FMA
FINANCIAL MARKETS AUTHORITY
TE MANA TĀTAI HOKOHOKO

JUNE 2023

Consultation: Proposed exemptions for CREs in liquidation, receivership, or voluntary administration

About this consultation

The Financial Markets Authority - Te Mana Tātai Hokohoko (FMA) is considering a class exemption to provide relief from climate reporting duties under Part 7A of the Financial Markets Conduct Act 2013 (FMC Act) for climate reporting entities (CREs) that are in liquidation, receivership, or voluntary administration, and for managers that are CREs in respect of registered managed investment schemes (registered schemes) in wind-up.

We welcome your feedback on the exemption proposal in response to the specific questions in this paper, as well as any other general comments.

Next steps

Please use the feedback form at the end of this document to submit your feedback. **Submissions close at 5pm on 20 July 2023.** After this date, we will consider all submissions, finalise our policy proposals and, if any exemptions are granted, work to get them in place.

This consultation is for climate reporting entities, investors, and other interested parties.	It seeks feedback on proposed exemptions from climate reporting duties for CREs in liquidation, receivership, or voluntary administration.

Contents

Overview 2

FMA's exemption powers 3

Background 4

Proposed exemptions and conditions 7

Appendix: Overview of liquidation, receivership, voluntary administration and scheme wind-up processes 8

Consultation questions 11

Feedback form 12

Overview

The CRD regime and its purposes

In October 2021 the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act (CRD Act) was enacted. The CRD Act amended the FMC Act by including a new Part 7A entitled “Climate-related disclosures for certain FMC reporting entities with higher level of public accountability”.

Mandatory climate-related disclosures are aimed at helping New Zealand meet its international obligations and achieve its target of net zero carbon by 2050. The intention is that by improving transparency and revealing climate-related information within financial markets, our financial system and economy will become more resilient, and climate change risks[1] will be addressed.

The purposes of the climate-related disclosures regime are to:

- ensure the effects of climate change are routinely considered in business, investment, lending and insurance underwriting decisions
- help climate reporting entities better demonstrate responsibility and foresight in their consideration of climate issues
- lead to more efficient allocation of capital, and help smooth the transition to a more sustainable, low-emissions economy.

The climate-related disclosures regime in Part 7A applies to entities called climate reporting entities (CREs), comprising:

- large listed issuers of quoted equity securities or quoted debt securities (over $60 million in market capitalisation or quoted debt, respectively. Issuers listed on growth markets are excluded)
- registered banks, credit unions and building societies with total assets over $1 billion
- licensed insurers with total assets over $1 billion or annual gross premium revenue over $250m
- managers in respect of registered managed investment schemes (other than restricted schemes) where the manager has more than $1 billion in total assets under management.

There are three sets of duties under Part 7A. These duties relate to—

a) keeping proper records relating to CREs’ responsibility to make climate-related disclosures
b) preparing climate statements and having those statements signed by two directors of the CRE (or two directors of the manager in the case of a scheme)
c) lodging those statements with the Companies Office, so they are publicly available.

Climate record-keeping requirements are already in force. Climate statements will be required to be lodged from early 2024 for accounting periods that start on or after 1 January 2023. From October 2024 there will be a further set of duties in Part 7A regarding assurance of greenhouse gas emissions disclosures in climate statements.

[1] The risks are described in the 2020 National Climate Change Risk Assessment Report and actions to manage those risks are outlined in the 2022 National Adaptation Plan. Refer to Chapter 10 of the plan regarding the economy and the financial system.

FMA's exemption powers

To grant an exemption under section 556 of the FMC Act, the FMA must be satisfied that the exemption is necessary or desirable to promote one or more of the purposes of the FMC Act. The extent of the exemption also cannot be broader than is reasonably necessary to address the matters that gave rise to the exemption.

The purposes of the FMC Act are:[2]

- to promote the confident and informed participation of businesses, investors, and consumers in the financial markets
- to promote and facilitate the development of fair, efficient, and transparent financial markets
- to 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
- to ensure that appropriate governance arrangements apply to financial products and certain financial services that allow for effective monitoring and reduce governance risks
- to avoid unnecessary compliance costs
- to promote innovation and flexibility in the financial markets.

