



# Financial Markets Supervisors Regulations 2014

Jerry Mateparae, Governor-General

## Order in Council

At Wellington this 3rd day of November 2014

Present:

His Excellency the Governor-General in Council

Pursuant to section 53(1) of the Financial Markets Supervisors Act 2011, the Governor-General, acting on the advice and with the consent of the Executive Council and on the recommendation of the Minister of Commerce and Consumer Affairs made after consulting the Financial Markets Authority, makes the following regulations.

### Contents

		Page
1	Title	2
2	Commencement	2
3	Interpretation	2
	<i>Licensing criteria</i>	
4	Matters that FMA must consider in satisfying itself that directors and senior managers are of good character	4
5	Things that FMA must take into account in assessing matters referred to in section 16(3) of Act	4
6	Matters that FMA must assess under section 16(3)(i) of Act	7

r 1	<b>Financial Markets Supervisors Regulations 2014</b>	2014/335
7	Method of assessment of matters in section 16(3) of Act	9
	<i>Conditions imposed on licence by regulations</i>	
8	Licensee must not, without good cause, refuse to accept appointment as FMA appointee	9
9	Licensee that is to cease being supervisor must transfer or assign property to replacement supervisor	10
10	Conditions apply regardless of when licence is issued	11
	<i>Contents of regular reports that are required to be delivered by licensees to FMA</i>	
11	Matters and information that must be contained in all regular reports	11
12	Additional matters and information that must be contained in regular reports of supervisors of 1 or more supervised issuers	12
13	Additional matters and information that must be contained in regular reports of statutory supervisors of 1 or more supervised retirement villages	14
	<i>Revocation</i>	
14	Securities Trustees and Statutory Supervisors Regulations 2011 revoked	15

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## Regulations

- 1 Title**  
These regulations are the Financial Markets Supervisors Regulations 2014.
- 2 Commencement**  
These regulations come into force on 1 December 2014.
- 3 Interpretation**
  - (1) In these regulations, unless the context otherwise requires,—
    - Act** means the Financial Markets Supervisors Act 2011
    - applicant** means a person who applies for, or to vary, a licence under section 15 of the Act
    - associated person** has the same meaning as in section 12(1) of the Financial Markets Conduct Act 2013

**authorised body** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2013

**director** has the same meaning as in section 16(4) of the Act

**existing appointee** has the same meaning as in section 22(1)(a) or 33(5) of the Act

**financial markets legislation** means the Acts listed in Schedule 1 of the Financial Markets Authority Act 2011 and the enactments made under those Acts

**market services licensee obligation** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2013

**proposed supervised entity** means the issuer in respect of a debt security or registered scheme, or the operator of a retirement village, the supervision of which is proposed to be covered by an applicant's licence

**relevant proceeding or action**, in relation to an application for a licence or to vary a licence, means civil or criminal proceedings, regulatory action, or disciplinary action (whether in New Zealand or overseas) that the FMA considers is relevant to the performance of the functions to which the licence relates or will relate

**reporting period**, in relation to a report delivered by a licensee to the FMA under section 25 of the Act, means—

- (a) the period since the period covered by the licensee's previous report to the FMA under that section; or
- (b) in the case of the licensee's first report under that section, the period since the licence was issued

**senior manager** has the same meaning as in section 16(4) of the Act

**supervised entity** means a supervised issuer or the operator of a supervised retirement village

**supervised retirement village** means a supervised interest that is a retirement village.

- (2) In these regulations, a civil or criminal proceeding, regulatory action, or disciplinary action is **successful** in relation to the person that is the subject of the proceeding or action if 1 or more of the following apply:
  - (a) a penalty or an order is imposed or made against the person:

- (b) any licence, registration, or other authorisation of the person is cancelled, revoked, or suspended (and, in this paragraph, **licence** includes a licence issued under section 16 of the Act or under the Financial Markets Conduct Act 2013);
- (c) the person is found guilty or liable;
- (d) the person is censured.

