

# Guidance Note

SEPTEMBER 2014

## Governance under Part 4 of the FMC Act

### About this guidance note

#### This guidance note is for:

Issuers of debt securities, managers of managed investment schemes and their supervisors.

#### It gives guidance on:

The expectations FMA has for your approach to the governance responsibilities and accountabilities that apply under Part 4 of the Financial Markets Conduct Act 2013.

## ABOUT FMA GUIDANCE NOTES

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### ***Our guidance:***

- > explains when and how we will exercise specific powers under legislation
- > explains how we interpret the law
- > describes the principles underlying our approach
- > gives practical examples about how to meet obligations.

**Guidance notes:** provide guidance on a topic or topic theme. Typically we will seek industry feedback via a public consultation paper, or more targeted consultation before we release a guidance note.

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

You might also like to check the reports and papers on our website. For example, our monitoring reports describe actual practice we are seeing and our comments on this.

### **Document history**

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This version was issued in September 2014 following a consultation in June 2014. It is based on legislation and regulations as at the date of issue.

**[www.fma.govt.nz](http://www.fma.govt.nz)**

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# Overview

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This guidance note is for issuers of debt securities, managers of managed investment schemes and their supervisors. It outlines the expectations the Financial Markets Authority (FMA) has for your approach to the governance responsibilities and accountabilities that apply under Part 4 of the Financial Markets Conduct 2013 Act (FMC Act). Information about what the specific responsibilities and accountabilities are can be found in our information sheets for each audience.

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Part 4 of the FMC Act imposes statutory duties of care on:

- supervisors of debt securities
- both managers and supervisors of managed investment schemes.

It also requires them to act in the best interests of the investors.

In this guidance note we show how we view these duties, together with the fair dealing duties in Part 2 of the FMC Act, as overarching duties. They set the scene for how debt issuers, managers and supervisors meet their specific responsibilities and for the relationships and accountabilities they have.

Governing documents and SIPOs play an important part in shaping and ensuring the effectiveness of the overall accountability framework.

We expect governing documents to be effective and fit for purpose and to give supervisors the tools they need to effectively supervise offers.

SIPOs must be clear, concise and effective. A more detailed guidance note on SIPOs will be available later in 2014.

# Section 1: Governance of MIS and debt – setting the scene

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## Harms addressed by Part 4 of the FMC Act

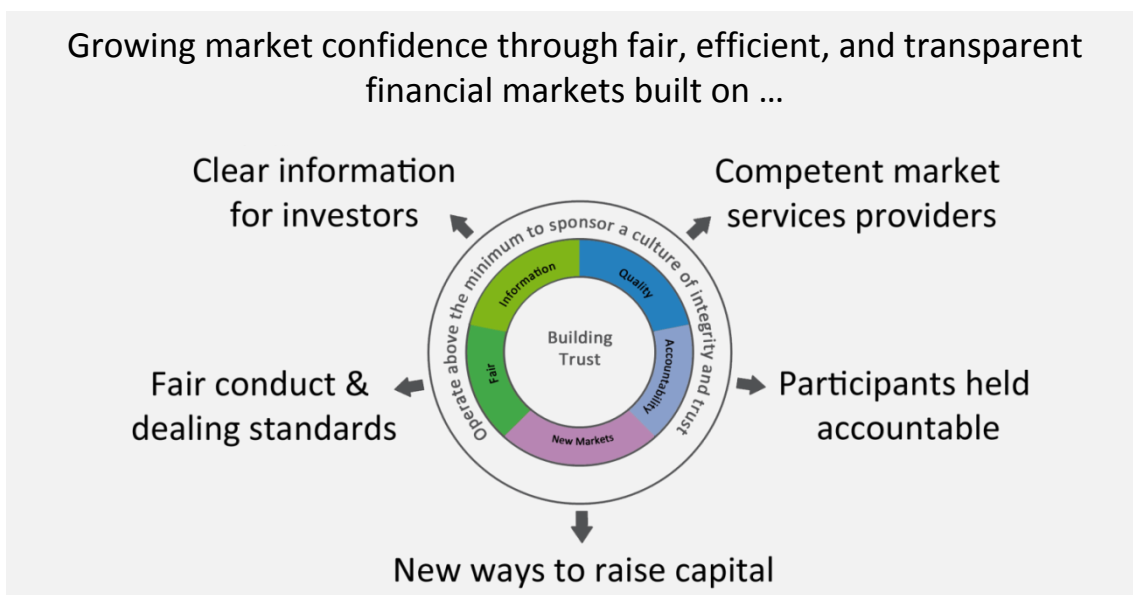
The core harm addressed by governance arrangements generally, and Part 4 in particular, is the risk of financial loss to investors from:

