



OCTOBER 2021

Submissions report: Proposed guidance on advertising offers

Collation of written feedback received as part of the public consultation on the FMA's proposed guidance on advertising offers

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Introduction

We would like to thank all submitters for their feedback on our consultation on the draft guidance on advertising offers of financial products. We received 30 written submissions from a wide range of stakeholders including investment managers, industry bodies, insurers, accounting firms, and law firms.

We appreciate the points raised and the effort put into submissions.

We have withheld some information in accordance with the Official Information Act 1982 and the Privacy Act 2020. We have also withheld one submission at the request of the submitter.

Submissions

1. [Advertising Standards Authority](#)
2. [AIA New Zealand](#)
3. [Anthony Harper](#)
4. [Boutique Investment Group](#)
5. [CFA Institute and CFA Society NZ](#)
6. [Connect and Grow Ltd](#)
7. [Dentons Kensington Swan](#)
8. [Financial Advice NZ](#)
9. [Financial Services Council of NZ](#)
10. [Financial Services Federation](#)
11. [Generate Investment Holdings Ltd](#)
12. [IG Markets Limited and IG Australia Pty Ltd](#)
13. [Implemented Investment Solutions Ltd and InvestNow](#)
14. [Insurance Council of NZ](#)
15. [i-Select Ltd](#)
16. [Kiwi Wealth](#)
17. [KPMG](#)
18. [Lane Neave](#)
19. [Massey University](#)
20. [Mercer NZ Ltd](#)
21. [Milford Asset Management Ltd](#)
22. [NZ Bankers Association](#)
23. [PwC New Zealand](#)
24. [Responsible Investment Association Australasia](#)
25. [Russell Investments](#)
26. [Russell McVeagh](#)
27. [Securities Industry Association](#)
28. [Six Step Financial Services Ltd](#)
29. [Smartshares](#)

Advertising Standards Authority (ASA) Submission on the Financial Markets Authority Proposed Guidance: advertising offers of financial products under the Financial Markets Conduct Act 2013

Submitter Details

Name: [REDACTED]
Position: [REDACTED]
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Contact Details: [REDACTED]
[REDACTED]

The ASA consents to the publishing of this submission.

Background

The ASA is the self-regulatory organisation that sets standards for responsible advertising over and above legislative requirements in New Zealand. The ASA provides a complaints process and has an education role to support code compliance. The ASA has 14 member organisations representing advertisers, agencies, and media companies.

There are two ASA Codes applicable to advertisements for financial advertising. The [Advertising Standards Code](#) (ASC) applies to all advertisements in all media. This Code includes rules about socially responsible advertising in areas such as taste and decency, safety, and health and wellbeing.

There are additional rules for advertising financial products and services in the [Code for Financial Advertising](#). The Code covers truthful presentation and social responsibility. A high standard of social responsibility is required in the development and placement of advertisements for financial products and services. This is a higher standard than the due standard expected for other advertisements where only the ASC applies. A high standard is applied when there may be a vulnerable audience. The Code for Financial Advertising is due for review in 2021.

The ASA has a free consumer complaints process and a user-pays competitor complaints process for any advertisement in any media. In 2020 the ASA processed 1151 complaints about 591 advertisements. The Advertising Standards Complaints Board considered 237 advertisements which the Chair ruled had grounds to proceed. The Board ruled to uphold or settle 63% of these cases and the advertisements were removed or changed. All decisions are published on the ASA website, www.asa.co.nz. The average time to deal with a complaint

depends on how far it goes in our process, but the Complaints Board meets fortnightly to adjudicate on complaints.

Advertisements designated in our finance category made up 6% of the total cases considered in 2020 and a breakdown of the outcomes from the cases specifically considered under the Code for Financial Advertising is set out below, along with a snapshot over a five year period.

Year	Total # Complaints under Code for Financial Advertising	No Grounds to Proceed Decision	Not Upheld Decision	Settled / Upheld Decision (ad amended or changed)
2016	15	11	4	0
2017	13	10	3	0
2018	12	7	2	3
2019	13	6	3	4
2020	12	9	2	1

It is not unusual for the ASA to receive complaints about advertising for financial products and services that are not related to financial matters – for example. an issue relating to driving safety or a taste and decency matter – covered under the Advertising Standards Code.

Definition of Advertisement

“Advertising and advertisement(s)” are any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language, and communicated in any medium with the intent to influence the choice, opinion, or behaviour of those to whom it is addressed.

The Advertising Standards Code includes a requirement that advertising must be identified as such. Guidelines on this rule (Rule 2(a)) are included in the Code and in September 2020, the ASA published guidance on identifying influencer advertising in a social media environment – it is available [here](#).

Support for the proposed guidance

The ASA supports the proposed guidance that is the subject of this consultation process. The key principles reflect a similar approach to the ASA and its assessment of the consumer takeout when adjudicating on advertisements.

Through its training and education work, the ASA knows advertisers welcome resources that can help to improve awareness of the standards and guidelines to support responsible advertising. This guidance is a welcome update on advertising offers on financial products under the Financial Markets Conduct Act 2013.

Consultation Questions

Question 1: General Scope

The proposed guidance is applicable to all advertising and promotion of offers of financial products, including advertising relating to offers subject to an exclusion in Schedule 1 of the Financial Markets Conduct Act 2013 (the FMC Act), and including all financial product types.

Responses

Do you agree with the scope of the guidance?

The ASA supports the scope of the guidance.

Do you think the guidelines need to differ for advertising of different types of financial product offers?

The ASA's approach to applying advertising standards to different types of financial products is to take a principle and rule approach, with a broad over-arching principle, such as truthful presentation and rules that may apply to specific products and services. For example, the Therapeutic and Health Advertising Code has different rules applying to therapeutic claims and health benefit claims.

Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers?

The ASA notes the increased expenditure by advertisers on a range of digital media platforms including the use of influencers to promote a range of products and services.

The ASA Influencers AdHelp Information on Identifying Ad Content, referred to earlier in this submission, has highlighted the role of individuals acting as publishers of content to consumers. While they are promoting products and services on behalf of advertisers, they may not be aware of the breadth of regulation that applies to financial advertising. The ASA has reminded advertisers of their obligations to ensure influencer posts meet the same standards as other advertisements.

The ASA is also aware that small and medium enterprises do not have the resources available to larger companies to support regulatory compliance and resources to support their efforts are appreciated.

Question 2: Short-form Advertising

We are aware of current market practice where a user may "click through" a short-form advertisement (e.g., from a Google search, LinkedIn, Facebook, Instagram, Stuff.co.nz, etc.) to a second webpage (often maintained by the issuer) where information required by sections 90-92 of the FMC Act is located.

Our position is that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restrictions. If the provisions cannot be complied with, then a short-form advertisement must not be made.

Do you agree with this position? If not, can you please explain why?

Response

The ASA agrees that not all mediums are suitable for all types of advertising. While this has not been an issue in the complaints we have dealt with for financial products and services, it is often raised in therapeutic and health advertising.

The Association of New Zealand Advertisers supports a user-pays process for independent adjudicators to pre-vet therapeutic and health advertising. General guidance is available on their website including guidance on [mandatory product information relating to digital advertising](#) and closed captions which may be of interest.

Question 3: Potential gaps

Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?

Response

With reference to recent complaints to the ASA, there are no examples of poor conduct or need for guidance that are not addressed in the advertising guidelines.

Question 4: Offers restricted to wholesale investors.

Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors? Do you agree with the suggested wording for inclusion?

Response

The ASA supports the requirement and the wording for inclusion.

Question 5: Miscellaneous

Are there any other aspects you wish to submit on?
For example, are there any unintended consequences that may arise from the proposed guidance that we should be aware of?

Response

The ASA does not have comments about any other aspects.



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16 February 2021

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cc: [REDACTED]

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

This submission is made on behalf of AIA New Zealand Limited and its related entities (together "AIA New Zealand").

About AIA New Zealand

AIA New Zealand is part of the AIA Group Limited, which comprises the largest independent publicly listed pan-Asian life insurance group. It has a presence in 18 markets in Asia-Pacific and is listed on the Main Board of The Stock Exchange of Hong Kong Limited. It is a market leader in the Asia-Pacific region (ex-Japan) based on life insurance premiums and holds leading positions across the majority of its markets. It had total assets of US\$291 billion as of 30 June 2020.

AIA New Zealand Limited is a licensed insurer. It has been in business for over 30 years, previously operating under the Sovereign brand. AIA New Zealand Limited was acquired by the AIA Group in July 2018. AIA New Zealand previously also operated through a second licensed insurer (AIA International Limited, New Zealand Branch). On 1 January 2020, the insurance business of that company was transferred to AIA New Zealand Limited.

AIA New Zealand offers a range of life and health insurance products, as well as legacy investment products. AIA New Zealand distributes its products through third-party financial advisers and also acts as a financial advice provider in its own right.

AIA is New Zealand's largest life insurer, helping to protect the lives of around 650,000 New Zealanders. AIA New Zealand is committed to an operating philosophy of Doing the Right Thing, in the Right Way, with the Right People.

Our Submission

We are broadly supportive of guidance being provided to the financial services industry in respect of advertising of financial products. Financial products are inherently complex and difficult for the average consumer to understand. Therefore such guidance should support financial product providers to advertise in a way that facilitates consumer understanding and promotes public trust and confidence in the financial services industry.

However, we submit that the scope of the guidance should be clarified. The guidance states in one place only (on page 5) that it applies "to advertisements made for the purposes of advertising or promoting offers of financial products **for issue**" (emphasis added), and refers throughout to "issuers", "investing public", "investment decisions", "investor/s" and "investment". Accordingly, it is our understanding that is not intended to apply to financial advice products (e.g. contracts of insurance).

Other parts of the guidance simply refer to the advertising of financial products – for example, “The following section sets out our expectations for how the principles of fair dealing [i.e. Part 2 of the Financial Markets Conduct Act 2013] will be applied in practice to the advertising of offers of financial products...” (page 10). As a result, we consider that there is a risk that the guidance is unclear in respect of whether it does apply to financial advice products, given that the definition of “financial product” for the purpose of Part 2 of the Financial Markets Conduct Act (**FMC Act**) will be amended by the Financial Services Legislation Amendment Act 2019 (**FLSAA**) to include financial advice products from 15 March 2021. Additionally, “financial products for issue” does not appear to be a term defined in legislation, and so it does not provide sufficient clarity in respect of which products the guidance will apply to.

We consider that the guidance should be revised to make clear whether or not financial advice products (e.g. contracts of insurance) will be subject to the guidance once FLSAA comes into force.

In the event that the guidance is intended to capture financial advice products, we submit that the guidance should be revised as follows.

Scope of the guidance

As currently drafted, the proposed guidance appears to be directed almost entirely at investment products. We recommend revising the drafting of the proposed guidance to ensure it is relevant and applicable to financial advice products, as appropriate.

Short-form advertisements

The proposed guidance states that short-form advertisements “should follow this guidance where applicable, regardless of any limitations imposed” (page 6). We consider that it may not be possible for advertisers to comply with some aspects of the proposed guidance (as written) in respect of short-form advertisements, even if the advertisement complies with the fair dealing provisions in the FMC Act.

For example, it may be difficult to present “complete” information; include all key information; or be consistent with other advertisements across different channels if a short-form advertisement is looked at in isolation from the information sitting behind it via a “click through”. While we acknowledge that a “click through” should not be used to correct any misstatement in a short-form advertisement, the limitations on short-form advertisements may restrict the advertisers ability to present “complete” information (when viewed in isolation) in all circumstances.

In our view, it is impractical to suggest that advertisers should simply avoid short-form advertisements if they cannot comply with the proposed guidance. In an age where many consumers receive a large amount of their information from social media, avoidance of short-form advertising would risk some consumers not having easy access to relevant information to initiate the financial advice process, which is often required to obtain health and life insurance in particular, given its complexities. A high number of New Zealanders are underinsured when it comes to their lives, their incomes or suffering a major illness,¹ and avoidance of short-form advertising may create a further barrier for New Zealanders to access protection.

Content of guidance

We suggest that the guidance clearly defines what constitutes advertising. We note that the definition of “advertisement” as set out in s 6(1) of the FMC Act is referred to on page 9. However, this appears as part of the “Advertising provisions for regulated offers” section, and states that this definition is “for the purposes of Part 3”. Accordingly, it is not clear what the definition of advertisement is for offers of financial products which are not regulated offers. It would also be helpful if the guidance provided a definition of advertising in plain English for non-lawyer users of the guidance.

¹ Financial Services Council “*Gambling on Life – The problem of Underinsurance*” January 2020.

We note that page 9 also states that communicating information about an issuer and/or the products being offered constitutes advertising. We recommend clarifying whether this applies to advertising generally or only to regulated offers.

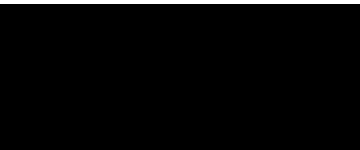
We consider that the guidance should also provide further examples of what constitutes advertising. For example, whether publishing general information about life insurance (without reference to specific product offerings) as an education tool for the public, branded with an insurer's logo, would constitute advertising.

We note that the guidance requires that "Information provided in one language should be a full and accurate translation of the other in all material respects – this may not necessarily be a word-for-word literal translation" (page 10). We consider that the proposed guidance should also address the standard required of advertisers to comply with this guideline, as advertisers likely do not have the skills to translate their own advertisements. For example, should advertisers be required to have advertisements and advertising materials translated by a suitably qualified expert? It should be noted that such translation services can be costly and may be prohibitive.

The costs of insurance products will vary greatly between customers having regard to their individual circumstances. Insurance premiums are often calculated following a lengthy disclosure process and have regard to risks posed by each individual. As a result, it is not possible to disclose the fees and costs up front in all advertising of insurance products (page 13). Disclosure of fees and costs is more appropriately made in a comprehensive way through the application process. We submit that this guideline should be revised to acknowledge this.

In conclusion, we would be pleased to discuss any questions you have on this submission and we would welcome the opportunity to collaborate or consult further with the Financial Markets Authority as it considers the next steps, particularly if financial advice products are intended to fall within the scope of the guidance. Ensuring a focus on our customers and good outcomes remains paramount to AIA New Zealand.

Yours sincerely



Anthony Harper

16 February 2021

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FEEDBACK: PROPOSED GUIDANCE ON ADVERTISING OFFERS OF FINANCIAL PRODUCTS UNDER THE FINANCIAL MARKETS CONDUCT ACT 2013

1 Introduction

- 1.1 This is Anthony Harper's submission on the Financial Markets Authority's proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013.
- 1.2 Anthony Harper is one of the top legal practices in New Zealand. Over recent years we have been New Zealand's fastest growing law firm, and we are one of its largest. We have a team of over 30 partners and more than 130 people operating out of our offices in Auckland and Christchurch. Anthony Harper has recognised expertise in a large number of practice areas, including financial services law.

2 Submission

- 2.1 We support steps by the FMA to clarify its expectations of financial product advertising. In our experience most market participants already seek to advertise in a fair and transparent way, and seek to inform consumers through their efforts. However, this is not always the case. Guidance would be useful in setting the minimum standard, and driving consistency.
- 2.2 We generally agree with the proposed guidance. However, there are a number of areas where we think it could be improved. We are a member of the Financial Services Council and endorse its submission, which we were involved in preparing. In addition, we wish to make our own submission on a number of key matters, as set out as the schedule to this letter.

3 Further information

- 3.1 I would be pleased to discuss any aspect of this submission. [REDACTED]

- 3.2 Thank you for the opportunity to submit.

Yours faithfully
ANTHONY HARPER

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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. **Submissions close on 16 February 2021.**

Date: **16 February 2021** Number of pages: **4 (including cover letter)**
 Name of submitter:
 Company or entity: **Anthony Harper**
 Organisation type: **Law firm**
 Contact name (if different): **[REDACTED]**
 Contact email and Phone: **[REDACTED]**

Question Number	Comment	Recommendation
<p><i>You don't need to quote from the consultation document if you use part & paragraph numbers. You may attach extra pages - please label each page with your name & organisation.</i></p>		
1	<p>We agree that the scope of the guidance is appropriate. We also consider it adequately captures all relevant parties.</p> <p>We do not think that different guidelines are needed for different types of financial products. It is inevitable that some aspects of the guidance will be more (or less) relevant for some types of products, and some forms of advertising. However, we consider this is a matter that should be left for issuers in applying the guidance. Attempting to spell this out would add unnecessary complexity to the guidance for limited additional benefit.</p> <p>We think that the guidance is correctly targeted at financial products. While we acknowledge the fair dealing provisions in the FMC Act also apply to financial services, we consider that references to financial services in the guidance should be removed. Without further detail as to FMA's views (for example, as to exactly what information may be applicable) the reference to financial services simply creates uncertainty.</p>	References to financial services in the guidance should be removed.
2	In our view, short-form "click through" messages should be considered part of the same communication that they link to, such that together they comprise a single advertisement for FMC Act purposes. We recognise that this interpretation involves an element of fitting the law with market practice, but provided the	The guidance should provide for short-form "click through" messages that link to full communications containing the information required by section 91 or 92. If FMA does not agree that this position is lawful, then we consider a law change is needed. Either way, the guidance should

	<p>content of the short-form message is not misleading in isolation and the main advertising content contains the information required by section 91 or 92 we do not consider it to be contrary to policy, nor specifically precluded by the wording of the FMC Act.</p> <p>Ultimately this may be a point where a law change is needed to clarify the position. The interpretation outlined by FMA in the consultation paper is practically unworkable and, with suitable safeguards, we see no reason that short-form messages should be precluded due to a legal technicality.</p> <p>Regardless, we consider the guidance note should specifically outline FMA's position on "click through" advertising (this may be your intention, upon receipt of feedback on this question). This could form part of the "Advertising on platforms where content is restricted" section on page 6. We consider the same click-through approach should also be acceptable there – i.e. where there are content limitations, including additional content as part of a linked communication should be acceptable, provided the content subject to restrictions is not misleading in isolation.</p>	<p>be expanded to specifically outline FMA's expectations for short-form messages.</p>
3	<p>We are not aware of poor conduct or the need for guidance in advertising financial products that has not been addressed by the draft guidance. However, the development of new products and unique offerings will inevitably mean that the guidance needs to remain under regular review.</p>	
4	<p>We agree that advertising for wholesale offers should clearly explain that the offer is only available to wholesale investors. In practice, our experience is that those making wholesale offers already include clear up-front warning statements regarding the nature of their offers.</p> <p>However, it is not appropriate to require a statement that a wholesale offer is "not suitable for retail investors". In practice, some wholesale offers <i>are</i> suitable for retail investors, provide they understand the limitations involved. To the extent that FMA considers some wording is required, a more correct option would be to flag that the offer "may not be suitable" for retail</p>	<p>The wording of FMA's sample warning statement should not include a blanket statement that wholesale offers are not suitable for retail investors.</p> <p>The wholesale offer warning should be "reasonably prominent" rather than "immediate and prominent".</p>

	investors. In addition, rather than requiring "immediate and prominent" disclosure, we consider the guidance should provide for the nature of the offer to be made "reasonably prominent" for consistency with other comparable requirements.	
5	In the "key principles" section we consider it would be useful to include additional content to explain the legal test for misleading conduct – i.e. the fact that the assessment is made having regard to the target audience for the advertisement, ignoring outliers in the group, and assuming a reasonable amount of common sense. It may also be helpful to provide information on puffery, as in our experience that is a concept which is commonly misunderstood. The benefit of this additional content is that it would help those applying the guidance to more easily conceptualise how the guidance is to be applied, and how to think about their target audience.	Additional guidance should be added to explain the legal test for misleading conduct, and the concept of puffery.
Feedback summary – if you wish to highlight anything in particular		
<p>Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.</p>		
Thank you for your feedback – we appreciate your time and input.		

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

16 February 2020

Part 1 - Introduction and Summary

Introduction

1. This is a submission by the **Boutique Investment Group (B.I.G.)** on behalf of the Managed Investment Schemes listed in **Appendix 1**. No part of this submission is confidential. Please contact [REDACTED] for any queries.
2. **Appendix 2** sets out short-form answers to the specific consultation questions asked. However, legal and regulatory considerations do not exist in a vacuum. In addition to answering the questions specifically asked, we discuss the broader context of the market and the part that advertising is playing in the current situation to inform what the FMA's overall approach and strategic goals with respect to advertising should be.

Summary - as to why the FMA should take a different approach for heavily regulated entities versus offers at the perimeter of the regime

3. There are good strategic reasons why the FMA should take a pragmatic and facilitating approach to interpreting the law for advertisements by FMC Act licensed providers, with heavily prescribed offer documents. These are:
 - a. The FMA has observed poor investment outcomes among people who lack confidence, access to relevant information, or who are disengaged from financial markets. The main function of an advertisement is to stimulate engagement, brand recognition and familiarity in a single provider or offer. Thus a market with a healthy backdrop of advertisements from the full range of reputable providers should result in a more confident and engaged customer base than would be the case in a market where it is difficult to advertise, and where the public do not recognise the providers or have a sense of familiarity with the products.
 - b. Currently most MIS managers do not have branches throughout New Zealand. The public will also not know the existence of many good providers or investment options, but for the advertisements they come across. It is the public knowing they have choices and what those choices are, which then places pressure on incumbents to improve, which in turn drives the market as a whole to improve. In contrast, a depressed advertising system, which sees the incumbents dominate advertising slots on mainstream media, together with the FMA taking interpretations of the law that restricts the ability to advertise outside of mainstream slots, will favour the status quo for incumbents and slow down the evolution of the market. More specifically if incumbents can ignore disruptors because they get no traction due to low brand

recognition, then pressure on large businesses to improve their offerings drops significantly.

- c. For MIS where the content of the PDS is heavily prescribed, there are particular topics that are not well covered by the current regulatory framework such as; ESG approach, information about the broader market that an offer relates to, bolt on components of offers, investment strategy, or just a more simple explanation of what a particular product is and why it is beneficial than is possible to provide in a regulated document. (Some of this is recorded in customer research undertaken by FMA in 2018.) Therefore the market needs to include other information, in addition to prescribed regulatory information, in order to provide complete and effective disclosure to customers. Much of this information would fall within the definition of “advertisement” and/or “restricted communication”.
4. In contrast with heavily regulated providers, the FMA should be much more vigilant and take a much less facilitating approach to advertising by entities that are unlicensed and/or that are offering products on the perimeter of the regime:
 - a. The main reason for this is that the risk of harm to the end customer is much greater where; there isn’t the same suite of regulated documentation on hand to clarify headline statements or fill gaps in advertising, where the products in question are intrinsically of higher risk, and where there may be less opportunity for recourse in the event of things going wrong e.g. because an unregulated offeror is based overseas or has no capital behind it.
 - b. The market is currently awash with offers and advertisements from businesses that are not regulated (such as cryptocurrency offers or offers targeted at unsophisticated wholesale investors, particularly property offers) or from businesses that are not bona fide, such as courses on how to trade derivatives, or from businesses that may not have any local presence, and therefore cannot be held to account if there is a problem. The market will only suffer if the FMA, essentially allows this segment of the market to proliferate with its advertising while at the same time suppressing advertising by businesses that are well regulated, that can easily be held to account in New Zealand and that offer fundamentally good products (as most licensed MIS Managers will do). Ironically, the natural consequence of the FMA implementing its current draft position (which restricts how regulated entities can advertise relative to unregulated entities) and placing its oversight lens on regulated businesses would result in this unfavourable outcome for the market.
 5. Putting points a) and b) above together, we believe that the net effect of exposing the public to a majority of advertisements pertaining to regulated products from licensed providers will be to help build consumer confidence in investing (which will help them build their wealth long term). In contrast, exposing the public to a predominance of low quality and/or higher risk perimeter offers will likely build the impression that the market cannot be trusted (which will hinder people from investing and generally growing their long term wealth).

Summary - as to what taking a facilitating approach to advertising by heavily regulated players means

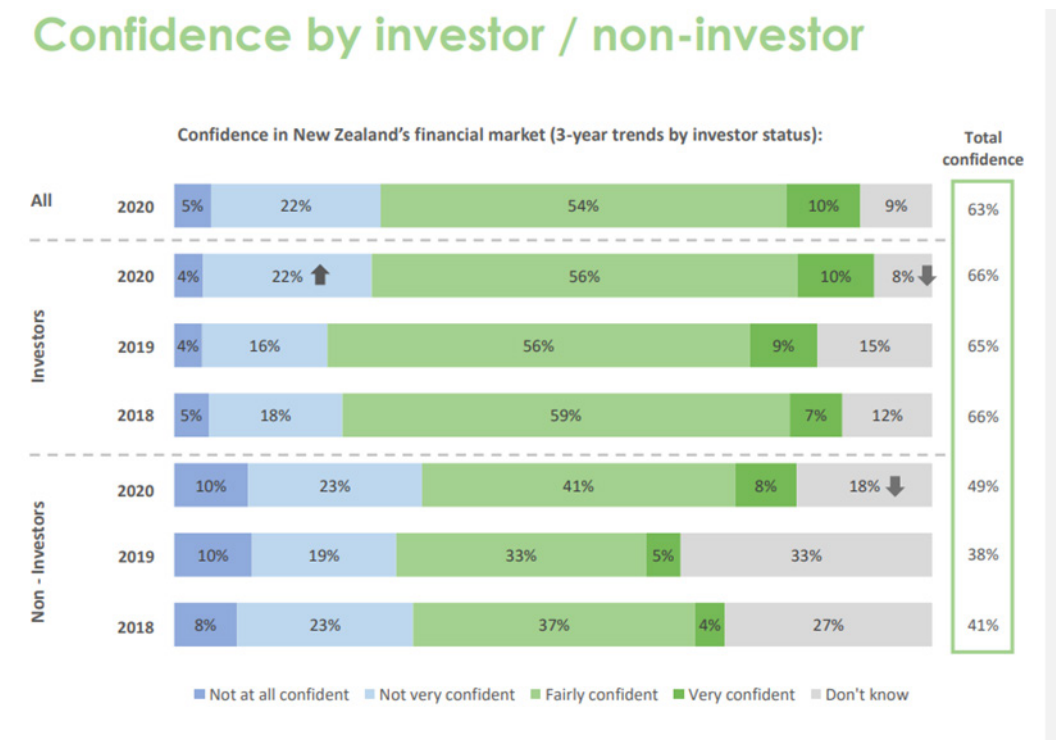
6. In terms of what taking a pragmatic and facilitating approach means for us:
 - a. Online media are important places to advertise on. The online format requires MIS managers (and indeed all businesses and organisations, including the FMA) to communicate in layers with customers - and customers are well used to this. We believe that it is open to the FMA to interpret a linked series of layers of communication as a single advertisement. This would provide some flexibility as to what information should go into each layer, rather than repeating all information required by sections 89 to 92 of the FMC Act at every layer. We suggest some principles drawing on some of the ideas already in the consultation paper as to how this should be done in an appropriate way.
 - b. There are some topics of judgment on which it would be useful to receive some further practical guidance:
 - i. Constructing a good advertisement involves making trade-offs between considerations that pull in different directions e.g. accuracy and detail versus simplicity and ease of understanding. It would be useful for the FMA to provide greater guidance on how to weigh these; and
 - ii. There are boundaries as to what constitutes an “advertisement”, which are not fully explored in the guidance.
7. In some ways, a facilitating approach for heavily regulated entities, could be described as just wanting a level playing field with the non-regulated entities that are not subject to sections 89-92 of the FMC Act and that are currently proliferating.

Part 2 – The importance of advertising and why FMA should take an approach that facilitates it for licensed entities with highly prescribed offer documents

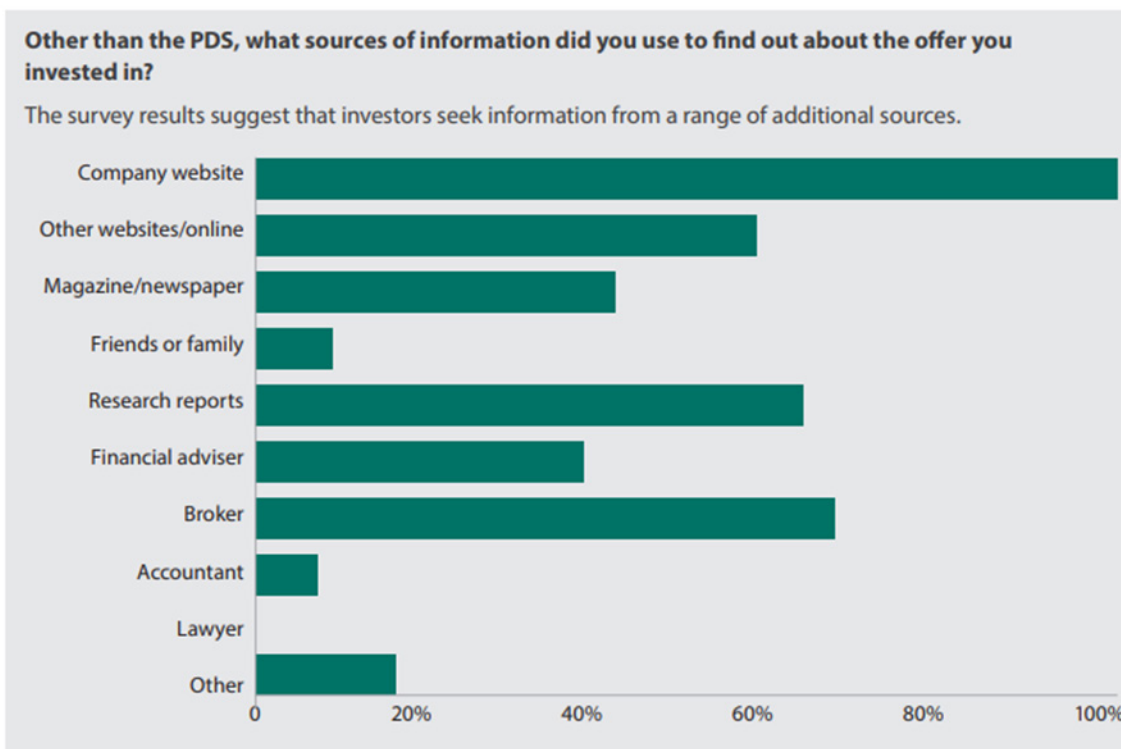
The link between disengagement and poor customer outcomes and the role advertising has in creating engagement

- 8. Page 30 of “Attitudes towards New Zealand’s Financial markets – Investor confidence research June 2020” shows correlation between people who are disengaged and/or who lack confidence in financial markets and people who do not invest (to their detriment).

Confidence by investor / non-investor



- 9. The fundamental point of advertising is to seek to engage with a target market, to capture their interest and to create confidence in brands. If a large number of licensed providers are able to succeed in this regard so that there is an effective backdrop of advertising to the market, the likely effect will be a net positive effect on consumer confidence.
- 10. This view is reinforced by the FMA’s interviews of investors who are highly engaged in investing set out in “Product disclosure statements: Understanding investors’ information needs” (April 2018) (FMA Consumer Survey). One of the key findings is that confident engaged investors actively want to learn about offerings from a variety of different sources:



11. It should be noted that some of these information sources would constitute “advertisements” for the purposes of the FMC Act. (The definition of advertisement means any form of communication made to the public or a section of the public for the purpose of promoting the offer or intended offer and so would include a broad range of material. The definition of “restricted communication” is even broader.)
12. Further, it is clear that Government’s official position is that investors benefit from being engaged with by providers. This is evidenced by “KiwiSaver advice” guidance note (7 March 2017) and the fact that MBIE will require default providers to meet engagement requirements as part of the role if they are successful in winning the current RFP.
13. Overall, enabling a rich backdrop of information about products and brands, is part of creating an environment in which investors feel like they are not alienated and can have the confidence to make informed choices. There is a clear observable link between those who are not investing and who receive poor outcomes and those who are disengaged from the market. Conversely there is a link between people who are confident and who consume information about products from a wide range of sources, many of which would constitute advertisements.
14. In terms of where we are now, there are still large numbers of KiwiSaver members who are disengaged. This suggests that there is more work to be done in making financial markets and financial products more accessible. A backdrop of good advertisements has a part to play in further improving the market in this regard.

The importance of advertising to the success of the market

15. As well as being helpful for making customers confident and engaged, advertising is essential to the effective operation of the market itself. It is the primary mechanism to enable retail customers to become aware of the existence of fund managers and KiwiSaver schemes that are not the incumbents and that do not operate branches. Customers are not going to take advantage of the full range of offers that are in the market or put pressure on incumbent offerings if they do not receive this exposure.
16. Milford and Fisher Funds are good examples of high-quality non- bank fund managers, whose success at retail is a direct product of the exposure that they have been able to generate. Simplicity also is another fund manager that has very effectively put its brand into the public domain. Not only have these businesses been successful in their own right, but also the cumulative effect of these businesses has been to cause natural incumbents to improve their offerings in response. For example, BNZ has recently committed to using its scale to become the lowest cost KiwiSaver provider.
17. In contrast, if it becomes more difficult to advertise, disruptors become less relevant, potentially to the point that the larger businesses with branches and the scale to buy up all the prime slots on media can effectively ignore them. If incumbents can ignore disruptors, then pressure on large businesses to improve their offerings drops significantly.
18. One of the reasons why lack of advertising by disruptors enables incumbents to disregard non incumbent competitors, and why customers would remain with incumbents despite objectively better offers being in the market is that many customers have a strong automatic bias against brands they do not recognise and toward brands that they do recognise. The FMA Consumer Survey, which also references ASIC research, finds:

This reinforced our findings that investors have a more positive reaction to information if they are already familiar with the brand or company.

ASIC's research observed that "it is possible that some of the retail investors paid more attention to, or were more positively predisposed towards, an issuing company they felt they had some affinity or familiarity with". ASIC noted this is an 'availability' bias – a tendency to develop a preference or positive predisposition toward things you are familiar with. Their research also showed that, for some, a positive predisposition towards a particular IPO may have coincided with further biases such as confirmation bias, where people can give more weight to information that confirms their initial judgment. This may lead to investors either searching for information that confirms their bias, or discounting or trivialising information that contradicts their position.

19. As an aside, it is interesting that “Smart Investor”, Government’s tool for enabling the public to compare offers, does not appear to have been effective at galvanising the public to switch from incumbent providers to objectively better offers. One possible explanation is that many of the disruptor offers have very limited brand recognition with the public.
20. The most effective away to assist customers with overcoming natural bias in favour of well-known brands in order to be able to identify objectively better offers is by way of facilitating the full range of participants in the market to win brand recognition so as to create a more level playing field and to enable smaller businesses to place competitive pressure on larger businesses to improve.

Advertising necessary to cover gaps in prescribed documentation

21. The disclosure documentation required by the FMC Act provides a basis for enabling comparison across vanilla offers from the point of view of topics that were considered most relevant as at 2013-2014. However, the market continues to evolve and so it is now necessary to cover an important range of topics that have become more important since that time outside of prescribed documents. This is particularly true for managed funds, given that so much of the content of the PDS document is prescribed and there is a strict word limit, which effectively prevents being able to adequately cover new topics of interest.
22. Examples of topics that cannot be covered well within a PDS for MIS are as follows:
 - a. ESG and related topics such as, modern slavery and climate impact: The importance of these subjects to Government and customers has increased significantly within the last few years. The prescribed format for managed fund PDS do not cover these issues and the word counts for managed fund PDS are not sufficient to insert information to cover them, therefore they need to be dealt with outside the PDS. (It is possible to place this information on the Disclose Register but there is very little evidence to suggest that the public will find it.)
 - b. The general nature of the market the investment relates to: The regulatory theory of disclosure in the FMC Act is that you are required to provide information about your particular offer for your particular business, but there is no place to discuss your sector or the market more generally. However, the state of the broader market or sector is often very relevant to an investor’s decision to invest (see FMA Consumer Survey). Therefore news letters, updates and advertisements of this nature will often comment on these topics in lieu of the prescribed documentation.
 - c. Investment strategy and philosophy: The PDS tends to focus on the easily comparable aspects of offers. However, for genuine active managers, the importance of being able to spend time explaining the investment strategy can be very significant. As a case in point the Nikko AM Ark Disruptive Innovation Fund has a strategy of investing in businesses that use 5 specific technologies (genome sequencing, A.I., blockchain, battery technology and robotics) that it considers to be approaching tipping points in terms of their broader take-up in the world, which suggests that picking the right businesses in these fields could grow in value significantly. With a fund of this nature, members will

either invest or not invest depending on their belief in the concept/ strategy. There is very little room to talk about the underlying strategy, or developments in terms of what is happening with each of the relevant technologies in the prescribed regulatory framework.

