material pricing errors or failures to comply with pricing methodologies (which may also need to be reported to the FMA).

TIMING

It is currently expected that the Bill will be introduced into Parliament before the election, that it will go through the Select Committee process through much of the first part of 2012, with the regulations being developed through the year and the legislation enacted in late 2012. The proposed transitional provisions are as follows:

- If units in a fund are offered in a prospectus that is registered under the current law before the commencement of the new regime, the current law will continue to apply to the offer.
- For a period of six months following the commencement of the new regime, managers will be able to elect to comply with the current law in respect of any prospectus to be registered during that period. If such an election is made, units in the fund will be able to be offered and allotted under that prospectus in accordance with the current law.
- Certain provisions of the new regime will apply even when the current law applies to an offer.
- All offers and allotments on the basis of the current law must cease within two years of the commencement of the new regime.

COMPLIANCE ROADMAP

While awaiting a lot of its detail, now is the time for fund managers to be mapping out how they are going to prepare themselves for the introduction of the new regime. The list below can serve as a starting point, which should be developed as the process unfolds.

Now

- Understand the new regime and how it will impact on your current and proposed future business.
- Consider whether to make written submissions on the exposure draft and/or meet with MED officials to discuss any particular implications or concerns. As was evident with the development of the financial advisers regulation last year, industry input is crucial to developing good law. The MED has shown a real interest in consulting with industry participants and we encourage fund managers to get involved in the process.

When the Bill is introduced into Parliament

- Understand the changes and further developments to the exposure draft and re-evaluate the implications of the new regime for your business.
- Consider whether to make written submissions on the Bill.

When the Bill is reported back from the Select Committee and as and when relevant regulations are released

- Prepare for licensing.
- Review and update your directors' and officers' insurance and indemnification documentation where necessary.
- Refresh your liability advice to reflect the proposed new liability regime.
- Review and update your trust deeds where (and when) necessary.
- The new regime will better facilitate comparisons between products. Consider how your products will stack up against competitors' products having regard to the required disclosures. Does anything need to change to ensure your products are competitive?
- Consider what changes will need to (or should) be made to the marketing and distribution of your products (for example, the standardised nature of a PDS may necessitate additional material being prepared).
- Review your service agreements to ensure that they facilitate compliance with the new regime (for example, to ensure that you are in a position to comply with the new disclosure and reporting obligations).
- Update your risk and compliance plans where necessary.
- Start developing the look of your PDSs and, having regard to rollover dates, proposed product launches and the transitional provisions, determine when you will comply with the new regime.

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