FINANCIAL MARKETS AUTHORITY
TE MANA TĀTAI HOKOHOKO

April 2024

Standard Conditions for derivatives issuer licences

Who do these conditions apply to?

Licensed derivatives issuers:

If we grant you a derivatives issuer licence under section 396 of the FMC Act, the licence will be subject to conditions. See section 402 of the FMC Act.

Conditions will include:

- a condition that the licensee or authorised body may, under the licence, only provide the market services or class of market services to which the licence relates and for which each person is authorised under the licence (see section 402(1)(a) of the FMC Act)
- conditions imposed by the FMA under section 403 of the FMC Act – these will generally include:
  - the standard conditions (see **part A** below)
  - any specific conditions (see **part B** below).
- any conditions imposed by regulations (see **part C** below). As at 1 December 2014, the only relevant regulations are the Financial Markets Conduct Regulations 2014.

We will consult with industry prior to changing the standard conditions in part A.

A. Standard conditions

Where a derivatives issuer licence refers to standard conditions, this means the following conditions.

Licensed derivatives issuers that have been granted a licence pursuant to section 396 of the FMC Act are required to comply with all of the standard conditions from 1 December 2014, unless otherwise specified.

1. Prohibition on dealing with unregulated financial service providers

Standard condition:

You must take reasonable steps to ensure that any broker, introducing broker, or white-label derivatives business who does business using the derivatives you issue has the required authorisations, licences or registrations for the jurisdictions it operates in.

Explanatory note: The purpose of this condition is to ensure you only use appropriate delivery channels to sell your derivatives.

2. Outsourcing

Standard condition:

If you outsource a process/system necessary to the effective and proper running of your derivatives issuer service (or any other market services licensee obligation) you must be satisfied that the provider is capable of performing the service to the standard required to enable you to meet your market services licensee obligations and you must have a legally binding agreement with the provider. You must also ensure that records pertaining to the derivatives issuer service are available for inspection when requested by the FMA.

Explanatory note: This condition only covers outsource arrangements related to the licensed business where you rely on the outsource provider to meet your market services licensee obligations. Important information that you may want to consider when conducting due diligence on a proposed outsource provider includes:

- the outsource provider's previous experience
- public reports and information about their service
- reported complaints about them, and their complaint handling procedures
- their operating jurisdiction and any protections/controls imposed in that jurisdiction.

You should regularly review your outsourcing arrangements (at a frequency appropriate to the risk involved) and you should monitor the ongoing performance of the outsource provider. For further information in relation to outsourced services see the outsourcing section of the Licensing Application Guide. You don't need to arrange for the FMA to have direct access to the outsource provider's records, providing we can promptly obtain the records through you.

3. Records

Standard condition:

You must have systems and procedures to maintain relevant records pertaining to your market service and you must provide us with the records we need to monitor your on-going capability to effectively perform as a derivatives issuer in accordance with the applicable eligibility criteria in the Act.

Explanatory note: This standard condition requires you to have arrangements in place so that we can inspect your records without unnecessary delays. We would expect this to involve reliable archival systems and getting client consents in advance. This also requires you to have appropriate arrangements in place with outsource providers (see standard condition 2 above).

4. Regulatory returns

Standard condition:

You must provide us with the information we need to monitor your on-going capability to effectively perform the derivatives issuer service in accordance with the applicable eligibility criteria in the Act. This will include updated information on the nature, size and complexity of your derivative issuer service. Information must be provided in accordance with any Regulatory Return Framework and Methodology we issue under subpart 4, part 9 of the Act.

Explanatory note: In future, all licensees will be asked to provide information to the FMA on a periodic or ongoing basis, or on request, in accordance with the requirements set out in a Regulatory Return Framework and Methodology. Under section 412 of the FMC Act you have obligations to report various matters to the FMA as soon as practicable, including any material change of circumstances. This standard condition is in addition to those reporting obligations and any other reporting obligations that may be imposed in regulations. The regulatory returns will help the FMA to understand the profile of your business and to focus its resources appropriately. This is likely to require reporting of factual business information, such as business volumes and services types, numbers of customers, numbers and types of breaches, and complaints information. FMA will consult with industry prior to publication of the Regulatory Return Framework and Methodology which will form part of the standard conditions.

5. Compliance

Standard condition:

You must have, at all times, adequate and effective systems, policies, processes and controls that are likely to ensure you will meet your market services licensee obligations in an effective manner.