- d. Bolt-on products: the PDS framework for managed fund MIS tends to assume a simple fund and nothing else. If the offer includes bolt on features such as insurance components (for life time annuity type funds) or special adviser remuneration arrangements these do not fit well within the regulatory framework.
- e. A more simple and user friendly explanation of what the product is and what its benefits are: As an example the regulated explanation in the PDS that must be used by all providers to describe what KiwiSaver is set out below:

“This is a managed investment scheme. Your money will be pooled with other investors’ money and invested in various investments. [Name of manager] will invest your money and charge you a fee for its services. The returns you receive are dependent on the investment decisions of [name of manager]* and the performance of the investments. The value of those investments may go up or down. The types of investments and the fees you will be charged are described in this document.”

While this statement is true in a technical sense, it is arguably unhelpful from a customer perspective because it doesn’t tell you what KiwiSaver is for or why you should consider KiwiSaver. The statement is akin to describing paracetamol, by reference to its constituent chemicals, rather than by saying it is something that will help when you have a headache or fever. To put the point another way, the regulatory documentation focuses on the “what” (what the product is), rather than the “why”. As a consequence, one of the functions of a lot of “advertisements” is to provide a simpler and more useful explanation as to the point of investing in particular thing to a customer base who may not be financially literate. For example, the ANZ KiwiSaver Scheme Guide (15 May 2020) provides a much more pertinent explanation as to what KiwiSaver is from the perspective of “why”:

KIWISAVER'S MAIN BENEFITS

Save for your retirement

KiwiSaver is a long-term savings initiative designed to help you save for retirement.

Starting early, keeping up your contributions and taking advantage of the benefits can help you grow a sizeable nest egg for your retirement.

Make the most of the benefits

You don't need to be employed to join KiwiSaver. Most New Zealanders are able to join.

If you're under 18, self-employed or not employed, KiwiSaver can still help you save for your retirement and let you share in some of the great benefits.

Whether you're under 65, or over, KiwiSaver remains a great way to invest or continue saving.

KiwiSaver benefits

	Under 18 years old	18 years old or over, not eligible for a retirement withdrawal			65 years old or over, eligible for a retirement withdrawal*
		Employed	Self-employed (PAYE not deducted)	Not employed	
Annual Government contribution of up to \$521.43		●	●	●	
Employer's regular contributions		●			Dependent on employer
Help to buy your first home	●	●	●	●	

*You will need to meet certain conditions that might restrict these benefits.

<https://www.anz.co.nz/content/dam/anzconz/documents/personal/investments-kiwisaver/ANZKS-Guide.pdf>

To reinforce our point about how one of the functions of non regulatory documentation is to fill in the missing “why” from regulated documents, the first words of the ANZ KiwiSaver Scheme Guide (15 May 2020) are “Why Us”.

23. Our view of what is missing from the regime, and that consumers want/need the ability to access information from sources other than just the regulated documents is entirely supported by the outputs of the FMA Consumer survey. Two excerpts are set out below:

The PDS is not the only source of information

Where investors go for information about investments

	PDS	Conversations	Online research	Business publications	Online forums
Product-specific Returns, time period to maturity, fees	✓				
Company-specific Financial performance, governance and management	✓	✓	✓		
Industry-specific The company's competitive environment and overall industry trends	✓	✓	✓		✓
Market information Macro-level trends in the NZ financial markets, such as changes in tax policy or the property market				✓	✓

<ul style="list-style-type: none"> They typically access a PDS online 	<ul style="list-style-type: none"> Tailor your PDS for online use – include hyperlinks and chapters so users can navigate the document without having to scroll
<ul style="list-style-type: none"> They want to know if companies are acting in a socially responsible way. This extends to the company's governance approach and culture 	<ul style="list-style-type: none"> Consider how to disclose information such as ESG (environmental, social and governance) reporting to investors
<ul style="list-style-type: none"> They are happy to do additional research 	<ul style="list-style-type: none"> Make sure that non-material information on your website and other channels complies with the 'fair dealing' provisions of the Financial Markets Conduct Act 2013

24. Overall it is important that MIS managers (and other bona fide licensed issuers with prescribed documentation) are able to provide access to a rich backdrop of information for investors and also to provide prompts and links so that customers know where to find this information and are stimulated to look. This do it yourself commentary by MIS managers and issuers is particularly important in a small economy where there is less analyst commentary and media driven coverage than is the case in other markets. A good deal of this information would either fall within the definition of “advertisement” or “restricted communication”.

Part 3 – The perversity of taking a restrictive approach to advertisements by FMC Licensed businesses while enabling/ignoring high risk advertising by perimeter players

25. If the FMA were to conduct a stocktake of investment related advertising in both mainstream media and on popular online channels, it would find that a high proportion of current advertisements are related to businesses that are not regulated for one reason or another and that present higher risk to investors. Examples include:
- a. The sale of training courses or programmes that promise to enable investors to succeed in high risk activities, such as derivatives trading;
 - b. Trading platforms that also encourage high risk trading by unsophisticated investors;
 - c. Offers of unregulated cryptocurrencies;
 - d. Offers of participation in unregulated property syndicates and forestry partnerships;
 - e. Offers targeted at unsophisticated wholesale customers (including so-called “eligible investors”); and
 - f. Scams.
26. Also when we look at what is going badly wrong in the market, and where people losing their life savings (e.g. Forrestlands, Arbor, Cryptopia, CBL, MAAT and the finance companies) it is very clearly in the space of poorly governed and semi regulated or unregulated entities, not in the space of well regulated licenced MIS with diversified portfolios.
27. Against this backdrop, the members of B.I.G. who are all well-regulated MIS Managers (with licences, supervisors and retail ready products), first have the challenge of persuading the public (who may not have heard of us at all) that we are reputable businesses. How are we differentiated in the eyes of the public from these low quality offers that are so prevalent if we are advertising through the same channels?
28. Second, based on the FMA’s position in its consultation paper as drafted, we would have less freedom to advertise than those higher risk entities, so the FMA in fact appears to be enabling these kinds of alternate offer at our expense. We set out below some examples of the risks posed by some of the entities that the FMA would be enabling to illustrate the point.

Du Val Group

29. The Du Val Group (<https://www.duvalpartners.com/mortgage-fund>) is an unlicensed fund manager that is currently advertising a “ guaranteed 10% p.a. return” for the “Du Val Mortgage Fund LLP”:



Du Val Group

Sponsored · 



Receive a guaranteed 10% p.a. return, paid quarterly,
secured by bricks & mortar. Simple.



30. There are two possible meanings to the word “guaranteed”:
 - a. The first is that many people equate the word “guaranteed” with “sure to happen” or “certain”; and
 - b. The second more technical meaning is that a particular person has provided a guarantee. The value of the guarantee then turns on the quality of the person issuing it.
31. Having made such a representation, there is no documentation on Du Val Group’s website to enable a person to understand, which of these different meanings is applicable, and if meaning b) is applicable, it doesn’t say who is guaranteeing this 10% return. Without knowing who is giving the guarantee, it is impossible to tell whether the seemingly impressive headline claim has any merit at all.
32. To our group, the omission of providing any information as to what is meant by “guaranteed” is at best a startling failure to meet an obvious expectation that Du Val Group themselves have created.
33. As a final comment on Du Val Group:
 - a. Fund managers that are unlicensed because they offer at wholesale only; and
 - b. That target the least sophisticated end of wholesale e.g. mum and dad investors that may have money, rather than to sophisticated investors such as DIMS advisors and institutions;

Are probably one of the highest risk parts of the market. In these offers you have the nexus of; lack of oversight of the entity making the offer (both formal from a regulator or informally by capable institutional investors), investors that could be extremely unsophisticated despite having money, and investments in chunks that might constitute a large portion of the net worth of the individual investors. Further, the products being offered are generally illiquid and often with a limited secondary market (in stark contrast with most licensed MIS schemes).

34. The irony is that the position taken by the FMA in question 2 of the discussion paper, would enable high risk entities like Du Val Group to dominate the market. They would be able to advertise online using short form adverts (because they are not required to provide the information in sections 89-92 to advertise), whereas reputable licenced MIS managers with alternative lower risk options would not be able to (based on FMA’s interpretation).

Williams Corporation Capital

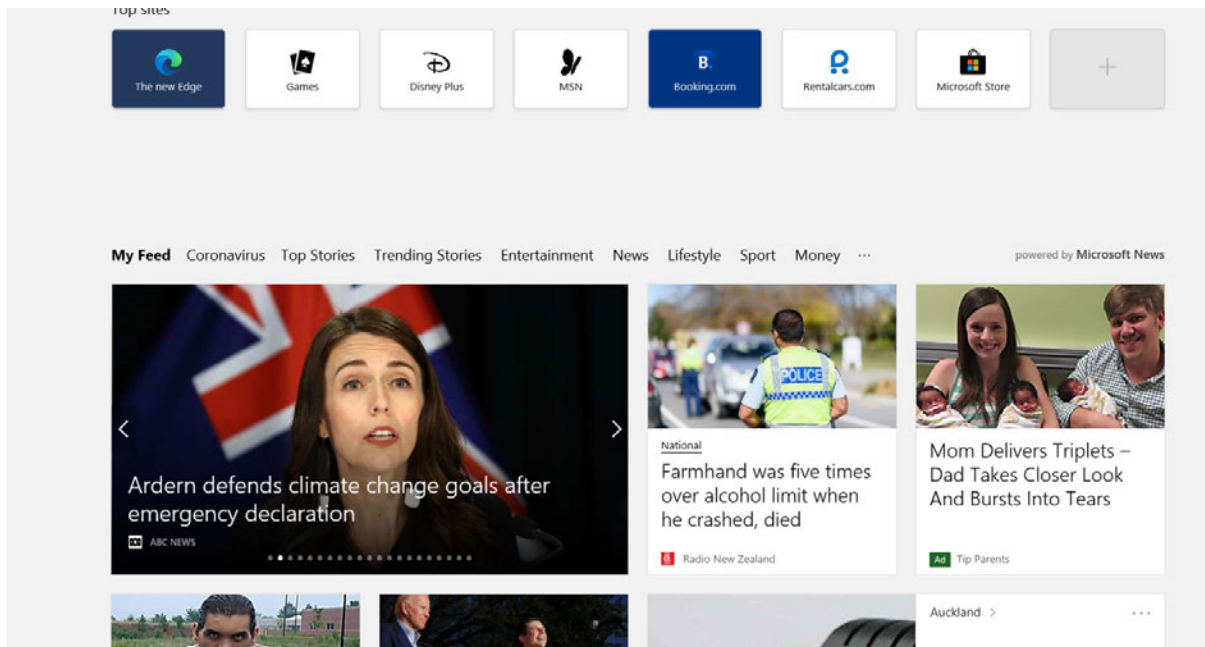
35. Williams Corporation Capital <https://www.williamscorporation.co.nz/fund/> has a similar kind of offering to the Du Val Group and is also leading with a 10% return offer:



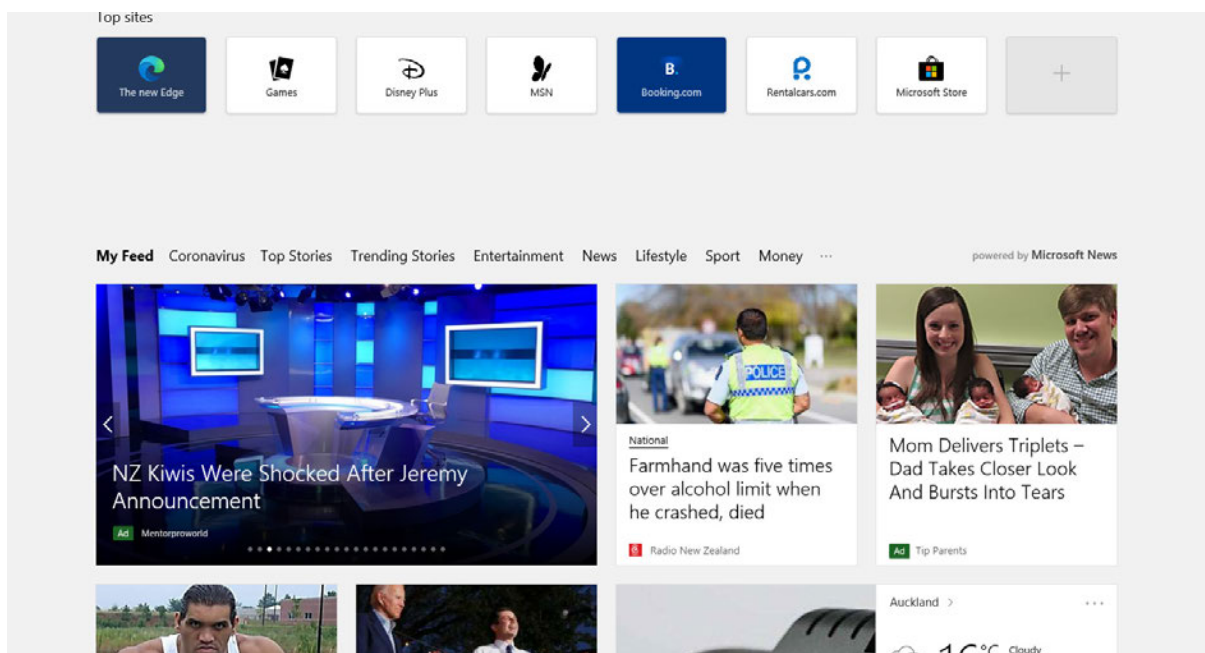
36. The advertising is not as problematic as for Du Val because it does not make a headline claim that the return is guaranteed. In addition, the video on William’s Corporation website does take the investor through how the investment works in some detail.
37. However, we do wish to draw attention to the fact that there are currently a very large number of unregulated property offers like this that appear to be providing alternatives to people who may need a regular pay cheque of the same amount each month, but who are unable to invest in term deposits as interest rates are too low.
38. The FMA will be aware that the cohort of people most likely to have the combination of; a need for a regular income cheque, and \$750K to invest are people who have just retired and who have a lump sum that they need to invest. While this cohort is technically “wholesale”, this is the group of investors that can least afford to take a significant loss to their savings. Therefore what we are seeing in the marketplace is a concern to us and potentially a symptom of; low interest rates, poor Government policy in respect of creating good investment options for people post retirement, and an environment in which it is difficult to draw genuinely better regulated offers to the attention to the public.

Apparent scam like advertisement being advertised by Microsoft Network (MSN) and NZ Herald

39. The top left hand pane of MSN includes a box that rotates through the supposed main news headlines of the day. (At this point it is rotated on an article about Jacinda Ardern and Climate Change Goals):



40. However, embedded within the series of the legitimate stories was the following supposed news headline (“NZ Kiwis Were Shocked After Jeremy Announcement”):



41. Clicking on this headline will then take a person to the following story about Jeremy Wells stunning the world by revealing his secret strategy, the upshot of which is to invite people to subscribe to BitcoinEra:

Jeremy Wells Discloses Controversial Investment Strategy Live On TV, ANZ Bank Is Terrified And Threatens Legal Action

New Zealand citizens are already raking in millions of dirhams from home using this "wealth loophole" - but is it legitimate and why do major banks not want you to be aware of it?

Published: Wednesday, December 16, 2020
By Duncan Bridgeman

Reader Results

Profit: \$5,552

"I've been using **Bitcoin Era** for just over 2 weeks. I've taken my initial deposit from \$250 to \$5,802. That is far more than I make at work."

Jack Brown
Tauranga, New Zealand

Profit: \$9,200

"I've hit over \$9,200 in profit after just a month of using **Bitcoin Era**. Because I can use it on my laptop, I've been traveling around New Zealand and making money the whole time!"

Mark Anderson
Queenstown, New Zealand

Jeremy Wells comes out with new secret investment that's making hundreds of people in New Zealand very

42. Similar to the advertisement above, there is an advertisement in a pane on NZ Herald (probably from the same business because some of the pictures and wording is the same), which routes to a story supposedly from UK mirror, advertising "Megaprofit" supposedly developed by Kim Dotcom and backed by Bill Gates, Elon Musk and Richard Branson:

<https://www.mirror.uk.com/tv/tv-news/kim-dotcom-latest-investment-fm/?lp=MEGA%20Profit&s3=wqksjt7jbfdc4922fhg5m14&co=3>

43. A Snip of part of the "special report" is set out below:

SPECIAL REPORT: Kim Dotcom's Latest Investment Has Experts in Awe And Big Banks Terrified

New Zealand's citizens are already raking in millions of dollars from home using this "wealth loophole". But is it legitimate?



44. Our view, is that while section 30 of the FMC Act rightly provides publishers with a defence if they do not know and have no reason to suspect that an advertisement contains false and misleading information, we believe that reputable mainstream media in New Zealand, should be capable of picking up on the unlikelihood of:
 - a. ANZ suing Jeremy Wells over disclosing his investment strategy, and
 - b. Bill Gates, Richard Branson and Elon Musk coming together to back an investment strategy developed by Kim Dotcom.
45. As far as our group is concerned, if entities like the Herald and Microsoft are running what appear to be scam offers of this nature alongside our credible ones, then this becomes very undermining for legitimate boutique providers who may not have established a strong brand recognition.
46. What makes these kind of advertisement particularly pernicious when run by entities such as the Herald and Microsoft at this point in time is they are being made against the backdrop of financial uncertainty for so many and a current proliferation of "fake news" . Mainstream media should be the place that people should be able to go for credible news information and credible offers. This is clearly not occurring if scam products are being dressed up as news stories and mainstream media outlets are inserting these "stories" into the same panes that their real stories are run.
47. Overall, the current situation needs to be inverted. High risk low quality offers and advertisements by the perimeter players, such as those described above should be made more difficult - currently they are allowed to proliferate and they are being targeted at the people in society who can least afford to suffer heavy losses. The media also need to be enlisted to play

their part in weeding out the more egregious content. They certainly should not be assisting offers of this nature to pass themselves off as news stories by embedding them in the same panels as the main news.

48. The other side to dampening down the more egregious content, is being facilitative in enabling genuinely good providers draw their brands and their offers to the attention of the public.

Part 4 – What taking a pragmatic and facilitating approach means

Viewing layers of linked information as a single advertisement in the online format

49. Increasingly, online media are important places to advertise on for a wide variety of reasons; the FMA Consumer Survey finds that the people they interviewed accessed PDS online and wanted to carry out their further research online, some customer segments can only be reached via online media, and slots on mainstream media are expensive and have largely been purchased by very large providers meaning that boutique providers will need to look for cheaper alternative channels.
50. One of the main features of communicating in the online format is that it requires providing layers of information and people are comfortable with this. Some evidence for this is set out below:
 - a. Feedback from participants in the FMA Consumer Survey was that regulated documents could be improved if they were put in a more online friendly format; and
 - b. We set out as Appendix 3 an excerpt from the FMA's own newsletter which manifests the same principle of providing a short introduction to a link that provides further information.
51. We believe that it would be open to the FMA to interpret a linked series of layers of communications to be a single advertisement. There is nothing in the law which says that every separate page that a customer sees has to be a separate advertisement from the previous page. This is entirely analogous with dealing with a leaflet – the FMA would likely regard that as a single advertisement and expect sections 89-92 of the FMC Act to be covered once in a sensible way in the leaflet, rather than on every page.
52. In the case of an online advertisement, a linked series of steps might typically:
 - a. start with a very short banner advertisement that does nothing more than create an impression that there might be something that a potential customer might be interested in looking at if a link is clicked (but there is clearly not enough information for the customer to form any view about the offer); then
 - b. Clicking the link takes a customer to a landing page which sets out some of the key features of the offer, (still at a very high level) but which also works as a library of links to access all the relevant detailed information; and

- c. Then there would be a pathway to making an investment that at some point would require downloading the PDS or the customer confirming the PDS has been read before a customer can proceed to invest.
53. Sections 89 – 92 of the FMC Act make sense in the online format if a linked series of layers that a customer must go through are treated as a single advertisement/process. However, they do not make sense if each layer must be treated as an individual advertisement. The practical consequence of treating each layer as a single advertisement is that each layer would be required to provide the same information about how to find the PDS in a process that would inevitably take the customer to the PDS at some point anyway. This is an absurd outcome, that would not benefit consumers in terms of the information that they are required to look at each time and that would also significantly impede the ability of firms to use quick links and banner ads as first steps towards taking end customers to a landing page with more information about an offer.
54. Finally and most importantly, the actual harm that that sections 89-92 is intended to address is the risk of a customer making an investment decision without proper regard to the regulated content of the relevant PDS. This risk is addressed in the online format provided a link/reference to the PDS features at a reasonable point in the customer journey through the layers. (In fact a link to a PDS in a second or third layer of an online advertisement does a better job than a newspaper article with an upfront reference to where a PDS can be obtained, because an upfront reference in a newspaper cannot simply be clicked on to take you into the PDS itself immediately.)
55. Our view is that, where providers advertise online using a series of layers/links, the set of pages should be regarded as a single advertisement if it is a reasonably self contained journey, rather than being a series of individual advertisements. Sections 89- 92 must then reasonably be complied with within the series of layers once. The FMA should also gain comfort from the fact that normally the PDS is actually embedded within these customer journeys at some point (in contrast a television or newspaper advertisement would require an investor to have to leave the media they are in and go somewhere else to find the relevant documentation). When the FMA looks at the words in sections 89-92 and to the factual context of advertising online and to the purpose statement of the FMC Act, this is the only interpretation that makes sense and achieves the practical purpose that the FMC Act is seeking in terms of promoting the confident and informed participation of businesses, investors, and consumers in the financial market – certainly participation by businesses is reduced with no real upside to consumers if FMA takes an approach that unreasonably inhibits the ability to advertise.
56. This is a key point in our submission and we seek further engagement with our group if FMA disagrees with it.

Some suggested good conduct principles for advertising products by way of a series of links

- **Follow up on any headline claim with the detailed information that a customer needs to properly understand the headline claim:** (The Du Val Group example above is an example of this not being done.)

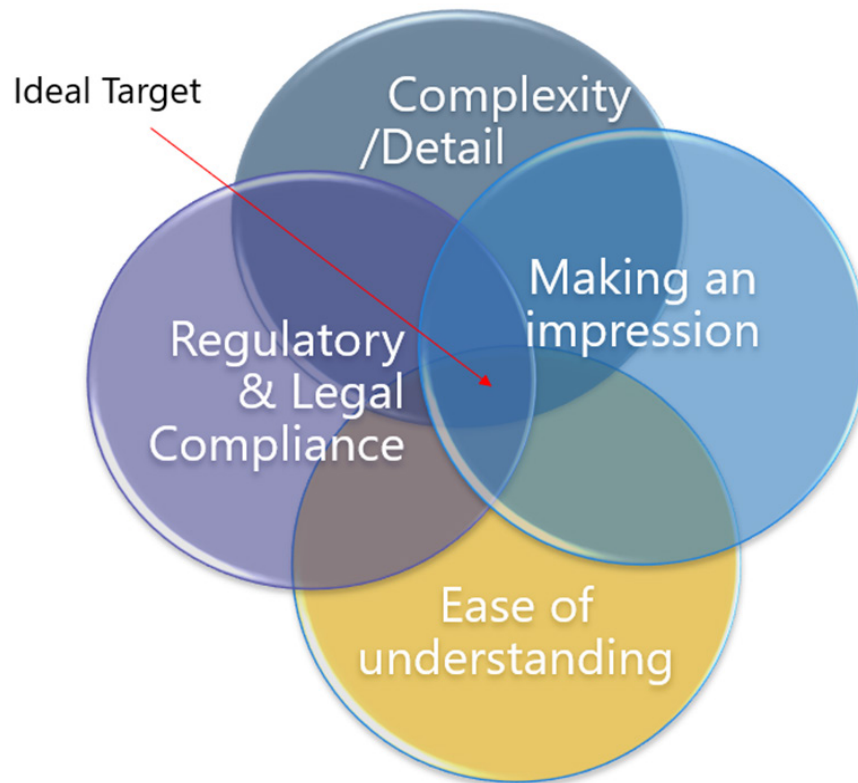
- **Be Fair with Pros and Cons (this is similar to the FMA proposal, except that we are also considering where information is placed within a series of layers of information):** If there are unusual adverse features of your offer don't bury these in the fine detail (although not every risk needs to be brought to the fore).
- **Be fair when making comparisons (very similar to guidance proposal):** If you are drawing a comparison to another form of investment e.g. rates of return in term deposits be sure to call to attention differences in risk profile as soon as reasonably practicable.
- **Do not waste customer time:** If an offer is not applicable to a large number of customers who may be perusing it e.g. the offer is wholesale only or just not appropriate for people without a certain willingness to take on risk then bring this to attention quickly.
- **Actually embed the PDS and other relevant prescribed documents within the customer journey where possible:** One of the strengths of the online format is that the PDS or links to the PDS can be embedded within the layers of an online advertisement, whereas this is not possible with publications in more traditional media, so make use of this feature.

Finding the right balance – the trade-offs that go into making a good advertisement

57. A topic that is not discussed in any detail in the guidance paper is the fact that a “good” advertisement; meaning one that is engaging and effective from the point of view of capturing attention and making the case for an offer, while also being fair and conveying the right level information involves finding the right balance between a number of considerations that are in potential conflict:

ADVERTISING - FINDING THE RIGHT BALANCE

Obstacles/challenges - some competing objectives



58. Interestingly, the online format, with different amounts of information at different levels, is probably the means of communicating which best lends itself to being able to balance these multiple different considerations because you can start with a relatively simple statement, but then allow the customer to drill deeper and deeper into the detail.
59. With radio and television, advertisements tend to be between 15 and 30 seconds long. This provides very little opportunity to make more than two to three points about an offer. Part of that time would have to be taken up with describing where the PDS can be found. Therefore, much of the guidance around outlining fees and risks etc would not be realistically possible in that media.
60. It would be useful if the FMA were to provide some guiding principles as to how to find the right balance more generally and maybe to provide different commentary for different media. One point that we would note in this regard is that the regulatory documentation focuses on the “what” and provides certain topics in detail. Therefore, it is reasonable for advertising to be more focused on the “why” but then refer to the regulatory documentation for the “what”.
61. As a final observation, it is worth commenting on how important the “making an impression” aspect of an advertisement is because this is the characteristic that regulators will most often take issue with and seek to dampen down or exclude, in favour of more accuracy or compliance ingredients.

62. An ability to make an impression is critical. We know from the FMA's research that one of the main differentiators, if not the main differentiator, between people who do well with their investments and people who do not comes down to how engaged they are in what they are doing. Whether or not the public engages with an offer or not at a micro level, will turn on how engaging it is. When this point is then writ large across all offers and the market as a whole, throttling up or down the interest and impression characteristics of offers can be the difference between having a community that is interested in investing and one that is not.

The scope of an "advertisement"

63. The scope of things caught by the statutory definition of "advertisement" and "restricted communication" is different from the things that a person might naturally think of when the word advertisement is used in ordinary life. As examples:

- The statutory definition of "advertisement" seems to assume that there is a particular offer or service that is the subject of the communication. This raises a question as to whether an advertisement that simply draws attention to a brand or entity without any direct reference to a financial product would constitute an "advertisement" under the FMC Act. For example, if there was a billboard that said "Take a look at Nikko Asset Management", it seems like it would not be caught by the definition of "advertisement". (There may be good reason for this because providing information about where to find a PDS arguably does not make sense if you have not referred to any particular product (or service) in your advertisement.) It is then somewhat unclear as to whether the same advertisement would be caught by the definition of "restricted communication" – it depends on how broadly the word "indirect" is interpreted; conversely
- The statutory definition of "restricted communication" may capture articles, analysis and other similar documentation and publications if they can be linked in any way to a particular offer or product, even though they are not traditionally what one might consider to be an "advertisement". We hope that the FMA takes a pragmatic approach to this kind of market commentary as there is a relative shortage of quality analysis in the New Zealand market; and
- There are publications, such as the ANZ KiwiSaver Scheme Guide (15 May 2020), that do advertise the ANZ product but that also provide a much more practical function of providing education on what KiwiSaver is and how it works. Therefore some of the FMA's comments about separating advertising from other communication may need further elaboration.

64. It would be useful for the FMA to comment on these issues further.

Part 5 – Miscellaneous points

Organic searches

65. As an extension of the issues raised above about how regulated businesses would be disadvantaged inappropriately if the FMA did not accept that layers of communication should be treated as a single advertisement is the situation with respect to Google searches.
66. When a client enters their own search criteria into a search engine, a combination of paid for advertisements and organic results are presented. The organic results are not within the control of the provider, rather Google (for example) uses algorithms and artificial intelligence to present results that the search engine believes best answers the query (based on recognition of key words, length of time spent on previously suggested pages etc). Without the ability for providers to use Google advertisements, non-regulated issuers will be able to pay for advertisements that will appear instead. Not only will the proposed criteria mean that advertising on social media in general will become dominated by offers from un-regulated entities, results generated by the public searching for their providers website or for general information relating to investments will become dominated by advertisements from those non-regulated issuers. This would be an unintended and adverse consequence of the proposed restrictions which would effectively preclude regulated providers from advertising on social media and search sites.

At what point advertisers should signal that an offer is wholesale only

67. Overall, the level of priority given to clarifying that an offer is wholesale only turns on the channel that is being used to promote the advertisement.
68. If an advertisement is pointed into the world such that a large proportion of retail investors are likely to encounter it, then the fact that it is wholesale only should be signalled very rapidly e.g. if you are advertising by way of a page on the New Zealand Herald website that the public at large will see. Most likely this clarification should be on the first communication with the investor, or prominently on the first landing page if it is not possible e.g. due to space constraints of the format.
69. In contrast, the more that an advertisement is targeted at what might reasonably be expected to be a forum for real wholesale investors, it could become more of an avoidance of doubt feature at the end of the advertisement; for example if you circulate an advertisement to a contact list that you reasonably believe constitute wholesale investors but you cannot control whether someone will pass the advertisement on, or you advertise on an Angel Investor forum, then it becomes more reasonable to place the wholesale only aspect further down the communication.
70. Another situation where it is more reasonable to clarify “wholesale only” at the end of a communication is in relation to publications that most people might not consider to be true advertisements of offers. An example would be an article written by the portfolio managers of a MIS about what they see happening in the markets. In such cases, the intent is not really to push a particular offer hard so much as to create brand recognition with insightful commentary, and whether or not a reader is able to take up the products that the authors may have to offer, does not necessarily detract from being able to read the article. Many businesses would finish

such articles with disclaimers, on the offchance that they might be treated as an advertisement from a technical perspective.

71. While the eligibility to participate in an offer should be clarified quickly where there is potential for retail investors to be drawn into a wholesale offer process before being turned away it is worth remembering that the actual harm that results from this will generally be annoyance, rather than commercial loss. Therefore the species of harm that flows from a failure of this principle will not be that significant in most cases and should temper any regulatory response.
72. What is more problematic are situations where someone is actually able to complete an unregulated investment without fully realising that the safeguards of retail investment do not apply in the situation. This could occur:
 - c. In relation to offers that are not regulated, such as offerings of crypto currencies, many syndicated property offerings or some forestry partnerships; or
 - d. Where a sales process is targeted at unsophisticated wholesale investors and investors are signed up as wholesale without the significance of that fact ever really being made clear.

This again reinforces the importance of vigilance of perimeter offers.

Statement on page 8 of the draft guidance is legally incorrect

73. We believe that the following statement on page 8 of the draft guidance is legally incorrect “advertising which is likely to mislead or confuse, without actually being misleading or confusing, is sufficient to breach the fair dealing provisions” . The prohibition in Part 2 says “ A person must not ... make a false or misleading representation”. Therefore unless a statement is actually false or misleading, there is no breach of Part 2.
74. The reason for the error appears to have arisen as a result of the guidance collapsing the FMA’s powers to intervene in the market in Part 8 which references the words “likely” and “Confusing” with the obligations on participants in Part 2, which do not reference those words.
75. We believe that the FMA’s intervention powers uses the word “likely” (whereas Part 2 does not) is to enable the FMA to use the power pre-emptively, e.g. stop material before it goes publi and it also means the FMA doesn’t actually have to prove that someone has been misled in order to use the stop order power. From a participant perspective, we are more concerned with Part 2 than Part 8.
76. Second, it is correct that whether a statement is misleading or not is an objective matter for a Court to determine rather than a subjective matter i.e. a statement can objectively be misleading even if that was not the intent of the participant. However, the reverse must therefore also be true i.e. it may be possible for a customer to misunderstand a statement without the statement being misleading at an objective level.
77. The problem that this raises is that participants and the FMA alike need to have a common view of the calibre of the theoretical person we are thinking about when we are seeking to assess

whether a statement is misleading. Candidates could range from the “prudent but non expert person” (introduced by s49 of the FMC Act) to “a moron in a hurry” (Morning Star Cooperative Society v Express Newspapers Limited). We also need to understand whether our hypothetical person changes depending on the target audience (there is a suggestion that the FMA holds this view). This would be a very useful topic on which to gain guidance.

Whether prime advertising slots have been captured

78. One of the circular problems that boutique fund managers can face is that it can be difficult to achieve scale if you are unable to create brand recognition.
79. To an extent achieving brand recognition requires being able to advertise on mainstream media (including radio, television and newspaper), but at the same time you are arguably walled out from being able to advertise on mainstream media (in the prime slots in particular) if you are not already a scale player. First because of cost, second many mainstream media have restrictions on number of advertising slots and these have already been taken, third the media may also have restrictions on more than certain numbers of the same kinds of offer on their platform.
80. Another media related issue also worth considering is that many of the industry experts that are asked to comment on morning shows etc, are there because they pay to be there as the independent expert. Conversely the media often will not hear from experts if they are not prepared to pay. The lack of transparency around these practices is problematic.
81. We would therefore invite the FMA to engage with main media outlets to gain a picture of what their policies are with respect to availability of slots, costs, exclusivity type policies and approaches toward the fact that people presented as independent experts on television or radio may be there because they are paying to be there, rather because they have been sought out. In the meantime, this highlights the fundamental importance of quality boutique providers being free to advertise through cheaper online channels.

Part 6 – Concluding comments

What should the FMA’s overall strategic goal for advertising be?

82. The FMA’s draft guidance does not clearly state what its overall strategic goal for advertising in financial markets is. It also doesn’t say what problems that it is seeing that it is seeking to solve. We consider that the utility of the guidance would be significantly improved with this additional context.
83. In the absence of FMA providing comment, our view is that the FMA’s overall strategic goal should be to consider the full universe of offers that customers/investors are exposed to through advertising and then seek to improve the quality of that exposure.
84. We believe that there is currently a proliferation of advertisements by low quality unregulated perimeter players that creates risk for the public and that ultimately undermines confidence in financial markets because customers begin to associate the financial sector with low quality. Conversely, it is not easy for the full range of credible well regulated entities to bring their

brands and their products to customers' attention. Enabling this would improve the competitive dimension of the market and consumer confidence for the reasons canvassed above.