Our decision on the exemption proposals discussed in this paper will be based on whether we are satisfied the above statutory test is met.

[2] See sections 3 and 4 of the FMC Act.

Background

Impact of liquidation, receivership, and voluntary administration

When a company goes into liquidation, receivership, or voluntary administration the usual business, investment, and other activities of the company generally cease permanently or temporarily. This is also the case for investment in the company and trading in its shares. Control of the business transfers to the external administrator, while directors remain in office but have limited if any powers or access to capital. The external administrator focuses on selling the company's assets to repay creditors or investors or, for a voluntary administration, assessing whether the company can viably continue or needs to put in liquidation. Winding up of a registered scheme has similar characteristics to a liquidation.

A brief overview of the processes of liquidation, receivership, voluntary administration and scheme wind-up is set out in the appendix.

Why we are considering a class exemption

When a CRE is in liquidation, receivership, or voluntary administration, or a registered scheme (managed by a manager that is a CRE) is in wind-up, climate-related disclosure obligations under Part 7A of the FMC Act continue to apply. We are seeking feedback on whether the costs of compliance may outweigh the benefit to primary users[3] of receiving climate-related information in these circumstances and therefore whether a class exemption may be appropriate.

Insolvent liquidation or scheme wind-up

In a liquidation of an CRE or scheme wind-up, the focus shifts from normal business activity to realising assets and repaying creditors or investors so that the CRE or scheme can be ended. The normal business, investment, and other activities of the CRE or scheme cease. The cost of complying with Part 7A obligations during liquidation or wind-up where a CRE or scheme is insolvent is likely to materially diminish the returns available to creditors or investors (particularly where the process is lengthy), and it is not clear that the benefit of compliance will outweigh these costs.

Primary users of climate-related disclosures are unlikely to find climate-related information valuable where a CRE (or scheme) is failing. When a business is being liquidated or a scheme is wound up, forward-looking strategies and planning are no longer relevant and climate-related information ceases to inform business, investment, lending, and insurance underwriting decisions. Whether a CRE (or scheme) is demonstrating responsibility and foresight in its consideration of climate issues no longer has relevance if capital is not being invested by or in the CRE (or scheme), and climate-related disclosures no longer inform allocation of capital or affect transition to a more sustainable, low-emissions economy when the business is coming to an end.

In addition, there may be practical difficulties complying with Part 7A obligations when a CRE is in liquidation. Directors of a company remain in office but cease to have normal powers, functions, and duties.

[3] Existing and potential investors, lenders, and other creditors (as defined in Appendix A of NZ CS 3).

They no longer control the company records or have access to capital. As such, they may not be able to oversee or fund the preparation of the climate statements and sign them as required under the FMC Act. The liquidator is also likely to be unable or unwilling to sign the climate statements given they are not a director and will not want to assume any potential liability.

In addition, compliance with Part 7A of the FMC Act will not normally be considered by the liquidator to be a priority or to further their principal duties. In a liquidation the liquidator's principal duty is to take possession of, protect, and realise the entity's assets, and distribute the proceeds of the realisation of the assets to its creditors.

Finally, Part 7A obligations are likely to be unenforceable against a CRE that is in an insolvent liquidation. There is a moratorium on legal proceedings that applies to companies in administration or insolvency. If a CRE does not comply with Part 7A obligations, enforcement proceedings could only be taken against the CRE with the consent of the liquidator (which is unlikely to be granted) or the permission of the court (which would be likely to be opposed by the liquidator if their consent was withheld).

Solvent liquidation or scheme wind-up

While a solvent CRE (or scheme) that is being liquidated or wound up will not be failing, the result is the same in that normal business operations and decisions about investment by and in that entity or scheme cease. Given the CRE or scheme will soon cease to exist and will generally cease operating while assets are realised and distributed, it is unlikely that primary users will find value in the climate reporting disclosures. Although a solvent entity or scheme is better placed to pay for the costs of compliance than an insolvent one, this will still reduce returns for creditors and investors without providing a clear benefit for primary users of climate-related information.