Explanatory note: This condition requires you to keep your systems, policies, processes and controls up to date to ensure you are always likely to be able to meet your market services licensee obligations in an effective manner. Changes may be needed over time as the size or scope of your business changes or due to changes in the market as a whole. You should consider whether your systems, policies, processes and controls are sufficient to meet the requirements of the FMC Act and Regulations by reference to the minimum standards set out in the Licensing Application Guide.

6. Governance arrangements

Standard condition:

Your governance and compliance arrangements must be substantially the same as, or better than, those in place, or which the FMA was advised of, at the time you applied for your licence (or any subsequent change advised to the FMA). You must notify the FMA of material changes to your governance and compliance arrangements as soon as practicable.

Explanatory note: This condition requires you to maintain your compliance and governance arrangements to at least the standard you have told us about, but it allows flexibility for these arrangements to be improved. This condition also requires you to notify us of material changes to your governance and compliance arrangements, which includes any material change to your outsource arrangements, as soon as practicable (which we would ordinarily consider to be within five working days after the change takes effect). For further information in relation to the requirements of your governance and compliance arrangements see the governance and compliance sections of the Licensing Application Guide.

7. Financial resources – Solvency

Note: Standard Conditions 7 to 11 (Financial Resources) will not apply to you if you are a registered bank, a non-bank deposit taker (NBDT) (as defined in the FMC Act), or a licensed insurer.

FMA acknowledges that Standard Conditions 7 to 11 (Financial Resources) may not be appropriate for some derivatives issuer business structures. If you can show the risks to retail investors will not be materially affected by adopting different financial resources conditions the FMA will consider this on a case by case basis at the time of your licence application.

Standard condition:

You must be solvent at all times.

Explanatory note: In this standard condition solvent means you meet both limbs of the solvency test in the Companies Act 1993.

8. Financial resources – Cash flow

Standard condition:

You must:

1. prepare within one month prior to your balance date and the date six months after your balance date, a rolling forecast of your cash flows over the next 12 months based on your reasonable estimate of revenue, expenses and other cash flow items over the term

2. document the calculations and assumptions used in preparing your cash flow forecasts, and explain in writing why the assumptions are appropriate
3. have your cash flow forecast approved by your board of directors or governing body as being reasonable estimates of receipts and payments over the period
4. review your actual cash flows against your cash flow forecast promptly following the end of each calendar month, and document the reasons for any significant variations
5. update your cash flow forecast if there is a reason to suspect an updated projection would show you are not meeting, or will not continue to meet, the financial resource requirements applying to you
6. demonstrate, based on the cash flow projection, that you will have access, when needed, to enough financial resources to meet your liabilities over the projected term, including any additional liabilities you project may be incurred during that term and any reasonably foreseeable contingencies
7. demonstrate, based on the cash flow projection, that you will have in cash or cash equivalents, at all time to which the projection relates, an amount equal to or greater than the amount you are required to have in cash or cash equivalents under the NTA requirement
8. make the cash flow projection available to the FMA upon request
9. provide a report to the FMA within three working days if you know or suspect that you have ceased to be solvent, it is likely you will cease to be solvent, or your cash flow forecast shows that your forecast cash expenditure exceeds your cash on hand and forecast cash receipts.

Explanatory note: Cash flow forecasts should be broken down into intervals of no longer than a month. In respect of any significant expenditure which occurs at a single point in time, your cash flow forecasts should show when that amount needs to be paid by, and demonstrate that you have sufficient cash to meet that expenditure at that time. While the forecast must be prepared prior to the commencement of the period, they may be updated after the beginning of the period to reflect actual opening cash balances.

Your calculations, assumptions and explanations form part of your cash flow forecast, and must be approved by your board or governing body as required in paragraph 3, updated as required by paragraph 5, and be included in, or accompany, your cash flow forecast at any time you are to provide your cash flow forecast to the FMA or your auditor.

The approval required under paragraph 3 should be prior to or very soon after the beginning of the period to which the forecasts relate. For the purposes of this requirement and the audit requirement in Standard Condition 11, your governing body includes:

- if you are not a company, a committee:
    - comprising all, or some, of your directors (as that term is defined in the Act)
    - having substantially equivalent powers and responsibilities as the board of directors of the company
- if the FMA has, in the course of considering your licence application or subsequently, accepted a body other than your board of directors as the body which will provide governance level oversight over your derivative issuer business, that body.