- mismanagement by product providers
- inadequate oversight by supervisors
- inadequate processes and tools for holding product providers and supervisors to account for performing their role and duties.

## Governance and the importance of accountability

The requirements of Part 4 build on more general principles of good corporate governance, and on existing director and trustee duties. Those principles and duties make trustees of restricted schemes and the boards of debt issuers, corporate MIS managers, and supervisors, ultimately responsible for preparing for and overseeing compliance with the FMC Act. As such, we expect trustees and boards to play a key role in establishing and overseeing FMC Act compliance, and in holding those they oversee to account. In turn, we also will be holding participants accountable to promote positive market outcomes.

Holding financial markets participants accountable for performing their duties and obligations is a key component to building investor trust. This is central to developing and maintaining fair, efficient, and transparent financial markets, and to growing market confidence, as illustrated in the following diagram:



## A new accountability framework – overarching duties

Part 4 of the FMC Act imposes statutory duties of care on:

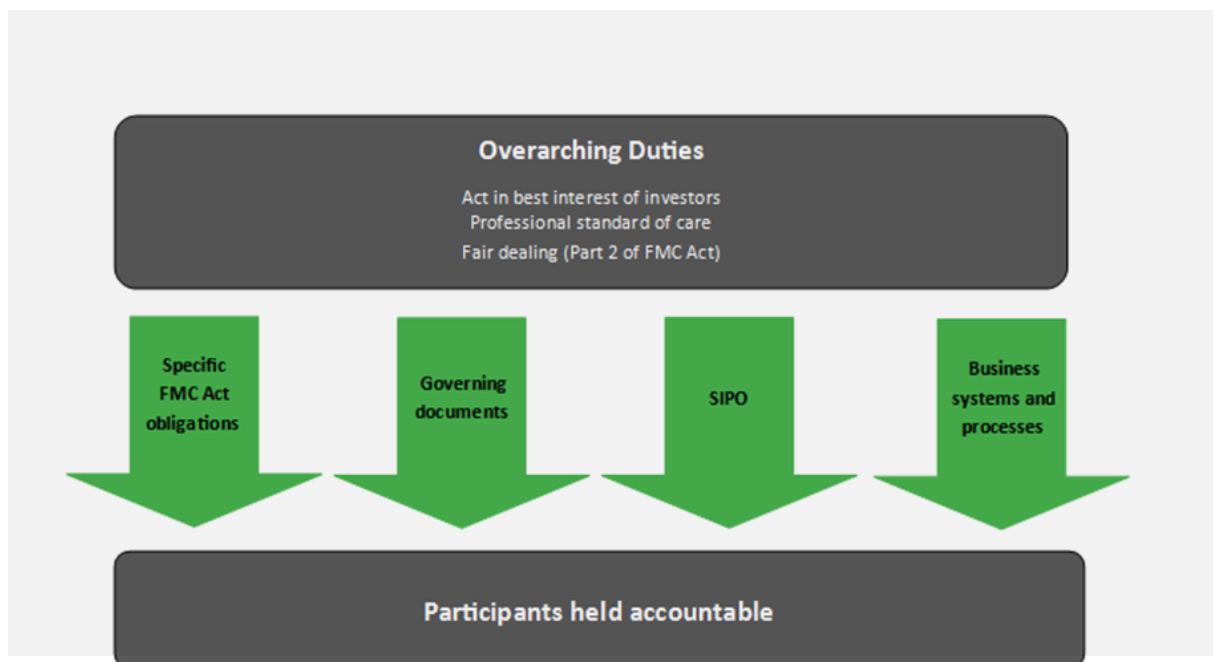
- supervisors of debt securities
- both managers and supervisors of managed investment schemes.