Receivership

The compliance burden of Part 7A obligations when a CRE is in receivership is likely to be high. Directors will often not be able to oversee or pay for the preparation of climate statements when a CRE is in receivership and the receivers will not consider compliance with Part 7A to be a priority or part of their duties.

In most cases, receivership will involve a failing company and relate to the majority of the company's assets. While the receiver may continue to trade, this is usually only to maximise returns to the secured creditor from realising the company's assets. Liquidation will often follow the end of receivership or run alongside the receivership.

Given normal business operations and decisions about investment by and in the company will have ceased and the CRE will usually be failing and not survive the receivership, it is unlikely that primary users will find value in climate reporting disclosures for the CRE.

Where a receiver has been appointed primarily for purposes other than dealing with an insolvent entity – for example, to resolve a deadlock between the main security holder and the directors regarding the future direction of the entity – it is not clear that relief would be appropriate. In this case, the CRE is likely to continue its business once the deadlock has been resolved. Therefore, primary users may well see value in receiving continued climate-related information, and there are likely to be funds available to meet the costs of this.

Voluntary administration

As with receivership, the compliance burden of Part 7A obligations when a CRE is in voluntary administration is likely to be high. The administrator takes control of the company's business, property and affairs and may carry on the company's business or terminate and/or dispose of the company's business and property. Shares in the company can usually not be transferred. Directors remain in office but are not able to oversee or pay for the preparation of climate statements when a CRE is in administration. The administrator will not consider compliance with Part 7A to be a priority or part of their duties.

With the company insolvent or at risk of being insolvent in future, and with its continued survival uncertain, it is unlikely that primary users will find value in the climate reporting disclosures for the CRE until it is clear whether the business is viable and will survive. The enforceability issues noted in relation to insolvent liquidations also apply to a voluntary administration.

Proposed exemptions and conditions

We are considering a class exemption for a five-year term for CREs that are in liquidation, receivership, or voluntary administration and for managers that are CREs in respect of registered schemes that are in wind-up.

Proposed relief is from the whole of Part 7A (and any corresponding Regulations) including:

- record-keeping obligations
- the requirement to prepare and lodge climate statements or group climate statements or any scheme climate statements
- the requirement to link to the climate statement in the annual report
- the requirement to obtain an assurance engagement in relation to the climate statements.

We propose that full relief would apply in a liquidation or scheme wind-up (whether solvent or insolvent).

Where a CRE is in receivership or voluntary administration we are considering deferral relief for two years. This means the CRE would be exempt from Part 7A obligations for two years but would need to comply with the deferred obligations at the end of the two years in addition to ongoing reporting obligations.

The proposed exemptions will only apply in relation to Part 7A reporting duties. They will not exempt CREs from any other obligations under New Zealand law, including fair dealing obligations under Part 2 of the FMC Act. In addition, the proposed relief will not exempt CREs from the obligation to pay a Class 16 levy under the Financial Markets Authority (Levies) Regulations 2012.

We invite feedback about the proposed scope of the exemptions. The proposed relief would be limited to a small subset of CREs at any time. Our initial view is that the proposed exemptions are not broader than reasonably necessary to address the matters that give rise to the exemptions. We welcome feedback on whether you agree with this view.

Proposed conditions and limitations

We are considering imposing a condition requiring a CRE to give notice to investors and other stakeholders that it is relying on the exemption and therefore will not be publishing climate statements. Potentially, this might be done by lodging a notice on the CRD register (noting a fee would be payable for this) and publishing the notice on the entity’s website. The purpose of this condition is to ensure creditors, investors and other stakeholders know that the relevant CRE’s climate statements will not be available (or will not be available in respect of the registered scheme).

We are also considering imposing a requirement that if a liquidation, receivership, voluntary administration, or scheme wind-up is terminated, then the relief will cease to be available. If the relief is deferral relief, then the deferred obligations will need to be met from that termination date in addition to any new obligations.