Compare: SR 2011/282 r 3

#### *Licensing criteria*

#### **4 Matters that FMA must consider in satisfying itself that directors and senior managers are of good character**

- (1) The matters that the FMA must consider in satisfying itself that a director or senior manager of an applicant is of good character for the purposes of section 16(2)(b) of the Act are whether the director or senior manager has been—
  - (a) the subject of a successful relevant proceeding or action; or
  - (b) refused registration or any other entry into, or restricted from carrying on, any profession or occupation that is relevant to the role of a director or senior manager.
- (2) Paragraphs (a) and (b) of subclause (1) apply only to the extent that the FMA is aware of the matters referred to in those paragraphs.
- (3) Subclause (1) does not limit the matters that the FMA may consider in satisfying itself that every director and senior manager of an applicant is of good character for the purposes of section 16(2)(b) of the Act.

Compare: SR 2011/282 r 4

#### **5 Things that FMA must take into account in assessing matters referred to in section 16(3) of Act**

- (1) The FMA must, in assessing the matters referred to in section 16(3)(a) of the Act, take into account—
  - (a) the number of years of experience that the applicant's directors and senior managers have—
    - (i) in the roles that they hold in the applicant; and
    - (ii) in the financial or retirement village industry; and

- (iii) in business generally; and
  - (b) the extent to which the applicant's directors and senior managers are members of relevant professional bodies (for example, the New Zealand Institute of Chartered Accountants, the New Zealand Law Society, and The Institute of Directors in New Zealand Incorporated).
- (2) The FMA must, in assessing the matters referred to in section 16(3)(b) of the Act, take into account—
  - (a) the assets of the applicant, the form the assets take, and the ratio of liquid to illiquid assets; and
  - (b) whether the applicant would be able to absorb the cost if 1 or more of the proposed supervised entities were to fail and if the applicant were not to be paid for its services; and
  - (c) any bank overdraft resources available to the applicant; and
  - (d) the financial strength of the applicant's shareholders or owners; and
  - (e) any guarantees or financial arrangements that the applicant has with any associated persons; and
  - (f) the estimated assets and liabilities of the proposed supervised entities; and
  - (g) the estimated assets and liabilities of the registered schemes the supervision of which is proposed to be covered by the applicant's licence.
- (3) The FMA must, in assessing the matters referred to in section 16(3)(c) of the Act, take into account—
  - (a) the number of staff employed by the applicant who are involved in supervisor work, and the training those staff have received; and
  - (b) the number of support staff employed by the applicant; and
  - (c) the applicant's access to legal and other professional services; and
  - (d) the applicant's office facilities and infrastructure.
- (4) The FMA must, in assessing the matters referred to in section 16(3)(d) of the Act, take into account the applicant's practices of—
  - (a) peer review; and

- (b) oversight of junior staff.
- (5) The FMA must, in assessing the matters referred to in section 16(3)(e) of the Act, take into account—
- (a) the reporting obligations that the applicant proposes to require of different types or classes of proposed supervised entities in relevant governing documents; and
  - (b) the applicant's systems to track whether it has received on time all required documentation from proposed supervised entities; and
  - (c) the applicant's systems to record its consideration of reports received from proposed supervised entities and any action taken as a result.
- (6) The FMA must, in assessing the matters referred to in section 16(3)(f) of the Act, take into account—
- (a) the ownership of the applicant; and
  - (b) any relationships that the applicant has, or any of its directors or senior managers has, with the proposed supervised entities; and
  - (c) any other businesses carried out by the applicant, or any associated persons of the applicant, that may compromise the applicant's independence from the proposed supervised entities; and
  - (d) any other relationships that the applicant has, or any of its directors or senior managers has, that have the potential to compromise the applicant's independence from the proposed supervised entities.
- (7) The FMA must, in assessing the matters referred to in section 16(3)(g) of the Act, take into account—
- (a) the balance of independent and executive directors on the applicant's board; and
  - (b) the nature, composition, powers, and functions of the applicant's board committees; and
  - (c) whether the applicant's constitution allows any director of the applicant to act otherwise than in the best interests of the applicant when exercising powers or performing duties as a director; and
  - (d) the applicant's succession plans, disaster recovery plans, and risk management policies; and
  - (e) whether the applicant has an internal auditor.

- (8) The FMA must, in assessing the matters referred to in section 16(3)(h) of the Act, to the extent that the applicant is reasonably able to provide such information in accordance with the terms of the relevant professional indemnity insurance contract, take into account—
- (a) the amount for which the applicant is insured, and how it compares with the applicant's overall risk of exposure to liability; and
  - (b) the coverage of the applicant's professional indemnity insurance contract and its exclusions; and
  - (c) how often the insurance is reviewed.
- (9) This regulation does not limit the things that the FMA may take into account in assessing the matters referred to in section 16(3) of the Act or the way in which those matters may be assessed.
- (10) In subclause (7)(c), **constitution** means,—
- (a) in the case of a company within the meaning of section 2(1) of the Companies Act 1993, the constitution of the company; and
  - (b) in the case of any other entity, the documents or instruments constituting or defining the constitution of the entity.