85. Our view therefore is that the FMA's overall strategic goal should be to reverse the current trend by taking a facilitative approach to credible licensed players and by taking a stern approach to the perimeter.

The most important point is to regard communication in layers as a single advertisement

86. The most important specific point that we make is our view that where we communicate with customers in the online format with a self-contained series of layers this should be treated as a single "advertisement". Otherwise, every single layer in the online format would have to contain the same, information about where to find the PDS. In addition reputable boutique businesses would be barred from engaging in use of banner ads. This is probably the most important form of advertising for us where mainstream media slots are taken. There would be no upside to the customer for inhibiting us from being able to use such advertising, especially when higher risk perimeter players would be able to use it.
87. If the FMA is considering not agreeing with our interpretation on this point, we request a meeting with the FMA to discuss the matter further.

A backdrop of advertisements by high quality providers is helpful to customers and to the market

88. It is worth remembering that; financial products and financial markets are alien to most people, most of the quality MIS managers have a relatively low profile with the public at large and do not have branches in main streets for people to drop into, and regulatory documents are not particularly user friendly or engaging because they focus on the "what", not the "why".
89. As a consequence of all this, advertising and marketing is critical to helping bridge the accessibility gap that many people have to the sector – far more so than other sectors. In the absence of bridging that gap, many people will not achieve their financial goals.
90. Therefore the FMA's role in facilitating the right kind of advertising by the right kind of participants cannot be overstated.

Appendix 1 - MIS Managers supporting the submission

- NIKKO ASSET MANAGEMENT NEW ZEALAND LIMITED
- AMP INVESTMENT MANAGEMENT (N.Z.) LIMITED
- AMP WEALTH MANAGEMENT NEW ZEALAND
- ASPIRING ASSET MANAGEMENT LIMITED
- BOOSTER INVESTMENT MANAGEMENT LIMITED
- CASTLEPOINT FUNDS MANAGEMENT LIMITED
- CLARITY FUNDS MANAGEMENT LIMITED
- CONRAD FUNDS MANAGEMENT LIMITED
- FISHER FUNDS MANAGEMENT LIMITED
- HARBOUR ASSET MANAGEMENT LIMITED
- KIWI WEALTH INVESTMENTS LIMITED PARTNERSHIP
- MERCER (N.Z.) LIMITED
- MILFORD FUNDS LIMITED
- MINT ASSET MANAGEMENT LIMITED
- NEW ZEALAND FUNDS MANAGEMENT LIMITED
- OYSTER MANAGEMENT LIMITED
- SIMPLICITY NZ LIMITED

Appendix 2– abridged answers to consultation questions:

The proposed guidance is applicable to all advertising and promotion of offers of financial products, including advertising relating to offers subject to an exclusion in Schedule 1 of the Financial Markets Conduct Act 2013 (the FMC Act), and including all financial product types.

- Do you agree with the scope of the guidance?

On the topic of advertising, the FMA should think holistically about everything in relation to financial markets that customers see advertisements for because:

- It is only by considering the full suite of entities that advertise in the market that the FMA's response to addressing harm will be coherent and effective. Further it is the entities that operate on the perimeter of the regime that are higher risk because they are not subject to the same governance, presence within New Zealand and they do not have prescribed documentation to cure any shortfalls in advertising. It makes no sense to place all the lens of advertising oversight on entities that are lower risk and better governed; and
- The wording of Part 2 of the FMC Act is broad, in addition the FMA has even broader scope to comment on issues of concern in the FMA Act. Therefore, the FMA should not unduly limit the scope of its discretion by only looking at a small slice of the market.

- Do you think the guidelines need to differ for advertising of different types of financial product offers?

The general principles of Part 2 of the FMC Act are the same for all entities. Therefore, as noted above, the FMA should draw the full market within the scope of the guidance.

However, there should be a different approach to the oversight and enforcement of advertising issues between regulated and unregulated entities to improve the overall universe of offers that the public encounter.

We consider that the FMA should be relatively facilitative of advertising by entities that are licensed, supervised and have heavily prescribed documents. This is because:

- i. The FMA has observed poor investment outcomes among people who lack confidence or who are disengaged from financial markets. As the main function of an advertisement is to stimulate engagement, familiarity and brand recognition (and therefore confidence) in a provider, a market with healthy backdrop of advertisements from the full range of reputable providers should result in a more confident customer base than would be the case in a market where it is difficult to advertise.
- ii. Advertising is essential to the effective operation of the market. Given that most MIS managers do not have branches throughout New Zealand, the public will not know the existence of many good providers or investment options, but for the advertisements they come across. It is the public knowing they have

choices and what those choices are, which then places pressure on incumbents to improve, which in turn moves the market as a whole to improve. In contrast, a depressed advertising system, which sees the incumbents dominate advertising slots on mainstream media, together with the FMA taking interpretations of the law that restricts the ability to advertise outside of mainstream slots, will favour the status quo for incumbents, and slow down the evolution of markets and the ability to disrupt.

- iii. For MIS where the content of the PDS is heavily prescribed, there are particular topics that are not well covered by the current regulatory framework such as; ESG approach, information about the broader market that an offer relates to, particular stand out features of offers, and investment strategy. (Some of this is recorded in customer research undertaken by FMA in 2018.) Therefore the market actually needs to include other information, in addition to prescribed information, in order to provide complete and effective disclosure to customers. Much of this information would fall within the definition of “advertisement”.

In contrast, the FMA should be much more vigilant and take a much less facilitating approach to advertising by entities that are unlicensed and/or that are offering products on the perimeter of the regime. The reason for this is that the risk of harm to the end customer is much greater where there isn't the same suite of regulated documentation to clarify headline statements in advertising and where the products in question are intrinsically of higher risk.

- Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers?

No. As noted above the FMA should consider the full universe of advertisements including by perimeter entities in financial markets.

In addition, the FMA should consider its approach to publishers. In particular, mainstream media, are running advertisements by perimeter entities that are at best deeply lacking in risk disclosures and at worst scam like offers alongside advertisements by reputable players.

If the public cannot rely upon entities such as the Herald to pick out the obviously disreputable offers, from credible players, then this becomes very undermining for both sides of the market. Relatively unknown boutique businesses struggle to assert their credibility and the public will not know who they can trust. (To be clear we are not referring to advertisements that a reasonable publisher would not realise breach the FMC Act, we refer to advertisements with egregiously false content, which take the form of supposed news articles, we provide two examples above.)

We are aware of current market practice where a user may “click through” a short-form advertisement (e.g. from a Google search, LinkedIn, Facebook, Instagram, Stuff.co.nz, etc.) to a

second webpage (often maintained by the issuer) where information required by sections 90-92 of the FMC Act is located. Our position is that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restrictions. If the provisions cannot be complied with, then a short-form advertisement must not be made. Do you agree with this position? If not, can you please explain why?

We do not agree with the FMA’s position.

In all walks of life (including the FMA’s own website and newsletters) it is common for information to be provided to customers in layers, when communicating online. For example, Nikko AM’s disclosure page for its digital tool (below) consists of a series of headings that expand out where customers wish to drill into them:

Welcome to GoalsGetter

Before you start, here are 5 things you should know:

>	Which products can you access? GoalsGetter allows you to invest in Nikko AM products only Read more
>	What advice is available? GoalsGetter provides basic advice about investing in managed funds (including KiwiSaver) based on limited inputs. If your situation is complex or you’re thinking about investing in something other than managed funds, we recommend you see an authorised financial adviser Read more
>	Who can invest? GoalsGetter allows individuals to invest online, if you’re not investing in your own name you may need to contact us Read more
>	What does it cost? If you choose to invest, you will be charged fees as described in the Product Disclosure Statements , but there is no charge for using GoalsGetter Read more
>	Is your information safe? Rest assured we take your privacy and the security of your information very seriously, for more information please see our privacy statement Read more

There is nothing in the law which says that each layer should be treated as a separate document.

Our contention is that where an advertisement constitutes a series of layers in a reasonably self-contained journey it should be treated as a single advertisement, in the same way that a leaflet or pamphlet that unfolds would be regarded as a single advertisement.

Not only is this interpretation viable on the words of the FMC Act in relation to the definition of “advertisement” but in the online context it is the only interpretation that makes sense. Otherwise:

- On every new page that a customer expands or clicks through to, the customers would need to be provided with the same information again and again about where to find the PDS, which would be annoying and unhelpful;

- The main harm that that sections 89-92 is intended to address is the risk of a customer making an investment decision without proper regard to the relevant PDS. This risk is addressed in the online format provided a link/reference to the PDS features at a reasonable point in the customer journey through the layers. (In fact a link to a PDS in a second or third layer of an online advertisement does a better job than a Newspaper Article with an upfront reference to where a PDS can be obtained, because an upfront reference in a Newspaper cannot simply be clicked on to take you into the PDS itself.) ; and
- The FMA interpretation would result in high risk offers by perimeter players being able to dominate because they would be able to advertise with quick links and banner advertisements, whereas reputable players would not. This would result in the opposite of a sensible harms based overlay to advertising by the FMA and would not be consistent with many aspects of the purpose statement of the FMC Act, which includes:
 - promote the confident and informed participation of businesses, investors, and consumers in the financial markets – [neither participation by investors nor reputable businesses would be assisted by the FMA interpretation]
 - provide for timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products or the provision of financial services – [The FMA information would be to require the wrong information to be provided at the wrong point in time]
 - avoid unnecessary compliance costs
 - promote innovation and flexibility in the financial markets – [The FMA interpretation is not workable for the digital format]

This topic is discussed more fully above. (We also propose, some good conduct principles for when advertising to customers online using layers of communication.)

Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?

Yes:

- as noted above publishing and publisher's obligations not to publish if they ought to know that an advertisement would breach Part 2 is not covered;
- See above some of our good conduct suggestions for advertising using layers of information online; also
- The guidance does not comment on the issues requiring judgment e.g. how to trade off competing considerations e.g. accuracy of information and detail as against simplicity and ease of understanding, see discussion above; also
- See examples of poor conduct by perimeter players set out above. Our contention is that it is the perimeter where there is the greatest risk of harm.

Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors?

It depends on the nature of the of the channel/ forum that the advertisement is made in. More specifically, if an advertisement is placed in a general public forum where a large portion of the readers are likely to be retail e.g. in the Herald, then it should be clarified immediately. In contrast, as the audience becomes more naturally wholesale e.g. if you were to advertise on an Angel Investor website or in a more specialist publication, then it becomes more reasonable for this information to become more of an avoidance of doubt point.

There may also be other factors that impact on the reasonableness of the point at which it is necessary to clarify that an offer is wholesale only, for example in a news-letter with the primary purpose of discussing markets generally and providing interesting investor information, but which would nevertheless be captured by the definition of an advertisement.

Do you agree with the suggested wording for inclusion?

The suggested wording would be appropriate in many situations, and so is reasonable to use as an example. However, there are also many situations in which it would be appropriate to use different formulations depending on circumstances. For example:

- It may be preferable to have the words “offer is wholesale only” as a link with then a more detailed explanation of what that means if it is clicked on. This is more concise; or
- It may be preferable to provide information about what the offeror needs at a practical level, rather than a reference to law; or
- The participant’s own definition of wholesale may be more restrictive than the legal one, which would require further modification.

Question 5: Miscellaneous Are there any other aspects you wish to submit on? For example, are there any unintended consequences that may arise from the proposed guidance that we should be aware of?

- A key topic that we submit on above is the importance of advertising to the success of the market, which is a reason for the FMA to take a pragmatic and facilitating approach.
- The statutory definition of “advertisement” is potentially very broad. The definition of “restricted communication” is even broader. Between them the words would capture a broader range of content and documents than the word “advertisement” would normally convey to an ordinary person, such as any and all content on a MIS manager’s website and articles discussing the market at a generic level. At the margins, some of the good conduct recommendations will not be relevant to those.
- The guidance is ambiguous as to the FMA’s position on unsubstantiated representations. Our position is that at the time of making a representation, a participant is required to have reasonable grounds for making the representation, but is not required to publish it. It is enough that a participant can substantiate if called upon. This interpretation is consistent with the way that section 12A of the Fair Trading Act 1986 has been interpreted (which has substantially the same wording but applies to general activities “in trade”). (At some points the guidance could be read as stating that all representations must be substantiated in the

same documents that they are made in, which is why we are clarifying our position on this.) This is an important point because many advertisements need to be short (particularly on the radio or in print media) and so there are many formats in which it would be necessary to just make the representation without fully substantiating it there and then.

- One interesting way to conceptualise much of the difference between regulatory documents such as PDS and fund updates and non regulatory documents is that the regulatory documents tend to focus on the “what”, whereas many advertisements and non regulated documents focus on the “why”. Also a regulatory document may tend to focus on a specific offer whereas an advertisement may be more about the provider and what its philosophy is. Therefore in an ideal world the two sets of documents should complement one another, albeit that there may be little overlap in the content.
- The following section of the draft guidance is problematic for a range of reasons

Key principles

It is the overall impression which counts

Whether an advertisement is likely to mislead or confuse depends on the overall impression as perceived by the investor. This means that:

- advertising which is likely to mislead or confuse, without actually being misleading or confusing, is sufficient to breach the fair dealing provisions;
- intent to mislead or confuse is irrelevant;
- advertising (or conduct generally) is more likely to mislead where a financial product is complex or where the investor base being targeted is vulnerable or ill-informed;
- representations that are true and verifiable in isolation are nonetheless capable, when viewed holistically, of generating a confusing or misleading impression overall. This may be the case where material information or qualifications to a representation (e.g. risks or downsides to a product) is disclosed in fine print.

First, the statement “*advertising which is likely to mislead or confuse, without actually being misleading or confusing, is sufficient to breach the fair dealing provisions*” is incorrect. The prohibition in Part 2 says “*A person must not ... make a false or misleading representation*”. Therefore unless a statement is actually false or misleading, there is no breach of Part 2.

The reason for the error appears to have arisen as a result of the guidance collapsing the FMA’s powers to intervene in the market in Part 8 which references the words “likely” and “Confusing” with the obligations on participants in Part 2, which do not reference those words.

The reason why the FMA’s intervention powers uses the word “likely” is so that it can be exercised preemptively (e.g. before a statement goes public) and without the FMA having to prove harm.

; it covers the scenario of FMA stopping material before it goes public e.g. a preregistration PDS review, and/or before anyone has in fact been misled. From a participant perspective, we are more concerned with Part 2 than Part 8.

Second, it is correct that whether a statement is misleading or not is an objective matter for a Court to determine rather than a subjective matter i.e. a statement can objectively be misleading even if that was not the intent of the participant. However, the reverse must therefore also be true i.e. it may be possible for a customer to misunderstand a statement without the statement being misleading at an objective level. The problem that this raises is that participants and the FMA alike need to have a common view of the calibre of the theoretical person we are thinking about when we are seeking to assess whether a statement is misleading. Candidates could range from the “prudent but non expert person” (introduced by s49 of the FMC Act) to “a moron in a hurry” (*Morning Star Cooperative Society v Express Newspapers Limited*). We also need to understand whether our hypothetical person changes depending on the target audience (there is a suggestion that the FMA holds this view). This would be a very useful topic on which to gain guidance.

- Finally, FMA’s draft guidance does not clearly state what its overall strategic goal is for advertising in financial markets. It also doesn’t say what problems that it is seeing that it is seeking to solve. A large part of the value add of guidance is being able to understand this context. In addition the best engagement with industry in consultation is likely to be borne out of discussion as to how each side perceives the problem and its solution.

Appendix 3 – excerpt from FMA Newsletter

[View this video](#) of the recent launch of the Full Licensing Application Guide for financial advisers, with FMA's Director of Market Engagement John Botica and Principal Consultant Derek Grantham.

Ease of doing business with the FMA

Each year we ask stakeholders and industry for feedback. The results can be found in our Ease of Doing Business Survey.

[Read more here on industry's views on ease of doing business with the FMA.](#)

Are you a FinTech business? We'd love to hear from you!

We want to foster technology innovation that improves outcomes for consumers. If you identify yourself as a FinTech business we are keen to hear more about you and the challenges you face, which will help our thinking about ways we can better support your innovation journey.

[Tell us about your FinTech business here.](#)

15 February 2021

Financial Markets Authority
consultation@fma.govt.nz

Re: Feedback on proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013

On behalf of our members in New Zealand, CFA Institute¹ and CFA Society New Zealand, we appreciate the opportunity to comment on the Financial Markets Authority's (FMA) proposed guidance: advertising offers of financial products under the Financial Markets Conduct Act of 2013 ("Guidance").

CFA Institute aims to promote leading standards in ethics, education, and professional excellence in the global investment industry. It represents the views of its investment professionals to standard setters, regulatory authorities, and legislative bodies worldwide about issues affecting the practice of financial analysis and investment management, education, and licensing requirements for investment professionals, and on issues affecting the efficiency, integrity, and accountability of global financial markets.

CFA Institute supports efforts to ensure asset managers provide to investors information that is fair, accurate, and complete. False advertising about how an asset manager has performed in the past and will operate in the future can cause significant harm to individuals and their financial circumstances. It therefore warrants FMA's attention. There are many ways in which asset managers can and do promote their products to clients, and clients can range from sophisticated institutional investors to retail investors with limited financial expertise. We believe that FMA must strike the right balance between creating complex rules while also providing ample protection for less-sophisticated retail investors who are most likely to be victims of confusing, misleading, and even false or fraudulent advertising. With this concern in mind, we provide the following comments on the Guidance.

We believe there should be minimum presentation and disclosure guidelines any time an investment is courted to the public, whether retail or wholesale investors, on any platform. To enable prospects to compare performance between asset managers and products we recommend incorporating some standardised performance requirements in advertisements. Standardising which returns must be included in an advertisement, as well as requiring certain disclosures, would address many of the concerns that are described in the proposed Guidance. The CFA Institute Global investment

¹ CFA Institute is a global, not-for-profit professional association of nearly 179,000 investment analysts, advisers, portfolio managers, and other investment professionals in 165 countries, of whom more than 172,000 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 158 member societies in 73 countries and territories. For more information, please visit www.cfainstitute.org

CFA Society New Zealand is an association of local investment professionals, including portfolio managers, security analysts, investment advisers, and other financial professionals. As a CFA Institute Society, we connect members to a global network of investment professionals. Our members include CFA charterholders, CFA candidates and associate members.

Performance Standards (GIPS®), which have been adopted by over 1,700 organizations in more than 40 countries, are based on the principles of fair representation and full disclosure. Firms that comply with the GIPS standards are required to provide specific information about either a composite or a pooled fund. This information includes annual total returns for the product and the benchmark, along with disclosures providing key information about the product that is presented. Implementing GIPS standards reporting would mean investors can compare like with like performance and ensure managers are held to high standards of transparency, objectivity, and ethical behaviour.

Standardised performance that is fully and fairly disclosed ensures that material information is not omitted. It also allows prospects to understand the information that is provided and allows them to better compare different financial products. The information that is required to be included in a GIPS Report must be current, complete, and accurate.

Asset managers that comply with the GIPS standards represent that they:

- Adhere to several core principles, including adhering to applicable laws and regulations and ensuring that information presented is not false or misleading.
- Use input data consistently to calculate performance and use certain calculation methodologies to facilitate comparability.
- Create standardised GIPS Reports that must be provided to prospective clients and pooled fund investors.

Standardised GIPS Reports help ensure that asset managers are evaluated on their actual record and that calculation and presentation methods do not result in unfair competition or “cherry-picked” performance. New Zealand investors are currently disadvantaged by a lack of local regulation whereby managers can present back-tested results and cherry-picked data as representative performance for investors. This is not the best practice overseas and unfairly disadvantages investors placing them at unnecessary risk to unscrupulous managers who have free reign to frame the discussion in the light which best suits themselves. Implementing GIPS standards would alleviate these issues and give investors unbiased data allowing them to make the best decisions possible. Asset managers that comply with the GIPS standards must establish robust policies and procedures for complying with all applicable requirements of the GIPS standards. Compliance also demonstrates that the asset manager has voluntarily committed to following ethical standards and industry best practices.

CFA Institute recommends that FMA implement the relevant provisions and sections of the GIPS standards as guidance or requirements to help standardise industry practices, raise the ethical standard, and improve the quality of the content in the advertising materials issued by market participants related to their financial products. If taking a principles-based approach it is essential to show through both best-practice guidance and regulatory prosecutions, what is and is not acceptable.

We welcome the proposed guidance however believe it doesn't go far enough. New Zealand has a chance to make foundational changes to its financial landscape regarding how information is best presented to investors. We believe it should join the rest of the world in best practice reporting, already established by the GIPS standards and implemented by over 47 countries and markets worldwide. In this manner asset managers will be reporting on the same level playing field and investors will be able to make the best-informed decisions while relying on accurate, standardised and transparent financial data.

If the FMA does not wish to adopt full GIPS, we believe at a minimum its core principles should filter down into the Guidance. The most important of these are:

- Standardised risk and after-fee before-tax return calculations and reporting on all calendar years, 1-year, 3-year, 5-year, 10-year and since inception periods;
- Displaying an appropriate benchmark and noting where this does/doesn't comply with FMA benchmark guidance; and
- Disclosure of conflicts in any communication or presentation.

We would be delighted to assist FMA with further understanding the GIPS and the principles behind them and hope to work with you in future to improve the financial literacy and ultimately the investment decisions of New Zealanders.

We have offered general comments on the consultation, which would best sit under Consultation Question 3: Potential Gaps where we believe more comprehensive and transparent reporting is required. Please refer to the sections below for our comments.

Section: Fair Dealing and Disclosure Provisions

Subsection: Omissions can be misleading

Text: “Confusing information or misleading conduct extends beyond positive actions or positive statements – it also includes omissions, whether deliberate or inadvertent. It is not a defense to “do or say nothing” if silence or partial disclosure (eg, cherry-picking) is likely to leave an overall misleading or confusing impression on the investor.”

CFA Institute agrees with the need to protect investors’ interests. One of the ways we do this is by setting ethical standards for investment performance presentation, through the GIPS standards, to ensure fair representation and full disclosure of investment performance. Only once all managers are reporting under the same standards can products be truly comparable which empowers and enables investors to make the best choices for themselves.

From an investment strategy perspective, the GIPS standards require firms to create and maintain a composite for all strategies for which the firm manages segregated accounts or markets to segregated accounts. A composite must include all portfolios managed in that strategy, not just the best performing ones. Firms must maintain and make available information about all of the strategies they manage using composites or pooled funds. These requirements prevent firms from cherry-picking their best performing portfolios or funds to boost their achievements to investors.

Similar to accounting standards, the comparability between products and managers can only occur where firms are held to the same mandatory standards, with penalties for violation. The GIPS standards require the reported returns to be clearly identified as gross-of-fees returns or net-of-fees returns and specify the different types of fees that must be deducted from each type of returns. This allows prospective investors to compare performance across firms.

The underlying principles of the GIPS standards; fair representation and full disclosure, help to ensure that current and prospective clients and investors are not given performance or performance-related information that is incomplete, inaccurate, biased, or fraudulent. Firms must not present any performance or performance-related information that is known to be inaccurate or that may mislead either current or prospective clients, or current or prospective investors. This concept applies to all performance and performance-related materials on a firm-wide basis and is not limited to those materials that reference the GIPS standards.

As such, CFA Institute recommends that FMA implements the relevant provisions of the GIPS standards that asset management firms can follow to ensure accurate and comparable information are included in their advertising, and to avoid the risk of leaving an overall misleading or confusing impression on the investor.

Section: Advertising Standards and Guidelines

Subsection: Introduction

Text: “We encourage market participants to not only meet the standards and guidelines expressed in this guidance (as and where applicable to them), but also to consider how their conduct actively assists the investing public to make appropriate and considered investment decisions.”

It is the view of CFA Institute that investment management firms should adhere to the highest ethical and professional standards, which sometimes are more demanding than the requirements or guidelines imposed in that jurisdiction, to protect the interests of the investors and to instill trust in the investment industry. By promoting compliance with the GIPS standards, CFA Institute offers a set of voluntary standards that asset management firms can follow to avoid misrepresentations of performance and to communicate all relevant information that prospective investors should know in order to evaluate past results.

CFA Institute recommends that FMA implements the relevant provisions of the GIPS standards as requirements for the industry to influence the conduct of the practitioners which, in turn, will assist the investing public with making appropriate investment decisions. Failing to do so will further perpetuate the mistrust of the financial profession and encourages a situation where investors can be easily misled. The GIPS standards have been adopted by 47 countries and markets as best practice and serves investors best by producing accurate, objective, and transparent data. These should form the cornerstones of investment decisions, not cherry-picked or non-representative performance data.

Section: Advertising Standards and Guidelines

Subsection: Performance History

Text: "Past performance information must be meaningful and be presented in a balanced way. Data that is "cherry-picked" to create a more favourable impression, or is overly reliant on additional information for understanding, may result in a misleading impression."

It is the view of CFA Institute that asset management firms must present their past performance information honestly and accurately. The underlying principles of the GIPS standards, fair representation, and full disclosure, help to ensure that current and prospective investors are not given performance or performance-related information that is incomplete, inaccurate, biased, or fraudulent. Firms must not present any performance or performance-related information that is known to be inaccurate or that may mislead either current or prospective investors. Firms must present information in a standardised format, easily digestible by consumers.

As discussed earlier, the GIPS standards set out requirements to create and maintain composites for all strategies that are managed or offered, and a composite must include all portfolios managed in that strategy. These requirements prevent firms from cherry-picking their best performing accounts or pooled funds but leaving out the poorly performing ones, which we understand is prevalent in the New Zealand market.

The GIPS standards also set out requirements to report past performance, to prevent firms from cherry-picking the best periods that a portfolio or fund had performed in the past. For a firm to claim compliance with the GIPS standards, the firm must initially attain compliance and report performance in compliance with the GIPS standards for a minimum of five years, or for the period since the firm inception if the firm has been in existence for less than five years. The firm must then build towards reporting a minimum 10-year compliant track record.

CFA Institute would recommend FMA to implement the relevant provisions of the GIPS standards as guidelines (or even requirements) for the industry to prevent "cherry-picking" manipulation by firms in their reporting. We have attached some examples as Appendix A and Appendix B to this submission, which form part of the 2020 GIPS standards.

Section: Advertising Standards and Guidelines

Subsection: Performance History

Text: “Performance history for periods of more than 12 months should be annualised, and the effects of commissions, fees, other charges, and tax should be disclosed.”

CFA Institute agrees that performance for periods of more than 12 months should be annualised. However, to allow investors to compare performance across firms, we believe that it would be helpful if FMA recommends standardised periods for which performance is reported. For example, FMA could recommend that managers report annualised performance for the 1, 5, and 10-year periods through the most recent quarter end.

We also recommend providing guidance as to how managers can disclose the effects of fees and costs. We believe that the most effective way to demonstrate this information is to disclose returns, for the same periods, that are gross of such fees and costs and net of such fees and costs. This approach would be consistent with the GIPS standards, which recommend that firms provide gross and net returns for all periods that are presented. This allows investors to easily understand the effects of fees and costs over time.

CFA Institute recommends that FMA implements the relevant provisions of the GIPS standards as guidelines (or requirements) for the industry to ensure consistency in historic performance reporting.

Section: Advertising Standards and Guidelines

Subsection: Clearly disclose fees and costs

Text: *“Fees must be consistent with the relevant disclosure documents, and must be disclosed such that they give a realistic impression of the overall level of fees and costs an investor is likely to pay (including any indirect fees or costs) over a relevant period.”*

It is the view of CFA Institute that reported investment performance must be fully and fairly disclosed. These are underlying principles of the GIPS standards.

The GIPS standards require firms to disclose information about fees and costs investors are expected to incur. Specifically, firms are required to disclose the following:

- For composite strategies, the investment management fee schedule;
- For pooled funds, the investment management fee schedule and the current total expense ratio.

The GIPS standards also recommend that firms disclose how research costs are reflected in returns.

Once again, we recommend that FMA implements the relevant provisions of the GIPS standards as guidelines (or requirements) for the industry to ensure consistency in fees and costs disclosure requirements. This would represent the best outcome for investors and enable and empower them to make more accurate choices with standardised, reliable, objective, and transparent data.

Appendix A: Sample GIPS Composite Reports

SAMPLE1 COMPOSITE WITH TIME-WEIGHTED RETURNS

Spinning Top Investments – Large Cap Growth Composite

1 February 2011 to 31 December 2020

Year	Composite			3-Year StdDeviation					
	Gross Return	Composite Net Return	Benchmark Return	Composite Gross	Benchmark	Number of Portfolios	Internal Dispersion	Composite Assets	Firm Assets ^(b)
	TWR (%)	TWR (%)	Return (%)	Gross (%)	Return (%)		(%)	(\$ M)	(\$ M)
2011 ^(a)	2.18	1.25	1.17			31	n/a	165	n/a
2012	18.66	17.49	15.48			34	2.0	235	n/a
2013	41.16	39.80	33.36			38	5.7	344	n/a
2014	14.50	13.37	13.03	11.30	9.59	45	2.8	445	1,032
2015	6.52	5.47	5.67	12.51	10.68	48	3.1	520	1,056
2016	8.22	7.15	7.09	12.95	11.15	49	2.8	505	1,185
2017	33.78	32.48	30.18	12.29	10.53	44	2.9	475	1,269
2018	-0.84	-1.83	-0.65	13.26	11.91	47	3.1	493	1,091
2019	33.08	31.78	29.76	12.81	11.71	51	3.5	549	1,252
2020	7.51	6.44	6.30	13.74	12.37	54	2.5	575	1,414

(a) Returns are for the period 1 February 2011 to 31 December 2011.

(b) Spinning Top Investments acquired the composite through an acquisition of ABC Capital in May 2014. Firm assets prior to 2014 are not presented because the composite was not part of the firm.

Disclosures

1. Spinning Top Investments claims compliance with the Global Investment Performance Standards (GIPS®) and has prepared and presented this report in compliance with the GIPS standards. Spinning Top Investments has been independently verified for the periods 1 January 2011 to 31 December 2020. The verification report is available upon request.

A firm that claims compliance with the GIPS standards must establish policies and procedures for complying with all the applicable requirements of the GIPS standards. Verification provides assurance on whether the firm's policies and procedures related to composite and pooled fund maintenance, as well as the calculation, presentation, and distribution of performance, have been designed in compliance with the GIPS standards and have been implemented on a firm-wide basis. Verification does not provide assurance on the accuracy of any specific performance report.

2. Spinning Top Investments is an equity investment manager that invests solely in US-based securities. Spinning Top Investments is defined as an independent investment management firm that is not affiliated with any parent organization. Spinning Top Investments acquired ABC Capital in May 2014.
3. The Large Cap Growth Composite includes all institutional portfolios that invest in large-cap US stocks that are considered to have growth in earnings prospects that are superior to that of the average company within the XYZ Large Cap Growth Index. Key material risks

include the risks that stock prices will decline and that the composite will underperform its benchmark. The account minimum for the composite is \$5 million. Prior to July 2016, the account minimum was \$2 million. Prior to March 2020, the name of the composite was the Growth Composite.

4. Performance prior to May 2014 occurred while the investment management team was affiliated with another firm. The investment management team has managed the composite since its inception, and the investment process has not changed. The historical performance has been linked to performance earned at Spinning Top Investments.
5. The benchmark is the XYZ Large Cap Growth Index, a market-capitalization-weighted equity index of all US stocks with a market cap greater than \$10 billion and a growth tilt.
6. Returns presented are time-weighted returns. Valuations are computed and performance is reported in US dollars.
7. Gross-of-fees returns are presented before management and custodial fees but after all trading expenses. Composite and benchmark returns are presented gross of non-reclaimable withholding taxes. Net-of-fees returns are calculated by deducting a model management fee of 0.083%, 1/12th of the highest management fee of 1.00%, from the monthly gross composite return. The management fee schedule for separate accounts is as follows: 1.00% on the first \$25 million; 0.60% thereafter. The management fee schedule and total expense ratio for the Large Cap Collective Fund, which is included in the composite, are 0.65% on all assets and 0.93%, respectively.
8. Policies for valuing investments, calculating performance, and preparing GIPS reports are available upon request.
9. A list of composite descriptions and a list of broad distribution pooled funds are available upon request.
10. The composite was created in November 2011, and the inception date is 1 February 2011.
11. As of 1 January 2014, internal dispersion is calculated using the equal-weighted standard deviation of annual gross returns of those portfolios that were included in the composite for the entire year. Prior to 2014, internal dispersion was calculated using asset-weighted standard deviation
12. The three-year annualized standard deviation measures the variability of the composite gross returns and the benchmark returns over the preceding 36-month period.
13. Effective November 1, 2011, portfolios are removed from the composite if they have a significant cash flow. A significant cash flow is defined as a contribution or withdrawal greater than 25% of the beginning market value of a portfolio. The portfolio is removed from the composite for the month in which the significant cash flow occurred.
14. GIPS® is a registered trademark of CFA Institute. CFA Institute does not endorse or promote this organization, nor does it warrant the accuracy or quality of the content contained herein.

Appendix B: Sample GIPS Pooled Funds Reports

SAMPLE2 POOLED FUND WITH TIME-WEIGHTED RETURNS

Pudoru Investment – Japanese Large Cap Equity Fund

1 April 2011 to 31 March 2021

3 Year Annualised Return | 3 Year Annualised Std Deviation

31 March	Fund	Fund	Benchmark	3 Year Annualised Return		3 Year Annualised Std Deviation		Fund Assets (¥ B)	Firm Assets (¥ B)
	Gross Return (%)	Net Return (%)		Fund Gross (%)	Benchmark (%)	Fund Gross (%)	Benchmark (%)		
2012	2.25	1.49	2.11	n/a	n/a	n/a	n/a	18.4	35.1
2013	19.33	18.45	16.00	n/a	n/a	n/a	n/a	29.8	51.5
2014	40.20	39.18	32.39	19.60	16.18	14.22	11.94	49.7	78.6
2015	15.25	14.40	13.69	24.46	20.41	10.62	8.97	55.3	103.3
2016	1.45	0.69	1.38	17.91	15.13	12.16	10.47	57.6	124.7
2017	13.53	12.69	11.96	9.90	8.87	12.04	10.60	61.8	150.8
2018	23.51	22.60	21.83	12.46	11.41	11.28	9.93	63.3	143.3
2019	-8.02	-8.72	-7.58	8.85	8.02	12.65	11.80	49.9	146.2
2020	-3.86	-4.58	-3.67	2.98	2.74	14.20	13.56	61.6	165.6
2021	16.46	15.60	15.06	0.99	0.80	18.16	17.00	68.9	185.8

Pudoru Investments claims compliance with the Global Investment Performance Standards (GIPS®) and has prepared and presented this report in compliance with the GIPS standards.

Pudoru Investments has been independently verified for the periods from 1 April 2011 to 31 March 2021. A firm that claims compliance with the GIPS standards must establish policies and procedures for complying with all the applicable requirements of the GIPS standards. Verification provides assurance on whether the firm's policies and procedures related to composite and pooled fund maintenance, as well as the calculation, presentation, and distribution of performance, have been designed in compliance with the GIPS standards and have been implemented on a firm-wide basis. The Japan Large Cap Equity Fund has had a performance examination for the periods from 1 April 2015 to 31 March 2021. The verification and performance examination reports are available upon request.

Pudoru Investments is an equity investment manager that invests solely in Japan-based securities.