Your review under paragraph 4 should consider whether:

- any variations during the previous months indicate that assumptions may no longer be valid
- any significant new expenditure items will need to be met within the remaining term of your cash flow forecast, and should be included in your forecast, or
- if your opening cash balance for the month is less than forecast, whether this affects your ability to comply with your financial resource requirements.

9. Financial resources – Net tangible assets

Standard condition:

1. At all times your net tangible assets must be, at least, the greater of $1,000,000 or 10% of your average revenue.
2. You must have at least 50% of the required NTA in cash or cash equivalents (excluding any cash or cash equivalents that are held in respect of any liability or obligation to clients) and any remaining balance must be held in either additional cash or cash equivalents, or other liquid assets.
3. You must calculate your NTA:
   a) as at the last date of each month or, if your balance date is not the last day of a month, as at the same date as your balance date each month
   b) as at any other date on which there is a reason to suspect your NTA has decreased from the amount shown in the last calculation to a level that is less than 110% of your required NTA.
4. If you have less than 110% of the required NTA (each being a notifiable event), you must provide a report to the FMA that specifies your NTA as at the date of the report:
   a) within 3 working days after becoming aware of the notifiable event
   b) on the first working day of every week, unless as at the last day of the preceding week your NTA was greater than 110% of the required NTA.
5. If you have less than 100% of the required NTA, you must:
   a) lodge a report with the FMA within 3 working days after becoming aware of the breach that specifies your NTA as at the date of the report
   b) within 10 working days of becoming aware of the breach, provide a plan of how you will replenish your NTA back up to at least 100% of the required NTA
   c) calculate your NTA as at each working day after the date of the initial report, and report your NTA to the FMA on the next working day, until it is back to 100% of the required NTA.
6. Except with the express written approval of the FMA, if you have:
   a) 90% or less of the required NTA or
   b) less than 100% of your required NTA for 20 or more consecutive working days

you must not under any circumstances enter into any transactions with clients that could give rise to any further liabilities, contingent liabilities or other financial obligations.

Explanatory note: Net tangible assets (**NTA**) has the meaning set out in appendix 1 of this document. Failing to maintain 110% of your required NTA is not a breach of your licence conditions, and there is no requirement to recapitalise your business within any particular timeframe. However, having a smaller buffer above the required level may put you at an increased risk of failing to comply with the financial resource requirements. Accordingly, an increased frequency with which you calculate your NTA and reporting to the FMA is appropriate to ensure we receive notice of any breach of your financial resource requirements or any further deterioration of your NTA. Increased reporting will cease where your NTA has become greater than 110% and is reasonably expected to remain above 110%.

Failing to ensure your NTA remains above 100% of your required NTA is a breach of your licence. FMA may take any regulatory action it considers appropriate in the circumstances.

After restoring your NTA to at least 100% of required NTA, you will continue to be subject to weekly reporting under paragraph 4 until your NTA is at least 110% of required NTA.

You are not permitted to enter into any new position with a client if your NTA falls below the levels specified in paragraph 6. However, you are permitted to enter into transactions which close out all, or part, of a client's position, provided that you remain able to carry out your hedging strategy (and the transactions do not increase your total net exposure or the counterparty risks for other clients).

10. Financial resources – Risk management

Standard condition:

You must adequately manage the risks of having insufficient financial resources to meet your financial resource requirements.

Explanatory note: This standard condition requires you to be pro-active in managing your financial resources to meet the requirements.

11. Financial resources – Audit requirements

Standard condition:

1. Each year, you must engage a qualified auditor to provide, to your board of directors or governing body and to the FMA:
    a) an assurance report (the Assurance Report) on the design and operating effectiveness of your financial resources controls throughout your most recently completed accounting period

b) a report of factual findings in respect of your NTA calculation (the NTA Report) as at the end of your most recently completed accounting period on the basis of your audited annual financial statements.

2. You must send the FMA a copy of the Assurance Report and the NTA Report, including a copy of your NTA calculation as at your balance date based on the audited financial statements, by the earlier of:

   a) five working days after the audit report on your annual financial statements is signed

   b) four months and five working days after the end of your accounting period.

Explanatory note: Qualified auditor has the meaning set out in section 461E of the FMC Act.

The Assurance Report and the NTA Report do not need to be addressed to the FMA. However, a copy of the opinion must be sent to the FMA. Additionally, if the report specifies the intended users or disclaims liability to any user, or for any use, other than that intended users and uses, the report should expressly provide that both the licensee's board or governing body and the FMA are intended users, and should not in any way limit the rights of the FMA to rely on that for the purposes of monitoring or enforcing compliance by the licensee with its market services licensee obligations (as defined in the FMC Act).

