Financial Markets Conduct Amendment Regulations 2020

Patsy Reddy, Governor-General

Order in Council

At Wellington this 14th day of December 2020

Present:
The Right Hon Jacinda Ardern presiding in Council

These regulations are made under subpart 1 of Part 9, section 576, and clause 90 of Schedule 4 of the Financial Markets Conduct Act 2013—

(a) on the advice and with the consent of the Executive Council; and

(b) on the recommendation of the Minister of Commerce and Consumer Affairs made in accordance with sections 545(3), 549, 550, and 576(2) and clause 90(2) of Schedule 4 of that Act.

Contents

Regulations

1 Title

These regulations are the Financial Markets Conduct Amendment Regulations 2020.

2 Commencement

(1) These regulations come into force on 15 March 2021.

(2) However,—

(a) regulation 17 comes into force on 30 January 2021; and

(b) regulations 29(2) and 30 come into force on 18 January 2021.

Part 1
Amendments to Financial Markets Conduct Regulations 2014

3 Amendments to Financial Markets Conduct Regulations 2014

This Part amends the Financial Markets Conduct Regulations 2014.

4 Regulation 3 amended (Overview)

Before regulation 3(f)(v), insert:

(ivb) additional regulation of regulated client money or client property services; and

5 Regulation 5 amended (Interpretation)

(1) In regulation 5(1), revoke the definitions of **DIMS**, **NBDT category 2 debt securities**, and **personalised DIMS**.

(2) In regulation 5(1), insert in their appropriate alphabetical order:

bank notice product has the meaning set out in clause 44(3) of Schedule 8

bonus bond has the meaning set out in clause 46A(2) of Schedule 8

call building society share has the meaning set out in clause 46A(2) of Schedule 8

call credit union share has the meaning set out in clause 46A(2) of Schedule 8

call debt security means a debt security under which—

(a) the product holder has a right to demand repayment of the principal sum in full at any time; and

(b) the issuer has an obligation to repay the principal sum in full not later than 1 working day after the demand is made; and

(c) the rate of interest payable or any other benefit provided does not alter as a result of the demand being made; and

(d) no fee or other amount is payable as a result of the principal sum not having been held by the issuer for a particular period of time

credit union fixed term deposit product means a share referred to in section 107 of the Friendly Societies and Credit Unions Act 1982, and issued by a credit union, under which—

(a) the member has a right to demand repayment of the value of the share in full at any time; and

(b) the credit union has an obligation to repay the value of the share in full in accordance with section 107(4) of the Friendly Societies and Credit Unions Act 1982; and

(c) a fixed rate of dividend or interest is payable if the principal sum is held by the credit union for a fixed period of time of up to 5 years (but the rate of dividend or interest payable may alter as a result of a demand being made before that fixed period ends); and

(d) no fee or other amount is payable as a result of the principal sum not having been held by the credit union for a particular period of time

credit union savings account product means a share referred to in section 107 of the Friendly Societies and Credit Unions Act 1982, and issued by a credit union under a savings account, under which—

(a) the member has a right to demand repayment of the value of the share in full at any time; and

(b) the credit union has an obligation to repay the value of the share in full in accordance with section 107(4) of the Friendly Societies and Credit Unions Act 1982; and

(c) the rate of dividend or interest payable or any other benefit provided does not alter as a result of the demand being made; and

(d) a fee or other amount may be payable as a result of the principal sum not having been held by the credit union for a particular period of time; and

(e) the fee or other amount referred to in paragraph (d) does not exceed $50

Crown-related entity means—

(a) a Crown entity under section 7 of the Crown Entities Act 2004, other than Public Trust:

(b) a department within the meaning of section 5 of the Public Service Act 2020:

(c) a government-related organisation as defined in section 4 of the Crown Organisations (Criminal Liability) Act 2002:

(d) the Reserve Bank

fixed term redeemable building society share has the same meaning as in clause 46A(2) of Schedule 8

PIE call fund unit has the same meaning as in clause 44(3) of Schedule 8

PIE term fund unit has the same meaning as in clause 44(3) of Schedule 8

simple NBDT debt security means a debt security issued by an NBDT that is—

(a) a call debt security; or

(b) a call building society share; or

(c) a call credit union share; or

(d) a credit union fixed term deposit product; or

(e) a credit union savings account product

(3) In regulation 5(1), definition of **specified bank**, paragraph (c), replace "regulation 9 of the Financial Advisers (Definitions, Voluntary Authorisation, Prescribed Entities, and Exemptions) Regulations 2011" with "regulation 229ZE".