The Japan Large Cap Equity Fund (the "Fund") seeks to achieve long-term capital appreciation by investing primarily in large-cap equity securities of Japanese issuers. Under normal market conditions, the Fund will invest at least 80% of its net assets (including the amount of any borrowings for investment purposes) in common and preferred stocks of large-capitalization companies. The Fund may from time to time emphasize one or more sectors in selecting its investments, including the financial services sector. The value of the Fund's assets may be adversely affected by economic and social demographics. Japan's population is aging, and the government may have to increase taxes as it spends more on healthcare, which could slow economic growth at a time when Japan has been in a prolonged economic downturn. The Fund may borrow up to 30% of its net asset value. Historically, the Fund's borrowing level has averaged less

than 1% of net assets and has never exceeded 10%. Leverage may also magnify losses as well as gains to the extent that leverage is used.

The benchmark is the XYZ Japan Large Cap Index, which is designed to measure the performance of the large-cap segment of the Japanese market. The index is fully invested and includes the reinvestment of dividends.

Valuations are computed and performance is reported in Japanese yen. Policies for valuing investments, calculating performance, and preparing GIPS reports are available upon request.

Gross returns are presented before the deduction of management fees but reflect the deduction of all trading and administrative expenses. Share Class A is used to calculate Fund gross returns. Net returns are calculated by deducting 1/12th of the management fee (0.75% annually, for all share classes) from the monthly gross Fund return. The total expense ratios for Class A and Class I as of the Fund's most recent fiscal year end (31 March 2021) were 1.50% and 1.35%, respectively.

A list of composite and pooled fund descriptions is available upon request.

The inception date of the Fund is 1 April 2011, which is the first day assets were invested in the strategy.

The three-year annualized standard deviation measures the variability of the Fund and the benchmark returns over the preceding 36-month period.

In January 2019, Koh Yuwabara, the Fund's portfolio manager, retired. Yuna Tanaka became the portfolio manager.

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Feedback form

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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. **Submissions close on 16 February 2021.**

Date: 18/11/2020 Number of pages: 2

Name of submitter: [REDACTED]

Company or entity: CONNECT AND GROW LTD.

Organisation type: INSURANCE ADVICE

Contact name (if different): -

Contact email and Phone: [REDACTED]

Question Number	Comment	Recommendation
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You don't need to quote from the consultation document if you use part & paragraph numbers.

You may attach extra pages - please label each page with your name & organisation.

Q 2	No - if clients click through to web page where all the disclosures set then it should be okay. It is very difficult to get people to think about insurance. Push advertising is required.	
5	We can still take care following the initial request for info. Please don't make it even harder for us to find clients. clients with insurance are far better off than clients without insurance - even if not 100% right.	

Feedback summary - if you wish to highlight anything in particular
 PLEASE DON'T ADD RESTRICTIVE COMPLIANCE TO ALL AREAS OF OUR BUSINESSES *

Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

Thank you for your feedback - we appreciate your time and input.

AS YOU KNOW 50% ARE SOLE ADVISER BUSINESSES STRUGGLING TO KEEP UP WITH ALL THE CHANGES.
 PTO

50% OF MY TIME IS SPENT ON COMPLIANCE.

THIS MEANS REVENUE IS DOWN

- " " I CAN'T OFFER FREE ADVICE (AS ERM/LETS)
- " " FEWER PEOPLE INSURED
- " " POORER CONSUMER OUTCOMES WHICH IS THE SOLE OBJECTIVE OF THE FMA.

FMA NEED TO RECOGNISE THAT INSURANCE IS NOT SOMETHING CONSUMERS STOP FOR.

WE NEED TO REACH THEM TO

- 1) EDUCATE ON THE NEED FOR INSURANCE
- 2) " THEM ON TYPES OF " AVAILABLE
- 3) HELP THROUGH THE PROCESS

IT NOW TAKES 3-6 MONTHS PER IDENTIFIED CLIENT TO GET AN OUTCOME

- 1) NOT INTERESTED / CAN'T AFFORD
- 2) APPLY FOR COVER
- 3) GET ACCEPTED / DECLINED

5 YEARS AGO THINGS WERE EASIER AND QUICKER NOW OUR PER HOUR RATE IS PROBABLY VERY LOW EVEN THOUGH OUR PER POLICY COMMISSION IS ACCEPTABLE. IF YOU DIVIDE \$ BY HOURS WORKED THEN IT IS NOT EXCESSIVE.

Level 2, 1 Grey Street
PO Box 1179
Wellington 6140
New Zealand

Our Ref: ZZZ999/2003

16 February 2021

Financial Markets Authority

Proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013 - Dentons Kensington Swan submission

- 1 This is a submission by Dentons Kensington Swan on the Financial Markets Authority ('**FMA**') *Proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013* consultation paper dated 18 November 2020 ('**Consultation Paper**').

About Dentons Kensington Swan

- 2 Dentons Kensington Swan is one of New Zealand's premier law firms with a legal team comprising over 100 lawyers acting on government, commercial, and financial markets projects from our offices in Wellington and Auckland. We are part of Dentons, the world's largest law firm, with over 10,500 lawyers in 198 locations.
- 3 We have extensive experience in financial product and service law issues, with a specialist financial markets team acting as experts in this area.
- 4 We advise a range of financial markets participants, including a number of persons who offer financial products under the Financial Markets Conduct Act 2013 ('**FMCA**'). Our experience extends to advising existing major and niche market participants, and prospective market participants on how to meet their obligations conferred under the FMCA.

General comments

- 5 Our responses to the questions set out in the Consultation Paper are attached.
- 6 We welcome the FMA's initiative in producing guidance and formally articulating its views as to how it will apply the fair dealing provisions of the FMCA to advertisements made for the purposes of advertising, or promoting offers of, financial products. Doing so is consistent with the FMA's function of promoting fair, efficient, and transparent financial markets.
- 7 In our view, however, the guidance proposed in the Consultation Paper does not go far enough in providing practical guidance to market participants looking for clarity regarding their disclosure

Eric Silwamba, Jalasi and Linyama ► Durham Jones & Pinegar ► LEAD Advogados ► Rattagan Macchiavello Arocena ► Jiménez de Aréchaga, Viana & Brause ► Lee International ► Kensington Swan ► Bingham Greenebaum ► Cohen & Grigsby ► Sayarh & Menjra ► Larrain Rencoret ► For more information on the firms that have come together to form Dentons, go to [dentons.com/legacyfirms](https://www.dentons.com/legacyfirms)

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obligations under the FMCA, as amended by the Financial Services Legislation Amendment Act 2018 ('FSLAA'). We would also support any guidance issued in this space being expressed in more facilitative terms to minimise the extent of technical regulatory impediments to advertisements that otherwise comply with the fair dealing provisions of the FMCA.

8 In brief, we believe the proposed guidance fails to address some of the issues faced by providers in relation to their disclosure requirements under the FMCA. We also believe that some of the proposed guidance takes an unduly restrictive approach to applying the law. We do not believe this is consistent with promoting fair, efficient, and transparent financial markets. In particular:

- The proposed guidance primarily covers well understood principles without addressing contentious practical issues that advertisers face.
- The restrictions proposed for short-form advertising are not pragmatic, with the unintended consequence of stifling the potential for short-form advertising being used for increased efficiency and accessibility when promoting financial products.
- The wording within the proposed guidance is unduly prescriptive in some areas. In our view, guidance should be limited to a principles-based approach. The requirement that advertisements be clearly identifiable from other content can be simplified to omit the need for comparisons to other content while still achieving the FMA's intended purpose.
- The proposed guidance fails to inform advertisers as to the FMA's views on how to best meet their disclosure obligations when advertisements regarding consumer credit contracts and insurance products include financial advice.

Further information

9 We are happy to discuss any aspect of our feedback on the Consultation Paper. Thank you for the opportunity to submit.

Yours faithfully

[Redacted signature block]

[Redacted contact information block]

[Redacted contact information block]

Specific responses to Consultation Paper questions

- 1 **Question 1: Do you agree with the scope of the guidance? Do you think the guidelines need to differ for the advertising of different types of financial product offers? Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers?**
 - 1.1 In our view, the guidance's broad focus on the advertising of financial products generally makes it simple and digestible for market participants. As all mediums of advertising financial products are covered by the provisions of the FMCA we consider the scope of this guidance is correctly targeted to inform the collective marketplace.
 - 1.2 The broad nature of the guidance effectively captures all parties who may be involved in advertising and promoting offers. Ensuring that persons making "restricted communications" are caught, ensures that most advertisers of financial products will be covered by this guidance.
 - 1.3 However, we believe that the proposed guidelines and approach taken for certain types of advertising should differ from the general approach. As we discuss below when addressing question 2, it would be impractical for short-form advertising to be measured by the same disclosure standards as traditional, longer form advertising. The proposed guidance would be of greater benefit if it took a more practical approach to advertising, as would be achieved by differentiating certain forms of advertising.
 - 1.4 The proposed guidance omits any guidance regarding class financial advice, which under the current law does not require the same level of disclosure as personalised financial advice. Market participants would benefit from guidance either confirming the status quo in relation to advice contained in advertisements that is general in nature and falls outside of any regulatory exclusions from the financial advice disclosure regime, or else clarifying the FMA's expectations under the new regime.
- 2 **Question 2: The FMA's position is that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restrictions. If the provisions cannot be complied with then a short-form advertisement must not be made. Do you agree with this position? If not, can you please explain why?**
 - 2.1 In our view, the FMA's position on short-form advertising as articulated in the draft guidance is unduly restrictive and may have the unintended consequence of prohibiting advertisers' use of short-form advertisements due to impracticality. Taking an inflexible approach to applying sections 89-92 of the FMCA creates disclosure obligations that advertisers may struggle to meet without distorting the balance of the advertisement, which risk being dominated by the required disclosures. In traditional print advertising this may be unavoidable, but reliance on click-through content is an ideal approach for digital communications, without derogating from the extent of the disclosures that must be made available to support an advertisement.
 - 2.2 In our view, the strict application of the disclosure requirements of the FMCA as contemplated under the proposed guidance is inappropriate.
 - 2.3 Click-through advertisements use small areas of digital space to promote an intended offer. These advertisements are designed to be minimalistic so as to not detract from user experiences on the hosting website. These advertisements typically have very little information on the product and are

unlikely in themselves to induce an investor to invest without further information. That further information and required legal statements can be found via a click-through function. In our view this provides an appropriate balance between gaining a potential investor's interest and providing appropriate detail before that investor can invest.

- 2.4 We believe that discharging prescribed disclosure requirements by following a click-through when advertising via digital mediums should be regarded as sufficient to protect consumers interests, and the proposed guidance would benefit from endorsing such an approach, with appropriate safeguard conditions. Otherwise, effectively prohibiting the use of click-through advertisements for those offering financial products is not consistent with promoting fair, efficient, and transparent markets.
- 2.5 In our view, allowing advertisers to effectively market their products in conjunction with a subsequent disclosure will better facilitate the function of the marketplace. This outcome will promote greater efficiency in financial markets, without surrendering much in the way of transparency and fairness, and as such is in line with the FMA's functions.

3 Question 3: Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?

- 3.1 We are not currently aware of any examples of poor conduct when advertising financial products that have not been addressed by the proposed guidance.
- 3.2 However, one key area that is omitted from the proposed guidance regards advertisements of financial products which don't fall under the exclusions in Schedule 5 of the FMCA, as inserted by FSLAA. As the new disclosure requirements will come into force on 15 March 2021, it would be beneficial to have early guidance as to how the FMA will approach advertisements that are not excluded from the new regime, where those advertisements contain financial advice.
- 3.3 In particular, when FLSAA comes into force, providers who advertise consumer credit contracts or insurance products which include financial advice will potentially need to comply with the full disclosure requirements of the new regime. Including financial advice within these advertisements is not caught by any prescribed disclosure obligations under the current regime, provided it constitutes 'class' advice, and as such there have been no regulatory compliance issues to address to date. It would be beneficial for the fair and efficient operation of the affected markets for the FMA to provide some practical guidance in this space.
- 3.4 In our view, the most valuable guidance the FMA could provide at this stage would be to address concerns as to how the relevant disclosure regulations should be addressed by such advertisements. The disclosure regulations will have a profound effect on how promoters of financial products will meet their disclosure obligations under the new regime, leading to the potential for significant re-positioning of advertisements to avoid them being categorised as advertisements. Doing so provides no consumer benefit, and in many cases may restrict the effectiveness of the messaging to the detriment of the quality of the information imparted. It would be helpful for the FMA to provide direction to market participants on this issue, rather than waiting to respond to issues after they arise.

4 Question 4: Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors? Do you agree with the suggested wording for inclusion?

- 4.1 We agree that consumers of advertising for wholesale offers should be made aware, in the relevant advertisement, that the offer being advertised is not available to retail investors.
- 4.2 However, we believe that the FMA's proposed wording is inappropriate and overreaches the FMA's regulatory remit. The proposed wording on page 14 that advertisements should state that "this offer is available to wholesale investors and is not suitable for retail investors" is effectively expressed as prescribed wording, and as such goes beyond the appropriate scope of what can be considered guidance. Prescribing particular required wording should be done by legislative instrument, not by the FMA.
- 4.3 The most appropriate form of wording to properly inform potential investors as to the limitations and suitability of a particular offer is something best left to the relevant offeror to assess in the particular circumstances of the offer, in light of the applicable obligations under the fair dealing provisions of the FMCA. In our view, the guidance here should be limited to requiring advertisements to express the limit on the class of investors able to access the product on a principled basis, without prescribing specific wording or dictating a requirement to specify categories of investor for whom an offer is not suitable

5 Question 5: Are there any other aspects you wish to submit on?

- 5.1 We agree in principle that advertising should be clearly identifiable as such. However, the example given requiring that advertising be 'identifiable' from other content is, in our view, inappropriate, and potentially confusing in its intent. The example would be more helpful if it simply referred to advertising as 'distinguishable' or 'discernible' from other content, and were positioned as being relevant where advertising is combined or presented with other content. That would ensure providers have reasonable flexibility in how they construct advertising collateral without being unduly constrained in how it is presented. Advertisements that are clearly advertising collateral on their face, with no risk of being confused as anything else by a reasonable consumer, should not be required to be identified by having 'paid or sponsored content' labels attached to them.
- 5.2 In our view, the proposed guidance does not go far enough in addressing the practical issues that are faced by advertisers in a sufficiently facilitative manner. The Consultation paper largely limits itself to relatively well-understood principles of advertising financial products, without materially assisting market participants comply with their obligations under the FMCA in areas of uncertainty. The focus of the guidance appears to be more on directing advertisers what they cannot do and restricting their ability to inform the market, than on assisting with the informed participation of consumers in financial markets.
- 5.3 Promoting an increase in the quality and effectiveness of advertising will be better facilitated by the final guidance if the FMA were to provide pragmatic solutions for common issues that advertisers face in meeting their obligations under the FMCA. Consumers' interests will be more helpfully advanced if advertisers are provided with a pragmatic guidance framework to reference. That framework should focus on enabling advertisers of financial products to more effectively navigate the regulatory challenges of the digital age and the ever-expanding reach of financial regulation, in a compliant fashion that meets or exceeds the FMA's expectations.

Feedback to FMA: Proposed guidance on advertising offers of financial products

DATE:	16 FEBRUARY 2021
NUMBER OF PAGES:	5
NAME OF SUBMITTER:	[REDACTED]
ENTITY:	FINANCIAL ADVICE NEW ZEALAND
ORGANISATION TYPE:	INCORPORATED SOCIETY WITH AROUND 1600 FINANCIAL ADVISER MEMBERS
CONTACT NAME:	[REDACTED]
CONTACT EMAIL:	[REDACTED]
CONTACT PHONE:	[REDACTED]

QUESTION	COMMENT
1	Agree ,with comments about excluding an adviser’s Statement of Advice.
2	Don’t agree as it is currently proposed.
3	No comments.
4	Agree with the intent.
5	Nothing to add.

Financial Advice New Zealand is a professional membership body for financial advisers in New Zealand. It represents around 1600 members.

Financial Advice New Zealand has no direct involvement with the advertising of financial products. However, one of our mandates under our Constitution is to work with financial service providers, and their industry bodies, to promote consumer focused products and services.

We also note the FMAs point that much of the guidance “may also applicable to the advertisement of financial services”, which makes these guidelines relevant for our members.

In general, we support the goals of providing clear guidance around fair dealing in relation to advertising of financial products.

We understand that these guidelines may reduce advertising of financial products compared to what we see today due to the detail now required. We recognise the positive role advertising can play in the financial services market and wouldn't want to see too much overall reduction. We have some particular concerns about possible unintended consequences of restricting short form advertising.

Quality advertising informs consumers of the options available to them and supports better consumer outcomes whereas misleading or deceptive advertising can lead to poor consumer outcomes. On balance, we hope any reduction in advertising is balanced by a focus on advertising that protects and better informs consumers.

We would like to see strong leadership from the FMA in ensuring that breaches of the guidelines are dealt with swiftly and the lessons learnt are available to all as precedents.

Consultation Questions

Question 1: General Scope

The proposed guidance is applicable to all advertising and promotion of offers of financial products, including advertising relating to offers subject to an exclusion in Schedule 1 of the Financial Markets Conduct Act 2013 (the FMC Act), and including all financial product types.

- Do you agree with the scope of the guidance? [Yes, for financial products.](#)

[We do not agree that the inclusion of financial services by way of a comment that “much of the information expressed in this guidance may also be applicable to the advertising of financial services” is appropriate.](#)

[We ask that when/if guidelines are developed for the advertising of financial services that we are given the appropriate opportunity to consult on what those particular guidelines are.](#)

- Do you think the guidelines need to differ for advertising of different types of financial product offers? [No.](#)
- Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers?

Statement of Advice – should be explicitly excluded

[We ask that a financial adviser's Statement of Advice is explicitly stated as excluded as an “advertisement of a financial product” for the avoidance of doubt.](#)

[We posit that the Statement of Advice is not an advertisement as the advice given is independent of the issuer/offerer and therefore falls outside the definition of Restricted Communication as defined by s464 of the FMC Act.](#)

At present, a reader of the guidance document could believe the Statement of Advice was included as arguably it falls within the Restricted Communication definition given as footnote 1 on page 5,

“For the purposes of the FMC Act, a “restricted communication” means a form of communication that directly or indirectly relates to an offer (or intended offer) of financial products, is reasonably likely to induce persons to apply for financial products, or is reasonably likely to induce persons to make further contributions, investments, or deposits. In this guidance a reference to “advertising” or an “advertisement” is a reference to a “restricted communication”. See section 464 of the FMC Act.

What this footnote excludes is the requirement under s464 of the FMC Act that in addition to the above, Restricted Communication is;

authorised or instigated by, or on behalf of, the offeror, the issuer, the service provider, or an associated person of the offeror or issuer or service provider or that is prepared with the co-operation of, or by arrangement with, any of those persons

In our view, this full definition excludes an adviser’s Statement of Advice from the classification of Restricted Communication as the information and advice contained within it are independent from the issuer/offeree and not authorised or instigated by them.

While we do not disagree that a Statement of Advice should follow the general principles included in this guidance, ie not be misleading or deceptive, there is a key difference between an advertisement from an issuer to the public vs a Statement of Advice between an adviser and the public.

In the latter, the consumer has engaged the adviser to use their experience and professional judgement to advise them, and the adviser is already under many obligations through FSLAA to ensure their advice is appropriate.

Including the Statement of Advice in this guidance by not excluding it could lead to significant duplication of information which, in our opinion, would be detrimental to the consumer’s ability to understand the advice given.

Question2: Short Form Advertising.

We (FMA) are aware of current market practice where a user may “click through” a short-form advertisement (e.g. from a Google search, LinkedIn, Facebook, Instagram, Stuff.co.nz, etc.) to a second webpage (often maintained by the issuer) where information required by sections 90-92 of the FMC Act is located.

Our position is that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restrictions. If the provisions cannot be complied with, then a short-form advertisement must not be made.

Do you agree with this position? If not, can you please explain why?

We do not agree with the position how it is currently expressed, although we do support the idea that advertisements should not be able to rely on secondary click through pages to ensure content is not misleading or deceptive.

Social media, ads on news sites, search engines and other short form advertising mediums are a key component of how Kiwis receive information, and stopping all advertising of financial products in these mediums we see as detrimental to New Zealanders' overall financial wellbeing.

We believe the proposed blanket ban on short form advertising of financial products unacceptably reduces the ability of consumers to know where they can go to meet their financial needs and goals.

In our opinion, advertisers should be allowed to generically advertise their product, product categories or the fact they have an offer available, in short form advertising as long as no features, comparisons, returns or similar are stated.

The fact that a firm offers a particular type of financial product should be allowed, and encouraged, to be advertised, with click throughs to the product/offer web page where all required disclosures should be given. These generic ads play a significant role in informing the public about the availability of financial products, and in who they can contact for more information.

Generic advertisements of this type do not appear to be excluded from the full requirements under these guidelines. If the intention is that these generic ads fall outside the scope of these guidelines, we'd like to see that stated with some examples.

New Zealanders need to be more active in their involvement and management of KiwiSaver, develop an investment mentality and generally gain better financial literacy. Restricting advertising of financial products in the place that most New Zealanders now receive their information severely restricts where consumers can hear these key messages.

Google searches

Another unintended area which may be captured by this section of the guidance is SEO information on webpages. When a consumer does a google search, the difference between a paid google ad (a clear advertisement), and a google listing derived from a firm's SEO on a product page is minimal from the consumer's point of view.

Was it the FMAs intention that google search responses derived from website SEO referring to a financial products are captured by the guidelines and therefore not allowed as they are short-form advertising?

This could severely reduce a firm's ability to reach their market as in effect they would have to remove their website, or at least all product/offer pages, from Google search.

If non-paid google search results were not intended to be included in this guidance, then there seems a discrepancy whereby SEO generated search results are allowed, yet paid search results aren't.

Question3: Potential Gaps.

Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?

No.

Although we are aware of other types of investment advertising offers which fall outside of the “financial product” definition that we would ideally like to see covered by these guidelines such as property investment and syndication products. We understand, however, that the FMA has no jurisdiction in this area.

Question 4: Offers restricted to wholesale investors.

Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors? Do you agree with the suggested wording for inclusion?

We agree with the intent, but have concerns about the practicality.

We are concerned that an average consumer would not understand whether they are a retail or wholesale investor and at what point they might qualify to be a wholesale investor.

Question 5: Miscellaneous.

Are there any other aspects you wish to submit on? For example, are there any unintended consequences that may arise from the proposed guidance that we should be aware of?

Nothing additional to add.

Financial Services Council.

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Tuesday 16 February 2021

Financial Markets Authority
Level 2 1 Grey Street
Wellington

Financial Markets Authority
Level 5 Ernst & Young Building
2 Takutai Square
Britomart
Auckland

By email: consultation@fma.govt.nz

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

This submission on the Financial Markets Authority (FMA) consultation paper, proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013 (the Proposed Guidance) is from the Financial Services Council of New Zealand Incorporated (FSC).

The FSC is a non-profit member organisation and the voice of the financial services sector in New Zealand. Our 91 members comprise 95% of the life insurance market in New Zealand and manage funds of more than \$83bn. Members include the major insurers in life, health, disability and income insurance, fund managers, KiwiSaver and workplace savings schemes (including restricted schemes), professional service providers, and technology providers to the financial services sector.

Our submission has been developed through consultation with FSC members and represents the views of our members and our industry. We acknowledge the time and input of our members in contributing to this submission.

The FSC's guiding vision is to be the voice of New Zealand's financial services industry and we strongly support initiatives that are designed to deliver:

- strong and sustainable customer outcomes
- sustainability of the financial services sector
- increasing professionalism and trust of the industry.

We welcome the opportunity to provide feedback on the Proposed Guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013 (FMCA) and supporting good advertising practices in the best interest of consumers. As frequently noted in FSC industry submissions, we encourage collaboration exercises between the regulatory officials, perhaps through the Council of Financial Regulators, to ensure consistency and to reduce duplication, confusion, and compliance burdens where there are multiple guides and codes that deal with advertising of financial products and services.

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of New Zealand

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I can be contacted on [REDACTED] to discuss any element of our submission.

Yours sincerely

[REDACTED]

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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. Submissions close on 16 February 2021.

Date: 16 February 2020

Number of pages: 13 (including a two page covering letter)

Name of submitter: [REDACTED]

Company or entity: Financial Services Council of New Zealand

Organisation type: Non-profit member organisation

Contact email and phone: [REDACTED]

Question	Comment	Recommendation
<p>Question 1: General Scope</p> <p>a) Do you agree with the scope of the guidance?</p> <p>b) Do you think the guidelines need to differ for advertising of different types of financial product offers?</p> <p>c) Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers?</p>	<p>We agree that the Proposed Guidance should be applicable to all advertising and promotion of offers of financial products and all financial product types. We note that Part 2 of the FMCA has a wide scope and therefore aligning the Proposed Guidance would be appropriate positioning.</p> <p>We note that this Proposed Guidance is mainly focused on investment products, rather than financial services and this is appropriate given the complexity of such products for consumers.</p> <p>We also understand that the guidance is not intended to apply to contracts of insurance. At this stage we do not see the need for specific guidance for advertisement of insurance products, noting that in addition to the existing legislative requirements insurers also subscribe to the FSC Code of Conduct</p>	<p>It would be helpful if, in the 'What this guidance applies to' section on page 5, if the Proposed Guidance expressly states what financial products are in plain English for non-lawyer users of this document. In addition, on page 8 of the Proposed Guidance, the FMCA definition of Financial Products is provided. It would be more helpful if the definition is provided the first time it is used in the Proposed Guidance, i.e., on page 5 rather than on page 8.</p> <p>Similarly, it would be helpful to include a plain English definition of "regulated offer".</p> <p>On Page 5 of the Proposed Guidance it states, "...much of the information expressed in</p>

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	<p>and/or the ICNZ Fair Insurance Code as applicable.</p>	<p>this guidance may also be applicable to the advertising of financial services” and also at page 10, “Many of the standards and guidelines established below may be also applicable to other areas such as the supply or potential supply of financial services.” We consider these statements should be removed as they are vague and create confusion and uncertainty as to how the guidance may apply to financial services and what approach FMA will take to enforcement of this. We recommend that the Proposed Guidelines are limited to investment financial products due to their complexity.</p> <p>As there has been similar guidance issued by other regulatory bodies such as the Advertising Standards Authority and the Commerce Commission and also codes of practice and conduct in the industry, we encourage consideration of such existing guidance and if a coordination exercise could be undertaken, perhaps through the Council of Financial Regulators, to refresh that guidance and to streamline rather than duplicate industry guidance that applies to financial products.</p> <p>We note that there are other relevant guidance and resources listed on page 6 of the Proposed Guidance. We</p>
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		query whether those resources will reference this Proposed Guidance and whether it is possible to consolidate in some instances.
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Question	Comment	Recommendation
<p>Question 2: Short form advertising</p> <p>Do you agree with this position? If not, can you please explain why?</p>	<p>Historically some short form advertising which required lengthy disclaimers or terms and conditions, a click through approach has been used.</p> <p>We recognise that short form advertising, especially in a rapidly evolving technological age, can be problematic and it is challenging to define the medium in a way that captures future technology. In addition, we acknowledge that the nature of short form advertising increases the risk of advertisements potentially being misleading and are strongly supportive of measures to reduce the likelihood and to discourage the use of a “click through” to correct any misstatement. However, we consider that it is appropriate for “click through”/landing page advertising to be used to display the section 91 and 92 FMCA information so long as investors are not able to invest in a product without going through a landing page on which the Product Disclosure Statement (PDS) is displayed. The short form advertisement is intended to be read in conjunction with the landing page (for example it includes a “find out more” button) and the short form advertisement clicks through to further advertising rather than an application page. This provides appropriate investor protection by ensuring receipt of the PDS and prescribed information while facilitating innovation in the financial markets by enabling the use</p>	<p>We recommend including in the Proposed Guidance specific principles in respect of how short form advertisements can comply with the fair dealing provisions in the FMCA such as the use of disclaimers in respect of full information.</p>

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	<p>of technology mediums to advertise financial products (within the bounds of the FMA's conduct expectations as expressed in the Proposed Guidance). This is particularly relevant for managed funds and KiwiSaver schemes due to the volume of material that is required to be communicated in a restricted communication space.</p> <p>Whilst there are the fringe cases such as those who receive promotional SMS messages but do not have smart phones or who cannot access links provided, we would not expect such investors to be exposed to the initial technological advertising nor to subscribe through a technological facility.</p> <p>We consider that the Proposed Guidance goes beyond the scope of the FMCA which requires a reasonable prominence of the prescribed information but does not prohibit the "click through" approach that is commonly used in the industry. If it is no longer considered appropriate or is considered too risky, then we recommend that the legislation is amended to address this point.</p> <p>There are perhaps other approaches that have not been considered and require further guidance. For example, search engines such as Google, bring up details of products and services of a financial provider but no reference to a PDS. Interested consumers can then click through to a provider's website to see more information. We note that the definition of an advertisement in the FMCA requires the communication to be "for the purpose of promoting the offer or intended offer", but a key purpose of the Google search ads is to help the investor find a web page. The investor will only click on those searches that the investor is</p>	
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	<p>interested in and those Google search ads will be therefore be read in conjunction with the page the investor clicks through to.</p> <p>More generally, we note that the Proposed Guidance on page 6 states that short form advertisements “should follow this guidance where applicable, regardless of any limitations imposed”. We consider that some of the guidance may be difficult to comply with in respect of short-form advertising, for example presenting “complete” information, if the short-form advertisement is considered in isolation.</p>	
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Question	Comment	Recommendation
<p>Question 3: Potential gaps</p> <p>Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?</p>	<p>We note where there are possible gaps, such as the constantly evolving nature of crypto, there is also a gap in applicable regulation.</p>	

Question	Comment	Recommendation
<p>Question 4: Offers restricted to wholesale investors.</p>	<p>Whilst wholesale offers and discretionary investment management services require less guidance due to the sophistication of</p>	<p>As noted in response to Question 5, we encourage this Proposed Guidance to support</p>

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<p>a) Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors?</p>	<p>wholesale investors, we support the general requirement to state in some manner that it is not suitable for retail investors. We see the benefit of the Proposed Guidance being applicable to the advertisement of these product types to ensure equal protection to consumers and standards. However, we note that the issuer and offerors of a product bear the obligation of making sure a wholesale product is not sold to a retail investor incorrectly and will have systems and processes in place to ensure this does not occur.</p>	<p>flexibility rather than prescribed wording and placement within the advertisement, particularly given the detail that is contained in customer facing documentation, the level of sophistication of the customer, the media that is used for advertising and space available, such as short form advertising. If the Proposed Guidance provides an example of the wording in the final guidance it should be clear that this is only guidance and not prescribed wording, such as “could include wording to this effect”.</p>
<p>b) Do you agree with the suggested wording for inclusion?</p>	<p>We have some concerns about the requirement that the disclaimer be “immediately and prominently clear” and what this requires. For example, is it the very first statement in an advertisement? A wholesale product must include selling restrictions in order to qualify as a wholesale product. By requiring the statement at the very start of the advertisement it could potentially create a risk that an investor reads the statement on the first page and overlooks the selling restrictions which provide more detail around which classifications of wholesale investors may buy the product. The investor may then think they can purchase this wholesale product, not realising that they are not the correct classification of wholesale investor. This could increase mis-selling risk, which in turn puts more pressure on offerors to ensure they are selling the right product to the right investor.</p>	

Question	Comment	Recommendation
	<p>1. We support principle-based guidance rather than prescriptive requirements</p>	<p>We recommend that any elements of prescription would</p>

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<p>Question 5: Miscellaneous</p> <p>a) Are there any other aspects you wish to submit on?</p> <p>b) For example, are there any unintended consequences that may arise from the proposed guidance that we should be aware of?</p>	<p>such as prescribed language in regulatory guidance. We recognise the benefits of uniformity however there are instances where it is unclear whether the FMA is prescribing language or whether there is flexibility to reflect the principles in the Proposed Guidance. For example, the comment under the heading “<i>Performance history</i>” on page 13, there is a statement “... <i>should include a prominent warning statement that past performance is not a reliable indicator of future performance. The reference period, and source of information should also be clearly stated.</i>” We note that these comments seem to reflect the approach historically taken in the Securities Regulations 2009 (regulations 25 – 28) which took a prescriptive approach to advertising disclosures and were overhauled by the introduction of the FMCA. For example, the requirement to disclose the source of information is problematic when many cases the provider will calculate its own fund or index returns and therefore a source reference is not required.</p>	<p>be more appropriate in legislation and this Proposed Guidance contains a principles approach to interpretation.</p>
	<p>2. The section on Substantiate your claims on page 8 of the Proposed Guidance notes that the FMA will be interested in representations about the suitability of a product or service. Whilst we endorse the application of the principles contained in the Proposed Guidance on suitability, we note that it may be difficult in practice to substantiate representations around suitability, which is naturally more subjective and such guidance may deter providers from including</p>	<p>We recommend the provision of guidance or examples of what would be considered appropriate evidence to substantiate the suitability of a product.</p>

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	that information in their advertisements.	
	<p>3. The definition of ‘advertisement’ for the financial product limb in section 6(1) of the FMCA includes at the start of the definition the words “<i>in relation to an offer, or intended offer</i>” suggesting an advertisement requires the promotion of an <i>offer</i> of a financial product. We have concerns that in the blue box on page 9 of the Proposed Guidance, the way the definition has been stated is too broad, and as such may have the unintended consequence of capturing providers that market their brand; their style or business; and the provision of information or service communications such as a text message to customers to remind them that the end of the KiwiSaver Government contribution year is closing soon. We also have concerns that the inclusion of this definition in this section of the Proposed Guidance (and the use of the words “for the purposes of Part 3”) gives the impression that this definition only applies in the case of restricted communications, as opposed to any advertisement subject to the Proposed Guidance.</p>	<p>We recommend including a definition of advertising at the beginning of the Proposed Guidance, to apply to the guidance as a whole. In this definition we recommend deleting the words <i>an issuer and/or</i> as the definition of an advertisement should be limited to the promotion of an offer of financial products. The Proposed Guidance would be more helpful for the industry if it also includes what the FMA considers is not an advertisement.</p> <p>We also suggest that the Proposed Guidance reference section 90 of the FMCA and note that the distribution of some documentation may be done without contravening section 89 of the FMCA.</p>
	<p>4. The third paragraph in the blue box on page 9 of the Proposed Guidance, includes fund managers distributing fund updates and therefore units in the fund and this is considered an advertisement. Fact sheets and different information collateral is frequently sent to existing customers which is not advertising as they are not subscribing for new units.</p>	<p>We recommend carving out from this requirement updates that are prescriptive update requirements and general collateral to existing customers.</p>

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	<p>5. Whilst we acknowledge the FMA’s view that advertisements should give consistent information across different communication channels, we note that there are many differing communication channels or medium for advertising and these differing channels target differing segments in audiences and markets (such as radio ads for younger customers and print advertisement for older customers) which in turn may require differing tone and language. We encourage flexibility in considering evolving communication approaches rather than exclusion.</p>	<p>On page 10 in the paragraph that begins, “Advertisements must give consistent information across different communications channels,” we recommend adding the words, “<i>Where practicable</i>”.</p>
	<p>6. We are supportive of the use of plain language to assist customer understanding and truthful and accurate representations as outlined on page 10 of the Proposed Guidance. However, this can be challenging in the case of complicated products.</p>	<p>We recommend further clarification on what is considered key information and guidance as to how prominence can be given to all key information provided.</p>
	<p>7. We have concerns around the focus on FRS-42 and NZ GAAP in the “Forecast returns” section, as we do not consider that will be applicable in the managed funds or discretionary investment management service space. We consider that forward looking methodology, incorporating a reasonable estimate of long term fair value should be sufficient. In relation to KiwiSaver the FMCA Regulations provide a projected returns methodology for member statements, which providers may also use as a basis for calculating forecast returns in advertising material.</p> <p>We also have concerns regarding the extent of disclosure that the Proposed</p>	<p>We recommend that the sentence starting “The basis” in the “Forecast returns” section be amended to read: “The basis of any forecast return should be made clear (<i>where practicable</i>) and references to where <i>any</i> further information on the underlying assumptions can be found should be included”.</p> <p>We also recommend that the examples of NZ GAAP and FRS-42 be deleted to ensure the guidance is principals based.</p>

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	<p>Guidance requires regarding the basis on which the estimate has been made. Some estimates (for example estimated average annual percentage returns and estimated negative return years out of 20 years) are based on highly technical calculations which would be difficult to explain (and meaningless) for the average investor.</p>	
	<p>8. We are supportive of full and accurate translations of information provided in dual or multiple languages.</p>	<p>We recommend clarification on what would be considered appropriate for translating advertising from English to other languages.</p>
	<p>9. It would be helpful if the FMA could give more guidance about what it means by “same impression” on page 10.</p>	
	<p>10. On pages 12 and 13 of the Proposed Guidance, which addresses forecasts and returns, as noted under Question 1, we have concerns of this also applying to services or not.</p>	
	<p>11. On page 5 of the Proposed Guidance the paragraph beginning “The purpose of the...” should more accurately reflect the FMA’s main objective as set out in the Financial Markets Authority Act 20011. Also, on page 5, the paragraph beginning “We encourage market participants...” seems to go further than what is contemplated by Part 2 of the FMCA regarding “appropriateness”.</p>	
	<p>12. We disagree with the example of comparing non-bank financial</p>	

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	<p>products to registered bank term deposits on page 11. We do not think the comparison is inappropriate or unreasonable given customers may be choosing between these two different types of investments and need to understand the features of each.</p>	
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FINANCIAL SERVICES FEDERATION

1 February 2021

By email to: consultation@fma.govt.nz

Proposed guidance on advertising offers of financial products under Financial Markets Conduct Act 2013

The Financial Services Federation (“FSF”) is grateful to the Financial Markets Authority (“FMA”) for the opportunity to provide this submission on the proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013 (“the Guidance”) on behalf of its members.