Compare: SR 2011/282 r 5

## **6 Matters that FMA must assess under section 16(3)(i) of Act**

- (1) The matters that the FMA must assess under section 16(3)(i) of the Act are as follows:
- (a) whether the applicant—
    - (i) previously had, or currently has, a licence issued under section 16 of the Act or under the Financial Markets Conduct Act 2013; or
    - (ii) has previously been, or is currently, an authorised body in respect of a licence issued under the Financial Markets Conduct Act 2013; and
  - (b) whether an associated person of the applicant—
    - (i) previously had, or currently has, a licence issued under section 16 of the Act or under the Financial Markets Conduct Act 2013; or

- (ii) has previously been, or is currently, an authorised body in respect of a licence issued under the Financial Markets Conduct Act 2013; and
  - (c) if paragraph (a) or (b) applies, the applicant's or associated person's record in respect of the licence, including any contravention of the conditions of the licence, licensee obligations, market services licensee obligations, or financial markets legislation; and
  - (d) the applicant's due diligence processes when deciding whether to accept new appointments as a supervisor; and
  - (e) whether the applicant proposes to delegate or delegates any of its functions to another entity and, if so, how the applicant will or does ensure that the function is effectively performed; and
  - (f) whether the applicant or any relevant party has been the subject of a successful relevant proceeding or action.
- (2) The matters in subclause (1)(b) and (c) in relation to an associated person of the applicant must be assessed only to the extent that the FMA considers that the matters are relevant to the performance of the functions to which the licence relates or will relate.
- (3) Subclause (1)(f) applies only to the extent that the FMA is aware of the relevant proceeding or action.
- (4) In this regulation, a person (**R**) is a **relevant party** in relation to an applicant (**A**) if—
- (a) 1 or more of the following apply:
    - (i) A is a body corporate and R has the power, directly or indirectly, to exercise, or control the exercise of, the rights to vote attaching to 25% or more of the voting products of A (where **voting products** has the same meaning as in the Financial Markets Conduct Act 2013):
    - (ii) A and R are acting jointly or in concert:
    - (iii) A acts, or is accustomed to act, in accordance with the wishes of R:
    - (iv) R is able, directly or indirectly, to exert a substantial degree of influence over the activities of A:



- (v) R is a director or senior manager of A or of a person who is associated with or connected to A under subparagraphs (i) to (iv); and
- (b) the FMA considers that the nature of the association or connection referred to in paragraph (a)(i) to (v) is relevant to the performance of the functions to which the licence relates or will relate.

Compare: SR 2011/282 r 6

#### **7 Method of assessment of matters in section 16(3) of Act**

The FMA must assess the matters referred to in section 16(3) of the Act, the things to take into account in assessing those matters under regulation 5, and the matters referred to in regulation 6 as follows:

- (a) the matters in section 16(3)(a), (d), and (e) of the Act, the things to take into account in assessing those matters under regulation 5(1), (4), and (5), and the matters in regulation 6 must be assessed only against the part of the applicant's business that is actually involved in the work of performing the functions of a supervisor:
- (b) the matters set out in section 16(3)(b), (c), (f), (g), and (h) of the Act and the things to take into account in assessing those matters under regulation 5(2), (3), (6), (7), and (8) must be assessed against the applicant's business as a whole.

Compare: SR 2011/282 r 7

#### *Conditions imposed on licence by regulations*

#### **8 Licensee must not, without good cause, refuse to accept appointment as FMA appointee**

- (1) A licence is subject to a condition that a licensee must not, without good cause, refuse to accept an appointment by the FMA under section 22(2)(b) or (c) or 37(1) or (1A) of the Act (subject to subclause (2)).
- (2) The condition applies only if the FMA has given the licensee a written notice that contains a statement to the effect that the FMA agrees to pay the costs and charges incurred by the licensee in its capacity as an FMA appointee—
  - (a) that the FMA considers are reasonable; and