6 Regulation 17 amended (PDS does not have to be given before application if investment in category 2 products is made urgently and PDS is later provided)

(1) In the heading to regulation 17, replace "**category 2**" with "**certain**".

(2) Replace regulation 17(a) with:

(a) the products are—

(i) call building society shares; or

(ii) call credit union shares; or

(iii) call debt securities; or

(iv) co-operative shares; or

(v) credit union fixed term deposit products; or

(vi) credit union savings account products; and

7 Regulation 18 amended (PDS does not have to be given for category 2 products issued by NBDT that are debt securities)

(1) In the heading to regulation 18, replace "**category 2**" with "**certain**".

(2) In regulation 18, replace "NBDT category 2 debt securities" with "simple NBDT debt securities".

8 Regulation 19 amended (NBDT must give credit risk statement to investors if it does not have investment-grade credit rating)

In regulation 19(2) and (3)(a), replace "NBDT category 2 debt securities" with "simple NBDT debt securities" in each place.

9 Regulation 20 amended (Information at start of PDS)

(1) In regulation 20(1)(e), replace "a financial adviser" with "a financial advice provider".

(2) In regulation 20(3), replace "a financial adviser to help you make your decision. You should ask if that adviser" with "a financial advice provider to help you make your decision. You should ask if that provider".

10 Regulation 22 amended (Content of PDS for offer of debt securities)

In regulation 22(2)(a), replace "NBDT category 2 debt securities" with "simple NBDT debt securities".

11 Regulation 26 amended (Key information summary)

In regulation 26(2), replace "NBDT category 2 debt securities" with "simple NBDT debt securities".

12 Regulation 34 amended (Additional information)

In regulation 34(4), definition of **relevant section**, paragraph (f), replace "NBDT category 2 debt securities" with "simple NBDT debt securities".

13 Regulation 49E amended (Modification of statement at start of PDS)

In regulation 49E, replace "a financial adviser" with "a financial advice provider".

14 Regulation 87 amended (Custodian must obtain assurance engagement)

Replace regulation 87(1) with:

(1) A custodian must obtain, within 4 months after the relevant date, an assurance engagement with a qualified auditor (including obtaining the assurance report within that period).

(1A) The assurance engagement must be done in accordance with applicable auditing and assurance standards.

15 Regulation 107 amended (Circumstances in which duty for issuer to keep register does not apply)

Replace regulation 107(b) with:

(b) call building society shares; or

(c) call credit union shares; or

(d) call debt securities; or

(e) credit union fixed term deposit products; or

(f) credit union savings account products.

16 New regulation 114AA inserted (Criterion for withdrawal of Schedule 3 scheme approval on trustee's application)

After regulation 114, insert:

114AA Criterion for withdrawal of Schedule 3 scheme approval on trustee's application

For the purposes of clause 2(1)(b)(iv) of Schedule 3 of the Act, the FMA must be satisfied that the scheme participant is entitled under the terms of the trust deed to receive, before the approval is withdrawn, a lump sum benefit that is equal to the total value of the scheme property after the payment of taxes and fees.

17 New regulation 106C and cross-heading inserted

After regulation 106B, insert:

Application of Trusts Act 2019 to PIE fund units

106C Application of Trusts Act 2019 to PIE fund units

(1) This regulation applies to a managed investment scheme constituted (or to be constituted) as 1 or more trusts or as including 1 or more trusts (or both) if the interests in the scheme—

(a) are—

(i) PIE call fund units; or

(ii) PIE term fund units; and

(b) are or will be offered in reliance upon clause 21(a) or (c) of Schedule 1 of the Act.

(2) The following provisions of the Trusts Act 2019 do not apply to any trust referred to in subclause (1):

(a) section 39 (adviser must alert settlor to modification or exclusion of default duty):

(b) sections 40 to 42 (exemption and indemnity clauses):

(c) section 43 (adviser must alert settlor to liability exclusion or indemnity clause):

(d) section 44 (court consideration of gross negligence):

(e) sections 60 and 61 (power to determine treatment of returns and accounts):

(f) sections 67 to 73 (exercise or performance of trustee powers and functions by others):

(g) sections 74 to 76 (special trust advisers):

(h) sections 81(2) and (3) and 82 to 85 (trustees' indemnities):

(i) section 96 (who may be appointed as trustee):

(j) sections 121 to 123 (termination and variation of trusts).

(3) *See* clause 28 of Schedule 8, which imposes governance requirements for offers made in reliance upon clause 21(a) or (c) of Schedule 1 of the Act.