By way of background, the FSF is the industry body representing the responsible and ethical finance, leasing, and credit-related insurance providers of New Zealand. We have over sixty members and affiliates providing these products to more than 1.5 million New Zealand consumers and businesses. Our affiliate members include internationally recognised legal and consulting partners. A list of our members is attached as Appendix A. Data relating to the extent to which FSF members (excluding Affiliate members) contribute to New Zealand consumers, society, and business is attached as Appendix B.

As can be seen from Appendix A, the FSF’s membership is comprised of entities which offer financial products and services and, as responsible providers, they will consider this Guidance as being of particular significance. It is on this basis that the FSF makes the following submission.

In short, the FSF supports the Guidance in its totality. The general scope of the Guidance, the position taken on short-form advertising, and the wording for the inclusion of offers to wholesale investors all appear to be very reasonable. The FSF is unaware of any gaps which have not been adequately addressed, nor do we anticipate any unintended consequences which may arise from the Guidance.

However, the FSF encourages the FMA to refer to the requirements of the Credit Contracts and Consumer Finance Act 2003 (“CCCFA”) and the Responsible Lending Code for consumer credit providers in the Guidance. The purposes of the Act are to protect the interests of consumers in connection with consumer credit contracts, consumer leases, and buy-back transactions of land by promoting confident and informed participation in consumer credit markets and promoting fair, efficient, and transparent markets for consumer credit.

The Act has undergone considerable amendment under the Credit Contracts Legislation Amendment Act 2019 which has included the introduction of new regulations some of

which are specifically related to the advertising of credit products. The Responsible Lending Code is undergoing review as to the guidance it provides to lenders in light of the changes to the Act and the introduction of the new regulations. The Code includes a chapter specifically relating to the way in which consumer credit products should be advertised including requirements of credit providers if advertising credit products in a language other than English.

The FSF would be concerned if the FMA's Guidance was to inadvertently replicate or contradict the requirements of the Act, the regulations or the Code so urges the FMA to ensure that it is made clear in the guidance that the requirements of the Act, the regulations and the Code take precedence over the Guidance for consumer credit providers.

The FSF also requests for some clarity on when exactly the Guidance applies to financial services. As stated in the introduction and further on in the Guidance, *some* of the contents *may* be applicable to financial services. There is a clear distinction between financial services and financial products, and for those entities who only provide the former and not the latter, further clarification as to which parts of the Guidance are actually relevant would be most appropriate; the FSF anticipates this would encourage compliance.

Otherwise, the FSF commends the efforts from the FMA on the Guidance, its presentation, and ease of comprehension.

Thank you again for the opportunity to provide the FSF's view on the proposed Guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013.

Please do not hesitate to contact me if you require anything further.

Yours sincerely,

A large black rectangular redaction box covers the signature area. Below it, two smaller black rectangular redaction boxes cover what would be the sender's name and contact information.

Membership List as at November 2020

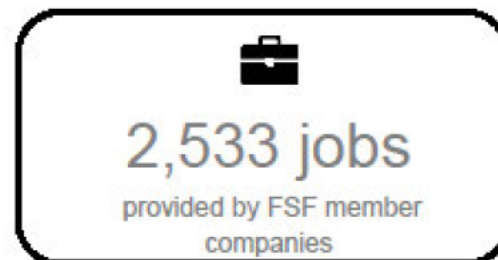
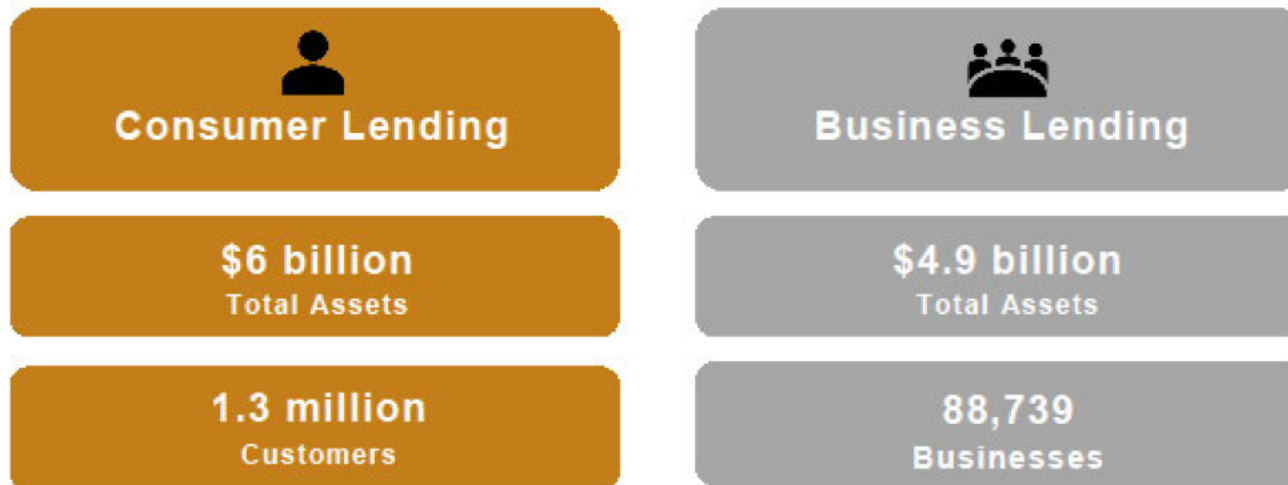
Appendix A

Non-Bank Deposit Takers Leasing Providers	Vehicle Lenders	Finance Company Diversified Lenders	Finance Company Diversified Lenders	Credit-related Insurance Providers	Affiliate Members
<u>Rated</u>	AA Finance Limited	Avanti Finance	Speirs Finance Group	Protecta Insurance	255 Finance Limited
Asset Finance (B)	Auto Finance Direct Limited	➤ Branded Financial	➤ Speirs Finance	Provident Insurance Corporation Ltd	Buddle Findlay
<u>Non-Rated</u>	BMW Financial Services	Caterpillar Financial Services NZ Ltd	➤ Speirs Corporate & Leasing		Chapman Tripp
Mutual Credit Finance	➤ Mini	CentraCorp Finance 2000	➤ Yogo Fleet		Experian
Gold Band Finance	➤ Alpha Financial Services	Finance Now	Thorn Group Financial Services Ltd		EY
➤ Loan Co	Community Financial Services	➤ The Warehouse Financial Services	Turners Automotive Group		FinTech NZ
	European Financial Services	➤ Southsure Assurance	➤ Autosure		Happy Prime Consultancy Limited
	Go Car Finance Ltd	Flexi Group (NZ) Limited	UDC Finance Limited		HPD Software Ltd
	Honda Financial Services	Future Finance	<u>Credit Reporting & Debt Collection Agencies</u>		KPMG
	Mercedes-Benz Financial	Geneva Finance	Baycorp (NZ)		LexisNexis
<u>Leasing Providers</u>	Motor Trade Finance	Home Direct	➤ Credit Corp		PWC
Custom Fleet	Nissan Financial Services NZ Ltd	Instant Finance	Centrix		Simpson Western
Fleet Partners NZ Ltd	➤ Mitsubishi Motors Financial Services	➤ Fair City	Collection House		
Lease Plan	➤ Skyline Car Finance	➤ My Finance	Equifax (prev Veda)		
ORIX NZ	Onyx Finance Limited	John Deere Financial	Illion (prev Dun & Bradstreet (NZ) Limited		
SG Fleet	Toyota Finance NZ	Latitude Financial	Intercoll		
	Yamaha Motor Finance	Metro Finance	Quadrant Group (NZ) Limited		
		Pepper NZ Limited			
		Personal Loan Corporation			
		Pioneer Finance			
		Prospa NZ Ltd			
		South Pacific Loans			
					Total: 63 members



FINANCIAL SERVICES FEDERATION

The Financial Services Federation (FSF) is the association for responsible finance and leasing companies operating in New Zealand. This infographic is a snapshot of our 61 members, the membership list can be found at our website: www.fsf.org.nz



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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. Submissions close on 16 February 2021.

Date: 16/02/2021 Number of pages: 2

Name of submitter: [REDACTED]

Company or entity: Generate Investment Holdings Ltd

Organisation type: MIS Manager/ KiwiSaver and Managed Fund provider

Contact name (if different):

Contact email and Phone: [REDACTED] [REDACTED]

Question Number	Comment	Recommendation
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You don't need to quote from the consultation document if you use part & paragraph numbers.

You may attach extra pages - please label each page with your name & organisation.

<p><i>Q2: Short Form Advertising</i></p>	<p>We are aware of current market practice where a user may "click through" a short-form advertisement (e.g. from a Google search, LinkedIn, Facebook, Instagram, Stuff.co.nz, etc.) to a second webpage (often maintained by the issuer) where information required by sections 90-92 of the FMC Act is located. Our position is that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restrictions. If the provisions cannot be complied with, then a short-form advertisement must not be made. Do you agree with this position? If not, can you please explain why?</p>	<p>In our view short-form click through advertising (Short-form advertising) with click through to a second webpage is no different to printed advertisements in newspapers, product disclosure statements or other printed material that have an asterix or reference to disclaimers and regulated disclosures on another page. It forms one advertisement and should therefore comply with the Act.</p> <p>Consumers are used to disclaimers and disclosures presented in this fashion in both print and short-form social media advertisements.</p> <p>Short-form advertising with click through is needed because of limitations on text from the advertising platforms.</p>
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<p><i>Q2: Short Form Advertising</i></p>	<p><i>As above.</i></p>	<p>It is in the consumers' best interest for short-form advertisements to be circulated on social media (e.g. from LinkedIn, Facebook, Instagram). A Pew Research report in 2018 (https://www.pewresearch.org/fact-tank/2019/09/11/key-findings-about-the-online-news-landscape-in-america/) found "More Americans get news on social media than from print newspapers. In 2018, one-in-five adults said they often get news on social media. And Facebook continues to dominate as the most common social media site used for news by Americans: About four-in-ten Americans (43%) get news on this site." E.g. in times of volatility the KiwiSaver industry needs to get clear, consistent messaging out to as many consumer as</p>
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		possible as quickly as possible. Social media short-form advertising is needed for this purpose.
Q2: Short Form Advertising	As above.	Social media is plagued by unregulated opinion and advice (often bad advice). Having regulated financial advice providers advertising, offering advice and providing news on social media channels is an important counterbalance to the bad advice. There is significant potential for harm to consumers from this bad advice.
Q2: Short Form Advertising	As above.	If you ban short-form click through advertising you will be reducing the ability for KiwiSaver providers and financial advisers to be able to offer financial advice through these platforms. Therefore, reducing the accessibility of quality advice.

Feedback summary – if you wish to highlight anything in particular

Social media short-form advertising is an important channel for communication, advertising and advice to consumers. Conceptually it is no different to a printed product disclosure statement referring to disclosures on another page. In many cases social media has restrictions on the amount of text so the only way to access social media is through short-form advertising. Restricting short-form advertising reduces the accessibility of quality advice and increases the potential for harm to the consumer from not being informed or having access to only bad advice without a counterbalance.

Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

Thank you for your feedback – we appreciate your time and input.

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

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Date: 10 February 2021 Number of pages: 2

Name of submitter: [REDACTED]

Company or entity: IG Markets Limited and IG Australia Pty Ltd

Organisation type: Derivatives Issuer

Contact name (if different): N/A

Contact email and Phone: [REDACTED] [REDACTED]

Question Number	Comment	Recommendation
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You don't need to quote from the consultation document if you use part & paragraph numbers.

You may attach extra pages - please label each page with your name & organisation.

Q1: General scope	<p>We agree with the general scope of the proposed guidance.</p> <p>We do not think the guidelines need to differ for advertising different types of financial product offers.</p>	<p>We recommend that the guidance should equally apply to publishers advertising and promoting offers.</p>
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Q2: Short form advertising	<p>We agree with the FMA's position that sections 89-92 of the FMC Act should apply to all advertising regardless of any length or content restrictions, with the exception of 'pay-per-click' (PPC) advertising. PPC advertising is a unique form of advertising offers of financial products, with such offers only presented to consumers who actively search for specific financial product-related terms via an internet search engine. The character count of a PPC advertisement is extremely limited, and therefore the inclusion of the section 89-92 requirements will take up a disproportionate number of characters, thereby making PPC a difficult channel to utilise for advertising purposes.</p>	<p>We recommend that advertising offers of financial products via PPC be exempted from the requirement to comply with sections 89-92, on the condition that the offer 'clicks through' to a web page that prominently displays the s89-92 requirements.</p> <p>Further, although question 2 specifically addresses the requirements under sections 89-9, page 13 of the proposed guidance sets out the FMA's expectation that all warnings, disclaimers and qualifications contained in an advertisement must be prominent and consistent across different communication channels. We recommend that advertising offers of financial products via PPC also be exempt from this requirement, with the condition that the offer must 'click through' to a web page that prominently displays the required warnings, disclaimers and qualifications.</p>
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Q3: Potential gaps	<p>The proposed guidance does not include guidance on advertising offers of financial products to an appropriate target audience.</p> <p>We believe that advertisements for complex products that are only appropriate for a limited group of people should not be targeted at a wider audience.</p>	<p>We believe the guidance with respect of marketing and promotional material should be consistent the Australian Securities and Investments Commission's (ASIC) Regulatory Guide 234 Advertising financial products and services (including credit): Good practice guidance, which states that, "Mass media has the capacity to reach a wide audience, often beyond the promoter's target market.</p>
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		<i>Promoters should consider the characteristics of the actual audience that is likely to see the advertisement (e.g. their financial literacy, knowledge, demographics) and whether the advertisement is accurate, balanced and helpful for that audience”¹.</i>
<i>Q4: Offers restricted to wholesale clients</i>	We agree that consumers of advertising wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors.	We think the wording should be reduced to: “this offer is available to wholesale investors only”. This is because where the offer is only available to wholesale investors, it therefore follows that retail investors are unable to access the offer and therefore do not need to be warned that the offer is not suitable.
<i>Q5: Miscellaneous</i>	We have no additional submissions.	
Feedback summary		
<p>IG Markets Ltd and IG Australia Pty Ltd (together “IG”) fully support the FMA implementing guidance that sets out its expectations of what good conduct in the advertising of offers of financial products looks like. For many years IG has maintained policies, processes and controls to ensure that our advertising of financial offers meets the requirements set out in the FMA’s proposed guidance. The implementation of the guidance will therefore have little impact on the advertising framework IG already has in place.</p>		
<p>Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.</p>		
<p>Thank you for your feedback – we appreciate your time and input.</p>		

¹ ASIC RG 234.133

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

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Date: 16 February 2021 Number of pages: 3

Name of submitter: [REDACTED]

Company or entity: Implemented Investment Solutions Limited and InvestNow

Organisation type: Licensed MIS Manager

Contact name (if different):

Contact email and Phone: [REDACTED] [REDACTED]

Question Number	Comment	Recommendation
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You don't need to quote from the consultation document if you use part & paragraph numbers.

You may attach extra pages - please label each page with your name & organisation.

Q1 – Part 1	<p><i>We think the scope of the guidance needs to be far broader and consider:</i></p> <ul style="list-style-type: none"> <i>The entire licensing regime and the way that it provides protection to investors. We think that advertising plays one step or component of the entire journey of people investing in regulated funds, which in turn has a lot of protections built into it (for example, the need to provide disclosure material as part of this journey). We believe that the application of the FMA's position (as expressed in the guidance note) will make it difficult/impossible to advertise regulated schemes.</i> <i>That there is a benefit in terms of promoting and educating investors about regulated investment schemes and funds, and that the FMA should encourage this.</i> <i>That the main areas of risk are things that sit outside the perimeter of the current licensing and regulatory regime. This includes wholesale offers, as well as things like online platforms (which may in fact be offshore).</i> 	Broaden scope.
Q1 – Part 2	<p><i>Yes. The guidelines should differ for different forms of financial products and offers.</i></p> <p><i>The guidelines for regulated licensed products should be far more flexible and accommodating (than those that should exist for things that aren't licensed or are lightly regulated). The FMA should have confidence in the licensing regime that exists for managed investment schemes in its entirety.</i></p> <p><i>There should be far stricter guidelines for investments that sit out of licensing, or the regulations (say for wholesale funds). The FMA should have a different approach to the oversight and enforcement of advertising issues based on the risks presented by the different types of entities and investments that are being promoted. The FMA should take a far more vigilant approach to advertising by entities that are unlicensed.</i></p>	The guidelines should be far tighter for products that aren't licensed/regulated.
Q1 – Part 3	No.	

	<p>We are interested in how the FMA will capture groups that are outside of NZ.</p>	
Q2	<p>We don't agree with the FMA's position. We think it is natural for consumers to drill down into information on different products, and that this is entirely sensible for investment funds and schemes. Information regarding an investment product can be presented sensibly in a layered way where people click from an advert, down into more details about a fund.</p> <p>We don't think that it is sensible or even practical that within an advertisement that investors are presented with all of the information that the FMA is seeking/prescribing. In our minds this doesn't work – and that in practice it makes more sense that investors drill down into the information they need (for example, in an online environment clicking down on more information).</p> <p>Ultimately people need to acknowledge that they have received and read the PDS for any regulated fund that they invest in, which we believe is a significant safeguard for investors.</p> <p>We note that within digital marketing, Google's organic search results are generated by a combination of their algorithms and SEO elements. Hence the issuer/manager is unable to control what is presented to the end user.</p>	<p>That the FMA have a far more pragmatic view and look at this from the perspective of how the consumer engages with the information (for example, by clicking down through ads to landing pages and disclosure material).</p>
Q3	<p>Yes. For us a key area of concern is around products that sit outside of the regulatory and licensing regime (for example, the advertisements relating to "wholesale" unregulated offers, which are clearly targeting retail investors).</p> <p>Note (philosophically) we think that the use of the term "wholesale" within the industry and regulations is problematic, leads to confusion, and is potentially misleading. This reflects that from a customer/consumer perspective "wholesale" implies a good deal, lower fees, and better consumer outcomes.</p> <p>Ideally, we think that the word "wholesale" should be replaced with the word "unregulated" to make it very clear that investors are stepping outside of the safety net that the regulations and licensing regime provides.</p> <p>Alternatively, the FMA could simply make it a requirement that any material or advertisement relating to a wholesale offer contains a large warning that the fund/product is "Not Regulated". We think that this would remove a lot of confusion within the market.</p> <p>Note that with the rise in online platforms we think that consideration needs to be given to advertisement including a warning statement where there could be a material adverse outcome for the investor. For example, an individual who starts trading NZ shares could inadvertently find themselves being subject to capital gains tax. This type of material real risk should have to be highlighted to investors in the same way that risks need to be set out in the disclosure material for regulated/licensed offers.</p> <p>We think that advertisements should carry warnings about these potential negative outcomes/risks (almost like a health warning). As stated, this would be consistent with how the risks have to be explained in the disclosure material for regulated funds.</p>	<p>Make it a requirement that any material or advertisement relating to a wholesale offer contains a large warning that the fund/product is "Not Regulated".</p>

Q4	<p>We think that saying that “this offer is available to wholesale investors only and is not suitable for retail investors. The requirements to meet the wholesale investor criteria are described in the Financial Markets Conduct Act” is ineffective.</p> <p>As noted above, we think that calling something “wholesale” makes it even more appealing to consumers. The statement appears to further enforce this by saying “The requirements to meet the wholesale investors criteria.....”, which makes it sound aspirational/better. It also implies that protections exist for wholesale investors within the FMC Act.</p> <p>We think that all information relating to wholesale offers should have to prominently display the words “Not Regulated”. This would make it clear to investors that they were stepping outside the protection provided by the FMC Act and the FMA.</p>	<p>Make it a requirement that any material or advertisement relating to a wholesale offer contains a large warning that the fund/product is “Not Regulated”.</p>
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Q 5	No.	
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Feedback summary – if you wish to highlight anything in particular

We think that all information relating to wholesale offers should have to prominently display the words “**Not Regulated**”. This would make it clear to investors that they were stepping outside the protection provided by the FMC Act and the FMA.

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Thank you for your feedback – we appreciate your time and input.

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

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Date: 16 February 2021

Number of pages: 2

Name of submitter: ██████████

Company or entity: Insurance Council of New Zealand (ICNZ)

Organisation type: Industry Association

Contact name (if different):

Contact email and Phone: ██████████

Question Number	Comment
<p><i>You don't need to quote from the consultation document if you use part & paragraph numbers.</i></p> <p><i>You may attach extra pages - please label each page with your name & organisation.</i></p>	
1 (general scope)	<p>The scope and unified approach (advertising of offers of all financial products by market participants) appears reasonable and appropriate, noting that the proposed guidance aligns with requirements under the Advertising Standards Code in various respects.¹</p> <p>We note that the proposed guidance overlaps with guidance issued by the Commerce Commission. If an organisation is advertising products captured by both the FMA and Commerce Commission guidance this means that they need to comply with two sets of requirements. Consideration should be given to, in the future, consolidating both guidelines to avoid duplication and unnecessary regulatory burden, potentially in conjunction with the Council of Financial Regulators (CoFR), which both FMA and Commerce Commission belong to.² For completeness, we see a real opportunity for CoFR to avoid duplication of consultations, guidance and other regulatory work programmes and ensure alignment between member agencies on a number of fronts.³</p> <p>Also see comments in the feedback summary section below.</p>
2 (short form advertising)	No comment.
3 (potential gaps)	We are not aware of any additional examples of poor conduct, or other areas in need of guidance, not adequately addressed in the proposed guidance.
4 (offers restricted to wholesale investors)	<p>We agree that, in the advertisement, customers should be immediately made aware if the offer is unsuitable for retail investors.</p> <p>We recommend that the suggested statement for inclusion be amended to include a brief plain English explanation of the wholesale investor criteria under the Financial Markets Conduct Act 2013. Like the suggested statement, the explanation of wholesale investor criteria should be able to be adjusted to, while conveying the intended detail, reflect the specifics of the product being offered and keep details brief.</p>
5 (miscellaneous)	Under the 'take care when comparing different products' section consideration should be given to including a requirement, like that included in the Advertising Standards Code, ⁴ not to denigrate competitors (including a specific competitor, multiple competitors or the rest of the

¹ <https://www.asa.co.nz/codes/codes/advertising-standards-code/> specifically principle 2: truthful presentation.

² See <https://comcom.govt.nz/business/dealing-with-typical-situations/advertising-your-product-or-service>. For completeness, we note the Memorandum of Understanding that the Commerce Commission and FMA entered into in March 2014, <https://comcom.govt.nz/news-and-media/media-releases/2014/commerce-commission-and-fma-sign-mou>.

³ See, by way of other examples, duplicating work generated by different CoFR members on COVID-19 impacts, outsourcing arrangements and cyber resilience.

⁴ See Rule 2 (d) Comparative advertising.

industry as a whole). Doing so may lead to inaccurate or misleading impressions being formed and potentially undermines trust and confidence in the broader investment sector.

It would assist if content on 'stop orders' in the proposed guidance was expanded to provide further details about the specific circumstances FMA is likely to use this power and how this would work in practical terms, noting the novel 'likely to confuse' element. While reference is made to the FMA website in this regard, details provided there are also limited. Consideration could be given to summarising other examples where such orders have been made to illustrate the application.

We also recommend that the comments made about potential liability for directors and senior managers on page 8 of the proposed guidance be expanded so it is clearer when this liability may arise.

Also see comments in the feedback summary section below. We are not aware of any unintended consequences that may arise from the proposed guidance.

Feedback summary – if you wish to highlight anything in particular

ICNZ and members support advertising best practice that is in the best interests of consumers and that reinforces trust and confidence in the wider financial services industry. We note the following in this regard:

- The proposed guidance relates to 'fair dealing' requirements under Part 2 of the Financial Markets Conduct Act 2013 as they relate to financial products (e.g. a debt security, an equity security, a managed investment product or a derivative), as opposed to financial services (such as acting as an insurer),⁵ with a clear focus on good outcomes in respect of the investing public. On this basis, and to avoid any ambiguity and uncertainty for providers and customers, we recommend that the references on pages 5 and 10 of the proposed guidance that it 'may' be applicable to 'financial services' be removed. The vague reference to the guidelines potentially applying to 'other areas' on page 10 should also be removed.
- The focus on financial products is appropriate given the growth in interest in investing following the COVID-19 outbreak and the complexity of these products, which may require consumers to have a good understanding of historical returns, forecasts, different fees and cost structures, assumptions and risk.
- It is not necessary or appropriate to extend these requirements to general insurers because, as members of the ICNZ,⁶ they are already subject to robust requirements under the Fair Insurance Code. This includes requirements to:
 - act transparently, and with integrity and utmost good faith (clause 2)
 - develop, market and sell their products responsibly (clause 4)
 - communicate clearly, including answering questions accurately and in writing if requested, providing access to policy wordings (which sets out in plain English what is insured and not insured, and what their obligations are), and explaining decisions accurately, clearly, concisely and effectively in all interactions (clause 6).
- In addition to these obligations and any relevant requirements to ensure good customer outcomes under the financial advice regime and consumer protection legislation, ICNZ members, as licensed insurers, also have disclosure obligations to policyholders under the Insurance (Prudential Supervision) Act 2010.⁷
For the reasons set out above, we do not consider that it is necessary or appropriate for advertising guidance relevant to the insurance industry to be prepared.

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Thank you for your feedback – we appreciate your time and input.

⁵ See the definition of 'financial service' in section 6 of the Financial Markets Conduct Act 2013 that refers to section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 which at 5(1)(m) lists 'acting as an insurer'.

⁶ ICNZ members insure about 95 percent of the New Zealand general insurance market, including about a trillion dollars' worth of New Zealand property and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents, travel and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability, business interruption, professional indemnity, commercial property and directors and officers insurance).

⁷ See sections 64 to 72 of the Insurance (Prudential Supervision) Act 2010.

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Date: _____ Number of pages: 5
 Name of submitter: _____
 Company or entity: i-Select Ltd
 Organisation type: Manager of Managed Investment Schemes
 Contact name (if different): _____
 Contact email and Phone: _____

Question Number	Comment	Recommendation
<p><i>You don't need to quote from the consultation document if you use part & paragraph numbers.</i></p> <p><i>You may attach extra pages - please label each page with your name & organisation.</i></p>		
Question 3	<p><i>Example 1: Billboards aimed at motorists where the fine print cannot possibly be viewed</i></p> <p><i>Example 2: Comparative example of fees where competitors are assumed to charge maximum fees, and advertiser is assumed to charge no fee. Currencies are switched to make competitor fees look larger than they are.</i></p> <p><i>Example 3: Staff of financial services provider posing as customers doing reviews of their company and potentially misleading investors</i></p> <p><i>Example 4: Comparative example of ethical status of funds not reflected in list of investments. Graphic looks like investments are banned, but they are only discouraged.</i></p> <p><i>Example 5: Illustration of returns for three years that looks like it is annualised, but is probably the actual return for three years.</i></p> <p><i>Example 6: Emphasis on one comparatively low fee without mention of uncompetitive ongoing fees.</i></p>	<p><i>Complex financial products should not be advertised on billboards/to motorists as there is a real danger that consumers will not be fully or accurately informed.</i></p> <p><i>Where comparisons are made with competitors, they should be like-for-like. If the maximum fees for competitors are assumed, the same should be assumed for the advertised product. If \$ are used, comparisons should be in \$, not another currency with the intention of deceiving or possibility of misunderstanding.</i></p> <p><i>It should be forbidden for staff of a financial service provider to pose as customers and give reviews in a way that potentially misleads investors.</i></p> <p><i>Inaccurate representations when making comparisons with competitor products should require a correction of the equivalent size and prominence. Graphics should not give a misleading impression.</i></p> <p><i>All fund return tables should have the same format to aid comparison. Where a different return is presented, it should not have the potential to confuse or be misrepresentative and should have a different format.</i></p> <p><i>If comparing fees (or other qualities), all fees (or similar qualities) should be compared, not just one that looks favourable.</i></p>

<p>Feedback summary – <i>if you wish to highlight anything in particular</i> <i>On the whole, aggressive marketing has the potential to push boundaries of fair representation of the product, and of the product’s competitors. Where a large number of small infractions and misrepresentations form part of a larger single advertising campaign, they should be considered and treated as a whole.</i></p>		
<p>Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.</p>		
<p>Thank you for your feedback – we appreciate your time and input.</p>		

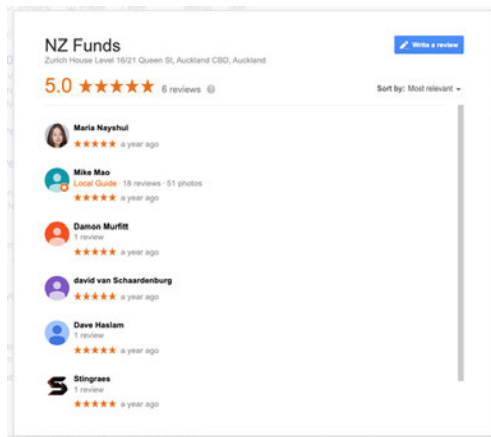
Example 1: Billboards aimed at motorists



Example 2: Unfair comparisons (Asset Magazine January 2020)



Example 3: Staff writing Google Reviews of their own company (December 2019: At least five of the six reviews are from staff of the company at the time)



Example 4: Inaccurate representations when making comparisons (October 2020 and see also Disclose Register CSV holdings file)

Not sure where you are at with NZ Funds, but here is a good one. They show

We manage funds responsibly

We take our social responsibility seriously*. We work with ISS ESG to screen investments worldwide. We're also members of the Responsible Investment Association of Australasia and a signatory of Principles for Responsible Investment.

* For more information on NZ Funds' responsible investment policy, click [here](#).

NZ FUNDS



MAS

If you then actually go into their policy it is not quite true as they state that they will strongly recommend to third party fund managers that they don't invest in these things https://www.nzfunds.co.nz/Assets/Documents/shared/A_high_standard_of_responsible_investing-NZ_Funds.pdf See Principle 5.

Then if you look at their investment portfolio at 31 March 2020, they are invested in Fossil fuels, Alcohol, through the likes of BP and Molson Coors Brewing.

Example 5: Actual returns for 3 years possibly intended to look like annualised returns for 3 years (<https://www.nzfunds.co.nz/InvestmentSolutions/UKPension/StrategiesOverview/>.)

Strategy returns*	Year-to-date	1 month	3 months	6 months	1 year	2 years†	3 years‡	Since inception	Maximum decline 12 months§	Volatility 5 years¶
Income Strategy - British Pounds	-1.61%	-0.03%	-2.49%	1.09%	-1.61%	7.75%	6.70%	14.51%	-12.89%	10.41%

NZ Funds Managed Superannuation Service Income Strategy - British Pounds

Previously known as the ROPS GBP Income Strategy

* Returns are stated after Strategy fees and expenses, but before any advisory fees or investor tax. Past performance is not necessarily an indication of future returns.

Maximum Decline and Risk

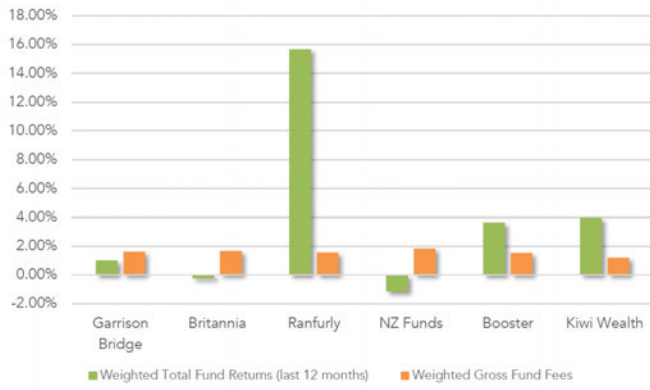
x Returns should be looked at in conjunction with the level of risk associated with an investment. "Maximum decline" is a measure of risk. It represents the largest decline in value in the previous 12 months or since inception of the Portfolio if it has not existed for 12 months.

^ This is the annualised standard deviation calculated using weekly returns of the Strategy and market index data over the 5 years ending 31 December 2020. Market index data is used for calculating the volatility prior to the inception date. For more details on the market index data, see the SIPO for the NZ Funds Managed Superannuation Service. For more details on the Strategy's Maximum Decline and Volatility please contact NZ Funds.

Note: Rounding may affect some numbers.

Example 6: Comparing fees. Low transfer fees (see Example 2) versus less competitive ongoing fees (see adviser compiled comparison below August 2020)

Figure 1. Investment returns and fees across NZ QROPS to 30 June 2020



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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. Submissions close on 16 February 2021.

Date: 15 February 2021

Number of pages: 13

Name of submitter: [REDACTED]

Company or entity: Kiwi Wealth Investments Limited Partnership

Organisation type: Limited Partnership

Contact name (if different):

Contact email and Phone: [REDACTED]

Question Number	Comment	
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You don't need to quote from the consultation document if you use part & paragraph numbers.

You may attach extra pages - please label each page with your name & organisation.

