

Reprint
as at 17 December 2015



**Financial Advisers (Custodians of FMCA Financial
Products) Regulations 2014**
(LI 2014/48)

Jerry Mateparae, Governor-General

Order in Council

At Wellington this 24th day of February 2014

Present:

His Excellency the Governor-General in Council

Pursuant to section 154 of the Financial Advisers Act 2008, His Excellency the Governor-General, acting on the recommendation of the Minister of Commerce made after consulting the Financial Markets Authority and on the advice and with the consent of the Executive Council, makes the following regulations.

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Note

Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this official reprint.
Note 4 at the end of this reprint provides a list of the amendments incorporated.

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

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Regulations

1 Title

These regulations are the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014.

2 Commencement

- (1) These regulations, except regulation 11, come into force on 1 April 2014.
- (2) Regulation 11 comes into force on 1 December 2014.

3 Interpretation

In these regulations, unless the context otherwise requires,—

Act means the Financial Advisers Act 2008

address, in relation to a client, means the client’s last known address or an address specified by the client for the purpose of receiving information required by regulation 5(1) (whether the address is electronic or otherwise)

applicable auditing and assurance standard has the meaning given to it in section 5(1) of the Financial Reporting Act 2013

associated person has the meaning given to it in section 12 of the Financial Markets Conduct Act 2013

assurance report means a report resulting from an assurance engagement referred to in regulation 9(1)

custodian means a person to whom these regulations apply under regulation 4(1)

family trust has the meaning given to it in section 173M(5) of the Tax Administration Act 1994

FMCA custodial service means a custodial service (as that term is defined in section 77B(2) of the Act) that—

- (a) is provided in respect of client money or client property that relates to an FMCA financial product; and

- (b) does not include any service to the extent that client money or client property is held solely for completing a transaction, securing an obligation, or both

FMCA financial product means each of the following within the meaning of the Financial Markets Conduct Act 2013:

- (a) a debt security:
- (b) an equity security:
- (c) a managed investment product:
- (d) a derivative

qualified auditor has the meaning given to it in section 461E of the Financial Markets Conduct Act 2013

sub-custodian means a person who provides FMCA custodial services under an arrangement with a custodian where the custodian holds a beneficial interest in the FMCA financial product (to which the FMCA custodial services relate) in trust for, or on behalf of, the client.

Regulation 3 **FMCA custodial service** paragraph (b): amended, on 17 December 2015, by regulation 4 of the Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2015 (LI 2015/277).

4 Application

- (1) These regulations apply to a person who carries on a business of providing or offering to provide FMCA custodial services to a client (whether or not the business is the provider's only business or the provider's principal business).
- (2) These regulations do not apply to—
 - (a) a person who provides FMCA custodial services if the person and all of its associated persons provide FMCA custodial services to no more than 5 clients in aggregate:
 - (b) services provided by—
 - (i) a trustee of a family trust in respect of the trust's assets; and
 - (ii) an executor, an administrator, or a trustee of a deceased person's estate in respect of the estate's assets; and
 - (iii) an attorney acting under an enduring power of attorney in respect of a donor's property in circumstances where the donor becomes mentally incapable; and
 - (iv) any person appointed by the court in respect of a person's assets:
 - (c) a sub-custodian acting in that capacity.
- (3) Subclause (4) applies in respect of FMCA custodial services provided to a client (C) if—
 - (a) a person (A) provides the FMCA custodial services to C on behalf of the business of another person (B); and

- (b) B does not itself provide the FMCA custodial services but, by virtue of section 77U of the Act, is treated (instead of A) as the broker having the broker obligations under the Act.
- (4) If this subclause applies,—
 - (a) B must ensure that A complies with the requirements of these regulations in respect of the FMCA custodial services (applied as if references to a custodian were references to A); and
 - (b) B must be treated as having complied with the requirements of these regulations in respect of the FMCA custodial services if A complies with the requirements as referred to in paragraph (a).

Regulation 4(3): replaced, on 1 December 2014, by regulation 4 of the Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2014 (LI 2014/329).

Regulation 4(4): replaced, on 1 December 2014, by regulation 4 of the Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2014 (LI 2014/329).