The Assurance Report

The objectives of the assurance engagement required by this standard condition are:

a) to obtain reasonable assurance about whether, in all material respects:

   i. the controls within the scope of the engagement were suitably designed to achieve compliance with standard conditions 7 to 10

   ii. the controls operated effectively as designed throughout the period

b) to express in a written report a reasonable assurance opinion on the matters in (a) above and describe the basis for the opinion.

The qualified auditor must comply with SAE 3150: Assurance Engagements on Controls (and/or any assurance standard set by the External Reporting Board that replaces all, or any relevant part, of that standard) in forming the reasonable assurance opinion.

The NTA Report

The qualified auditor must comply with APS-1: Statement of agreed-upon procedures standards issued by the New Zealand Society of Accountants (now known as Chartered Accountants Australia and New Zealand) (and/or any standard that replaces all, or any relevant part, of that standard, regardless of the entity issuing any such standard) in providing the NTA Report.

In order to provide the NTA Report based on your audited annual financial statements the agreed upon procedures must include the following (or such procedures to achieve the same outcome):

a) re-perform your NTA calculation in accordance with Appendix 1 and report any differences

b) check each component of the NTA calculation agrees with the relevant information in your audited annual financial statements or **where the information is not included in those financial statements, agree** to appropriate accounting records or other relevant documentation

c) if you have intangible assets or related-party receivables in your audited annual financial statements, recalculate the adjustment required by Appendix 1 and report any differences

d) for any adjustment for subordinated debt made when calculating adjusted liabilities, confirm that:

   i. an executed deed of subordination exists

   ii. whether the amount that has been classified as subordinated debt is not repayable within one year from the date of the NTA calculation

e) enquire of you whether you have provided any guarantees during the accounting period and note any that have not been included in the NTA calculation.

12. Suitability of products for clients

Standard condition: *(This standard condition will be effective from 1 December 2015)*

Before entering into a derivative with a retail investor you must ask the retail investor to provide information about the individual's knowledge, experience and level of understanding of the relevant type of derivative (unless you already have such information) so as to enable you to assess whether the derivative is suitable for the individual.

When assessing suitability you must take all reasonable steps to determine whether the retail investor has the ability to understand the particular type of derivative and the risks involved.

If, based on the information you have concerning the retail investor, you consider that the investor does not have the ability to understand the particular type of derivative and the risks involved, you must not enter into that derivative with the investor.

If the retail investor elects not to provide the information to enable you to assess suitability, or if the investor provides insufficient information, you must warn them that you are required to request information from the investor in order to assess whether the derivative is suitable for the individual. The warning must note that without such information there is a strong risk you will not be able to assess whether they have the necessary ability to understand the derivative and the risks involved. This warning must also be in writing and prominently displayed.

Consequently, you must strongly advise the investor to provide you with any requested information that you believe is necessary to enable you to assess suitability.

If a retail investor asks you to go ahead with entering into a derivative in circumstances where you do not have sufficient information to assess whether the derivative is suitable for the individual, despite you having given the above warning, you may choose whether or not to go ahead with the transaction having regard to all the circumstances.

Explanatory note: This standard condition does not require, or authorise, the licensee to provide financial advice in relation to the derivative. It is independent of, and not related to any obligations under the FMC Act or the Code of Professional Conduct for Financial Advice Services to ascertain the suitability of a financial adviser service. The purpose of the condition is to reduce the possibility of derivatives being sold to people who do not have the ability to understand the derivative or the risks involved.

Where the retail investor is not an individual, the licensee must assess the ability of the relevant director(s), employee(s) or agent(s) (as appropriate) acting on behalf of the investor to determine whether they, either collectively or individually, have the ability to understand the particular type of derivative and the risks involved.

The approach to the suitability assessment may be proportionate to the complexity of the derivative. Where a derivative is more straightforward, it may be that less information is needed from certain retail investors to enable the licensee to determine that those investors have the ability to understand the particular type of derivative and the risks involved.

For example, where an investor buys a simple deliverable forward FX contract there would be no need to do more than check that the investor understands the value of the foreign currency they are buying may be very different (in terms of NZ Dollars) by the time it is delivered. This might be achieved by your past dealings with the investor.