<p>Question 1: General Scope</p> <p>The proposed guidance is applicable to all advertising and promotion of offers of financial products, including advertising relating to offers subject to an exclusion in Schedule 1 of the Financial Markets Conduct Act 2013 (the FMC Act), and including all financial product types.</p> <ul style="list-style-type: none"> • Do you agree with the scope of the guidance? • Do you think the guidelines need to differ for advertising of different types of financial product offers? • Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers? 	<p><i>Do you agree with the scope of the guidance?</i></p> <p>We think the guidance should cover all advertising in relation to retail financial products or services, not just those that involve an offer of financial products. For example, there are several investment platforms and comparison platforms that do not make offers of financial products themselves, but provide access to financial products, that should also be subject to the same standards as financial product manufacturers advertising their own products.</p> <p>The guidelines appear to be directed at fund managers more than other advertisers. If the guidance is intended to be broader in scope, then we think that should be made clearer in the guidance. This could be clarified through use of examples that are not related to issuers of managed funds. We also think that it is important that the guidance acknowledges that advertisers of financial products (fund managers in particular) are not just competing amongst themselves for consumer spend. They are competing against other investment opportunities (some of which the FMA does not regulate). Some examples of the alternative investments that financial service providers compete with include:</p> <ul style="list-style-type: none"> • overseas niche investment providers (like those offering brokerage services, FX trading or cryptocurrency investment); • bank accounts and term deposits; and • residential property investment. <p>While we agree that it is important to give investors a balanced impression of both the benefits and risks of financial products, these other products are not similarly required to do that. For example, banks can promote their latest special term deposit rate without</p>
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	<p>being required to point out that it almost certainly produces negative real returns. Similarly, a real estate agent can promote in marketing for a listing the expected weekly rental an investor could receive without having to mention the pitfalls of a highly leveraged investment.</p> <p>Imposing guidelines that bite too hard on only some parts of the financial markets risks further distorting the impression some consumers already have about the relative merits of various investments. In this regard, we note that research consistently demonstrates the value that financial advice plays in improving investment outcomes for people.¹ That research also shows that asset allocation is responsible for the vast bulk of that improvement. We think that good financial outcomes could be improved if there was a consistent approach to the way that investment products are advertised. In our view, there are two options for this:</p> <ul style="list-style-type: none"> • The first would be to allow advertisers of managed funds (who we suggest have done a very good job identifying the risks associated with their products) to highlight the benefits of the product, with less focus on the risks (for example noting in disclosure text that investing carries risk and recommending the PDS is read carefully). • The second option is to require all advertisers of financial products (no matter how simple or complex) to identify the key risks associated with those products (e.g. for managed funds, the fact that balances may go up or down in the short term; for term deposits, that the real rate of return is negative, etc.) within the advertisement itself. <p>Adopting either of these approaches would allow investors to better understand the limitations of their own asset allocation choices, thereby reducing the disadvantage suffered by people who do not receive financial advice. These approaches also balance the risk that investors do not properly review the PDS before making an investment decision.</p> <p><i>Do you think the guidelines need to differ for advertising of different types of financial product offers?</i></p> <p>We do not think that advertising principles need to differ between the type of financial product being advertised. Naturally, some of the guidance will be more applicable to some products than to others, but the overarching principles should be the same.</p> <p><i>Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers?</i></p> <p>Please see our comment above in relation to the scope of the guidance.</p>
<p>Question 2:</p> <p><i>Short form advertising</i></p> <p>We are aware of current market practice where a user may “click through” a short-form advertisement (e.g.</p>	<p>No. We do not agree with this position.</p> <p>We think the focus of advertising (and advertising disclosures) should be on providing the appropriate information to consumers at the appropriate time (much like in the case of the new financial advice disclosure regime).</p>

¹ See, for example, the *Trust in Advice* research paper published by Financial Advice New Zealand in 2020.

<p>from a Google search, LinkedIn, Facebook, Instagram, Stuff.co.nz, etc.) to a second webpage (often maintained by the issuer) where information required by sections 90-92 of the FMC Act is located.</p> <p>Our position is that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restrictions. If the provisions cannot be complied with, then a short-form advertisement must not be made.</p> <p>Do you agree with this position? If not, can you please explain why?</p>	<p>The mediums referred to, and others similar, are vital channels to reach customers and channels that customers want to be engaged through. Market participants need to be able to advertise in these channels to present opportunities for prospective customers to find out about financial products that are available. Some of these prospective customers would not be reached via any other medium.</p> <p>Customers that are familiar with investments will seek out investment opportunities and know how to find investment products. However, there are individuals that may have never invested before, and social media is an effective way to engage customers that may be new to investing. Use of brief messaging to engage consumers is the first step as part of a wider customer journey. Linking through to a webpage where more information about a product can be found is much more useful than overwhelming customers with disclosure that is likely to disengage them and cause them to overlook a product that could result in a positive customer outcome.</p> <p>Further, the restrictions imposed by the various social media channels, for example, character limits, would make it impracticable to advertise through these channels if all necessary disclosures needed to be contained in the social media advertisement. Trying to create content and messaging that captures and engages customers within the existing restrictions is already difficult.</p> <p>As noted, market practice has, since social media advertising became commonplace, been a “click through” webpage approach where that webpage contains the information required by sections 90-92 of the FMC Act, and more information about the product. The customer experience in this regard is positive. The current market practice has been in place for several years and, in our view, is operating well. We (and doubtless many other advertisers) have received legal advice from top tier law firms that this approach is appropriate in the context of the character limits imposed on social media advertisements. Accordingly, our view is that the FMA’s position is too conservative.</p>
<p>Question 3:</p> <p>Potential gaps</p> <p>Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?</p>	<p>The guidelines appear to reflect a change in stance in the FMA’s view of what is acceptable. For example, the guidelines are explicit in noting that historic fund returns should not be used as the focal point of an advertising campaign – they say “the past performance of a financial product should also not be the most prominent feature of an advertisement”. However, certain managed funds industry participants (for example, Milford and Generate) have their entire brand positioning based on their historic fund returns and have run extensive advertising campaigns based on past performance (with a disclosure about historic performance not being determinative). If using fund performance as the core of advertising material is problematic, we query how these industry participants have been able to run these campaigns for so long ■</p> <p>Our view is that it is inappropriate to lessen the ability of fund managers to use past performance as a basis for advertising investment products in the future when some industry participants have been able to carve out market share in the past because of it. As everybody knows, relative fund performance can change from month, to quarter, to year, meaning that other fund managers</p>



	<p>might hold the mantle in future. To restrict performance-based advertising is therefore likely to perpetuate the view that those managers who have heavily relied on it in the past, are still the ‘best performing’ managers, regardless of whether that is the case.</p> <p>In addition, we note that the Advertising Standards Authority already has guidance in place for advertising financial products, which specifically addresses using past returns. The guidelines should be consistent with that.</p> <p>Finally, as we discuss in our answers to question 5, we are concerned that advertisers of other financial products (i.e. not managed funds or direct share investment platforms) are not required, or expected, to point out the risks associated with their investments. For example, banks can advertise low interest savings accounts and term deposits without pointing out that the real return on these is negative, or without pointing out that New Zealand does not have a deposit guarantee scheme, so that depositors at the bank (which could be the only institution at which they hold deposits) carry the insolvency risk of that bank.</p>
<p>Question 4:</p> <p><i>Offers restricted to wholesale investors</i></p> <p>Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors?</p> <p>Do you agree with the suggested wording for inclusion?</p>	<p>No, we do not agree with the proposed wording.</p> <p>We do not agree with the suggested wording for inclusion. The wording indicates the investment is ‘not suitable for retail investors’. Retail investors simply cannot invest, replacing ‘not suitable’ with ‘not available’ would be a more accurate way to describe this. While this may appear to be semantics, there are a number of wholesale funds that are offered to the public through a retail wrapper, with no material difference in the fund composition. In those cases, the fund is clearly ‘suitable’ for a retail investor because it is offered to them. The reason the wholesale fund is not, is because of the compliance associated with making a retail offer, not necessarily because the offer is fundamentally inappropriate for retail investors.</p> <p>Additionally, referring customers to the FMC Act to find the requirements of a wholesale investor is unhelpful from an investor perspective.</p> <p>Generally, advertisements for wholesale offers are targeted at wholesale investors and the investment minimums that generally apply to wholesale investments across the industry rule out retail investors. From experience, it is very rare that we receive retail investors wanting to invest in our wholesale products. In the unlikely event that we do, a simple explanation is provided to the retail investor (and that explanation is accepted).</p> <p>In any event, we do not think that it should be necessary to specifically disclaim all wholesale offer advertisements. Using valuable space in advertisements to clarify that retail investors are ineligible to apply for the products is not helpful and could be counterproductive – drawing attention away from any disclosures that do need to be made to wholesale investors. The risk of retail investors thinking that they can invest in a product they have seen advertised should be one that product manufacturers can manage themselves - the responsibility should be with the fund manager/advertiser to “triage” via a landing page or a person answering an enquiry, to direct the investor into either the wholesale product prospect journey or a retail journey for a similar retail product option. If they are concerned about a flood of retail investors (for example, because the offer is being advertised in a magazine with both a large retail audience and a large wholesale audience, such as <i>Kia Ora</i>), they may see value in drawing attention to the fact that it is a wholesale offer. If, however, the offer is being promoted through a channel that has a primarily wholesale audience (for example, industry-focused websites like Investment News), that risk might not be seen as a real one.</p>

	<p>The onus should be on the fund manager to ensure that only wholesale investors can invest in wholesale products. If the concern is that there are people who are fundamentally “retail” in their level of investing knowledge and understanding, but who meet the definition of “wholesale” investor (for example, because they are investing a large amount of money), we suggest that the problem lies in the definitions of what a wholesale investor is and, accordingly, the fix is changing those criteria.</p>
<p>Question 5:</p> <p>Miscellaneous</p> <p>Are there any other aspects you wish to submit on?</p> <p>For example, are there any unintended consequences that may arise from the proposed guidance that we should be aware of?</p>	<p>We have some concerns with several specific passages in the guidelines. We address each relevant quote below.</p> <p>Page 9:</p> <p><i>“For example, a fund manager distributing monthly updates to investors, highlighting the performance of their fund is, in effect, promoting the acquisition of units in the fund (and by extension, the offer of units in the fund)”</i></p> <p>We disagree with the above statement. Providing customers with factual information about the performance delivered and commentary on how that performance was achieved should not require compliance with sections 89 – 92 of the FMC Act. As an existing customer, there is no requirement for them to be provided with a copy of the PDS to acquire additional interests in a fund (unless there have been material updates since they were originally provided with the PDS). In the case of a KiwiSaver scheme, further contributions to the scheme do not require provision of a PDS at all. Therefore, this requirement seems to be of little benefit/protection to the customer.</p> <p>Page 11:</p> <p><i>Advertisements that compare financial products should not emphasise (or overlook) certain aspects of financial products at the expense of other aspects that are important for investor decision making.</i></p> <p><i>Even where individual facts or details included as part of a comparative advertisement are literally true, the overall impression of the comparison may be still be false, misleading, or deceptive (or likely to mislead or deceive). Note that subsequent disclosure (e.g. footnotes, etc.) may not be sufficient to correct a misleading first impression (especially where a comparison is inappropriate or unreasonable) – e.g. comparing non-bank financial products to registered bank term deposits.</i></p> <p>Advertisements need to capture the attention of the intended audience and be engaging. There needs to be flexibility to have attention grabbing headlines that compare or contrast certain high-level product features or benefits to motivate the reader to find out more about the product.</p> <p>Comparing and contrasting different products provides important investor education. Comparing and contrasting products that customers are familiar with, against those that are fundamentally different, but which might be used by the customer for the same purpose (i.e. long term savings), is an important way to engage with customers using their existing knowledge and educate them further on other investment opportunities.</p>

Comparing every feature of a product is not practicable, and presenting customers with a “wall of text” comparing and contrasting all the features of different products is likely to disengage customers, particularly when there are many variations on similar product types. This creates a risk of poor customer outcomes because of customers feeling it is too hard to read through all the information.

As we note in our response to question 1, from research conducted into the value of financial advice,³ it appears allocation decisions are hurting consumers. Our view is that the predominance of certain unsound investing beliefs amongst the New Zealand public (namely that bank term deposits are safe, property investment is a sure bet, and anything related to share investment is risky (if not an outright gamble), needs to be addressed for the long-term financial welfare of New Zealanders. In a country where property ownership is increasingly out of reach for people without wealthy parents, conveying the message that investment in growth assets is absolutely essential to long term financial wellbeing is of utmost importance. It is very difficult to convey that message if advertising needs to give equal prominence to the risk of losing money on that investment (even if there is ample evidence to demonstrate that, over the long term, a well-diversified portfolio of growth assets will generate wealth).

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Careful consideration should be given to the use of certain terms or phrases. Some, such as ‘safe’, ‘relatively secure’, ‘limited poor returns’, ‘guaranteed’, ‘inflation proof’, ‘recession proof’, and ‘highly liquid’ may easily result in an investor generating an impression about an offer or product that is not correct.

Examples of mistaken impressions may include that investors are immune to losing their investment or that a product is secured, returns on a product are guaranteed, or that an investment can be withdrawn/redeemed on short notice where this is not necessarily the case.

While we agree caution should be exercised with the use of some of the terms above, those that factually describe an investment should be permissible. For example, using the term ‘highly liquid’ in relation to an investment that has a liquidity ratio of greater than 90% (as calculated per the requirements in the FMC Regulations) should be considered reasonable.

While most investment products have liquidity management tools in place, i.e. the power to suspend redemptions, these powers would generally be used in very exceptional circumstances, so we would not expect having to disclose or reference to powers that can be exercised in limited and rare circumstances in advertisements.

Context for the advertisement must also be considered. For example, describing a managed fund as accessible in the context of comparing/contrasting other financial products, such as an investment in KiwiSaver, should be acceptable.

Finally, while we agree that “safe” or “relatively secure/safe” should be avoided when describing investments, we note that even the FMA has struggled to restrict this usage in all contexts. For example, in the *Hits and Myths* guide to investing by Mary Holm, which the FMA promoted, there is the following sentence: “The safest investments are government bonds and Kiwi Bonds, which are

³ See, for example, the *Trust in Advice* research paper published by Financial Advice New Zealand in 2020.

backed by the New Zealand Government”. In *Bond Voyage*, the FMA states that bonds are appropriate if “you are looking for a relatively low risk way to preserve some or all of your capital while investing”. “Safe” is also acceptable to the FMA when used in relation to custody and the role of the custodian. Given the obvious risk of confusion, we suggest that rather than banning “safe”, the guidance provides clear examples as to when it is or is not reasonable to use the word. Alternatively, if the word/phrase is to be banned, then the FMA should consistently police its usage in all contexts.

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“Performance history for periods of more than 12 months should be annualised, and the effects of commissions, fees, other charges, and tax should be disclosed.”

We agree there should be consistency in disclosing performance history and would welcome guidance to ensure consistency. The industry has a mixed approach to disclosing returns with the following approaches common:

- Disclosing returns net of fees but before tax (i.e. a PIR of 0%)
- Disclosing returns net of fees but after tax (i.e. a PIR of 28%)
- Disclosing returns net of fees and after tax at all possible PIRs.

Given the PIR of an investor impacts the potential returns, we believe that adopting a net of fees but before tax approach would aid in transparency. Disclosing returns after tax using a PIR of 28% would mean those on a 0%, 10.5%, or 17.5% PIR would experience a different return on their investment. Disclosing returns based on all PIRs could create confusion and would require an additional disclosure regarding PIRs and create an additional administrative burden.

Generally, term deposits, savings accounts and other similar investments tend to disclose rates of return on a before tax basis. Therefore a 0% PIR would provide a greater level of consistency across most product types.

If returns are required to be disclosed on an after tax basis, then the tax rate should be made clear and this requirement should apply for all types of financial products (including Cash PIEs, bank term deposits, savings accounts, etc.) to provide consumers with consistency when assessing their investment options.

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The past performance of a financial product should also not be the most prominent feature of an advertisement. Overemphasis on performance history, or stating that a product has a good performance history without qualification may:

- ***result in an unrealistic expectation that high returns will continue into the future; and***
- ***distract investors from other important information such as fees, and risks.***

We disagree with the above.

Our view is that the most effective way to address the advertising of returns for financial products would be to require the advertising of the real returns. If all returns had to be shown net of CPI increases (which we consider to be an appropriate inflation measure given that investments are ultimately used to allow for future consumption), many of our concerns would be directly, or over time indirectly, addressed. Our view is that this would allow for diversified managed funds to identify themselves as a good long-term wealth building tool (which they undoubtedly are) and would likely reduce the reliance of investors on term deposits and investment property, thereby resulting in fairer, and more balanced, financial markets.

Prominently disclosing headline performance numbers is an effective way to engage the attention of the consumer. We believe this can be achieved without constructing an anchoring bias that would undermine good decision making through including appropriate disclosure and access to additional information for interested readers.

Consumers are not expected to make an investment decision based on performance figures alone, it is a requirement that all consumers must read the Product Disclosure Statement. As noted earlier, such advertisements that relate to performance use returns to gain attention and then refer customers to a page where they can find out more about a product.

Bank accounts (particularly bank term deposits) are financial products that routinely advertise based on returns alone. That a bank can advertise prominently the interest rate for a five year term deposit that offers a negative real return, but a fund manager could not promote the performance of a conservative fund that achieved a benchmark beating, positive real return over the last five years is not a reasonable outcome. Accordingly, if managed funds providers are required to portray a balanced view of the risks associated with achieving higher returns, banks and non-bank financial institutions should be under an obligation to point out the fact that very low returns are negative wealth generators.

While the guidelines set a clear expectation that performance should not be the focal point of advertising, they do not address the use of fees as the primary hook for customers. There is regulator and governmental pressure for managed funds providers (particularly KiwiSaver providers) to lower their fees and low fee funds prominently advertise based on this. However, there is no requirement for them to disclose whether or not those low fees also produce good performance. Given that all performance figures are quoted net of fees it's misleading to suggest that lower fees necessarily result in a better outcome for customers – a high fee fund that has generated better net returns than a low fee fund produces a better customer outcome from an investment performance perspective.

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Advertisements that disclose past performance should include a prominent warning statement that past performance is not a reliable indicator of future performance. The reference period, and source of information, should also be clearly stated.

We agree that a warning statement that past performance is not a reliable indicator of future performance is appropriate. We do not think this should be of equal prominence to the returns disclosed, but agree it should be in a font size and location so as not to be overlooked by the average reader.

Inclusion of the source of the information is unnecessary. Ultimately it is the issuer of the product that is responsible for ensuring the returns disclosed are factually correct, and in many instances, it will be the issuer that calculates the returns. Where the issuer has outsourced some of its administration duties, including calculation of fund performance, would the advertisement then need to refer to that outsourced administration provider? That information would seem to be of little benefit to consumers. In our view it would be more useful to use the advertising space to refer the reader to a website or link with more information about the product.

Page 13

Fees must be consistent with the relevant disclosure documents, and must be disclosed such that they give a realistic impression of the overall level of fees and costs an investor is likely to pay (including any indirect fees or costs) over a relevant period. Where a particular fee or cost has been described, or a fee or cost has been broken down into its individual components, the description must also be clear and not misleading.

Fees and costs should be shown in NZ dollars, and be inclusive of GST that is payable.

We agree that fee disclosures should be consistent with the relevant disclosure documents. However, if the fees disclosed in the Product Disclosure Statement are disclosed exclusive of GST, then the fees in the advertisement should also be disclosed on this basis to avoid confusion. Currently, there is no requirement to disclose the fees in the PDS inclusive of GST.

In addition, if our suggestion that this guidance be expanded to include investment platform providers and others in the financial services industry, the requirement for fees to be in NZ dollars will be problematic. For example, Hatch, our self-directed investing platform, charges fees in US dollars because it offers investments in the US share markets.

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Advertising should be clearly identified as such, and should not be masked as something other than an advertisement – e.g. paid or sponsored content should be clearly identifiable from other content. This includes content that appears on social media platforms

In our experience, the social media influencer medium is the most confusing for customers. The Advertising Standards Authority has now provided guidance around influencers disclose advertising content which appears to be in line with the FMA's proposed guidance.

We agree that a reasonable person should be able to easily distinguish whether content is (or is not) paid for or sponsored. This is important because of the inherent conflict of interest for the promoter in being paid to promote a product. However, in our opinion including an identifying statement should only be necessary where this is not obvious to the average reader. For example, product

information describing the features on an issuer’s website does not need to be identified as an advertisement because there is an obvious link between the sponsor and the promotion. Similarly, the draft guidance on page 9 suggests monthly communications to existing investors are an advertisement (which we disagree with), regardless, there is no need to identify it as such because the link between the promotion and the issuer is obvious.

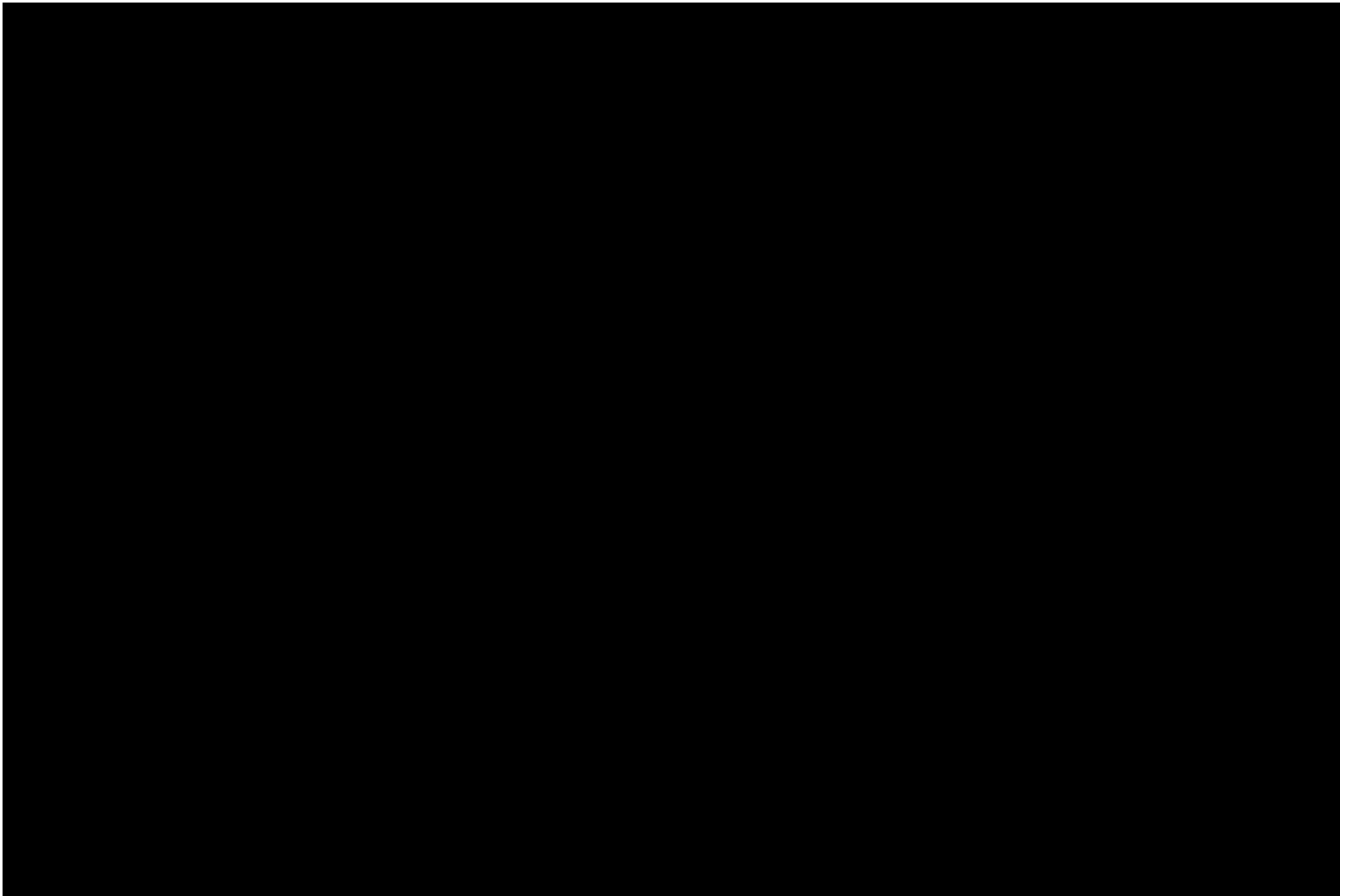
Advertorial content often includes the section 92 disclosures. However, where it does not (like in news websites), it should be clear to the average reader whether or not representatives of fund managers writing opinion pieces are also trying to drum up business. Where opinion pieces or advertorials are advertisements in disguise, readers should be made aware of the advertising nature of the content. We suggest the best way to do this would be to require any opinion piece or advertorial that has been paid for by the writer to be disclosed as paid content. This would mean that, for example Stuff opinion pieces by fund manager executives would be clearly identifiable as advertisements for their funds, rather than journalistic content.

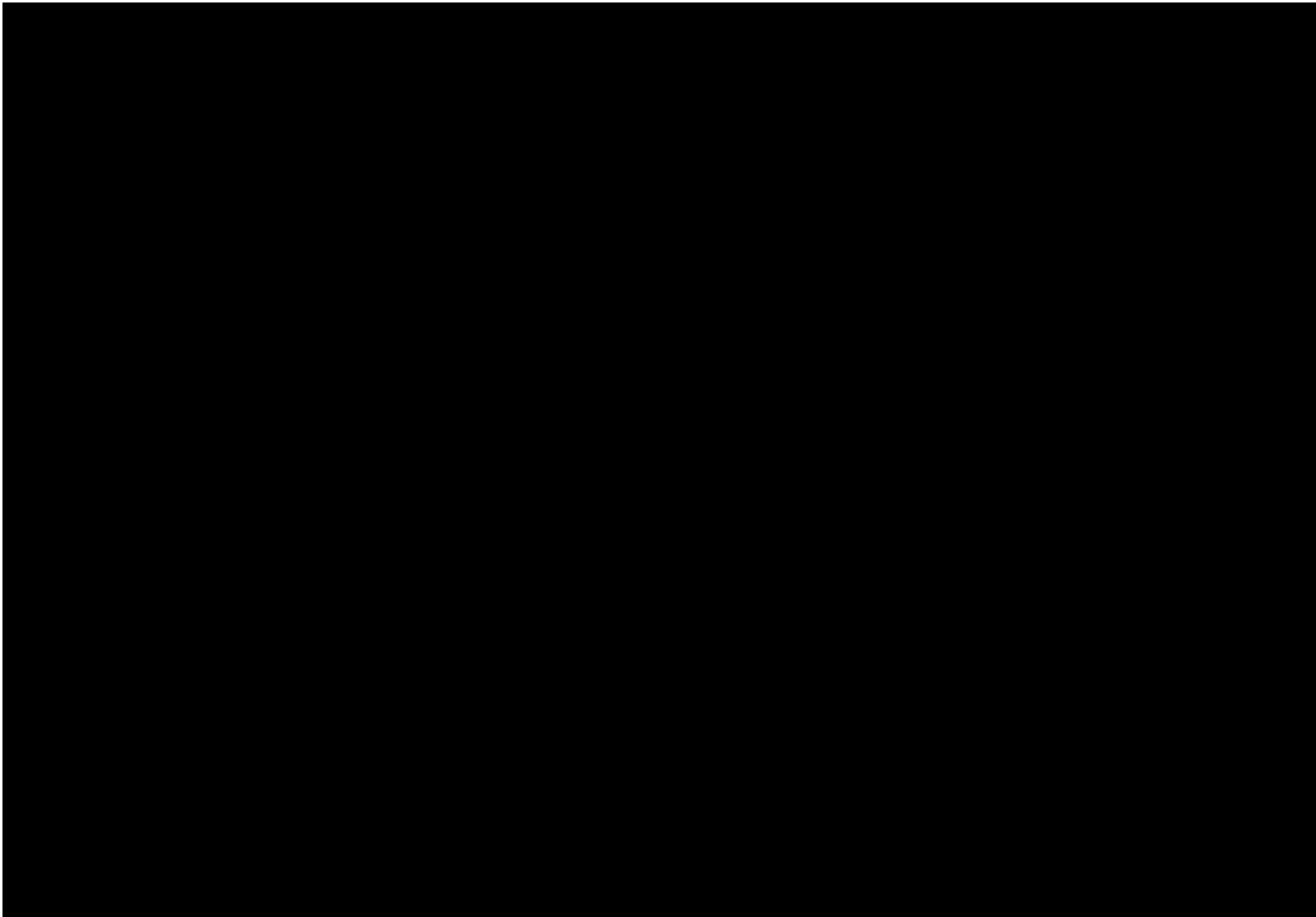
Feedback summary –

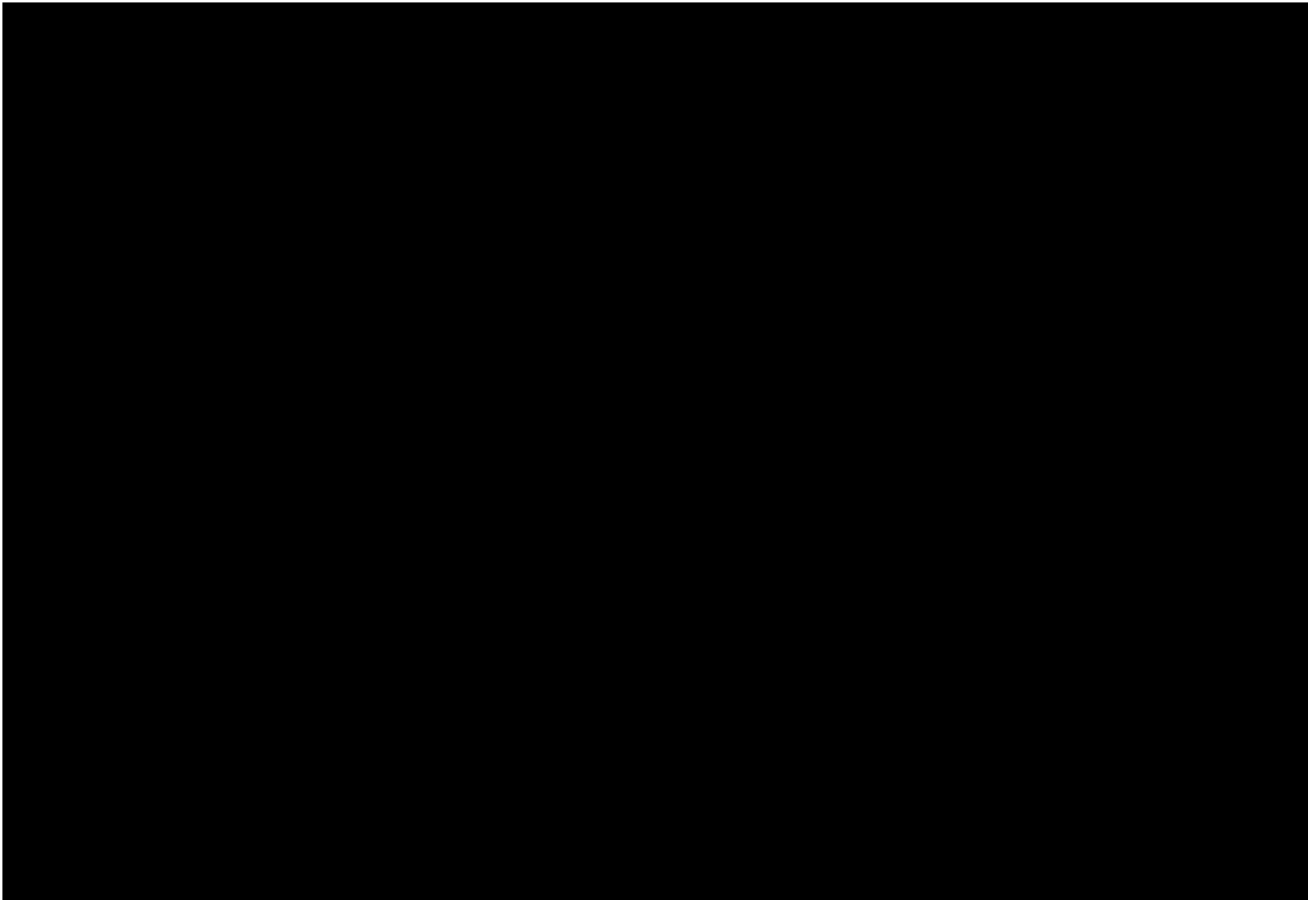
We agree with the intent of the guidance in making sure everyone understands the expectations when advertising to customers about investing, and to ensure a degree of consistency across advertisements.

Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

Thank you for your feedback – we appreciate your time and input.









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16 February 2021

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

Thank you for the opportunity to respond to the proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013.

We detail our views as follows.

Q1.a Do you agree with the scope of the guidance?

It is our understanding that the guidance covers a limited set of financial products as defined under Part 2 of the Financial Markets Conduct Act (FMCA), which includes debt securities, equity securities, managed investment schemes and derivatives. We note that the terminology used in the guidance paper also refers to investors rather than consumers/customers, and it is this language that further supports our understanding that it is investment focused guidance.

We did not anticipate that the scope would be limited to investment products, as we expected a broader range of financial products and services to be within scope. In light of recent Financial Markets Authority action (FMA) against FMCA Part 2 breaches relating to a range of products within the financial services sector (such as insurance and banking products) we believe it would be desirable for the FMA to produce guidance beyond investment products to support the financial services industry to meet the regulator's expectations and deliver good customer outcomes.

We acknowledge that for consumer credit products, there are advertising guidelines within the responsible lending code and the 2020 amendments to the Credit Contracts and Consumer Finance Act (CCCFA), however there are still several products where guidance is not available, e.g. insurance products and SME business lending products.

We have considered whether this may be due to the current scope of the FMA's remit, but as the FMA has taken enforcement in a range of circumstances across the banking industry, we assume this is not a factor in the limited scope, and we would expect that with the introduction of the Financial Markets (Conduct of Institutions) Bill these other product types would be included.

If the scope of the guidance is broadened to cover all financial products, we recommend this guidance is aligned to other forms of advertising standards such as the CCCFA guidance and that from the Advertising Standards Authority. In addition, we support guidance focused on consumers as a whole rather than investors only.

Q1.b Do you think the guidelines need to differ for advertising of different types of financial product offers?

We would recommend that guidelines are provided at an individual product level. Different products will have their own unique features and risks and as such should have a suitable set of advertising guidelines to protect consumers. We also suggest the guidance is more practical when using different advertising media and methods such as digital and social media; direct mail; or real-time. For example, the guidance in the UK and Australia is significantly more comprehensive and tangible for those using it, with explicit offer examples to demonstrate how the product provider can be compliant, and what would constitute non-compliance.

We note the guidance doesn't appear to include telemarketers/verbal offers explicitly, and although we acknowledge there is not an exhaustive list of captured advertising media, we would recommend more specific guidance to be included regarding differing expectations between verbal and written mediums given the different risks associated with each.

Q1.c Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offer?

Yes.

Q2. If the provisions cannot be complied with, then a short-term advertisement must not be made. Do you agree with this position? If not, why?

We agree.

Q3. Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?

n/a.

Q4. Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors? Do you agree with the suggested wording for inclusion?

We agree.

Q5. Are there any other aspects you wish to submit on? For example, are there any unintended consequences that may arise from the proposed guidance that we should be aware of?

No.

We would be happy to discuss this submission should you require.