It also requires them to act in the best interests of the investors.

We view these duties, together with the fair dealing duties in Part 2 of the FMC Act, as overarching duties. They set the scene for how:

- managers and supervisors meet their more specific responsibilities
- governing documents and SIPOs are developed and used
- product providers and supervisors set up their systems and processes to monitor conduct and performance.

This is illustrated in the following diagram:



Part 4 sets out the basic framework for the ongoing relationships and accountabilities between investors and product providers, and between product providers, supervisors and FMA. Part 4 also provides for those matters to be further tailored to the particular circumstances through governing documents and, in the case of MIS, through SIPOs.

Applying the overarching duties to the development or review of governing documents, SIPOs, and business systems and processes means these need to be ‘fit for purpose’. Where a managed investment scheme has both a manager and a supervisor, this is a shared responsibility (because both the manager and supervisor have the overarching duties). Agreeing ‘fit for purpose’ and effective governing documents and SIPOs, and holding product providers to account through the tools contained in or relating to those documents, is key to achieving the objectives of the FMC Act.

The accountability embodied by these governance arrangements aims to ensure appropriate management and supervision of offers, with the objective of preventing loss. However, should investors suffer loss resulting from poor governance, Part 4 also provides mechanisms for holding product providers and supervisors accountable (and possibly liable).

# Section 2: Role of the supervisor

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## Who are 'supervisors'?

Under the FMC Act supervisors include those who are currently:

- trustees of unit trusts, KiwiSaver schemes, superannuation schemes, workplace savings schemes, and other managed investment schemes
- trustees of debt securities
- statutory supervisors of participatory securities that are managed investment schemes.

The FMA has produced information sheets describing the key accountabilities and responsibilities for supervisors:

[New governance and accountability framework for MIS managers and their licensed supervisors](#)

[New governance and accountability framework for debt issuers and their licensed supervisors](#)

The requirements for supervisors in Part 4 build on the existing framework under the Securities Trustees and Statutory Supervisors Act 2011 (to be renamed the 'Financial Markets Supervisors Act 2011').

## What the overarching duties mean for supervisors

Your overarching duties mean that as supervisor you must ensure you are empowered to perform your role and that you are actively engaged with your supervised interests. Specific compliance obligations are standards of *minimum* conduct. Your overarching duties require you to consider what more might be required in particular circumstances.

Your duty to meet your professional standard of care and your obligation to act in the best interests of investors need to be at the forefront of determining how you go about your role as supervisor.

## Empowered supervisors

For each appointment, you will need to determine what systems and processes need to be in place and what changes need to be made to governing documents to ensure you can meet your overarching and specific duties.

You should have, and regularly review, minimum requirements for accepting appointments to ensure you are suitably empowered. You should not accept appointment to a role with a governing document that does not meet your minimum requirements or is not otherwise fit for purpose.

You should, jointly with the product provider, establish fit for purpose governing documents that will mean you can be effective in your role. It is your responsibility to ensure the documents include a full range of tools that will enable you to respond to both business as usual and stress events.

For example, you have a general duty to do all the things you have power to do, to remedy contraventions of issuer obligations. This means you will need to establish appropriate powers at the outset of the relationship. It will be up to you to consider what the appropriate powers are for each appointment.

You must also identify fit for purpose systems and processes so that you can operate effectively under the FMC Act and properly discharge all your responsibilities.

We expect you would be able to demonstrate to us that you are an empowered supervisor. For example:



- you could show us evidence that you and the manager collaborated on developing governing documents
- that in your interactions your focus was on ensuring governance arrangements would enable you to act in the best interests of investors
- that the governance arrangements include a range of tools, appropriate for the appointment, that would enable you to take action if the interests of investors were not being met
- that you could show us how the governing documents for a given MIS meet your minimum requirements for accepting appointments.

## Engaged supervisors

As a supervisor you must actively supervise using the tools given by your 'fit for purpose' systems and processes and governing documents.

You must regularly review the effectiveness of governing documents and your relationships with supervised interests. For existing appointments you will also need to be involved in governing document amendments to ensure the governing documents remain 'fit for purpose'. We expect governing documents to be 'fit for purpose' from the outset both for new relationships with supervised interests and for MIS upon transition to the FMC Act regime.