18 Regulation 182 amended (Exemptions from DIMS licensing requirement)

(1) In regulation 182, replace "389(2)(c)" with "389(3)(b)".

(2) Replace regulation 182(1)(b) with:

(b) a service provided by a statutory officer or a Crown-related entity in—

(i) discharging any duties or exercising any powers of the statutory officer or the Crown-related entity under any enactment; or

(ii) doing anything that is incidental to the discharge of the functions of the statutory officer or the Crown-related entity under any enactment:

(3) In regulation 182(1)(c), replace "category 2 products" with "the financial products listed in subclause (3)".

(4) Replace regulation 182(2) with:

(2) In this regulation,—

incorporated law firm has the same meaning as in section 6 of the Lawyers and Conveyancers Act 2006

non-profit organisation means any organisation, whether incorporated or not, that is carried on other than for the purposes of profit or gain to an owner, a member, or a shareholder

statutory officer means a person—

(a) holding or performing the duties of an office established by an enactment; or

(b) performing duties expressly conferred on that person by virtue of their office by an enactment; or

(c) holding office as the chief executive of a Crown-related entity

trustee corporation means one of the following:

(a) Public Trust:

(b) the Māori Trustee:

(c) a corporation that is authorised by an Act to administer the estates of deceased persons and other trust estates:

(d) a wholly owned subsidiary of a corporation referred to in paragraph (c) that is guaranteed by the corporation.

(3) For the purposes of subclause (1)(c), the financial products are the following:

(a) bank notice products:

(b) bonus bonds:

(c) call building society shares:

(d) call credit union shares:

(e) call debt securities:

(f) credit union fixed term deposit products:

(g) credit union savings account products:

(h) fixed term deposit products issued by a registered bank:

(i) fixed term redeemable building society shares:

(j) PIE call fund units or PIE term fund units.

19 Regulation 183 replaced (Exemption for temporary management of portfolio in situations of absence or incapacity or unexpected contingencies)

Replace regulation 183 with:

183 Exemption for temporary management of portfolio in situations of absence or incapacity or unexpected contingencies

(1) For the purposes of section 389(3)(b) of the Act, a service provided by a financial advice provider (**P**) to another person (**B**) is an exempt service if all of the circumstances specified in subclause (2) apply.

(2) The circumstances are as follows:

(a) the service referred to in subclause (1) is incidental or secondary to other financial advice services provided by P to B in connection with financial products; and

(b) the investment authority is not granted for the purpose of providing a mechanism to allow P to regularly manage some or all of B's holdings of financial products; and

(c) the investment authority is restricted to temporary management of the investor's portfolio under the investment authority in situations of absence or incapacity or unexpected contingencies where—

(i) B has confirmed in writing that P may manage some or all of B's holdings of financial products for a temporary period that is specified in the confirmation (being a period that is not longer than is reasonably necessary to cover the period of the absence, incapacity, or contingency); or

(ii) P reasonably considers it urgent to act under the authority in the best interests of B, and P is not reasonably able to obtain instructions from B within a time frame that would enable P to act urgently; and

(d) the management of some or all of B's holdings of financial products under subclause (1) is for a period or periods that, in aggregate, do not exceed 6 months in any 12-month period; and

(e) P agrees in a written client agreement with B that P will, in relation to acting under the investment authority,—

(i) comply with the duties that would apply under sections 433(1) and 435 of the Act as if P were providing the service as a DIMS licensee under the Act; and

(ii) take all reasonable steps to ensure that P's directors and senior managers comply with the duties that would apply under section 434 of the Act as if P were providing the service as a DIMS licensee under the Act; and

(f) if P has any rights to be indemnified by B for liabilities incurred in relation to the performance of the service referred to in subclause (1), those rights—

(i) are set out in the client agreement referred to in paragraph (e); and

(ii) are available only in relation to the proper performance of the duties referred to in paragraph (e)(i); and

(g) the client agreement referred to in paragraph (e) must adequately provide for reporting on the transactions undertaken under the service, including—

(i) providing for appropriate timing and content of reports; and

(ii) requiring reporting on why P considered it necessary to act urgently in the case of paragraph (c)(ii); and

(h) the client agreement referred to in paragraph (e) must adequately provide for a right for B to immediately revoke the investment authority by written or oral notice to P; and

(i) neither P nor any person associated with P otherwise provides a DIMS to B (except to the extent otherwise permitted by clause 84 of Schedule 4 of the Act); and

(j) neither P nor any associated person of P holds the financial products acquired or disposed of under the service; and

(k) the investment authority—

(i) is in writing; and

(ii) clearly discloses the scope of the investment authority, including any limits on the nature or type of investments and on the proportion of each type of asset invested in, or if there are no such limits, clearly discloses that fact; and

(iii) does not permit the authority to be changed without B's prior written consent.