When assessing an investor's ability to understand the particular type of derivative and the risks involved it may be appropriate to consider information such as:

- whether the investor is familiar with the particular type of derivative or other similar derivatives
- the nature, volume, and frequency of other relevant transactions entered into by the investor and the period over which they have been carried out
- the level of education, profession or relevant former profession of the investor
- whether the investor has received financial advice in relation to the derivative and whether the relevant adviser has confirmed that the investor has the ability to understand the particular derivative and risks involved
- the nature of the proposed transaction as a whole.

The standard condition does not require the derivatives issuer to consider all the above bullet points in every case. Other factors may be appropriate. The licensee must decide what steps are reasonable in light of its particular business to determine whether retail investors have the ability to understand the derivatives offered and the risks involved.

This standard condition only applies to transactions entered into on or after 1 December 2015. No review and assessment of transactions entered into before 1 December 215 is required under this standard condition.

13. Business continuity and technology systems

Standard Condition: *(This standard condition will be effective from 1 July 2024)*

You must have and maintain a business continuity plan that is appropriate for the scale and scope of your licensed market service.

If you use any technology systems, which if disrupted would materially affect the continued provision of your market service (or any other market services licensee obligation), you must at all times ensure the operational resilience of those systems – being the preservation of confidentiality, integrity and availability of information and/or technology systems – is maintained.

You must notify us as soon as possible and, in any case, no later than 72 hours, after discovering any event that materially impacts the operational resilience of your critical technology systems, and provide details of the event and impact on your licensed market service and recipients of the service.

Explanatory note: This condition requires you to have suitable arrangements in place to be able to manage disruptions to your business. This is intended to provide recipients of your licensed market service with the security of continuity of relevant services and associated products they receive from you.

Your *business continuity plan* includes the documented procedures that guide you to respond, recover, resume and restore a predefined level of operation following disruption. This plan should provide for the continuity of your licensed market service generally – not just the recovery of your technology systems. It should also encompass any outsource arrangements.

Your plan should consider the loss of availability of your key resources, including staff, records, systems, suppliers and premises. The extent of your business continuity plan should reflect the size and complexity of your market service, operational arrangements and exposure to disruptive events.

A small market services licensee with simple processes and technology may only need a relatively brief plan covering a more limited range of likely disruptive events. A larger or more complex market services licensee, relying more extensively on technology systems and possibly operating from multiple locations, will need to consider a wider range of disruptive events and reflect this in a more comprehensive business continuity plan.

Irrespective of the size or complexity of your circumstances, it is important that your business continuity plan is maintained, reviewed and regularly tested – at least annually. Your business continuity plan must also be updated immediately if there is a material change in business location, structure, or operations.

Critical technology is that which supports any activity, function, process, or service, the loss of which would materially affect the continued provision of your market service or your ability to meet your licensee obligations.

This condition requires that you maintain the operational resilience of your critical technology. This includes:

- regularly identifying and reviewing your operational risks, including cyber risk and threats; and
- implementing measures that maintain the level of operational resilience necessary for your risk profile; and
- having effective processes that monitor and detect activity that impacts your operational resilience; and
- setting out in your business continuity plan your predetermined procedures for responding to, and recovering from, events that impact on your operational resilience.

The operational resilience of your critical technology systems should be managed within the risk tolerance set through your governance processes. We recommend that you use an appropriate, recognised framework for this purpose.

You must have arrangements in place to notify us after discovering any event that materially impacts the operational resilience of your critical technology systems. This includes any technological or cyber security event that materially disrupts or affects the provision of your market service, or has a material adverse impact on recipients of the service. You do not need to notify us of minor events, such as receiving a 'phishing' email that is not successful i.e. has not materially disrupted or affected the provision of your market service, and has not had a material adverse impact on recipients of the service.

You need to provide details of the event including the affected systems, and the impact on your market service and recipients of the service. This should also include projected recovery timelines and remediation activity. If some of the details are not available at the time you discover the event, you will need to provide these details to us as soon as possible. We may also request additional information about the event. We may also specify the format or additional requirements for notifying events to the FMA.

B. Specific conditions

We may also set extra licence conditions for individual entities on a case by case basis, for example:

1. Limits
If you request a limit on your licensed activity, or can only demonstrate the capacity to provide an effective service within certain parameters, we may set limits on your licence.

Any specific conditions will be notified to you at the time we grant you your licence.

C. Conditions imposed under Regulations

Regulations made under the FMC Act may impose additional conditions on your licence. These regulations may change from time to time, so you will need to keep abreast of any new regulations.

The FMC Act and Regulations also contain many obligations that you will need to comply with when you have a licence even though they are not called licence conditions. For example section 412 of the FMC Act requires you to report various matters to the FMA as soon as practicable, including any breach (or likely breach) of your market services licensee obligations and any other material changes of circumstances.