In particular, we expect you will be engaging proactively with your supervised interests as they transition into the FMC Act regime. You will need to be ready in good time for 1 December 2014 for any products registered under or transitioning into the FMC Act from that date.

## Supervisor relationships and accountabilities

### With managed investment schemes

For managed investment schemes, you must actively supervise the manager's performance of its functions and issuer obligations, and the financial position of the manager and the scheme. This is overlaid with the need to act on behalf of scheme participants in relation to the manager, the governing document, and issuer obligations. FMA's licensing of MIS managers does not take away from your need to fulfil these requirements.

Different MIS product classes will have different supervisory approaches and documentation. This reflects the need for a 'fit for purpose' tailored supervisory focus.

### With debt issuers

For debt issuers, you must supervise the issuer's performance of its issuer obligations. You must also satisfy yourself that the issuer's assets are sufficient to discharge the amounts of the debt securities as they become due. Again this is overlaid with the responsibility to act on behalf of the debt security holders in relation to the issuer and the trust deed.

Since debt securities are fundamentally different products with different risks, and with governing documents that serve a number of purposes, we expect that your supervisory approach to debt issuers will be different to that of MIS.

### With FMA

As supervisor you are the front line supervisor. This means you, not FMA, have the core supervisory and compliance monitoring role for your supervised interests.

To avoid any duplication in supervision of MIS, our focus will be on monitoring supervisors to ensure you meet your general obligations under the FMC Act. The business of detailed day-to-day supervision of specific MIS is the role of the supervisor. We believe this is the best way to build



investor trust and achieve greater regulatory efficiencies, improved compliance standards, and consistency across the industry.

We will check you are meeting your obligations and hold you accountable for the proper discharge of frontline supervisory functions through the FMC Act, the Financial Markets Supervisors Act, and licence conditions.

## Section 3: Role of managers of managed investment schemes

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### Who are managers?

MIS managers include the licensed managers of non-restricted schemes and the trustees of restricted schemes acting collectively in respect of their scheme.

Our information sheet on the new [governance and accountability framework for managers of managed investment schemes and their licensed supervisors](#) summarises managers' duties.

Our [MIS manager licensing guide](#) and the [standard conditions for licensed MIS managers](#) set out our expectations of licensed MIS managers. These include minimum governance standards, regulatory reporting requirements, and a number of matters covered in Part 4 of the FMC Act, such as in relation to:

- SIPOs, investment selection, and investment monitoring
- custody arrangements
- outsourcing
- pricing.

We expect the trustees of a restricted scheme, who collectively act as manager of the scheme, to meet similar standards as licensed MIS managers. Specifically trustees must meet the same minimum standards in relation to SIPOs, investment selection, and investment monitoring; custody arrangements (allowing for the different custody structure for restricted schemes), outsourcing, and pricing. Further information about how the minimum standards for licensed MIS managers are relevant for restricted scheme trustees can be found in Section 4.

### What the overarching duties mean for managers

Your overarching duties mean that as manager:

- you must ensure your products are 'fit for purpose'
- you have a responsibility (and in the case of non-restricted schemes a shared responsibility with your supervisor) to ensure governing documents and the overall governance arrangements are 'fit for purpose'.

This means putting investors' interests at the forefront. Your commercial interests will need to be reconciled against these statutory duties.

### Manager relationships and accountabilities

#### With investors

The FMC Act regime has an increased focus on the interests of investors. Ultimately you are accountable to your investors. You must act in the best interests of investors.

## With supervisors (non-restricted schemes only)

The FMC Act encourages and expects increased interaction between managers and supervisors. The FMC Act supports this through the accountability and reporting framework it establishes.

You have a shared responsibility with your supervisor to act in the best interests of your investors.

We expect you to meaningfully engage with your supervisor to empower them through the governing documents, to fully and effectively undertake their role under the FMC Act.

On an ongoing basis your supervisor has a requirement to engage and monitor you more actively. You also have an obligation to engage and interact effectively and collaboratively with your supervisor.