20 Regulation 188 amended (Eligibility criteria for authorised bodies)

(1) After regulation 188(1), insert:

(1A) The eligibility criterion for an entity under section 400(1A)(e) of the Act is that the key personnel of the entity are fit and proper persons to hold their respective positions.

(2) In regulation 188(2), after "body corporate", insert "or other entity".

21 Regulation 199 amended (General FMA conditions)

(1) After regulation 199(1)(c), insert:

(ca) conditions under section 400(1A) of the Act to authorise 1 or more named entities to provide a financial advice service covered by the licence:

(2) In regulation 199(2), replace "section 403(3)" with "section 403(3) and (4)".

22 Regulation 200 amended (Other FMA conditions for DIMS)

In regulation 200(a), replace "section 392(1)(b)" with "432A(1)(b)".

23 Regulation 204 amended (Information at start of SDS for DIMS)

In regulation 204(1)(f)(i), replace "a financial adviser" with "a financial advice provider".

24 Cross-heading above regulation 229A replaced

Replace the cross-heading above regulation 229A (as inserted by regulation 12 of the Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2020) with:

Disclosure for financial advice and financial advice services

25 New regulations 229K to 229ZE and cross-headings inserted

Before the cross-heading above regulation 230, insert:

Financial advice that is not regulated

229K Circumstances in which financial advice is not regulated financial advice

Schedule 21B prescribes circumstances in which financial advice is not regulated financial advice for the purposes of clause 17 of Schedule 5 of the Act.

229L Lender's duty to ensure borrower understands that advice about credit contract or insurance is not regulated financial advice

(1) This regulation applies for the purposes of clause 10(2) of Schedule 5 of the Act (which provides that a lender is taken to have complied with clause 10(1)(b) of that schedule if the lender gives the borrower a statement in the prescribed manner).

(2) The statement must be in the following form:

"You are protected by responsible lending laws. Because of these protections, the recommendations given to you about [*briefly specify (for example, "this home loan")*] are not regulated financial advice.

This means that duties and requirements imposed on people who give financial advice do not apply to these recommendations. This includes a duty to comply with a code of conduct and a requirement to be licensed."

(3) The lender must ensure that the statement,—

(a) if it is presented with other information, is given prominence; and

(b) if it is presented in writing, is in a format, font, and font size that is easily readable; and

(c) is made available or given free of charge.

(4) The lender may otherwise make the information available or give the information in the form and manner they reasonably consider appropriate.

(5) Regulation 9 applies to a statement under this regulation.

(6) If the lender gives a statement in oral form under this regulation, the lender must maintain records that demonstrate that it has met the requirements of this regulation.

Record of nominated representatives

229M Record of nominated representatives

For the purposes of section 431T(5) of the Act, a financial advice provider must ensure that the record of its nominated representatives contains the following:

(a) the name of each nominated representative:

(b) if a nominated representative is engaged indirectly through 1 or more interposed persons, the name of each interposed person:

(c) the date on which the nomination of each nominated representative takes effect:

(d) if the nomination is specified as expiring on a particular date, that date:

(e) if the nomination has expired, the date on which it expired.

Custodians of financial products

229N Application of regulations relating to custodians of financial products

(1) Regulations 229P to 229V apply to a person who provides relevant custodial services to a client.

(2) However, those regulations do not apply to any of the following:

(a) a person who provides relevant custodial services if the person and all of its associated persons provide the 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:

(ii) an executor, an administrator, or a trustee of a deceased person's estate in respect of the estate's assets:

(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:

(iv) any person appointed by the court in respect of a person's assets:

(c) a sub-custodian acting in that capacity.

Compare: LI 2014/48 r 4(1), (2)

229O Definitions in regulations 229N to 229W

In regulations 229N to 229W,—

assurance report means a report for an assurance engagement under regulation 229U

custodian means a person to whom regulations 229P to 229V apply under regulation 229N

family trust has the same meaning as in section 173M(5) of the Tax Administration Act 1994

relevant custodial service—

(a) means a custodial service that—

(i) is a regulated client money or property service; and

(ii) relates to a financial product; but

(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

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

Compare: LI 2014/48 r 3

229P Relevant custodial services provided on behalf of business of another person

(1) This regulation applies to relevant custodial services provided to a client (**C**) if—

(a) a person (**A**) provides the services to C on behalf of the business of another person (**B**); and

(b) B does not itself provide the services but, by virtue of section 431ZI of the Act, is treated (instead of A) as the provider having the obligations under subpart 5B of Part 6 of the Act.

