

# Submission

to the

## Financial Markets Authority

on the

### Consultation: Guidance on references to climate statements in disclosure documents – proposed information sheet

30 August 2024

## 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 (New Zealand) Limited
  - 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:

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## Introduction

4. NZBA welcomes the opportunity to provide feedback to the Financial Markets Authority (**FMA**) on the Consultation: *Guidance on references to climate statements in disclosure documents – proposed information sheet (Guidance)*.
5. Overall, while the sector understands the intention behind the Guidance, we do not consider that it is necessary. We consider the market has sufficient experience to determine the extent to which information on climate change or climate-related risk may need to be disclosed to investors in a PDS<sup>1</sup> or Disclose register entry. We are also concerned that the introduction of the Guidance could pose compliance problems for issuers. However, if the FMA goes ahead with the Guidance, NZBA suggests it should be amended to provide guidance for issuers to consider whether to treat climate-related disclosures (**CRDs**) as material information or to otherwise include a reference to the CRDs in the PDS, rather than creating a de-facto disclosure requirement.

### Question 1: What are your views on the proposed guidance for PDS content?

6. NZBA does not consider that the Guidance is necessary, or appropriate in its current form, for the reasons set out below:
  - 6.1. there is no regulatory gap or compliance uncertainty that needs to be addressed – to the extent any information in a CRD does constitute material information, then an issuer already would be required to include that information in a PDS in accordance with the requirements of the FMC Act and FMC Regulations in any case;
  - 6.2. whether information constitutes material information requires an assessment of the particular circumstances of each offer and the issuer making the offer – it does not automatically follow that the mere status of an issuer as a climate-reporting entity (**CRE**) that prepares CRDs should constitute material information;
  - 6.3. if an issuer determines that CRDs should be referenced in a PDS, it should be up to the issuer to determine where in the PDS that reference should be included, having regard to the requirements of the FMC Regulations;
  - 6.4. the Guidance would create a de-facto disclosure requirement beyond what the FMC Act and the FMC Regulations require because CRDs may not be material information for all CREs; and

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<sup>1</sup> In this submission a reference to PDS includes a reference to LDD.

- 6.5. having regard to the restrictions in the FMC Regulations, including a reference to CRDs in the Key Information Summary (**KIS**) is likely to be particularly challenging and would pose compliance risks for CRE issuers.

*Material information*

7. NZBA disagrees with the Guidance's suggestion that the introduction of the CRD regime, the effect of the CRD regime on an issuer that is a CRE, and the CRDs prepared by an issuer, are likely to be material information for **all** CRE issuers. The FMC Act provides that material information in the context of a regulated offer is information that a reasonable person would expect to, or be likely to, influence persons who commonly invest in financial products in deciding whether to acquire the financial products on offer. Importantly, material information must relate to the particular financial products on offer or the particular issuer, rather than to financial products generally or issuers generally.<sup>2</sup>
8. CRDs contain a wide range of information across four thematic areas. They can be lengthy and quite technical documents. It is not at all clear that a reasonable person would consider that the contents of CRDs would be likely to provide a person that commonly invests in financial products with information that is relevant to their investment decisions. It is possible that the CRDs of a **particular** CRE issuer may constitute material information, but it is not correct or appropriate to treat CRDs of **all** issuers as material information.
9. If any of the information in a CRD would constitute material information, then an issuer already is required to include that information in a PDS or Disclose register entry. The FMA will be aware that the potential impacts of climate change already appear in PDSs, e.g. in risk factors where the particular impacts of climate change for issuers are described. We consider that this is appropriate, targeted and effective disclosure for investors. Issuers have included these types of disclosures without being prompted to do so by specific guidance. There is no obvious regulatory gap or compliance uncertainty that needs to be addressed.
10. Nor do we consider the mere fact that an issuer is classified as a CRE, or has prepared CRDs, to be material information. Those factors do not relate to a particular financial product or a particular offer. Instead they are factors that are relevant to CRE issuers generally. It is difficult therefore to reconcile those factors with the definition of material information in the FMC Act.
11. The lack of a reference in a PDS to CRDs will not mean that those investors who are particularly interested in reading CRDs cannot do so. CRDs are publicly available and those investors who consider CRDs to be an important part of their investment decision making process are free to access and read those CRDs. Other investors may take a different approach. The risk of automatically treating CRDs as material information is that investors may focus on the CRDs instead of focussing on the

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<sup>2</sup> FMC Act, s 59(1).

specific disclosures made by an issuer relating to the particular offer. It is important that any guidance from the FMA does not have the effect of detracting from the prominence of the required disclosures in the PDS.

*De-facto disclosure requirement*

12. NZBA considers it is not the role of guidance to impose de-facto disclosure obligations on issuers. FMA guidance can be valuable to the extent that it assists issuers with their compliance obligations. However, the Guidance goes beyond this by suggesting that all CRE issuers should reference CRDs in their PDSs. It is likely that issuers will feel compelled to follow the Guidance, meaning it will create a de-facto disclosure requirement. This is an inappropriate 'one-size-fits-all' approach to disclosure that is not required by the FMC Act or FMC Regulations. Nor is this approach consistent with effective disclosure in a PDS, which should be focussed on the circumstances particular to the relevant offer and issuer of the financial product.
13. The FMC Act provides that the issuer must ensure that the PDS and register entry contain all material information.<sup>3</sup> It also requires an issuer to balance what to include in the PDS with the requirement that a PDS must not contain any information in addition to the required or permitted information unless the additional information does not detract from the prominence of the information that is required to be included in the PDS.<sup>4</sup>
14. The FMA's previous guidance regarding the content and form of Disclose register entry information provides that it is not possible to produce a definitive list of factors that will always be material to an offer.<sup>5</sup> It suggests that issuers should use a due diligence process to help them identify all the information material to their offer.<sup>6</sup> Once the due diligence process has identified all material information, issuers should decide what to put in the PDS and what to put in the Disclose register entry.<sup>7</sup>
15. We agree with this approach and consider that it should apply to CRDs as well as to any other information because CRDs may not be material information for all CREs. However, the Guidance takes a different approach. First, it suggests that material information needs to be included in the PDS. This is not what section 57 of the FMC Act provides – the PDS and Disclose register entry together must include all material information. Second, the Guidance would result in the FMA's assessment of what is material information supplanting the assessment of the issuer. We do not consider this is the correct approach.