As at 1 December 2014, the only regulation that imposes additional licence conditions on derivatives issuers is regulation 191 of the Regulations. Appendix 2 sets out this regulation, but you should refer to the FMC Act and Regulations in full to understand your market service licensee obligations.

Appendix 1

Net tangible assets (NTA)

For the purposes of Standard Condition 9 (*Financial Resources – Net tangible assets*)

Net tangible assets (**NTA**) has the following meaning:

1. If a market services licensee has notified the FMA it is licensed as a financial services licensee by the Australian Securities and Investments Commission (**ASIC**), and it is required to calculate its net tangible assets (NTA) in accordance with the methodology published by ASIC, then net tangible assets (NTA) shall have the same meaning in that methodology published by ASIC.
2. In all other circumstances, NTA shall mean the market services licensee's **adjusted assets** minus **adjusted liabilities**.
3. **Adjusted assets** means, in relation to a market services licensee, the value of total assets as they would appear on a balance sheet at the time of calculation that has been prepared on the same basis as the market services licensee's financial statements required under part 7 of the FMC Act:
   a) minus the value of any intangible assets (i.e. non-monetary assets without physical substance)

      Explanatory note*: In this context, "intangible assets" includes any intangible assets within the definition of NZ IAS 38 Intangible Assets such as brands, goodwill and management rights as well as deferred tax assets recognised under NZ IAS 12 Income Taxes.*

   b) except when allowed under 4 or 5 below, minus the value of any receivables from, or assets invested in, any person who:
      i. is an associated person (as defined in the FMC Act) of the market services licensee
      ii. was or, if the FMC Act been in force at the time, would have been an associated person of the market services licensee (as defined in the FMC Act) at the time the liability was incurred or the investment was made or
      iii. became liable to the market services licensee in connection with the acquisition of interests in a managed investment scheme the market services licensee operates
   c) minus the value of any assets held as a beneficial interest or interest in a managed investment scheme, in respect of which:
      i. the market services licensee or an associate may exercise any form of power or control
      ii. any part of the amount invested is, in substance, directly or indirectly invested in the market services licensee
   d) minus the value of any receivable that would be included in the calculation, up to the amount that the market services licensee has excluded from adjusted liabilities on the basis that there is an enforceable right of set-off with that receivable
   e) minus the value of any assets that would be included in the calculation that may be required to be applied to satisfy a liability under a credit facility that is made without recourse to the market services licensee up to the amount of that liability excluded from adjusted liabilities

f) plus:

i. the amount of any **eligible undertaking** that is not an asset.

4. Despite 3(b) above, a receivable is not an excluded asset to the extent that:

a) it is **adequately secured** or

b) the following apply:

i. it is receivable as a result of a transaction entered into by the market services licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the market services licensee on an arm's length basis

ii. no part of the consideration for the transaction is, in substance, directly or indirectly invested in the market services licensee

iii. the value of the receivable (before any discount is applied) is not more than 20% of the assets less liabilities of the market services licensee.

5. Despite 3(b) above, the market services licensee can include a receivable to the extent that it is owing by way of fees from, or under rights of reimbursement for expenditure by the licensee out of property of a discretionary investment management service or a registered scheme to the extent that the receivable:

a) exceeds amounts invested by the DIMS or registered scheme in, or lent (other than by way of a deposit with a registered bank in the ordinary course of its banking business) directly or indirectly by the DIMS or registered scheme to, the market services licensee, a body corporate the market services licensee controls, a body corporate that controls the market services licensee or a body corporate that the market services licensee's controller controls

b) if receivable by way of fees, represents no more than the amount of fees owing for the previous three months

c) if receivable under rights of reimbursement for expenditure by the licensee, has not been receivable for more than three months.

6. **Adequately secured** means, in relation to a market services licensee:

a) secured by an enforceable security interest over financial products (other than financial products issued by the market services licensee or its associate) if:

b) the financial products are:

i. regularly traded on:

A. a financial product market operated by a licensed operator

B. a foreign market approved in writing for this purpose by the FMA or

C. interests in a registered scheme for which withdrawal prices are regularly quoted by the manager of the scheme, and the market services licensee believes on reasonable grounds that withdrawal may be effected within five working days

ii. the market value of these financial products is at least 120% of the amount owing, or at least 109% of the amount owing if the financial products are debt instruments or

iii. secured by a registered first mortgage over real estate that has a fair market valuation of at least 120% of the amount owing or

iv. owing from an eligible provider or

v. secured by an enforceable security interest over amounts owing to another market services licensee which themselves are adequately secured.