We also propose to limit relief to entities that are incorporated in New Zealand and subject to New Zealand insolvency laws, given it would not be feasible for the relief to accommodate a variety of overseas insolvency laws. However, this would not prevent a CRE established overseas from applying for individual relief.

Appendix: Overview of liquidation, receivership, voluntary administration and scheme wind-up processes

Liquidation

Liquidation is a formal process in which a company's assets are sold, the proceeds used to pay creditors and shareholders and the organisation is ended. It is usually triggered when a company is insolvent and is unable to pay its debts. However, it can also be voluntary, when a solvent company decides to go out of business and liquidate its assets.

A liquidator can be appointed by the High Court, by special resolution of shareholders, by a resolution of directors upon the occurrence of an event specified in the company's constitution, or by resolution of the creditors passed at the watershed meeting in a voluntary administration. The person appointed as liquidator for an insolvent liquidation must be a licensed insolvency practitioner.

When a company is placed in liquidation, the liquidation process in Part 16 of the Companies Act 1993 applies. This process also applies to certain other types of associations.

In summary, the liquidator must prepare an initial report soon after their appointment including:

- a brief summary of the reasons for commencing the liquidation
- a summary of the actions the liquidator proposes to take in the liquidation and, if practicable, the estimated dates on which those actions will be taken
- if practicable, the estimated date of completion of the liquidation
- for an insolvent liquidation, a statement of the company's financial affairs
- for a solvent liquidation, a statement that the liquidation is a solvent liquidation, and all creditors will be paid in full within 12 months of the commencement of liquidation.

After the initial statement of affairs, the liquidator must prepare and send to the Companies Office a six-monthly statement of affairs.

When a company goes into liquidation, its business activities cease, the directors lose their powers to manage the company and shares can no longer be transferred. There are restrictions on unsecured creditors bringing legal proceedings against the company or its property, or enforcing rights against the property of the company.

The liquidator will investigate the affairs of the company and may bring claims for the purpose of recovering additional funds to increase the funds available to repay creditors. The principal duty of the liquidator is to take possession of, protect, realise, and distribute the assets (or their proceeds) according to the priorities set out in the Companies Act.

Liquidation is complete when the liquidator sends a final report and various other documents to all creditors, shareholders, and the Registrar of Companies.

Receivership

Receiverships that are governed by the Receiverships Act 1993 are usually initiated by a company's secured creditor appointing a receiver when a company fails to comply with its obligations. The person appointed as receiver must be a licensed insolvency practitioner.

During the receivership, the receiver manages the assets over which the loan was secured in order to repay the debt owed to the secured creditor and amounts owed to preferential creditors. Directors' powers over the secured assets are suspended as necessary to enable the receiver to discharge their functions. Directors remain in office, but where all or most of the company's assets are in receivership (the usual situation) and the receiver is managing the company's affairs, the directors have few powers. The directors also retain obligations as directors (including compliance with Part 7A) but often have no access to resources to meet them.

In most cases, a receivership leads to the sale of the business and the entity is left with debt and is ultimately placed into liquidation. A receivership may also occur at the same time as a liquidation. However, appointment of a receiver does not necessarily mean the business is over. A receiver can be appointed to manage a business and then return control to the directors.

The High Court also has an inherent power to appoint receivers, but the purpose is often different to that of a creditor-appointed receivership. The Court sets the terms and conditions of the receivership.

Voluntary administration

Voluntary administration of a company is a process governed by Part 15A of the Companies Act. The object is for the business of an insolvent or near insolvent company to be administered in a way that:

- maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- if it is not possible for the company to continue in existence, results in a better return for the company's creditors and shareholders than would result from an immediate liquidation of the company.

An administrator may be appointed to an insolvent company or one that is at risk of insolvency in the future. The voluntary administrator must call a watershed meeting shortly after their appointment (normally within 20 working days) to determine the future of the company. For this meeting the voluntary administrator must supply a report about the company's business, property, affairs, and financial circumstances.