5 Information requirements

- (1) A custodian must provide the following information to a client for each reporting period in respect of client money and client property received, held, or paid by the custodian and any of its sub-custodians:
 - (a) a record of all transactions effected by the custodian or any of its sub-custodians for each client during the reporting period, which for each transaction must, at a minimum, include—
 - (i) the date of the transaction; and
 - (ii) the name of the issuer and the number (if applicable) and class of FMCA financial products to which the transaction relates; and
 - (iii) the balance of that class of FMCA financial products held on behalf of the client on completion of the transaction; and
 - (b) all entries made in a ledger of client money during the reporting period, which for each entry must, at a minimum, include—
 - (i) a date; and
 - (ii) references that identify the source or destination of client money and that enable it to be traced backward or forward; and
 - (c) information on client property currently held on behalf of the client, which, at a minimum, must include—
 - (i) the name of the issuer and the number (if applicable) and class of FMCA financial products currently held on behalf of the client; and
 - (ii) the name, if known, of the custodian or sub-custodian that holds those products; and
 - (d) the amount of any fees charged by the custodian in respect of client money or client property held on behalf of the client; and

- (e) a statement that the client may request the latest assurance report required by regulations 9 and 10.
- (2) The information required by subclause (1)—
 - (a) must be prepared as at the last day of the reporting period and in respect of the last reporting period; and
 - (b) must be provided to the client not later than 20 working days after the last day of each reporting period by giving it to the client or delivering or sending it to the client's address.
- (3) In this regulation, **reporting period** means—
 - (a) each period of 6 months (or any shorter period determined by the custodian) for which the person is a client of the custodian; or
 - (b) if the person ceases to be a client of a custodian on a date within that period, the shorter period ending on that date.

6 Alternative means of providing information required by regulation 5(1)

- (1) A custodian does not have to comply with regulation 5(2) and (3) if the information required by regulation 5(1) is available through an electronic facility on a substantially continuous basis and—
 - (a) the client agrees to the information being provided in that way; and
 - (b) the client has been given access to the facility.
- (2) The information that is made available on the facility must include a statement of the date at which the information is prepared.
- (3) For the purposes of this regulation, a reference in regulation 5(1) to a **reporting period** means the period—
 - (a) beginning on the date on which the person becomes a client of a custodian; and
 - (b) ending on the date that is not earlier than 48 hours before the information is made available.

7 Client request for information

If a client has made a written request to the custodian for any information required by regulation 5(1), the custodian must provide the information by giving it to the client or delivering or sending it to the client's address not later than 10 working days after the date on which the request is received.

8 Procedures for reconciling records

- (1) For the purpose of ensuring that the custodian's records accurately state the custodian's holding of client money and client property and all transactions relating to that money and property, the custodian must—

- (a) take adequate steps to reconcile records of client money and client property held for each client with the overall records of client money and client property held by the custodian; and
 - (b) take adequate steps to reconcile records of client money and client property kept by the custodian with records kept by sub-custodians and third parties; and
 - (c) have in place adequate procedures for promptly identifying discrepancies in those records and determining the cause of those discrepancies; and
 - (d) promptly and fully rectify any discrepancies referred to in paragraph (c).
- (2) The frequency of the reconciliation must be appropriate to—
- (a) the type of client property to which the records relate; and
 - (b) the frequency with which client property is traded; and
 - (c) the timing of any custody reports provided.
- (3) All records of client money must be reconciled daily.

9 Custodian must obtain assurance engagement

- (1) A custodian must obtain, within 4 months after the relevant date, an assurance engagement with a qualified auditor done in accordance with applicable auditing and assurance standards.
- (2) The custodian must,—
- (a) within 20 working days after obtaining an assurance report, provide a copy of the report to the FMA unless the FMA waives this requirement; and
 - (b) at the request of a client, send the client a copy of the most recent assurance report within 10 working days after receiving the request.
- (3) In this regulation and regulation 10, **relevant date**, in relation to a custodian, means—
- (a) the custodian's balance date; or
 - (b) a date in each calendar year that is—
 - (i) determined by the custodian; and
 - (ii) notified to the FMA in writing within 10 working days after the determination is made.
- (4) The following apply for the purposes of the date under subclause (3)(b):
- (a) in the case of a date that is adopted as the first relevant date, the date must be within the first 12 months of this regulation applying to the custodian in respect of a client; and
 - (b) the custodian may change the date if—
 - (i) the period between any 2 dates does not exceed 15 months; and

- (ii) the change is notified to the FMA in writing within 10 working days after the custodian decides to make the change; and
- (c) if the custodian adopts a date in accordance with paragraph (a) or changes the date in accordance with paragraph (b), it need not have a date in a particular calendar year.

Regulation 9(1): replaced, on 17 December 2015, by regulation 5(1) of the Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2015 (LI 2015/277).

Regulation 9(3): inserted, on 17 December 2015, by regulation 5(2) of the Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2015 (LI 2015/277).

Regulation 9(4): inserted, on 17 December 2015, by regulation 5(2) of the Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2015 (LI 2015/277).