## With FMA

Your supervisor is your 'front line' compliance supervision relationship. This means you will first need to address issues raised by your supervisor directly with them, not with FMA. Your supervisor may seek our involvement if necessary or desirable.

We will have an increased focus on working with and through your supervisor in the first instance wherever appropriate, rather than directly with you. In some circumstances it may be appropriate for us to engage directly with you and in those cases we will keep your supervisor informed.

## Section 4: Restricted schemes and the role of their trustees

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### What is a restricted scheme?

A restricted scheme is a KiwiSaver, superannuation, or workplace savings scheme that has restricted membership or is closed to new members, and which is registered as a restricted scheme.

A restricted scheme does not need a licensed manager or a licensed supervisor, but must instead have a licensed independent trustee.

All restricted schemes are managed investment schemes.

Our information sheet on the new [governance and accountability framework for restricted schemes and their trustees](#) summarises the duties of trustees.

### The licensed independent trustee

#### Appointing a licensed independent trustee

A licensed independent trustee is:

- A trustee that is independent under the test set out at section 131(3) of the FMC Act, *and*
- Is licensed under Part 6 of the FMC Act.

The FMC Act provides that the trustees of a restricted scheme must:

- include at least one licensed independent trustee whose licence covers the scheme, or
- consist only of a sole corporate trustee that has at least one director who is a licensed independent trustee whose licence covers the scheme.

The first of these alternatives contemplates the independent trustee being one of a number of trustees. The second alternative contemplates a situation where a sole corporate trustee is a vehicle for those who might otherwise be individual trustees to act together as directors through the corporate entity.

If your restricted scheme does not currently have an independent trustee, you will need to appoint an independent trustee who is either additional to the current trustees or in substitution for a trustee appointed by the employer or sponsor of the scheme. Other things being equal, appointing an independent trustee in substitution for a trustee appointed by scheme members, would undermine the effectiveness of the role of the independent trustee. It would also be inconsistent with section 9(b) of the Superannuation Schemes Act and section 119A(2)(b) of the KiwiSaver Act which protect the existing rights of members to participate in the management of their scheme.

The FMC Act also contemplates that a corporate entity may be a licensed independent trustee. But as noted above, we do not believe the FMC Act contemplates a sole trustee who is a licensed independent trustee. For example, an individual licensed independent trustee as sole trustee would not be an appropriate governance structure. However, in some circumstances it may be appropriate for a restricted scheme to have a sole corporate licensed independent trustee. We believe this is best dealt with by FMA considering exemptions, subject to appropriate conditions, on a case-by-case basis.

## Duties of licensed independent trustee

A licensed independent trustee must meet all of the duties and obligations of trustees under trust law and under the FMC Act.

But a licensed independent trustee also has additional duties. Under section 144 of the Act a licensed independent trustee is designated as a professional manager and must in exercising any powers or performing any duties, exercise the care, diligence and skill that a prudent person engaged in that profession would exercise in the circumstances. Generally this means a licensed independent trustee has a higher standard of care to meet than other restricted scheme trustees. However, the professional standard of care that automatically applies to a licensed independent trustee can also apply to any other trustee of a restricted scheme whose profession or business is or includes acting as a trustee or investing money on behalf of others.

A licensed independent trustee must have adequate and effective policies and systems or arrangements to exercise their powers or perform their duties under the Act. Specifically a licensed independent trustee must have in place procedures or arrangements to:

- Ensure they can identify serious problems with managed investment products in the scheme, and/or any events that give grounds for concern. This includes events that may indicate governance issues with the scheme.
- Report the serious problem or event to FMA.<sup>1</sup>

Our [licensing guides](#) for independent trustees have additional details.

## Trustees - your overarching duties as manager of the scheme

As trustees of a restricted scheme, acting together, you are the manager of the scheme. Each of you is jointly and severally liable for performance of the manager functions and duties. The provisions in Part 4 relating to managers of managed investment schemes therefore also apply to you, together, as trustees of a restricted scheme.

In particular, you will have overarching duties as set out in Section 3 of this paper on the role of MIS managers. We expect the trustees of a restricted scheme, as manager of the scheme, to meet the same minimum standards as licensed MIS managers in relation to:

- SIPOs, investment selection, and investment monitoring
- custody arrangements
- outsourcing and
- pricing.