- (b) where the FMA is satisfied that the FMA appointee has taken all reasonable steps to obtain payment of those costs and charges from the issuer (or operator) and the existing appointee but has been or will be unsuccessful.
- (3) Good cause to refuse to accept an appointment includes where—
  - (a) the licensee’s licence does not cover supervision of the debt security, registered scheme, or retirement village concerned; or
  - (b) the appointment would result in the licensee breaching a condition of its licence or any enactment or rule of law; or
  - (c) the appointment would result in the licensee having a conflict of interest; or
  - (d) the licensee has notified the FMA that the licensee is winding down its business and is in the process of divestment.
- (4) Good cause to refuse to accept an appointment does not include any matter relating to an unwillingness or inability of the FMA, the issuer, the operator, or the existing appointee to pay some or all of the costs and charges incurred by the licensee in its capacity as an FMA appointee.

**9 Licensee that is to cease being supervisor must transfer or assign property to replacement supervisor**

- (1) A licence is subject to a condition that, if the licensee is to cease being the supervisor of a debt security, registered scheme, or retirement village for any reason, the licensee must, at the licensee’s expense, execute all documents, provide any written authorities, and do all other things that are reasonably necessary to ensure that the relevant property is transferred or assigned to the replacement supervisor with effect on the replacement supervisor becoming, or as soon as practicable after the replacement supervisor becomes, the supervisor of the debt security, registered scheme, or retirement village.
- (2) The condition in subclause (1) is subject to a provision in the relevant governing document or any enactment or any rule of law to the contrary.

- (3) In this regulation,—
- replacement supervisor**, in relation to a licensee and a debt security, registered scheme, or retirement village in respect of which the licensee is to cease being the supervisor, means the FMA appointee or other person who has been, or will be, appointed in place of the licensee to the position of supervisor of the debt security, registered scheme, or retirement village
- relevant property**, in relation to a licensee and a debt security, registered scheme, or retirement village in respect of which the licensee is to cease being the supervisor,—
- (a) means the property that the licensee holds in the licensee’s capacity as the supervisor; and
  - (b) includes, in respect of a registered scheme, scheme property that is held by a custodian under section 156(1) or (3) of the Financial Markets Conduct Act 2013
- written authorities** means written authorities that are reasonably required by the FMA or the replacement supervisor.

- 10 Conditions apply regardless of when licence is issued**  
Regulations 8 and 9 apply regardless of whether the licence is issued before or after the commencement of these regulations.

*Contents of regular reports that are required to be delivered by licensees to FMA*

- 11 Matters and information that must be contained in all regular reports**
- (1) Every report delivered by a licensee to the FMA under section 25 of the Act must contain, for the reporting period, all of the following:
- (a) details of any changes in circumstances relating to the requirements referred to in section 16(2), the matters referred to in section 16(3), or any other matters reported to the FMA under section 26(3) of the Act;
  - (b) a statement that either—
    - (i) confirms the licensee’s compliance with all of the conditions of the licence; or

- (ii) sets out the details of the licensee's non-compliance with those conditions:
  - (c) a summary of the licensee's interactions with its supervised entities, including a broad description of how regularly the licensee received reports from, and met with, those supervised entities:
  - (d) a description of how any investigations by the licensee into concerns about any of its supervised entities were initiated and carried out:
  - (e) a description of what steps the licensee took in response to—
    - (i) any of its supervised entities being actually or potentially insolvent; or
    - (ii) any registered scheme in respect of which it is the supervisor being actually or potentially insolvent; or
    - (iii) any insolvency event in respect of any of its supervised entities:
  - (f) a statement that either—
    - (i) confirms the licensee's compliance with all of its licensee obligations; or
    - (ii) sets out the details of the licensee's non-compliance with its licensee obligations.
- (2) In subclause (1)(e),—
- insolvency event** has the same meaning as in section 6(4) of the Financial Markets Conduct Act 2013
- insolvent** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2013 (applied, in the case of an operator of a retirement village, as if it were an issuer).

Compare: SR 2011/282 r 8

## 12 Additional matters and information that must be contained in regular reports of supervisors of 1 or more supervised issuers

- (1) This regulation applies to a report delivered to the FMA under section 25 of the Act by a licensee that is a supervisor of 1 or more supervised issuers.