7. **Eligible undertaking** means the amount of a financial commitment payable on written demand by the market services licensee, provided by an eligible provider in the form of an undertaking to pay the amount of the financial commitment to the market services licensee, and that:

   a) is an enforceable and unqualified obligation

   b) remains operative (even if, for example, the market services licensee ceases to hold a market services licence) until we consent in writing to the cancellation of the undertaking.

8. A market services licensee cannot include as an eligible undertaking any amount committed that would be repayable as a liability by the market services licensee if money were paid.

   Explanatory Note: *A credit facility cannot be counted as an eligible undertaking.*

9. If the market services licensee demonstrates that in exceptional circumstances:

   a) it would be impracticable or unreasonably burdensome for the financial support to be obtained by an undertaking complying with 5 above

   b) the financial commitment would be as effective in meeting the objectives of the financial requirements as an undertaking complying with 5 above

   with the prior approval of the FMA, a market services licensee may treat as an eligible undertaking a financial commitment in a different form.

10. **Eligible provider** means:

    a) a registered bank regulated by RBNZ

    b) an Australian authorised deposit-taking institution (ADI) or

    c) an entity the FMA approves in writing for this purpose.

11. **Adjusted liabilities** means, in relation to a market services licensee, the amount of total liabilities as they would appear on a balance sheet at the time of calculation that has been prepared on the same basis as the market services licensee's financial statements required under Part 7 of the Act:

    a) minus the amount of any liability under any subordinated debt agreement (a copy of which must be provided to the FMA or your auditor upon request), where the obligation to repay the debt is subordinate to all other claims, demands, rights and causes of action of all unsubordinated creditors and the debt is not repayable within one year of the date to which the NTA calculation relates

    b) minus the amount of any liability that is the subject of an enforceable right of set-off, if the corresponding receivable is excluded from adjusted assets

    c) minus the amount of any liability under a credit facility that is made without recourse to the market services licensee

d) plus the value of any assets that are encumbered as a security against another person's liability where the market services licensee is not otherwise liable, but only up to the lower of:

   i. the amount of that other person's liability or

   ii. the value of the assets encumbered after deducting any adjustments.

Explanatory Note: *We consider it acceptable if the loan agreement allows for partial repayment within one year. However the loan agreement will need to clearly document the amount of the loan which is not repayable within a year. Only the amount that is not repayable within a year can be excluded from liabilities when calculating NTA. Any amount that is repayable or could be repaid within one year will not be subordinated debt and cannot be excluded from your liabilities for the purposes of your NTA calculation. For example, if there is a shareholder loan of $3m, the loan agreement could provide that:*

- *a clearly quantified amount of the loan is repayable on demand (eg $2m) – this amount cannot be classified as subordinated debt*
- *a clearly quantified amount of the loan is not repayable until a certain date, that is not within a year of the NTA calculation (eg $1m) – this portion of the loan could be classified as subordinated debt and excluded from liabilities in the NTA calculation.*

Clause 11(d) does not apply if the other person's liability is owed jointly by the market services licensee and that other person (i.e. to avoid double counting).

For managers of registered schemes, the value of encumbered assets is only included in clause 11(d) to the extent that it is not already included in clause 11(e).

a) for managers of registered schemes, plus the maximum potential liability of any guarantee provided by the market services licensee other than a guarantee limited to an amount recoverable out of any scheme property of a managed investment scheme operated by the licensee; or

12. **Liquid assets** means, in relation to a market services licensee:

    a) cash or cash equivalents other than a commitment of the kind specified in clause 13(d)

    b) assets that the market services licensee can reasonably expect to realise for their market value within six months

    that are free from encumbrances and, in the case of receivables, free from any right of set-off.

13. **Cash or cash equivalents** means, in relation to a market services licensee:

    a) cash on hand

    b) money deposited with a Bank that is available for immediate withdrawal

    c) short-term, highly liquid investments that are readily convertible to known amounts of cash that are subject to an insignificant risk of changes in value

    d) the value of any eligible undertaking provided by an eligible provider

    e) a commitment by an eligible provider to provide cash upon request within five working days:

       i. which will not expire within the next six months and which cannot be withdrawn by the provider without giving at least six months written notice to the person to whom the commitment is made

ii. in relation to which any cash provided is not repayable for at least six months.