Your role and duties as a trustee of a restricted scheme under the FMC Act build on your general duties as trustees of the scheme. In addition, if you are a licensed independent trustee your role and duties in that regard build on your FMC Act role and duties as trustee/manager and your general trustee duties.

## The application of relevant minimum licensing standards

MIS licensing standards recognise that there is a wide range of managed investment products and MISs. The standards set the minimum requirements that all licensed MIS managers must meet, but how they meet them will vary depending on products offered and size and nature of their business.

In the case of restricted schemes not all MIS standards will be relevant. However as a minimum, in order to properly discharge your duties, we would expect you to have considered the following standards to see if they are appropriate and relevant to your scheme:

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<sup>1</sup> Regulation 23 Financial Markets Conduct (Phase 1) Regulations 2014.

- **Capability.** Ensuring the individuals comprising the manager have the right mix of skills, experience and competence.
- **An oversight functionality.** An oversight body or functionality that considers the adequacy and functionality of your governance and compliance arrangements.
- **Governance culture.** Ensuring a robust compliance culture is implemented, supported by appropriate systems, policies, procedures and controls. In the context of a restricted scheme the compliance role may be undertaken by a single person and may be less formal.
- **Compliance assurance.** Establishing a compliance assurance programme. As noted above, in the context of a small restricted scheme this may be a less involved or detailed process.

We also expect that you will review other MIS minimum standards to see what else might be appropriate in particular circumstances.

## Outsourcing

A manager of a restricted scheme may outsource some or all of its functions as manager. The manager is responsible for ensuring that the provider is an appropriate entity, and outsourced functions are performed adequately and effectively. This will include:

- ensuring proper legal arrangements are in place
- effective monitoring takes place
- appropriate action for non-performance can be implemented
- records and information the provider holds is available
- regular reviews take place of the arrangements.

Any trustee of a restricted scheme who is not a professional manager must meet the prudent person of business standard of care when considering outsourcing arrangements. That standard will be determined within the context of that restricted scheme. Trustees in this position may need to take advice about outsourcing arrangements, or use the expertise of their licensed independent trustee.

## Trustee relationships and accountabilities

### With investors

The FMC Act regime has an increased focus on the interests of investors. Ultimately you are accountable to your investors.

### Among trustees

As trustees you need to work effectively together to discharge your collective 'manager' duties. While a licensed independent trustee has additional responsibilities, those do not detract from or diminish the role of the other trustees.

In practical terms, this means the views of the licensed independent trustee should not necessarily override or be treated as more 'right', valid or expert than that of other trustees. Good governance allows for debate of issues. Trustees will not always agree. In that case, the scheme's voting procedures will apply.

However, as trustees, in addition to understanding your own role and duties, you need to understand the role and duties of the licensed independent trustee.

## With the sponsoring employer

A licensed independent trustee has a responsibility to remain 'independent', and along with the other scheme trustees has an obligation at all times to ensure (among other responsibilities) that they fulfil and meet their trustee and manager duties and obligations. In particular, as manager you must act in the best interests of the scheme participants and treat the scheme participants equitably. If you are a trustee appointed by the sponsoring employer, these duties to investors prevail over any duties you may have to the sponsoring employer.

## With FMA

Because restricted schemes don't have supervisors, FMA has a direct oversight role. How we approach supervision of your restricted scheme will depend on:

- the size of your scheme. For example, the governance structures and processes that are needed for a large scheme will often be different than for a small scheme.
- the nature of the scheme and membership.

Other factors relevant to our level of engagement and monitoring include:

- the role of the sponsor and the sponsor's willingness to support the scheme.
- how the sponsor shows it views the importance of the role of the licensed independent trustee.
- how the sponsor views or manages the balance of trustees - between those who are appointed by the sponsor, those who are appointed by scheme members, and those who are independent.
- how the sponsor views our role – we will not mediate in any disagreement between the trustees and the sponsor.
- for schemes subject to actuarial valuation, the solvency and the actuarial assumptions adopted.
- whether the scheme is open to new entrants.
- whether there have been issues that have arisen in our monitoring of a licensed independent trustee, even if this was for another scheme or matter.