- (2) In addition to the matters and information referred to in regulation 11, the report must contain, for the reporting period, all of the following:
- (a) the number of supervised issuers:
  - (b) the number and type of issues of—
    - (i) debt securities that are supervised interests:
    - (ii) managed investment products in registered schemes that are supervised interests:
  - (c) the number of appointments as a supervisor that the licensee has gained or lost:
  - (d) the value of supervised interests that are debt securities, calculated as nearly as possible to the reporting date:
  - (e) the value of managed investment products in registered schemes that are supervised interests, calculated as nearly as possible to the reporting date:
  - (f) in respect of each supervised issuer that has contravened, may have contravened, or is likely to contravene any of its issuer obligations in a material respect,—
    - (i) the name of the supervised issuer:
    - (ii) a description of the contravention or possible contravention:
    - (iii) a description of what steps the licensee took, or intends to take, in response to the contravention or possible contravention:
  - (g) in respect of each supervised issuer that has issued debt securities or managed investment products in respect of which a serious problem has arisen,—
    - (i) the name of the supervised issuer:
    - (ii) a description of the serious problem:
    - (iii) a description of what steps the licensee took, or intends to take, in response to the serious problem.
- (3) In subclause (2)(g), **serious problem** has the same meaning as in section 199(2) of the Financial Markets Conduct Act 2013.  
Compare: SR 2011/282 r 9

- 13 Additional matters and information that must be contained in regular reports of statutory supervisors of 1 or more supervised retirement villages**
- (1) This regulation applies to a report delivered to the FMA under section 25 of the Act by a licensee that is a statutory supervisor of 1 or more retirement villages.
  - (2) In addition to the matters and information referred to in regulation 11, the report must contain, for the reporting period, all of the following:
    - (a) the number of supervised retirement villages:
    - (b) the number and type of operators of those supervised retirement villages:
    - (c) the number of appointments as a statutory supervisor that the licensee has gained or lost:
    - (d) a statement of whether those supervised retirement villages have full replacement insurance cover:
    - (e) the total amount, as at the date of the most recent audited financial statements of each operator prepared in accordance with generally accepted accounting practice, that the operators of those supervised retirement villages would be required to pay to residents under occupation right agreements in the event of the termination of all residents' occupation right agreements:
    - (f) the number of instances (if any) where the operator of a supervised retirement village has failed to pay any amount due to a resident under, or in relation to, an occupation right agreement, where that amount becomes due for any reason:
    - (g) a summary of the licensee's interactions with residents of the retirement village or villages.
  - (3) In this regulation, **resident** and **occupation right agreement** have the same meanings as in section 5 of the Retirement Villages Act 2003.

Compare: SR 2011/282 r 10

*Revocation***14 Securities Trustees and Statutory Supervisors Regulations 2011 revoked**

The Securities Trustees and Statutory Supervisors Regulations 2011 (SR 2011/282) are revoked.

Michael Webster,  
Clerk of the Executive Council.

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**Explanatory note**

*This note is not part of the regulations, but is intended to indicate their general effect.*

These regulations, which come into force on 1 December 2014, replace the Securities Trustees and Statutory Supervisors Regulations 2011 (the **2011 regulations**). These regulations prescribe matters for the purposes of the Financial Markets Supervisors Act 2011 (the **Act**). The Act, previously called the Securities Trustees and Statutory Supervisors Act 2011, is renamed by section 111 of the Financial Markets (Repeals and Amendments) Act 2013.

These regulations update the 2011 regulations to take into account the Financial Markets Conduct Act 2013 and to align these regulations with the Financial Markets Conduct Regulations 2014 (which also come into force on 1 December 2014).

The provisions that have been carried over from the 2011 regulations prescribe—

- the matters that the Financial Markets Authority (the **FMA**) must consider when processing applications for licences under the Act, and the method of making certain assessments;
- the content of the regular reports that licensees must provide to the FMA under section 25 of the Act.

These regulations also provide for the following conditions to be imposed on licences by the regulations:

- a condition that a licensee must not, without good cause, refuse to accept an appointment by the FMA as an FMA appointee under various provisions of the Act (for example, where the

FMA needs to appoint temporarily a supervisor for debt securities or a registered scheme that no longer has a supervisor):

- a condition that provides for a licensee that is to cease being a supervisor to transfer or assign property to a replacement supervisor.

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Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*: 4 November 2014.

These regulations are administered by the Ministry of Business, Innovation, and Employment.

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