The administrator takes control of the company's business, property and affairs, and may carry on the company's business or terminate and/or dispose of the company's business and property. The directors of the company stay in office but need consent of the administrator to take any action or exercise any power unless expressly permitted by the Companies Act. Shares in the company must not be transferred without consent of the Court or the administrator.

With limited exceptions, creditors' rights against the company or its property are suspended until the company's fate is determined at the watershed meeting. What happens after a watershed meeting depends on whether the creditors vote to return the company to the directors, place the company in liquidation, or enter a deed of company arrangement (DOCA). Voluntary administration ends once the creditors adopt one of the three options open to them at the watershed meeting.

If the company is returned to the directors, the usual operations of the company resume. If the company is placed in liquidation, then directors lose their powers to manage the company and its normal operations cease, as discussed above. If a DOCA is entered into, the status of the company changes. Unless creditors specify otherwise, the administrator becomes the deed administrator and is responsible for drafting and

administrating the DOCA. The nature and scope of the deed administrator’s role and the powers of the directors depend on the terms of the deed. Unlike in an administration, a deed administrator does not necessarily manage the company’s affairs.

The DOCA sets out how the company is to pay its debts. This may include some form of compromise of debt or an orderly liquidation of the company. The DOCA is binding on the company’s creditors (for claims pre-dating the DOCA), the company, the deed administrator, and the directors and shareholders.

When the DOCA is terminated, the directors regain complete control of the company, unless the deed provides for liquidation. The deed can be terminated by the court or the creditors, or when circumstances specified in the deed have occurred.

Scheme wind-up

The governing document for a registered scheme is required to provide for the winding up of the scheme. Winding up can be commenced by a resolution of scheme participants, in accordance with the governing document or by a Court order (on the application of the FMA or a supervisor of the registered scheme). A scheme may be solvent or insolvent when it is wound up. During a wind-up, scheme investments are converted to cash for distribution to the creditors and the scheme participants. Investment of scheme property ceases during winding up and interests in the scheme can no longer be transferred.

Consultation questions

1. Do you think we should grant a full exemption from Part 7A obligations for an insolvent liquidation or registered scheme wind-up? Please explain the reasons for your view.
2. Should the full exemption also apply to a solvent liquidation or registered scheme wind-up?
3. Do you think we should grant deferral relief for CREs that are in receivership or voluntary administration? Do you think two years is an appropriate period for the relief? Please explain the reasons for your view and any alternative period you consider more appropriate.
4. Do you consider that primary users will continue to find climate-related information valuable even after a CRE is in liquidation, receivership, or voluntary administration, or a scheme is in wind-up? Please explain the reasons for your view.
5. Would being in liquidation (or wind-up for a scheme), receivership, or voluntary administration make it more difficult to comply with Part 7A obligations? If so, please give details.
6. If you are a CRE, please describe the likely costs (including estimated dollar amounts) of compliance with Part 7A obligations in liquidation, receivership, or voluntary administration, or where a registered scheme is in wind-up.
7. Are there any potential problems or unintended consequences that may arise from granting the proposed exemptions? For example, could this result in downstream impacts on the ability of other CREs or registered schemes to comply with their Part 7A obligations?
8. Are the proposed conditions and limitations appropriate? Should there be any additional conditions or limitations imposed? If so, please provide details.
9. Are there any practical or financial considerations that would make it overly burdensome for CREs to comply with deferred climate obligations at the end of the two-year period (or earlier if the receivership or voluntary administration ends and control of the company is returned to the directors)? If so, please provide details.
10. Do you think a five-year term is appropriate for the proposed exemptions? If not, please let us know your views on a suitable term.

Feedback form

Consultation: Proposed exemptions from climate reporting duties for CREs in liquidation, receivership, or voluntary administration.

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Proposed exemptions from climate reporting duties for CREs in liquidation, receivership, or voluntary administration: [your organisation's name]' in the subject line. Thank you. **Submissions close on 20 July 2023.**

Date: Number of pages:

Name of submitter:

Company or entity:

Organisation type:

Contact name (if different):

Contact email and phone:

Question number	**Response**

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.