Yours sincerely



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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. **Submissions close on 16 February 2021.**

Date: **16 February 2021**

Number of pages: **3**

Name of submitter: [REDACTED]

Company or entity: **Lane Neave**

Organisation type: **Legal Practice**

Contact name (if different):

Contact email and Phone: [REDACTED] [REDACTED]


Question Number	Comment	Recommendation
<p><i>You don't need to quote from the consultation document if you use part & paragraph numbers.</i></p> <p><i>You may attach extra pages - please label each page with your name & organisation.</i></p>		
1: General scope	<p><i>Do you agree with the scope of the guidance?</i></p> <p>We agree with the scope of the proposed guidance.</p> <p>In particular, guidance on advertising of offers subject to an exclusion under Schedule 1 of the Financial Markets Conduct Act 2013 (FMC Act) is welcome. We have seen a significant increase in recent years of offers under Schedule 1 being widely advertised to the general public, with the issuers predominantly operating in the property syndicate and property finance space. Such offers are targeted at high net worth and experienced investors, but the investors are not traditional financial institutions or professionals. An FMA guidance note on advertising would, we believe, improve the quality of advertising materials from issuers in this space.</p> <p><i>Do you think the guidelines need to differ for advertising of different types of financial product offers?</i></p> <p>We would welcome more detailed guidance about the kinds of Schedule 1 offers referred to above. Issuers in this space typically release an Information Memorandum (IM) that contains key information about the investment and the terms of the offer (in our view, IM documents are "restricted communications" for the purposes of the FMC Act and, accordingly, are subject to the fair dealing provisions). We have some suggestions on that additional guidance may be useful</p>	<p>We would recommend that the section "What this guidance applies to" in the Introduction acknowledges that "restricted communications" include IMs and similar documents provided to potential investors under a Schedule 1 offer. Such documents are intended to induce potential investors to accept an offer and it should be clear that these documents are subject to the fair dealing obligations.</p>

	<p>for offers to such investors in our response to Question 3.</p> <p><i>Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers?</i></p> <p>We consider that the guidance adequately captures all of the relevant parties.</p>	
<p>2: Short form advertising</p>	<p>We agree with the FMA’s position that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restriction, as such a view is consistent with the language in the Act.</p> <p>We do consider that the implication of this position is that some social media platforms are effectively closed to offer advertising due to character limits or space restrictions. In principle, it may be possible for some “click through” advertising to function if it contained appropriate conditions. However, in our view this would require an amendment to the Act.</p> <p>We note that Schedule 1 offers would not be subject to this limitation. This could, in time, result in inconsistent styles of advertising between Schedule 1 offers and regulated offers.</p>	<p>We would like to see the FMA’s position on sections 89-92 articulated in the proposed guidance note.</p> <p>We would also welcome a review of the advertising provisions in sections 89-92 of the FMC Act to take account to changes in social media platforms and other group chat platforms since the introduction of the Act.</p> <p>The guidance note would be helpful if it included comments on whether the nature of a social media platform should be taken into account. For example, what considerations might apply to Schedule 1 offers advertised on platforms such as Facebook or Instagram.</p>
<p>3: Potential gaps</p>	<p>As indicated in our response to Question 1, we have seen a significant growth in the use of Schedule 1 offers that are marketed to the general public. In order to participate in such an offer, the investor must meet one of the wholesale investor criteria (most commonly as an “eligible investor”) but the investor is not a traditional financial institution or professional fund manager.</p> <p>In our experience, there is a “middle ground” between regulated offers and transactions involving financial institutions/professional investors. In this space are high net worth individuals and “eligible investors” who are relatively sophisticated and have prior investing experience. The regulated offer regime is not entirely appropriate for such investors. However, these investors may still not have access to the same level of resources and professional advice as traditional financial institutions.</p> <p>In this context, advertising materials (such as an IM) are often relatively detailed documents (but not necessarily containing the same amount of information and detail as a product disclosure statement for a regulated offer). However, there are a range of different approaches in the market.</p> <p>As a result, we would welcome further guidance from the FMA about its</p>	<p>We would recommend that the guidance note also addresses the FMA’s expectations for IMs and similar offer/advertising documents for Schedule 1 offers. Matters that the FMA may wish to consider is what level of disclosure of risks is required in a wholesale IM and what information may be material to a wholesale investor.</p>

	expectations for the content of IMs and other advertising materials for such Schedule 1 offers.	
4: Offers restricted to wholesale investors	<p>We agree that consumers of advertising for wholesale (Schedule 1) offers should be made aware immediately that the relevant advertisement that an offer is not available to retail investors.</p> <p>We agree with the suggested wording for inclusion in advertising (subject to our recommendation that follows). There are a range of practices in the market currently and we would welcome clear guidance on what is expected from the FMA.</p>	We would recommend that the guidance notes makes an unequivocal statement about what wording is included in short form advertising for wholesale offers. This will ensure that market practices are consistent.
5: Miscellaneous	In terms of unintended consequences of the proposed guidance note, we would expect to see issuers reviewing existing advertising material in advance of the guidance note coming into effect. We would also expect to see improvements in the quality of Schedule 1 offer documents as result of the guidance note. This may result in issuers incurring additional compliance costs that could potentially be passed onto investors.	
Feedback summary – <i>if you wish to highlight anything in particular</i>		
<p>Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.</p>		
<p>Thank you for your feedback – we appreciate your time and input.</p>		

Submission: Proposed Guidance on advertising offers of financial product Consultation Paper

Submission by:

Persons:	[REDACTED]
Company or entity:	 Massey University Submission is on a university basis.
Organisation type:	Education
Contact person:	As above
Email:	[REDACTED]
Phone:	[REDACTED]
Other contact info:	[REDACTED]
Total pages:	[REDACTED]
Date:	25 November 2020

Question 1:

The proposals do not make it clear what parties are covered by the guidance.

It is not clear if it applies to incorporated businesses as well as 'persons'. This is because the guidance uses the terms 'person, incorporated'

The proposal should also include insurance as a financial product covered.

Question 4:

Yes. Any advert for wholesale products needs to make it clear that it is not available for retail buyers.

Question 5:

The 'advertising provisions' are strict, and this could lead to unintended consequences.

One of the major reasons for the poor uptake of financial advice in NZ and of poor financial decision making is a lack of frequent, useful, communication between customers and product providers. For example; insurance customers tend to only get contact with their insurer at sale time, at renewal time., and at claim time. This means that all communication is stressful and result focused. This strongly inhibits customers from engaging actively with the provider or actively seeking to buy or understand the product.

Thus, we would argue that it is vital for regulations to encourage a greater level of useful, focused, interesting, communication between customers and their product provider/ adviser. The proposed rules, and the definition of 'advertisement' mean that could potentially strongly discourage this type of useful communication.

This is particularly true for financial advisers, who will be wary of any client communication, unless the rules around what is permitted are simple and clear. This could reduce the amount of financial literacy education which advisers undertake.

Financial products are open to fair disagreements about their value. The current value of most investments are based on the possible future value of cash flows or capital gains from these investments. These future values are based on assumptions about the likelihood of the product's return under various future scenarios. There are grounds for a wide range of honest opinion about the worth of various assumptions and future cashflows. It is inherently not possible for the worth of these assumptions to be proven at the time the opinions expressed, as the proposed guidance requires. Only time can tell. Opinions which seem currently extreme and unlikely may prove to be the most worthwhile. (for example, opinions expressed in 2019 that TSLA would rise to the unimaginable price of \$2,500)

Therefore, there needs to be:

- A clause allowing the expression of an honest opinion about a product's future performance vs stated price, as long as it is made clear that it is an opinion only and that there is a range of possible outcomes.

This is of particular concern with regard to financial bloggers in mediums like YouTube. These bloggers are proving to be particularly useful in educating population segments which traditional providers ignore, like younger or poorer investors. These bloggers need to be allowed to continue providing opinions about the worth or value of particular products, even if unconventional, as long as they are required to provide appropriate, clear, statements making it clear that 'this is not advice and only opinion'.

- An increased regulation around the style of language used. Terms like 'inflation' issue as differing rates of cost rises will apply to differing customer groups. A requirement that a reading age of 14 (for example) is checked for would be useful.
- A regulation relating to the disclosure of layered fees. For example, a fund of funds may disclose that it only charges a fee of 0.5% but fail to disclose that the funds it invests in also charge fees. While these layered fees are not always ascertainable, the provider should make as best an attempt as possible to quantify these.
- Some guidance around any area of regulation enforce for non-NZ international product providers, as increasingly for younger market segments, their contact with financial averts and opinions is location indistinct.

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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. Submissions close on 16 February 2021.

Date: 16 February 2021

Number of pages: 5

Name of submitter: [REDACTED]

Company or entity: Mercer (N.Z.) Limited

Organisation type: Managed fund provider

Contact name (if different):

Contact email and Phone: [REDACTED] [REDACTED]

Question Number	Comment	Recommendation
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You don't need to quote from the consultation document if you use part & paragraph numbers.

You may attach extra pages - please label each page with your name & organisation.

<p><i>Question 1: General scope</i></p> <p>a) <i>Do you agree with the scope of the guidance?</i></p> <p>b) <i>Do you think the guidelines need to differ for advertising of different types of financial product offers?</i></p> <p>c) <i>Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers?</i></p>	<p>a) We agree with the scope of the proposed guidance being applicable to advertising and promotion of offers of financial products and all financial product types. However, we would welcome clarity around what is considered an "advertisement relating to offers". Currently, the proposed guidance refers to an "advertisement" being a reference to a "restricted communication" which may have the unintended consequence of restricting information in relation to communications such as:</p> <ul style="list-style-type: none"> • a reminder to top up a member's KiwiSaver account to maximise the Government Contribution; • communication to KiwiSaver default members encouraging them to take a risk quiz and subsequently make an investment choice; or • the use of digital advice tools. <p>b) Yes, the guidance should take into consideration riskier or more complex products.</p>	<p>a) We recommend clear guidance as to what is considered an advertisement.</p> <p>b) This could be achieved by having a more robust oversight of advertisements made by unregulated entities. As a MIS manager, we have conduct obligations attached to our licence as well as our obligations as a Default KiwiSaver provider and holder of a QFE Licence/Financial Advice Provider Licence.</p> <p>c) Care should be given to ensure that any existing guidance aligns with the advertising codes - the Advertising Standards Code, and the relevant sector Codes; Children and Young People, Finance, and Gambling.</p>
<p><i>Question 2: Short form advertising</i></p> <p><i>Do you agree with this position? If not, can you please explain why?</i></p>	<p>We strongly disagree with the FMA's proposed position and consider the current click through approach needs to be protected in relation to short form advertising.</p> <p>Digital channels and particularly social media are the fastest growing channels. These channels are accessed and highly used by most New Zealanders but</p>	<p>Consideration of examples of possible short form disclaimers suitable for different channels e.g. Radio, Social Media.</p> <p>Any short form disclaimer should take into account that social media and internet based advertisements must still abide by fair dealing provisions. 'Click through information' must be prominent and take the customer to more product information that complies with sections</p>

	<p>particularly by younger customers. These channels have also proven to be a very successful way to engage with members, for example, in the KiwiSaver Default active choice campaign space we have had up to 7% higher conversion/engagement rates using digital channels (email supported by social media) vs. using traditional postal methods. When we use digital channels we have a better reach and rate of engagement and we believe that our members would be worse off if we could not use short form click through advertising to reach our members.</p> <p>The use of digital channels is likely to increase even more with the trend of working from home, online learning and social distancing which will continue for quite some time.</p> <p>For these reasons, digital channels and short form advertising need to be accounted for in any guidance. The guidance needs to reflect the restrictions or limitations that digital channels place on the amount of content that can be displayed.</p> <p>Digital channels are critical to successful futures of customers and businesses alike.</p> <p>Proposed guidance states on page 9 that to be considered an advertisement, a communication is not required to directly invite applications for the issue of financial products.</p> <p>This combined with the proposed limitations on short form advertising would effectively put an end to using social media and other digital channels. The demographics that use these channels are generally the ones that KiwiSaver Default providers use to reach some of the more disengaged and vulnerable customers. The unintended result may be that it becomes more difficult to engage with members than it currently is.</p> <p>Surely therefore short form advertising is a key way in which to reach these members. It is not possible to sign up to a managed investment scheme without first having read or at least seen the PDS.</p>	89-92 of the FMC Act rather than directly to a joining page.
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<p><i>Question 3: Potential gaps</i></p> <p><i>Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?</i></p>	<p>It would be helpful to have guidance to cover the following:</p> <p>Incentives: are a useful engagement tool, however can also lead to negative behaviour for example where the value of the incentive outweighs the ‘right’ decision. For example, a \$100,000 prize draw may encourage members to switch to a product that is not appropriate for them regardless of further advice, information or disclaimers.</p> <p>PR and industry experts: as a strategy, this is used by many organisations; it currently requires no disclaimer, but depending on the content could be seen as a form of advertising. For example, where brands have internal influencers who are seen as industry experts, this can heavily influence decisions.</p> <p>Company messages vs. employees own social media: clarification is needed in relation to what is published on behalf of the company vs. what is promoted by its employees.</p> <p>Comparison websites: clarification is needed in relation to comparison websites which generate leads for providers and in some cases charge for those leads.</p> <p>Social Influencers: similar to PR and industry experts, it is not clear how these might be captured by the guidance and how the disclaimers should be delivered e.g. in video and photo posts.</p> <p>Future proofing guidance: as new technology and channels change overtime e.g. gaming, product placements, it is important that the guidance has clear principles that are able to be applied to future developments.</p> <p>Promotion of financial services in multiple languages e.g. Maori; clarification is needed as to what language the disclaimers should be in.</p>	<p>Guidance should be given that clearly states the parameters within which incentives should be offered. The incentive must not detract from the offer.</p>
<p><i>Question 4: Offers restricted to wholesale investors</i></p> <p><i>a) Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant</i></p>	<p>a) Many wholesale customers would not identify themselves as ‘wholesale’ investors. For example, someone investing a large sum of money as a Family Trust would be classified as a wholesale customer, but may not consider themselves to be one. The</p>	<p>Our recommendation would be:</p> <ul style="list-style-type: none"> • Ensure that wholesale product advertising sends the target audience to a location which does have further clarification of whether a product is wholesale specific.

<p><i>advertisement that an offer is not available to retail investors?</i></p> <p>b) <i>Do you agree with the suggested wording for inclusion?</i></p>	<p>suggested inclusion could deter the correct audiences.</p> <p>Wholesale advertising is more targeted than a broader retail audience. Through the use of advertising in industry publications and specific targeting tools such as LinkedIn Campaign Manager, wholesale advertisers have more control to reach wholesale investors.</p> <p>If a retail customer was to progress through wholesale advertising, then they would not be able to get to the point of investing in a wholesale product, without being screened out in the onboarding process.</p> <p>Quite often wholesale advertising does not advertise a product or an offer, but rather advertises thought leadership or content which could possibly drive more interest in looking at wholesale products (e.g. the impact of investing on climate change). The intention of this content is to educate rather than mentioning any specific wholesale products or offers. Clarification would be needed here.</p> <p>The general progressive nature of humans and advertising means audiences are giving less and less attention to advertising, screening out advertisements faster and faster. The inclusion of the upfront suggested wording would likely deter many wholesale customers from reading an advertisement that could be beneficial for them, as a disclaimer seems relatively unengaging compared to advertising on non-financial products. This would likely deter wholesale advertisers from advertising products.</p> <p>b) We agree with the suggested wording, but we disagree with the immediate inclusion of the wording within advertising material. We would need further clarification as to what is considered advertising of a wholesale product or offer, versus advertising which promotes content, thought leadership, or brand advertising with no mention of a product.</p>	<ul style="list-style-type: none"> • Ensure that the onboarding process would screen out any retail customers from investing in a wholesale product. • This would need further clarification for KiwiSaver Preferred Provider Clients, as they are considered a wholesale audience, not purchasing a financial product, but would have flow on affects to retail products. • This would also need further clarification for advertising content and thought leadership versus products and offers.
<p><i>Question 5: Miscellaneous</i></p> <p>a) <i>Are there any other aspects you wish to submit on?</i></p>	<p>a) The proposed guidance does not seem to capture products that consumers would see as financial services providers</p>	

<p>b) <i>For example, are there any unintended consequences that may arise from the proposed guidance that we should be aware of?</i></p>	<p>e.g. property investment, short term lending providers.</p> <p>b) One of our main concerns is that the proposed guidance may have the effect of restricting and limiting channels that reach younger audiences.</p> <p>Lengthy disclaimers can scare off /discriminate against some potential investors (particularly younger ones, female, vulnerable) who may then miss out on the opportunity to invest. Our experience shows, that if you put up too many barriers when trying to help a customer make a decision, they often do nothing and are not inclined to engage at all.</p>	
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Feedback summary – if you wish to highlight anything in particular

In addition to this submission, we refer to and generally support the Financial Services Council of New Zealand Incorporated submission and the Boutique Investment Group (B.I.G.) submission and reiterate the key comments in these submissions. We appreciate the opportunity to provide input to the Consultation process.

Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

Thank you for your feedback – we appreciate your time and input.

Question 1: General scope

Do you agree with the scope of the guidance?

We generally agree with the scope of the guidance and do not think the guidelines need to substantially differ for advertising of different types of financial product offers. However, we do think the clarity of the guidelines could be enhanced by:

- (a) More clearly identifying what aspects of the guidance refer to (i) financial products as opposed to (ii) financial services (or by identifying where aspects relate to both)¹.
- (b) Differentiating FMA's expectations regarding initial offers of financial products as opposed to established continuous offers. For example, where there is an IPO and the PDS for it includes forecast returns, this is quite different to established managed investment schemes that do not include forecasts (particularly KiwiSaver and unit trusts). It would accordingly be helpful to separate considerations around advertising new offers of equity and quasi-equity securities (e.g. limited partnership offers) from aspects relevant to the advertisement of managed investment products.

Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers?

We are supportive of the submission by the Boutique Investment Group (BIG) and share the concern expressed in that submission that the guidelines need to effectively capture advertisements by both regulated and non-regulated (or perimeter) entities.

- By extension, this would call for the guidelines to be equally applied and enforced in relation to perimeter entities. This is particularly the case as both entity groups are targeting substantially the same investor base.
- We would contend that an examination of the investor register of any of the "wholesale" offerings common in the retail market-place would reveal an investor base differing from that of a managed investment scheme only in terms of the level of financial contribution made by the "wholesale" investor. In our view, a number of these non-regulated offerings are not being adopted by professional, sophisticated investors but rather by persons who, apart from the amount they are contributing, share essentially the same characteristics as any other retail investor.

Question 2: Short form advertising

We are aware of current market practice where a user may "click through" a short-form advertisement (e.g. from a Google search, LinkedIn, Facebook, Instagram, Stuff.co.nz, etc.) to a second webpage (often maintained by the issuer) where information required by sections 90-92 of the FMC Act is located. Our position is that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restrictions. If the provisions cannot be complied with, then a short-form advertisement must not be made.

Do you agree with this position? If not, can you please explain why?

¹ See second paragraph under *What this guidance applies to* – page 5

As the FMA has observed, it is industry practice to use short form advertisements. While we agree that the content of short form advertisements must be accurate and not misleading, it is not practical to include all of the matters contained within the proposed standards and guidelines given the character limits inherent in use of this media.

The purpose of a “click through” short form advertisement to a second webpage is to provide users with a gateway to further information. While disclaimers, legends and links referring investors to the PDS and alerting them to, for example, the importance of taking professional advice are clearly important, an unnatural squeezing of the disclaimer into the front (or each) page of the advertisement may only lead to investor confusion.

We consider a more balanced approach to be appropriate, with the disclaimer prominently positioned at an appropriate point in the overall body of the advertisement – we think that would enhance readability and investor comprehension.

The format and context of where disclaimers are positioned is an important consideration in ensuring people can understand both the nature of what is being promoted and where they can and should obtain information relevant to their investment decision.

ASIC has recognised that consumers benefit from ‘clicking through’ to another webpage to access additional valuable information. Its Regulatory Guide 234: Advertising financial products and services includes the following:

RG 234.145 *Online advertising can be advantageous for consumers because it can incorporate more engaging forms of media and can be interactive. Providing a facility for a consumer to access additional information (e.g. by ‘clicking through’ to another webpage) can be an effective way of providing further details and helping to engage the consumer. However, providing a facility for a consumer to access additional information cannot be used to correct a misleading overall impression in the advertisement.*

We recognise that the above expression of benefits is balanced by the following further cautionary statements in the Guidance Note:

- RG 234.147 The physical limitations of a particular medium are not a reason for producing an advertisement that might mislead: see also RG 234.117 and *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] FCA 1254.

Example 61: Internet banner advertising

If a banner advertisement on a webpage includes a strong headline claim about the potential returns available from a financial product, it should balance this with information about the risks. The stronger the headline claim, the more important it is for the risk information to be included in the banner advertisement itself and not included in a reference to another page where the consumer can find out information about the risks.

- RG 234.148 Social networking and microblogging services such as Twitter allow promoters to deliver short advertisements directly to consumers. As with other forms of advertising, promoters should consider the overall impression created by the advertisement when viewed for the first time. Promoters should carefully consider the appropriateness of some new media channels if content limitations mean that there is insufficient space to provide balanced information.

None of the foregoing in our view, however, derogates from the proposition that consumers are not misled or disadvantaged from having to ‘click through’ to a subsequent webpage to read standard warnings and disclaimers. Similarly, it should be possible to ensure consumers are not disadvantaged where balancing information is made available to them on a ‘click through’ basis from multiple webpages, provided those pages constitute a natural whole and the headline or banner claim is not excessive.

RG234.148 notes that media channel appropriateness needs to be considered if there is insufficient space to provide balanced information. We agree with this approach. Our view is that ‘balanced information’ does not need to include all relevant disclaimers at each layer.

In considering the issue of advertisements and direct communications to the retail public, the mediums the consumer market are using to collect and reference information need to be considered. More and more people (in particular, younger generations) are turning to social media and digital channels for their news and reference material. It is important that advertising requirements are able to work well within these mediums which, as noted above, are universally constrained by space and size – often character limits or advertising space size. Should requirements be imposed that are not workable in such digital mediums we, as an industry, run the risk of further apathy or alienation of potential investors. That cohort of potential investors may then not be exposed to investment opportunities and relevant useful information. Prominent disclaimers work logically within a print advert, or even radio. They do not necessarily work well within the confines of social media or other digital channels. We therefore believe the guidance needs to address the reality of where information feeds, and advertising exposure, is occurring in today’s market.

A recent study conducted by AUT² examined levels of engagement across social media as opposed to more traditional news channels, and highlighted the power and dominance of the major digital media platforms. Its observations of click through behaviour further illustrate the point that it is the entire communications that needs to be considered and not each web page in isolation.

Character limits in digital media

To illustrate the issue faced by entities wanting to advertise through digital media, we set out below two examples of limitations currently imposed by digital publishers:

Google Search advertisement: The headline must be under 90 characters and body copy must be under 180 characters.

Native advertisements: Requirements vary, but generally the headline must be under 70 characters and body copy must be under 100 characters.

Applying the above restrictions to Milford's own advertising we note that our standard PDS reference by itself amounts to 124 characters: *"Read the relevant Milford Product Disclosure Statement as issued by Milford Funds Ltd at milfordasset.com before investing."*

We therefore endorse the approach recommended by the BIG group that an advertisement made up of a series of layers/links should be regarded as a single advertisement on the basis that it is a self-contained promotion. We also share the BIG view that it is necessary and indeed open to FMA to view an advertisement comprised of a series of layers/links as complying with the requirements of sections 89 to 92 of the FMC Act.

Question 3: Potential gaps

Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?

In our experience, issuers of regulated products (KiwiSaver and unit trusts) and other licensed financial service providers (e.g. DIMS providers) generally have not, and do not, advertise on a basis that could be construed as being irresponsible or that could lead to poor conduct outcomes. Licensed product and service providers have invested, and continue to invest, considerable time and resource into ensuring their offerings remain compliant and that disclosure documentation remains complete and up to date.

This is not necessarily the case when it comes to perimeter entities and their advertisements where there is often an inadequate balancing of risk and reward. As an example, most unregulated offers carry liquidity risk in that there is no guarantee that a person's investment will be readily realisable when they want to redeem (as contrasted with the typical managed investment scheme where the underlying assets are able to be traded on recognised exchanges and where there is considerable diversification of assets held).

² Google, Facebook and New Zealand news media: The problem of platform dependency - Dr Merja Myllylahti Auckland University of Technology September 2018.
https://thepolicyobservatory.aut.ac.nz/_data/assets/pdf_file/0017/202841/google-facebook-and-new-zealand-news-media-merja-myllylahti.pdf

The risks posed by perimeter entities are magnified when (as is the case currently) they advertise predominantly on the basis of seemingly attractive projected returns.

The risks posed by unlisted property-based schemes are well recognised in Australia. We note ASIC's Regulatory Guide 46 includes the following statements:

Risks to investors

RG 46.23 Unlisted property schemes are often attractive to retail investors, who may believe that they offer capital stability and consistent ongoing returns. This is not always the case and there are a number of common risks associated with investments in the unlisted property sector. These key risks, many of them relating to the scheme's borrowings, are identified in Table 2.

Improving disclosure for investors

RG 46.25 Unlisted property schemes are difficult to exit easily due to the illiquidity of the underlying assets and the limited withdrawal rights (when they are available). It is therefore important that investors have a good understanding of the true nature of unlisted property schemes and their associated risks before they decide to invest.

We have directly observed the recent phenomenon whereby retail investors who have previously only invested in bank term deposits are seeking alternative investments in order to generate better returns. However, a noticeable section of those investors do not appear to have a good level of understanding of the fundamental differences between term deposits and managed funds or similar forms of product offerings that are not debt securities. Furthermore, this group of investors appears to have a near singular focus on the returns being promoted without a corresponding appreciation of the nature and (higher) levels of risk involved in the products being offered. It is notable that advertisements by perimeter entities uniformly emphasise projected returns, whereas the risks posed by the investment concerned are generally not addressed in the advertisement itself and may not be adequately touched on in supporting (generally non-PDS) documentation.

Question 4: Offers restricted to wholesale investors

Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors? Do you agree with the suggested wording for inclusion?

We agree with this approach and FMA's suggested wording. We think this form of warning will go some way toward encouraging investors to pause and satisfy themselves as to the risks as well as the benefits of an offer before committing to invest.

Question 5: Miscellaneous

Are there any other aspects you wish to submit on? For example, are there any unintended consequences that may arise from the proposed guidance that we should be aware of?

Fair dealing provisions

In our view, the *Key principles* in the Guidance appear to conflate the threshold test for the FMA's intervention powers with the threshold test to meet the requirements of the FMC Act. We think the references to 'confuse' should in most instances actually be a reference to "deceive". For example, the first bullet point deals with what would be sufficient to breach the fair dealing provisions, and that should be "deceive" rather than "confuse".

Similarly, the Guidance states that advertising is more likely to mislead where the investor base being targeted is vulnerable or ill-informed. We query the foundation for that statement. We think it is more about judging the statement made against whether the targeted investor base would be misled or deceived by it.

Balance risk and reward

Given the marked differences in risks posed by different financial products, and the impact on investors when particular forms of risk (e.g. liquidity risk) materialise, we believe it would be appropriate for investors to be made aware of particular risks applying to unregulated property based product offers.

As a first step, we would suggest that the first sentence of the "Balance risk and reward" section should be expanded to read:

"Advertisements must not make false or misleading representations in respect of the nature, effect, conditions, benefits or risks of a financial product."

Consideration should we believe be given to requiring an explicit statement in direct property-based (i.e. unlisted) investment offers along the lines: "Investment in this offer involves investment in property which carries particular risks the nature of which is outlined in (the PDS or other relevant offer material)."

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:

[REDACTED]
[REDACTED]
[REDACTED]

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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. **Submissions close on 16 February 2021.**

Date: 16/02/21 Number of pages: 2
 Name of submitter: [REDACTED]
 Company or entity: PwC New Zealand
 Organisation type: Partnership
 Contact name (if different): [REDACTED]
 Contact email and Phone: [REDACTED]

Question Number	Comment	Recommendation
<p><i>You don't need to quote from the consultation document if you use part & paragraph numbers. You may attach extra pages - please label each page with your name & organisation.</i></p>		
<p>1 - General Scope <i>The proposed guidance is applicable to all advertising and promotion of offers of financial products, including advertising relating to offers subject to an exclusion in Schedule 1 of the Financial Markets Conduct Act 2013 (the FMC Act), and including all financial product types.</i></p> <ul style="list-style-type: none"> <i>Do you agree with the scope of the guidance?</i> <i>Do you think the guidelines need to differ for advertising of different types of financial product offers?</i> <i>Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers?</i> 	<p>We agree that the scope of the proposed guidance is appropriate. Given the principled nature of the guidance we do not consider different guidelines are required for different products, although the option for more specific guidelines should be used if necessary. There is a general underlying assumption in the paper that parties to whom it applies will already be aware of that. There could be some scope to have some more definitive lists or examples of the types of parties to whom the guidance applies. We appreciate that creates a risk that parties to whom the guidance applies but who are not part of the lists or examples could misunderstand that they are excluded, when in fact they should be included.</p>	<p><i>Consider further guidance around scope of who is subject to the guidelines</i></p>
<p>2 - Short form advertising <i>We are aware of current market practice where a user may "click through" a short-form advertisement (e.g. from a Google search, LinkedIn, Facebook, Instagram, Stuff.co.nz, etc.) to a second webpage (often maintained by the issuer) where information required by sections 90-92 of the FMC Act is located.</i> <i>Our position is that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restrictions. If the provisions cannot be complied with, then a short-form advertisement must not be made.</i> <i>Do you agree with this position? If not, can you please explain why?</i></p>	<p>Depending on the nature of the investment product on offer it may be impractical for an issuer to include all requirements in a short form advertisement. The purpose of these short form advertisements is to attract investors. An advertisement which generally sets out the issuers' business and descriptions of product types may, arguably, not be subject to the same requirements but may be equally as effective to draw in investors. Ultimately the industry will have a view on this point and we suggest this should be carefully considered as a part of finalising the guidance.</p>	<p><i>No recommendations for change</i></p>
<p>3 - Potential gaps <i>Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?</i></p>	<p>We are not aware of any potential gaps.</p>	<p><i>No recommendations for change</i></p>

<p>4 - Offers restricted to wholesale investors Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors? Do you agree with the suggested wording for inclusion?</p>	<p>We agree it should be made clear if an offer is restricted to wholesale investors and the proposed wording appears to be appropriate.</p>	<p><i>No recommendations for change</i></p>
<p>5 - Miscellaneous Are there any other aspects you wish to submit on? For example, are there any unintended consequences that may arise from the proposed guidance that we should be aware of?</p>	<p>There are no further aspects we wish to submit on.</p>	<p><i>No recommendations for change</i></p>
<p>Feedback summary – if you wish to highlight anything in particular</p>		
<p>Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.</p>		
<p>Thank you for your feedback – we appreciate your time and input.</p>		

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Date: February 16, 2020 Number of pages: 1

Name of submitter: [REDACTED]

Company or entity: Responsible Investment Association Australasia

Organisation type: Membership (industry) association

Contact name (if different):

Contact email and Phone: [REDACTED] [REDACTED]

Question Number	Comment	Recommendation
Q2: (short form advertising)	<p>Yes agree with this position because regulating to align with achieving a fair, efficient and transparent financial market is central to the intent of this Guidance.</p> <p>Changes in how technology is used, should always be considered but in this case, the intent of the regulation should have primacy over technological advancement on advertising methods.</p>	<p>1. However, if the consumer can access the long-form within <u>one</u> direct click, then it may be worth considering as being compliant with the intent of the FMC Act.</p>
Q3: (potential gaps)	<p>Increasingly environmental, governance, social or sustainability (ESG) factors are becoming features appearing both in product labels and in legal and marketing materials.</p> <p>Any claims around delivering ESG-related product features should also be captured in this Guidance for advertising offers.</p> <p>This goes specifically to providing 'complete' guidance in support of Part 2 of the FMA Act around fair dealing provisions and avoiding false, misleading and unsubstantiated representations.</p>	<p>2. Consider adding to Page 6 list of <i>Other relevant guidance and resources</i>, the FMA's Disclosure Framework for integrated financial products.</p> <p>3. In the case that an advertising offers occurs (for the purposes of Part 3), it may be prudent that the relevant ESG factors of a product also be required to be disclosed as part of the advertising provisions.</p>

Feedback summary – Nil

Thank you for your feedback – we appreciate your time and input.

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Date: February 2021Number of pages: 7

Name of submitter: [REDACTED]

Company or entity: Russell Investments

Organisation type: Global asset manager and investment consultant

Contact name (if different):

Contact email and Phone: [REDACTED]

Question Number	Comment	Recommendation
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You don't need to quote from the consultation document if you use part & paragraph numbers.

You may attach extra pages - please label each page with your name & organisation.

<p>Question 1: General scope</p> <p>The proposed guidance is applicable to all advertising and promotion of offers of financial products, including advertising relating to offers subject to an exclusion in Schedule 1 of the Financial Markets Conduct Act 2013 (the FMC Act), and including all financial product types.</p> <ul style="list-style-type: none"> Do you agree with the scope of the guidance? Do you think the guidelines need to differ for advertising of different types of financial product offers? Do you think the guidance adequately captures all relevant parties involved in advertising and promoting offers? 	<p><i>Please note, we have limited our comments to areas in which we have specific experience and ongoing involvement (i.e. fund and wealth management and advice)</i></p> <ul style="list-style-type: none"> We agree that the scope should be broad, however believe it should go further to cover products or services that fall outside the definition of a 'financial product' in the FMC Act (i.e. 'restricted communications'). For instance, while the guidance states it 'may also be applicable to the advertising of financial services' it does not appear to specifically cover some services (e.g. 'model portfolios' or individually managed accounts (IMAs) offered by brokerages and wealth managers), even though the representatives of these firms/product sponsors are likely covered by the fair dealing provisions in the FMC Act. Both model portfolios and IMAs are promoted to retail investors and should, in our opinion, be subject to substantially the same requirements as Managed Investment Schemes (MIS) and other covered financial products and services. <p>Additionally, in many cases, 'firm promotion', is in effect 'product promotion'. As such, the guidance should be extended to include advertising and promotion of financial product and service <i>providers</i>, not simply the products themselves.</p> <p>We support the general approach taken by the FMA in developing guidance that is principles-based rather than overly prescriptive, as it provides the flexibility for firms to generate original, relevant and useful information for their clients and prospective clients. However, we believe there should be enough information for market participants to ascertain what is permissible and/or recommended and what is clearly deemed inappropriate. In our opinion, the proposed guidance does not go far enough. For instance, in guidance on the use of performance exhibits (discussed</p>	<ul style="list-style-type: none"> Revise guidance to include products or services offered by financial services providers that may fall outside of the definition of a 'financial product', for instance model portfolios and individually managed accounts. Revise guidance to ensure that all public communications by persons associated with firms involved in the sale or distribution of financial products or services also be covered or at least the circumstances in which it will apply to services.
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	<p>further later), there could be examples of practices that may confuse and/or mislead and thus should not be used in isolation (if at all). Or, there could be specific examples of behavior that would be deemed inappropriate for persons associated with providers of financial products (for instance, unsubstantiated claims made about the efficacy of one style of investment over another, misrepresentation of a competitor’s strategy and results in the public domain).</p> <ul style="list-style-type: none"> • We note the guidance reference to ‘any form of communication made to the public... for the purposes of promoting an offer or intended offer’, includes ‘advertising’ in newspapers as well as advertorials. However, we believe there should also be specific reference to opinion pieces or supplied articles, interviews and/or videos to newspapers, websites and other medium, even if they are not explicitly referencing a covered financial product or service. For instance, we have regularly witnessed occurrences where persons associated with firms that offer covered financial products or services have made unsubstantiated or exaggerated claims or have promoted falsehoods in newspaper opinion pieces, seminars, interviews and/or videos in relation to particular issues that are likely to be relevant to retail consumers. We believe these persons have in effect been advertising their firms and products and thus should be held to the same standards as applied to when persons are directly promoting their financial products. 	
<p>Question 2: Short form advertising</p> <p>We are aware of current market practice where a user may “click through” a short-form advertisement (e.g. from a Google search, LinkedIn, Facebook, Instagram, Stuff.co.nz, etc.) to a second webpage (often maintained by the issuer) where information required by sections 90-92 of the FMC Act is located. Our position is that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restrictions. If the provisions cannot be complied with, then a short-form advertisement must not be made. Do you agree with this position? If</p>	<ul style="list-style-type: none"> • Yes, we agree with this position. We see many examples of short-form advertisements which have the potential to confuse and/or be misleading, some examples of which are detailed in the response to Question 3. We also note that even when landing on a second webpage, in many cases consumers are encouraged to visit the Disclose Register or other documents to find out more detailed and relevant information. While we recognise the importance of the legal disclosure documents, requiring retail consumers to visit multiple websites and scroll through long documents is contrary to global best practice in fund and wealth management, where the current emphasis is on all relevant information being available on simple and easy to use financial product webpages. 	