You should share information and engage with us. To help you do this, we will run annual forums for licensed independent trustees and other restricted scheme trustees to discuss issues relating to restricted managed investment schemes. Forum dates will be notified.



## Section 5: Role of debt issuers

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### Who are debt issuers?

Those who offer debt securities are debt issuers. Our information sheet on the new [governance and accountability framework for debt issuers and their licensed supervisors](#) summarises debt issuer's duties.

### What the overarching duties mean for debt issuers

As a debt issuer, the overarching FMC Act duties will impact on you through your supervisor's overarching duties. Your supervisor's duty to meet their professional standard of care and their obligation to act in the best interests of investors will need to be at the forefront of determining how they go about their role as supervisor. These duties mean your supervisor must ensure your trust deed and the supervisor's oversight systems and processes are 'fit for purpose'. Part 4 also ensures you are accountable to your supervisor by requiring you to provide them with reports and information.

Debt issuers must also comply with the fair dealing requirements in Part 2 of the FMC Act.

### Debt issuer relationships and accountabilities

#### With supervisors

The FMC Act encourages and expects increased supervisor interaction. The FMC Act supports this through the accountability and reporting framework it establishes.

On an ongoing basis your supervisor has a requirement to engage and monitor you more actively. You also have obligations to engage and interact effectively and collaboratively with your supervisor.

We expect you to work effectively with your supervisor to ensure governing documents are effective and fit for purpose.

#### With FMA

Your supervisor is your 'front line' compliance supervision relationship. This means you will first need to address issues raised by your supervisor directly with them, not with FMA. Your supervisor may seek our involvement if necessary or desirable.

We will have an increased focus on working with and through your supervisor in the first instance wherever appropriate, rather than directly with you. In some circumstances it may be appropriate for us to engage directly with you and in those cases we will keep your supervisor informed.

### Non-bank deposit takers

We note that for non-bank deposit takers (NBDTs) a number of matters need to be clarified regarding the relationship between NBDTs, their supervisors, and FMA and as between FMA and the Reserve Bank. The Reserve Bank recently provided a report to the Minister of Finance on the Bank's review of the prudential regime for NBDTs, which included a number of recommendations for the Minister's consideration.

Once those matters have been settled we will be working with the Reserve Bank to provide further guidance, as required, on the relationship between NBDTs, their supervisors, and FMA, and as between FMA and the Reserve Bank.

## Section 6: SIPOs

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Statements of investment policy and objectives (SIPOs) play an important part in shaping and ensuring the effectiveness of the overall accountability framework for managed investment schemes.

The following will be available later in 2014:

- Guidance on SIPOs
- A framework and methodology on SIPO limit breaks.
- Guidance on pricing errors and failure to comply with pricing methodologies

## Terms used

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FMC Act	Financial Markets Conduct Act 2013
FMA	Financial Markets Authority
Governing documents	Debt security trust deed Trust deed for a managed investment scheme constituted as a trust, and/or such other documents that constitute or govern a managed investment scheme
Manager	Manager of a registered managed investment scheme, including in the case of a restricted scheme, the trustees of that scheme
MIS	Managed Investment Scheme The following are managed investment schemes under the FMC Act: unit trusts under the current law KiwiSaver schemes (see section 128 of the FMC Act) superannuation schemes (see section 129 of the FMC Act) workplace saving schemes (see section 130 of the FMC Act) some participatory securities under the current law investments declared by FMA to be managed investment schemes (see section 512 of the FMC Act)
Part 4	Part 4 of the FMC Act
Product provider	Issuer of debt securities Manager of a managed investment scheme (including in the case of a restricted scheme, the trustees of that scheme)
Restricted scheme	A KiwiSaver, superannuation, or workplace savings scheme that has restricted membership or is closed to new members, <u>and</u> which is registered as a restricted scheme  A restricted scheme does not need a licensed manager or a licensed supervisor, but must instead have a licensed independent trustee  All restricted schemes are managed investment schemes
SIPO	Statement of investment policy and objectives for a managed investment scheme
Supervisor / Licensed Supervisor	Supervisor of debt securities and/or of managed investment schemes