10 Requirements of assurance engagement and report

- (1) An assurance report must state whether, in the auditor's opinion,—
 - (a) the custodian's processes, procedures, and controls were suitably designed to meet the control objectives in subclause (2) throughout the most recently completed relevant period; and
 - (b) the custodian's processes, procedures, and controls operated effectively throughout that relevant period.
- (2) The control objectives are—
 - (a) new accounts are set up completely and accurately in accordance with client agreements and any applicable regulations:
 - (b) complete agreements that properly authorise the holding of client money and client property (**authorising agreements**) are established before the custodian starts providing FMCA custodial services:
 - (c) transactions are authorised, processed, and recorded in an appropriate, accurate, and timely manner:
 - (d) accounts are administered in accordance with the Act, these regulations, and authorising agreements:
 - (e) records and changes to records relating to FMCA custodial services are accurate and are kept—
 - (i) in an appropriate and timely manner; and
 - (ii) in accordance with the Act, these regulations, and authorising agreements:
 - (f) there are adequate safeguards against the loss, misappropriation, and unauthorised use of client money and client property:
 - (g) sub-custodians are appropriately approved and managed and adequately monitored:
 - (h) reports to the client in respect of holdings of client money and client property—
 - (i) are complete and accurate; and

- (ii) are provided within the time frames in the Act, these regulations, and client agreements:
 - (i) information technology systems and processes are appropriate to allow the custodian to accurately and reliably meet the objectives in paragraphs (a) to (h).
- (3) In this regulation, **relevant period**, in relation to a custodian, means a 12-month period ending on the relevant date of the custodian, and if, as a result of the date on which it became a custodian or a change of the relevant date of the custodian, the period ending on that date is longer or shorter than 12 months, that longer or shorter period is a relevant period.

Regulation 10(1)(a): amended, on 17 December 2015, by regulation 6(1) of the Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2015 (LI 2015/277).

Regulation 10(1)(b): amended, on 17 December 2015, by regulation 6(2) of the Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2015 (LI 2015/277).

Regulation 10(3): inserted, on 17 December 2015, by regulation 6(3) of the Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2015 (LI 2015/277).

11 Application of sections 77P to 77T of Act and these regulations to wholesale clients

- (1) Sections 77P to 77T of the Act and these regulations apply to FMCA custodial services provided by a custodian to wholesale clients.
- (2) Subclause (1) does not apply to an FMCA custodial service if all of the clients for that service fall within 1 or more of the following categories:
 - (a) investment businesses within the meaning of clause 37 of Schedule 1 of the Financial Markets Conduct Act 2013;
 - (b) large persons within the meaning of clause 39 of Schedule 1 of the Financial Markets Conduct Act 2013;
 - (c) government agencies within the meaning of clause 40 of Schedule 1 of the Financial Markets Conduct Act 2013;
 - (d) entities that are under the control of a person referred to in any of paragraphs (a) to (c) (where **control** has the same meaning as in clause 48 of Schedule 1 of the Financial Markets Conduct Act 2013).
- (3) In subclause (2)(b), for the purpose of applying Schedule 1 of the Financial Markets Conduct Act 2013, **relevant time** (as referred to in clause 39 of that schedule) must be treated as the time immediately before the client agreement for the FMCA custodial service is entered into.

Regulation 11(2)(d): inserted, on 17 December 2015, by regulation 7 of the Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2015 (LI 2015/277).

Transitional matters

12 Transitional provision relating information requirements

In regulations 5 to 7, the information required by regulation 5(1)—

- (a) does not have to be provided until on or after 1 April 2015; and
- (b) does not have to relate to any transactions or any entries that occurred before 1 December 2014.

13 Application of regulations 9 and 10

- (1) Regulations 9 and 10 apply to an accounting period beginning on or after 1 April 2014.
- (2) Regulation 10(1) does not apply to the design or operation of the custodian's processes, procedures, and controls before 1 December 2014.

Michael Webster,
for Clerk of the Executive Council.

Issued under the authority of the Legislation Act 2012.
Date of notification in *Gazette*: 27 February 2014.

Reprints notes

1 *General*

This is a reprint of the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014 that incorporates all the amendments to those regulations as at the date of the last amendment to them.

2 *Legal status*

Reprints are presumed to correctly state, as at the date of the reprint, the law enacted by the principal enactment and by any amendments to that enactment. Section 18 of the Legislation Act 2012 provides that this reprint, published in electronic form, has the status of an official version under section 17 of that Act. A printed version of the reprint produced directly from this official electronic version also has official status.

3 *Editorial and format changes*

Editorial and format changes to reprints are made using the powers under sections 24 to 26 of the Legislation Act 2012. See also <http://www.pco.parliament.govt.nz/editorial-conventions/>.

4 *Amendments incorporated in this reprint*

Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2015 (LI 2015/277)

Financial Advisers (Custodians of FMCA Financial Products) Amendment Regulations 2014 (LI 2014/329)