14. **Bank** means:

    a) a “specified bank” as defined in the Regulations

    b) a bank or financial institution which has a rating for its long-term unsecured and non- credit enhanced debt obligations of A- or higher by Standard & Poors rating agency or a comparable rating from an internationally recognised credit rating agency or

    c) any other bank or financial institution approved by the FMA.

15. For the purposes of calculating net tangible assets for a derivatives issuer, **average revenue** means:

    a) subject to clause 16, in its first financial year of being licensed to provide those financial services, the licensee’s forecast of its revenue from the calculation date for the remainder of the first financial year pro-rated to a 12-month period

    b) subject to clause 16, in its second financial year of being licensed to provide those financial services, the average of the aggregate of the licensee’s:

        i. actual revenue for the second financial year-to-date

        ii. reasonable forecast of its revenue for the remainder of the second financial year

        iii. revenue in the first financial year from the calculation date pro-rated to a 12-month period

    c) subject to clause 16, in its third financial year of being licensed to provide those financial services, the average of:

        i. the aggregate of the licensee’s:

            A. revenue for the third financial year-to-date

            B. reasonable forecast of its revenue for the remainder of the third financial year

            C. licensee’s revenue for its second financial year

            D. the revenue in the first financial year from the calculation date pro-rated to 12-month period

    d) for all subsequent financial years, the average of:

        i. the aggregate of the licensee’s:

            A. revenue for the current financial year-to-date

            B. reasonable forecast of its revenue for the remainder of the current financial year

            C. the licensee’s revenue for the last preceding financial year

            D. the licensee’s revenue for the second preceding financial year.

16. Where an applicant becomes licensed on or before 1 December 2014 and has been continuously carrying on business as a derivative issuer since before 1 December 2014, for the purposes of clause 15, a licensee should include, in determining its average revenue, revenues earned after it commenced business as a derivative

issuer but before it was licensed as a derivative issuer as if it was licensed at the time those revenues were earned.

***Explanatory note**: This is intended to provide a more accurate estimate of average revenues for existing businesses that have been operating under futures dealers authorisations or for which no relevant licence existed. It means that those businesses will take into account actual revenues for the period before they were required to be licensed under the Act, rather than treating them as new businesses and only considering their financial performance for the period since they became licensed.*

Appendix 2

Conditions imposed by regulations as at 1 December 2014

Extract from the Financial Markets Conduct Regulations 2014:

Conditions of licences

191 General reporting condition

(1) A market services licence is subject to a condition that, if any of the following occurs, the licensee or an authorised body must, as soon as practicable, send a report containing details of the matter to the FMA:

(a) the licensee or an authorised body becomes aware or has reasonable grounds to believe that —

(i) the licensee or an authorised body is, or it is likely that the licensee or authorised body will become, subject to an insolvency event or

(ii) a director or senior manager of the licensee, or any of the key personnel of an authorised body, is adjudicated bankrupt or it is likely that that person will be adjudicated bankrupt (whether in New Zealand or overseas) or

(b) the licensee or an authorised body becomes aware that a relevant proceeding or action has been commenced or taken against any of the following:

(i) the licensee

(ii) an authorised body

(iii) a director or senior manager of the licensee

(iv) any of the key personnel of an authorised body or

(c) a director or senior manager of the licensee, or any of the key personnel of an authorised body —

(i) resigns, is removed, or otherwise ceases to hold the office or position

(ii) is appointed, employed, or engaged or

(d) an auditor of the licensee or an authorised body —

(i) resigns or otherwise ceases to hold the office

(ii) is appointed (other than by way of reappointment) or

(e) the licensee or an authorised body proposes to change its name or its legal structure (for example, by virtue of an amalgamation) or

(f) the licensee or an authorised body proposes to enter into a major transaction (within the meaning of section 129 of the Companies Act 1993 applied to a licensee or an authorised body whether or not it is a company or

(g) the licensee or an authorised body becomes aware that a transaction or an arrangement has been entered into, or it is likely that a transaction or arrangement will be entered into, that will result or has resulted in a person obtaining or losing control of the licensee or the authorised body.

(2) In subclause (1)(b), **relevant proceeding or action** —

(a) has the same meaning as in regulation 5(1)

(b) includes a criminal proceeding for a crime involving dishonesty but

(c) does not include any proceeding commenced, or action taken, by the FMA.

(3) In subclause (1)(g), **control** has the same meaning as in clause 48 of Schedule 1 of the Act.