<p>not, can you please explain why?</p>		
<p>Question 3: Potential gaps</p> <p>Are you aware of examples of poor conduct or need for guidance in the advertising of financial products that have not been addressed, or adequately addressed, in the proposed guidance, including specifically the advertising guidelines?</p>	<ul style="list-style-type: none"> • We are aware of multiple examples of what we would consider poor conduct regarding the advertising and promotion of financial products and services (and the firms that offer them). We note that advertising and promotion standards in New Zealand are lower than in other markets in which we operate, for instance the US and Europe, where firms and associated persons are generally afforded less leeway and flexibility in how they advertise and promote their capabilities and products (i.e. fines for false/misleading advertising and misrepresentation of performance; strict rules around disclosure of conflicts of interest; investment in products offered by affiliated firms; fair presentation of performance, fees and the broad adoption of the CFA Institute’s Global Investment Performance Standards (GIPS); and, broad acceptance of the CFA Institute’s Code of Ethics and Standard of Professional Conduct). The widespread use of commissions, retrocession payments and rebates by financial product providers to compensate financial advisors for selling their products raises the prospect that end consumers are confused and/or misled about why products are being recommended to them. As a result of this market dynamic, we believe it is necessary that advertising and promotion standards are of the highest standard and reflect global best practices. In our view, any guidance on the topic should promote clarity, transparency and fairness in presentation while also encouraging firms and persons involved to produce enough relevant content that enables peer comparison and helps consumers make informed decisions. We also believe there should be real consequences for material breaches. <p>In addition to earlier comments addressing Question 1, we believe the guidance could go further, specifically in the following areas:</p> <p>(i) <u>Performance history</u>: We support the guidance that past performance is not overemphasised in advertising and promotion, as, among other things, it has shown to be a poor indicator of future results (Based on our experience, a fact that would be known by few retail investors). While we are generally supportive of the FMA’s principles-based approach, we believe there should be more prescription regarding the minimum requirements for presentation of performance in any form of advertising or promotion, including on provider websites.</p> <p>We have seen, and continue to see, many examples of:</p> <ul style="list-style-type: none"> - ‘cherry-picking’ of returns; 	<ul style="list-style-type: none"> • Revise guidance to include more detailed examples of best practice and recommendations as well as more examples of common conduct that falls short of expectations. This would be consistent with the approach taken in other jurisdictions, for example Australia. ASIC’s RG 234 ‘Advertising financial products and services (including credit)’ (RG 234) provides examples throughout of both good practice and practice that would not meet the requirements. • Revise guidance to refer to the CFA Institute’s advice on performance presentation as an example of global best practice: <i>‘Investment performance must be fairly represented and fully disclosed. Information regarding the risks taken, the costs incurred, and the results achieved allow investors to understand their portfolio’s performance and fairly evaluate their investment managers.’</i>

	<ul style="list-style-type: none"> - reference to short-term performance; - inappropriate use of peer universe rankings (i.e. the Morningstar KiwiSaver reports, comparing gross of fee ‘advisory’ performance versus net-of-fee fund performance); - displays of performance generated with little real money (or none at all, i.e. ‘simulated’ performance). Additionally, we see performance records being displayed in isolation (i.e. without additional more representative data) which bear little resemblance to the <i>actual</i> results achieved by any meaningful number of investors in a particular financial product or service. Specific examples of poor performance presentation practices include: <ul style="list-style-type: none"> o since inception cumulative growth charts, which may be based on relatively low asset levels and presented in isolation (i.e. without alternative, more meaningful exhibits) o model portfolio returns which ignore transactions costs and platform fees o net of fee KiwiSaver or managed funds returns which ignore ‘member’ fees. o returns displayed with no reference to an appropriate benchmark o returns displayed with no reference to risk or potential for loss of capital o ‘Simulated’ returns, with little discussion as to the methodology employed and limitations <p>We believe the FMA should, in its guidance, provide specific details as to what is required to be presented <i>whenever</i> performance is referred to in any advertising or promotional material (and we include websites and fact sheets in this definition). For instance, at a minimum, trailing period, net of fee returns over specified time periods (i.e. 1 year, 3 year, 5, year, 10 year, 15 year, since inception and calendar years).</p> <p>We refer the FMA to the CFA Institute’s 2020 GIPS for both pooled funds and composites for further information and believe that to be an excellent summary of global best practice in performance calculation and presentation. Alternatively, we recommend that the FMA consult the websites of major mutual fund providers in the highly regulated markets of Europe and the US which display all information detailed above.</p> <p>(ii) <u>Benchmarks and performance objectives</u>: Where performance is referred to or displayed, and in all advertising and promotional material for financial products, we believe benchmarks and performance</p>	
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	<p>objectives should feature prominently. Performance benchmarks should also be relevant, appropriate and reflective of the investment objective and investment strategy. This allows consumers, when evaluating performance, to separate what is essentially ‘beta’ or market-generated return and what is truly ‘alpha’ or value-added. Consumers should be able to ascertain, from the information provided, what value has been added by the fund or wealth manager (we do acknowledge that this concept may go over the heads of many retail investors).</p> <p>We see many examples of financial product providers using wholly inappropriate performance benchmarks, often as the basis to calculate performance fees based on complex formulas and processes¹. In cases where benchmarks are used that are not reflective of the investment strategy employed, firms should be mandated to clearly highlight this in all advertising and promotion.</p> <p>We also note the widespread use of customised and spliced benchmarks. In such cases, there should be frequent and clear disclosure as to the make-up of the composite benchmark and its calculation method and how the benchmark has changed over time.</p> <p>We are supportive of this section of the proposed guidance, however (and notwithstanding our preference for the principles-based approaches), we believe there is scope to provide further information and detail, perhaps by way of examples and best practices. We note that this would be in keeping with guidance in other jurisdictions (e.g. ASIC’s RG 234).</p> <p>(iii) <u>Tables, charts, graphs, and diagrams</u>: As above, we are supportive of the guidance covering exhibits but believe there should be more detail as to what is acceptable including examples of what is not acceptable (and thus has the potential to confuse and/or mislead consumers).</p> <p>As an example, the prominent display of since inception cumulative return performance charts (either gross of fees or net of fees), in isolation, can be highly deceptive, giving the impression of consistent, strong performance over the long-term (either absolute or relative), when in fact the actual history, when viewed from a periodic trailing return perspective may be more mixed.</p>	
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¹ The use of absolute return, hedge fund or cash-plus benchmarks to calculate performance fees for fully-invested, long-only investment strategies is, in our opinion, clearly inappropriate for retail investors and would appear to breach the FMA’s own guidance that firms should not be rewarded through performance fees for delivering what is in effect market beta. We see multiple examples of this, both listed and unlisted financial products, and believe that, at a minimum, the firms offering such unfair fee structures should be mandated to highlight that they are breaching the FMA’s guidelines on performance fees in all promotional and advertising material (and not simply buried in PDS documents). Based on our experience, most retail investors are incapable of making distinctions about ‘alpha’ and ‘beta’ returns and ill-equipped to assess the appropriateness of complex performance fee arrangements. As such, they should be afforded maximum protection in situations where firms do not follow the spirit of the FMA’s guidance concerning performance fees. The declining interest rate environment of the last decade has meant that many performance fees hurdles have declined significantly, even as equity and bond markets have delivered very strong ‘beta’ returns. This should also be highlighted in performance fee disclosures, perhaps by way of examples.

	<p>As mentioned earlier, we are generally supportive of the principles-based approach taken by the FMA in its draft guidance. However, we believe that performance presentation and fee disclosure are particularly important for retail investors and thus it may be appropriate to set out minimum requirements and best practice regarding presentation and disclosure.</p> <p>As noted earlier, GIPS, developed by the CFA Institute and adopted by thousands of firms around the world (although not extensively in New Zealand) are an appropriate starting point. They have guidance on how pooled fund performance should be presented including gross and net returns, standard deviations, product and firm assets.</p> <p>In addition, we believe it should be mandated that appropriate performance benchmarks are displayed, named and detailed (including if there have been any changes historically) in fund and wealth management product promotion and advertising.</p> <ul style="list-style-type: none"> • <u>Clearly disclose fees and costs:</u> We note that the guidance provides commentary on fee disclosures. We believe there should be more prescription as to how and where fees are displayed. We note the use of performance-based fees for retail investors is widespread, whereas in the institutional market they are used infrequently. Performance fees for retail long-only funds based on absolute return targets (for instance, the OCR +5%) have resulted in significantly higher fees than would have been paid under more traditional fee models found in other markets. In our opinion, fund managers should be required to clearly state such fee arrangements are in direct breach of the FMA’s guidance on performance fees, which state that rewards should be ‘based on factors added by the manager over and above those generally available through investing ‘in the market’, i.e. recognising alpha not beta. We believe when displaying net of fee performance, fund and wealth managers should incorporate all fees and costs in the analysis (recognising, that some such as member fees, as they are typically a fixed amount and may require assumptions about portfolio sizes),). <p>(iv) <u>Comparing different products:</u> We see widespread promotion of high dividend paying shares, real estate and managed funds as an alternative for term deposits with no mention of the potential for significant loss of capital and risk. Where investments are held out to be an alternative to low risk, we believe explicit reference must be made to the potential for significant loss of capital.</p>	
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<p>Question 4: Offers restricted to wholesale investors</p> <p>Do you agree that consumers of advertising for wholesale offers should be made aware immediately in the relevant advertisement that an offer is not available to retail investors? Do you agree with the suggested wording for inclusion?</p>	<ul style="list-style-type: none"> • Yes, we agree with this position and the wording. The requirement is similar to what we experience in other markets where offers are only available to professional or accredited investors. 	
<p><i>Question 5: Miscellaneous</i></p> <p>Are there any other aspects you wish to submit on? For example, are there any unintended consequences that may arise from the proposed guidance that we should be aware of?</p>	<ul style="list-style-type: none"> • Beyond being issued with a stop order, there do not appear to be any real consequences for false or misleading advertising. As a result, we expect practices in New Zealand to remain below global best practice, despite the new guidance from the FMA, which is welcome. In other markets in which we operate, regulators regularly fine market participants for breaches of advertising and promotion. 	<p>Consideration be given to expanding the enforcement options available to the FMA for contraventions of the fair dealing provisions in the FMC Act.</p>
<p>Feedback summary –</p> <p>Russell Investments welcomes the FMA’s consultation into this topic and the development of regulatory guidance. As noted above, we are generally supportive of the principles-based approach taken by the FMA in its draft guidance. However, we believe that as performance presentation and fee disclosure are matters of paramount importance to retail investors the guidance would benefit from more specifics as detailed above, including provision of examples where possible. Financial products are extremely complicated and subject to significant risk. They are typically ‘sold’ rather than ‘bought’ to retail investors generally lacking in knowledge and understanding. Thus, we believe they should be afforded the maximum protection. We are happy to discuss further if that is of interest.</p>		
<p>Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.</p>		
<p>Thank you for your feedback – we appreciate your time and input.</p>		

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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. Submissions close on 16 February 2021.

Date: 16 February 2021 Number of pages: [5]

Name of submitter: [REDACTED]

Company or entity: Russell McVeagh

Organisation type: Law firm

Contact name (if different):

Contact email and Phone: [REDACTED]

Note: This submission reflects the views of the authors as securities law practitioners within the firm. It does not reflect any client instruction or interest.

Question Number	Comment	Recommendation
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You don't need to quote from the consultation document if you use part & paragraph numbers.

You may attach extra pages - please label each page with your name & organisation.

<p>Question 1: General Scope</p>	<p><i>In general terms, we agree with the scope of the guidance and consider that it will be useful for issuers to have a practical guide of the expectations that the FMA has to assist in compliance and best practice. Similar guides are observed and referred to in a number of jurisdictions.</i></p> <p><i>Given the importance of the guidance, we think that it is important that it is clear in its scope, principles and recommendations. In this regard, we make the following core comments:</i></p> <p><i>1. Consistency across communications – the draft guidance suggests in a number of places that the advertisement must give consistent information across different communications channels, so that people receive the same impression of a financial product, regardless of the source. We disagree with this. Instead, we think it is important that the information within the specific advertisement is not inconsistent with the PDS and is reasonably balanced in terms of its content. To illustrate, a radio advertisement may just convey that the ACME share offer is happening now and how a copy of the PDS may be obtained. This may convey relatively little impression of the product – whereas a term sheet, or investor presentation slide deck may set out much more information such as the development activities ACME will undertake with the money raised may convey a</i></p>	<p><i>Refer to the comments, with a view to focusing on balance of content within the individual advertisements, rather than consistency across all advertisements for the offer.</i></p> <p><i>Clearer expectations on when disclosure on risks is required – consider aligning with the Australian guidance on this.</i></p>
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much greater impression of the product. In our view, what is important is that each advertisement is balanced and not misleading with regard to its own content.

2. Guidance on balance – further to comment (1), the draft guidance provides relatively little guidance on how balance is achieved (see the short section on page 11 of the draft). In particular, there is only a short statement in relation to risks – "nor should they exaggerate or give undue prominence to the potential benefits of a financial product, or portray returns at the expenses of clear information on significant risks". During the experience of the Covid-19 capital raising cohort of issuers, we observed a practice develop where risks were disclosed in the investor presentation. We understand that this was largely informed by the Australian practice in line with guidance from ASIC - particularly RG 247.62. This provides a much clearer expectation of when risks should be disclosed which we think would be helpful. For example... "It is important that a discussion about future prospects is balanced. It is likely to be misleading to discuss prospects for future financial years without referring to the material business risks that could adversely affect the achievement of the financial prospects described for those years." (RG 247.62). We think it would be useful for the FMA to enhance the guidance to more clearly state its expectations in this regard. Given the high number of Australian dual listed issuers, we think that it would be useful to be consistent with the Australian position referred to above.

3. Disclaimers – Page 13 briefly discusses that warnings, disclaimers and qualifications in advertisements must be prominent and consistent across different channels. We agree that warnings and disclaimers are important and appropriate in advertisements relating to financial products and other offering documentation. We note guidance from case law which indicates that these do not provide full relief from fundamentally misleading information. Rather they should identify that there are risks in relying on the information in question due to its nature, in line with the "bespeaks caution" doctrine which permeates securities case law in common law jurisdictions. Equally, it is understood that there are limits on their effectiveness to provide a complete relief of liability where the information has no basis to start with – for example "A reasonable person would not regard a standard form disclaimer as gutting the opinion or forecast of meaningful content. While forward-looking statements on earnings guidance have inherent uncertainties, a general disclaimer is unlikely to relieve the company from the obligation to have a reasonable basis for ... its earnings guidance."¹ It may be useful to provide greater guidance and clarity in the draft on these matters.

¹ TPT PATROL PTY LTD (as trustee for AMIES SUPERANNUATION FUND) v MYER HOLDINGS LTD (2019) 140 ACSR 38 at [1153], [1351]–[1363].

	<p><i>Further, similarly with comment (1) – any disclaimer should be appropriate having regard to the content of the advertisement. They need not be consistent across all advertisements – an advertisement that included no information on future business intentions or performance should not require a disclaimer commonly found on forward looking information, despite being used in a different advertisement for the same product. Such an approach is also consistent with the position adopted by the Courts (particularly in Australia) which indicate that it is the overall impression given that is relevant and disclaimers in contemporaneous documents would also be taken into account – For example, in the Myer case, in considering Myer's position that a statement had been made did not convey that Myer would achieve a minimum net profit the Judge held that "The position is also to some extent fortified when regard is had to the disclaimers in contemporaneous documents that were part of the webcast when the 11 September 2014 representation was made"².</i></p>	
<p>Question 2: Short form advertising</p>	<p><i>The FMA has identified the position under FMCA any advertisement that is placed with the purpose of promoting an offer is subject to sections 89 – 92 of the FMCA, regardless of any content or length restriction. The FMA has also referred to practice where a user may “click through” a short-form advertisement (e.g. from a Google search, LinkedIn, Facebook, Instagram, Stuff.co.nz, etc.) to a second webpage where information required by sections 90-92 of the FMC Act is located.</i></p> <p><i>As a starting point we think that, if the click through only provides minimal information, that would either be skipped over or would require the reader to click through to engage with the content if interested, it should be treated as a single advertisement with the landing page that provides that content. A possible test to determine whether click through content would be an advertisement is: whether a reasonable person would be influenced to make an investment decision based solely on the content of the click through link alone (without the separate landing page). In this case, the initial click through would be its own standalone advertisement.</i></p> <p><i>In this regard, we encourage a practical approach. The purpose of these advertisements is to access an increasingly large audience that is interested in investing, particularly through the secondary market, where social media or online content is their main point of attention. A possible implication if a stricter, "black letter" approach is taken is that without using a "buttons" etc, the offer cannot be offered through online channels in turn driving distribution of securities offerings back towards traditional channels, such as</i></p>	<p><i>See discussion – including a suggested approach of treating the button and landing page as a single advertisement, within certain parameters.</i></p>

² At [1150].

	<p>clients of larger brokerages with underwriting capacity. We think the better approach would be to treat a "button" and the subsequent landing page as a single advertisement with an emphasis on providing balanced information on that landing page which is likely to influence the investment decision. We think that is consistent with the underlying policy of those sections.</p>	
Question 3: Potential gaps	<p>The guidance refers on page 5 to the fact that advertising can be via any medium and goes on to refer to forums where issuers and investors can communicate.</p> <p>The place of forums for securities commentary which goes beyond offering a financial product has obviously become more relevant since the Gamestop trading frenzy.</p> <p>As concerns advertising, the requirements of sub-part 3 of Part 3 of the FMCA only apply if the advertisement is authorised or instigated by, or on behalf of, the issuer or offeror, or an associated person. Advertisements are also defined with regard to an offer or intended offer of financial products or financial services.</p> <p>We would generally expect an issuer to stay well out of any online forum in marketing or discussing its securities offerings.</p> <p>We note that the FMA has made comments recently as to who may be responsible for those forums. In our view, responsibility for moderating the forums should rest with those who provide the forums. Issuers and offerors should only be responsible for the content they choose to place on the forum and not for third party content or comment. This is consistent with defamation law and also generally aligns the responsibility with the person likely to be commercialising the platform and who has control of it.</p>	See comments.
Question 4: Offers restricted to wholesale investors	<p>We agree that an advertisement for an offer that is only available to wholesale investors should state that it is only available to wholesale investors. We do not agree with the suggested wording the FMA has proposed which goes on which require a statement that the offer is not suitable for retail investors.</p> <p>The Financial Market Conduct Regulations require a warning statement as to suitability of the investment only for certain types of offers, being:</p> <ul style="list-style-type: none"> • an issue of convertible financial products; • an issue of derivatives; and • an issue under the wholesale investor exclusion and the minimum amount payable on acceptance is \$750,000. <p>Even these regulations are not consistent with the general position under securities law that disclosure is paramount. The exclusions from the offer and sale provisions in</p>	That the suggested wording is amended to "this offer is available to wholesale investors only and is not available to retail investors. The requirements to meet the wholesale investor criteria are described in the Financial Markets Conduct Act 2013."

	<p><i>schedule 1 of the FMCA are generally built on the premise that due to the nature of the offerees they can obtain and digest information, such that they do not require disclosure through a PDS. As concerns the PDS – which is focused on disclosure rather than suitability – it is common for very risky (and objectively unsuitable) investments to be offered to retail investors under a PDS on the basis of the principle of disclosure. Equally, very safe bonds (which would typically be regarded as suitable for retail investors) could be offered only to wholesale investors only if the issuer did not wish to incur the cost of preparing a PDS.</i></p> <p><i>Therefore, our view is that the requirement for references to the offer not being suitable for retail investors should be removed from the guidance – as being inconsistent with fundamental principles of securities law which are based on disclosure rather than suitability.</i></p>	
<p>Question 5: Miscellaneous</p>	<p><i>On page 8, under contravention through involvement, an example is given for which circumstances a director or senior management might be liable for misleading conduct carried out by an issuer.</i></p> <p><i>The example is a summarised version of section 533 of the FMCA.</i></p>	<p><i>The Proposed Guidance should be amended to clarify that the accessory liability provisions are wider than the example given. Reference to section 533 could be included by way of footnote.</i></p>
<p>Feedback summary – <i>if you wish to highlight anything in particular.</i></p>		
<p>Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.</p>		
<p>Thank you for your feedback – we appreciate your time and input.</p>		

Friday 19 February 2021

Financial Markets Authority
Level 2, Grey St
Wellington 6140

By email: consultation@fma.govt.nz

Dear Financial Markets Authority,

Consultation on proposed Guidance: Advertising offers of financial products under the Financial Markets Conduct Act 2013

The Securities Industry Association (SIA) wishes to thank the Financial Markets Authority (FMA) for the opportunity to provide feedback on the proposed guidance for 'Advertising offers of financial products under the Financial Markets Conduct Act 2013'.

The Securities Industry Association supports the FMA's intent to provide guidance on financial services advertising with respect to the influence it may have on investor knowledge and behaviour. Our submission is attached with comments on the proposed draft Guidance. We welcome further discussion on this issue should the FMA have any questions on this submission or require additional information on the industry's advertising activities.

We are committed to supporting the intentions of the Guidance and welcome the opportunity to discuss this further. If you have any questions or require further information, in the first instance, please contact:

[REDACTED]

Yours sincerely

[REDACTED]

[REDACTED]

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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. **Submissions close on 16 February 2021.**

Date: 19 February 2021

Number of pages: 3

Name of submitter: [REDACTED]

Company or entity: Securities Industry Association (SIA)

Organisation type: Industry association

Contact name (if different):

Contact email and Phone: [REDACTED]

Question Number	Comment	Recommendation
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*You don't need to quote from the consultation document if you use part & paragraph numbers.
You may attach extra pages - please label each page with your name & organisation.*

<p>Question 2: Short-form advertising</p>	<p>The Securities Industry Association does not agree with the position "that sections 89-92 of the FMC Act apply to all advertising regardless of any length or content restrictions. If the provisions cannot be complied with, then a short-form advertisement must not be made."</p> <p>We are of the view that the application of the fair dealing provisions should take an appropriate and proportionate approach taking the advertising medium into account.</p> <p>In order to use short-form online advertising slots on providers, such as and for example only, Google Search (AdWords), NZ Herald and many other digital platforms, advertisers are required to comply with strict character limits for each part, for example, title, description, link text. The advertising product has a template format with no flexibility.</p> <p>By way of example only:</p>	<p>SIA recommends that that where there is a short-form ad with a link to a landing page, then the "advertisement" should be considered to be the ad plus the linked page.</p> <p>This reflects the reality of the nature of digital marketing and that more information is available and easily accessible – the initial advert is only the introductory component of the advertisement and ongoing relationship with the financial service.</p>
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1. Google AdWords (sometimes referred to as Search Engine Marketing or Google ads)

For Google AdWords, there is a 30-character limit on the headlines (the large link at the top of an advert, that typically appear on the top of the results page) and a 90-character limit on the descriptions (the text underneath). There is, therefore, very limited (if indeed any) space available for the placement of disclaimers.

Google AdWords are widely used by a broad range of financial services companies, with disclaimers included on their landing page.

2. NZ Herald online advertising (the same applies to other providers, such as Stuff but they may have slightly different character limits)

NZ Herald ads are another example of strict rules on character limits – 60 characters for the title and 100 characters for the description.

3. Social media channels

Social media character limits are not necessarily as stringent as the examples above. However, if ads don't fall within specific word and image parameters, then the reach of your advert is penalised – meaning you are paying for an advert to reach fewer people. Financial services companies ensure that the fair dealing provisions are complied with by providing a link to the main disclaimer on the website landing page.

Feedback summary – if you wish to highlight anything in particular

The Securities Industry Association supports the FMA’s intent to provide guidance on financial services advertising with respect to the influence it may have on investor knowledge and behaviour.

In particular, SIA believes that short-form advertisements should be viewed as an initial or introductory part of the promotion; they should not be viewed in isolation. They should be viewed in combination with the website that it links to where further disclaimer information can be read.

Online marketing channels are a fundamental tool within digital marketing campaigns. The most influential factors contributing to their success are the creative and messaging used. Sections 89-92 of the FMC Act are not compromised through the use of ‘click through’ short-form advertisements as the risks are adequately managed by the lengthier disclaimer being displayed prominently on the web landing page. If lengthy text is required on short-form advertisements, it is unlikely firms would continue to invest in these channels in future. This would impact the future success of digital marketing campaigns, as well as limiting the promotion of financial advice and products to consumers.

Typically, adverts in these short-form places only have ‘Learn more’, ‘Find out more’, ‘Contact us’ or similar as the calls to action. That implies there is more information a person needs to read/consider before taking an action. This should mean firms are able to only include disclaimers in a landing page that is clicked to from an advert, where the claims are being explained/substantiated in much greater detail.

SIA recommends that the FMA provides guidance to the industry on how it might continue to use short-form advertising as it is a necessary tool for digital marketing. We recommend that where there is a short-form ad with a link to a landing page, then then the “advertisement” should be considered to be the ad plus the linked page.

Thank you for the opportunity to provide comment on the proposed Guidance for Advertising offers of financial products under the Financial Markets Conduct Act 2013. We welcome further discussion on this issue if the FMA has any questions on this submission or requires additional information on the industry’s advertising activities.

Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

Thank you for your feedback – we appreciate your time and input.

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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. Submissions close on 16 February 2021.

Date: 18/11/2020 Number of pages:

Name of submitter: [REDACTED]

Company or entity: Six Step Financial Services Limited

Organisation type: FAP

Contact name (if different):

Contact email and Phone: [REDACTED] [REDACTED]

Question Number	Comment	Recommendation
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You don't need to quote from the consultation document if you use part & paragraph numbers.

You may attach extra pages - please label each page with your name & organisation.

Question 3	Much tighter control or banning adverts for personal loans	At the very least retail personal lending advertisements must finish with the important caveat - you should seek independent financial advice before proceeding with any high interest rate personal lending

Feedback summary – if you wish to highlight anything in particular

Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

Thank you for your feedback – we appreciate your time and input.

Something that has always troubled me significantly is when I see ads on television like the one currently playing where the woman says something like... Sometimes I save and sometimes If I want something I just borrow, it just makes sense, right?

This sort of advertising just plays to the financial illiterate and vulnerable consumer. As a Certified Financial Planner I coach people to understand the difference between consumer debt and investment debt or another way of putting it is the purchasing of depreciating items against appreciating items.

People have to understand the concept of deferring pleasure so they have a choice later on in life. They also have to understand the concept of compounding returns. This can be either in your favour or in the case of the person with personal loans with exorbitant interest rates very much against them.

So my recommendation would be a very strict oversight on the sorts of advertisements so they adhere to the concept of good financial advice. That oversight must be conducted through experienced financial planners so that vulnerable consumers are made to think.

Let's face it borrowing for a consumer product at 12.95% per annum does not make sense in fact the exact opposite but that is what they are telling the consumer to do.

Einstein said the eighth wonder of the world is compounding returns – those who understand it get it those who don't pay for it.

Let's not encourage vulnerable consumer to think personal debt is okay

16 February 2021

Financial Markets Authority
Level 2, 1 Grey Street,
Wellington, New Zealand
by email only: consultation@fma.govt.nz

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

Smartshares Limited (**Smartshares**) submits this response to the FMA's consultation regarding the 'Proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' (**Draft Guidance**).

Smartshares is a licensed managed investment scheme manager, and a continuous issuer of financial products in relation to its KiwiSaver, workplace savings and exchange traded funds schemes offered under the Smartshares and SuperLife brands.

We endorse the FMA's efforts to provide further guidance in relation to its expectations of good conduct in relation to the advertising of financial products, which will provide greater clarity and certainty for the industry.

We encourage the FMA to consider whether the interpretation of the term 'advertisement' should be narrowed, so that communications about an issuer, are excluded from the scope of the Draft Guidance. We do not consider that an issuer's brand marketing activities should be treated as an advertisement for the purposes of the disclosure obligations of Part 3 of the FMC Act.

We also suggest that the FMA further consider its view that 'click through' advertising is not permitted under the FMC Act, given that the legislation does not expressly prohibit this practice, but requires that the prescribed statements are 'reasonably prominent'. We consider that issuers should be permitted to utilise 'click-through' advertising where they are constrained from providing the prescribed language due to word or length restrictions of the medium being used, for example: banner advertisements; or, advertisements on platforms such as Google search and LinkedIn. The FMA's current interpretation will result in issuers being unable to fully utilise the benefits of modern technology to advertise their products, narrowing their reach to potential investors. We suggest that the Draft Guidance could more usefully mitigate the potential risks to investors, by including principal-based statements as to the FMA's conduct expectations for short-form advertising.

Our further detailed comments on selected questions from the consultation paper relating to the Draft Guidance are set out below. Thank you for the opportunity to provide this submission.

Yours sincerely,



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

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback: proposed guidance on advertising offers of financial products under the Financial Markets Conduct Act 2013' in the subject line. Thank you. **Submissions close on 16 February 2021.**

Date:	16 February 2021	Number of pages:	5
Name of submitter:	[REDACTED]		
Company or entity:	Smartshares Limited		
Organisation type:	Licensed Managed Investment Scheme Manager		
Contact name (if different):	[REDACTED]		
Contact email and Phone:	[REDACTED]		

Question 1: General Scope

(a) Do you agree with the scope of the guidance?

Comment 1

As noted in our introductory comments, we consider that the term 'advertisement' is cast too broadly in the Draft Guidance. In particular, the box on page 9 of the Draft Guidance suggests that communications about an issuer may fall within the definition of an 'advertisement' under Part 3 of the FMC Act. We disagree that an issuer's general brand marketing activities should attract the Part 3 disclosure obligations. We note that the introductory language of section 6(1) of the FMC Act defines an advertisement as a communication 'in relation to an offer, or intended offer'. We therefore consider that communications made by an issuer should not be considered an advertisement, unless the communication also refers to financial products that are being offered.

We do not consider that fund updates should be treated as advertisements for the purposes of the Draft Guidance. Fund updates are primarily intended to provide existing investors with information about their current investment, rather than to promote an offer. In addition, fund updates are prescribed communications which are subject to their own disclosure framework within the FMC regime (including the requirement to refer to a PDS under clause 73 of the FMC Regulations).

Recommendation 1

We suggest that the Draft Guidance better clarifies the nature of communications that may be regarded as an advertisement, and in particular that the following sentence in the box on page 9 is amended: *'For the avoidance of doubt, engaging in the "promotion of an offer or intended offer" may include communicating information about an issuer and/or the financial products that are being offered'*.

Comment 2

We suggest that the Draft Guidance applies solely to advertisements for financial products, rather than incorporating financial services. Although the fair dealing expectations may apply equally, some of the content of the Draft Guidance may be inapplicable, and/or differential considerations may apply to advertisements of financial services.

Recommendation 2

We suggest that the references in the Draft Guidance to financial services are removed.

(b) Do you think the guidelines need to differ for advertising of different types of financial product offers?

Comment

We agree with the approach taken that the Draft Guidance should be applicable to all types of financial products.

Question 2. Do you agree with the FMA's position in respect of "click-through" short form advertising?

Comment

We agree that care needs to be taken to ensure that short-form advertising is not misleading, due to the implicit size constraints for such communications, in particular to ensure that issuers consider the overall impression of the advertisement, and ensure that short-form advertising is not inconsistent with information contained on a landing page. However, we do not agree with the FMA's position in relation to 'click-through' short form advertising.

In our view, the lack of the prescribed statements in the short-form advertisement itself does not increase risk to investors, so long as the prescribed language is available on a landing-page which an investor must access as part of the application process.

We consider that issuers should be permitted to utilise 'click-through' advertising where they are constrained from providing the prescribed language due to word or length restrictions of the medium being used, for example: banner advertisements; or, advertisements on platforms such as Google search and LinkedIn. The FMA's current interpretation will result in issuers being unable to fully utilise the benefits of modern technology to advertise their products, narrowing their reach to potential investors. This may prejudice more vulnerable customers, who benefit from the simpler language used in short-form advertising and the accessibility of digital communications, as acknowledged in the FMA's [information sheet](#) in relation to vulnerable customers.

We also consider that the FMA's position is not supported by the FMC Act, given that the legislation does not expressly prohibit this practice, but requires that the prescribed statements are 'reasonably prominent'.

Recommendation

We suggest that the FMA reconsiders its approach to "click-through" short form advertising. We suggest that the Draft Guidance could more usefully include principle-based statements

as to the FMA's conduct expectations for short-form advertising to mitigate the potential risks to investors.

Question 4: Offers restricted to wholesale investors

Comment 1

We note that wholesale investors invest outside the regulatory perimeter that applies to regulated offers, and do not receive the benefit of the disclosures contained in a product disclosure statement. We consider that these investors would benefit from additional disclosure in a financial advertisement where the offer is only available for wholesale investment.

Recommendation 1

We suggest that the Draft Guidance recommends prominent disclosure in a financial advertisement of the fact that an offer is only available to wholesale investors. As no product disclosure statement will be available for offers solely targeted at wholesale investors, we suggest that the 'forecast returns' section of the guidance reinforces the importance of clear disclosure of the basis on which performance and fees are calculated in financial advertisements for such offers.

Question 5: Are there any other aspects you wish to submit on?

Comment 1

The Draft Guidance states that the FMA will be particularly interested in the substantiation of representations as to the nature, suitability and characteristics of financial products. We consider that all MIS managers, and in particular KiwiSaver scheme managers, have a role in educating investors about the suitability of their financial products, and a lack of clarity as to how such statements should be substantiated is likely to cause managers to be more hesitant in providing this information.

Recommendation 1

It would be helpful if the FMA could provide examples in the Draft Guidance to illustrate its expectations of good conduct in respect of the substantiation of representations. Although the nature and characteristics of a financial product are more objective and will be easier to substantiate, representations as to the suitability of a financial product will be more subjective in nature. The industry would benefit from further clarity as to the FMA's expectations as to how the suitability of financial products should be substantiated.

Comment 2

In certain parts of the Draft Guidance it is unclear whether the FMA is prescribing language for inclusion in advertisements. We suggest that it would be preferable for the FMA to adopt a principles-based approach to required disclosures to preserve flexibility for issuers, rather than formulating prescriptive statements which was the approach taken by the historical legislation.

Recommendation 2

We suggest that the Draft Guidance clarify whether statements that should be included in an advertisement must follow prescriptive language or must simply address the conduct matter

to which the statement relates. For example: the statement in paragraph 1 of page 13 that *'advertisements that disclose past performance should include a prominent warning statement that past performance is not a reliable indicator of future performance.'*