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<sup>3</sup> FMC Act, s 57.

<sup>4</sup> FMC Regulations, reg 34.

<sup>5</sup> Financial Markets Authority, *Guidance note: Content and form of Disclose register information* (2015), at 6.

<sup>6</sup> At 6.

<sup>7</sup> At 6.

*Making a disclosure in the KIS*

16. NZBA does not agree with the Guidance's suggestion that references to CRDs should be made in the "About" section of the KIS. The purpose of a KIS is to provide the issuer's assessment of the most significant aspects of the offer of the financial products that are relevant to a prudent but non-expert person's decision as to whether or not to acquire the financial products.<sup>8</sup> The FMC Regulations provide that the KIS must contain no information other than the required or permitted information.<sup>9</sup>
17. It is difficult to see how a reference to CRDs could be included in the KIS with the issuer still complying with the strict requirements of clause 29(1)(c) of the FMC Regulations. Clause 29(3) provides that a KIS does not fail to comply with clause 29(1)(c) merely because it contains additional information that is necessary to clarify required or permitted information or to put required or permitted information in context to ensure that the information disclosed is not false or misleading. However, we do not consider that these exceptions provide a sound basis for including references to CRDs in the KIS. The strict word and page limits imposed by the FMC Regulations are also relevant for issuers considering what information to include in a KIS.<sup>10</sup>
18. Having regard to the restrictions in the FMC Regulations, NZBA considers that it would be very challenging to include references to CRDs in the KIS in a way that is compliant with the FMC Regulations.

*Disclosure where the issuer is not a CRE but will become one if the offer is successful*

19. It does not make sense to us for a PDS for an issuer that is not a CRE to refer to CRDs. A PDS speaks only as at the time of the offer and is not a continuous disclosure document. What happens after the offer period has closed is not relevant to disclosures in a PDS, and does not need to be included.<sup>11</sup>

**Question 2:** What are your views on the proposed timing for updating each PDS?

20. NZBA consider this should be up to the issuer, if the issuer determines that it is necessary to update the PDS.

**Question 3:** What are your views on the proposed guidance for OMI?

21. NZBA consider this should be up to the issuer, if the issuer determines that it is necessary to update the PDS.

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<sup>8</sup> FMC Regulations, reg 27.

<sup>9</sup> FMC Regulations, reg 29(1)(c).

<sup>10</sup> FMC Regulations, reg 29(2).

<sup>11</sup> The offer period for a continuous issue obviously remains open, but there is no need to provide updates to previous investors.

**Question 4:** What are your views on the proposed guidance for SIPOs?

22. NZBA does not consider this guidance is necessary. It should be up to issuers to determine what policies are referred to in a SIPO. If an issuer determines that climate related policies are relevant to achieving the investment objective and strategies of a MIS, then there is already a requirement to include an explanation or a link to them in the SIPO.

**Question 5:** What are your views on the proposed information about annual reports?

23. NZBA does not consider this section is necessary as it only summarises the law.

**Question 6:** Is there anything missing that should be included in the information sheet? Please explain.

24. If the FMA goes ahead with the Guidance, NZBA suggests it should be amended to provide guidance for issuers to consider whether or not to treat CRDs as material information or to otherwise include a reference to the CRDs in the PDS, rather than creating a de-facto requirement.
25. NZBA also suggests that, if an issuer determines it is appropriate to refer to CRDs, a more appropriate location to include references to CRDs in a PDS may be the "Where you can find more information" section. This would ensure that the disclosure comes after the KIS and the other prescribed disclosures. This would reduce the risk that a reference to CRDs may detract from the prominence of other information.
26. We note for completeness that while the Guidance appears to apply to material information that is required to be included in all types of PDSs, the list of disclosure locations on page 3 does not include the "About" section that is required to be included in a PDS for derivatives. We assume this means that the Guidance does not apply to financial products that have not been specifically included such as derivatives, however, it would be helpful if the FMA could clarify this point.

**Question 7:** What are your views on the examples provided in the information sheet? Are they helpful? Are there any other examples we should include?

27. The examples only contemplate wording being added to the "About" section of a KIS. As we have said, we do not think this is appropriate. However, if issuers get comfortable adding a reference to CRDs in that section then the proposed examples could be further abbreviated given the page and word limits in the FMC Regulations. One way to achieve this could be to remove the summary of the key parts of climate statements and avoid providing multiple links to where CRDs can be found.
28. For example, alternative wording could be: *[Name of manager] is a climate reporting entity under Part 7A of the Financial Markets Conduct Act 2013. We are required to make annual disclosures called "climate statements" for [name of scheme/fund] which*

*are available on the Climate-related Disclosures Register at  
<https://www.companiesoffice.govt.nz/all-registers/climate-related-disclosures/>.*

**Question 8:** Do you need any further guidance or support from the FMA in relation to disclosure requirements in relation to the CRD regime?

29. No, thank you.