(2) If this regulation applies,—

(a) B must ensure that A complies with the requirements of regulations 229Q to 229ZC in respect of the relevant 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 regulations 229Q to 229ZC in respect of the relevant custodial services if A complies with the requirements as referred to in paragraph (a).

Compare: LI 2014/48 r 4(3), (4)

229Q Custodian must provide information to clients

(1) For the purposes of section 431ZF of the Act, a custodian must, in relation to its relevant custodial service, provide the following information to a client for each reporting period in respect of client money and client property received or held 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 the 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 financial products to which the transaction relates; and

(iii) the balance of that class of financial products held on behalf of the client on completion of the transaction; and

(b) all entries made in a ledger of client money held on behalf of the client 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 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 the fees (if any) 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 229U and 229V.

(2) The information—

(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.

Compare: LI 2014/48 r 5

229R Alternative means of providing information required by regulation 229Q(1)

(1) A custodian does not have to comply with regulation 229Q(2) and (3) if—

(a) the information required by regulation 229Q(1) is available through an electronic facility on a substantially continuous basis; and

(b) the client agrees to the information being provided in that way; and

(c) 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 229Q(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.

Compare: LI 2014/48 r 6

229S Client request for information from custodian

For the purposes of section 431ZF of the Act, if a client has made a written request to the custodian for any information required by regulation 229Q(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.

Compare: LI 2014/48 r 7

229T Procedures for reconciling custodian's records

(1) This regulation applies for the purposes of section 431ZE(4)(b) of the Act.

(2) 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, in relation to its relevant custodial service,—

(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.

(3) The frequency of the reconciliation of client property 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.

(4) All records of client money must be reconciled daily.

Compare: LI 2014/48 r 8

229U Custodian must obtain assurance engagement

(1) This regulation and regulation 229V apply for the purposes of sections 431ZC(4), 431ZE(4)(b), and 431ZF of the Act.

(2) A custodian must obtain, within 4 months after the relevant date, an assurance engagement with a qualified auditor in relation to its relevant custodial service (including obtaining the assurance report within that period).

(3) The assurance engagement must be done in accordance with applicable auditing and assurance standards.

(4) 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.

(5) In this regulation and regulation 229V, **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.

(6) The following apply for the purposes of the date under subclause (5)(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.

Compare: LI 2014/48 r 9

229V 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 that—

(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 relevant 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 relevant 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.

Compare: LI 2014/48 r 10

Application of obligations to custodial services provided to wholesale clients

229W Application of sections 431ZC to 431ZH of Act and regulations to wholesale clients

(1) The following apply to relevant custodial services provided by a custodian to wholesale clients:

(a) sections 431ZC to 431ZH of the Act (obligations for handling client money and client property); and

(b) regulations 229Q to 229V and 229X to 229ZE.

(2) Subclause (1) does not apply to a relevant 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 Act:

(b) large persons within the meaning of clause 39 of Schedule 1 of the Act:

(c) government agencies within the meaning of clause 40 of Schedule 1 of the Act:

(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 Act).

(3) Subclause (1) does not apply to a relevant custodial service provided by a derivatives issuer to the extent that the client money or client property to which the service relates is derivatives investor money (as defined in regulation 239(1) to (3) and (6)) or derivatives investor property (as defined in regulation 239(4) to (6)).

(4) In subclause (2)(b), for the purpose of applying Schedule 1 of the Act, **relevant time** (as referred to in clause 39 of that schedule) must be treated as the time immediately before the client agreement for the custodial service is entered into.

Compare: LI 2014/48 r 11; SR 2011/50 r 13

Holding client money or property together with other money or property

229X Application of regulations that allow client money or property to be held together with other money or property

(1) Regulations 229Y to 229ZC apply for the purposes of section 431ZC(3) and (4) of the Act (which provides for when client money or client property may be held together with other money or property).

(2) In those regulations, **client money trust account**, **financial product transaction**, **firm money**, **firm property**, **non-NZX provider**, **NZX provider**, and **reasonably necessary** have the meanings set out in clause 2 of Schedule 21C.

229Y Client money or property not held separately in order to facilitate settlements

(1) Section 431ZC(2) of the Act does not apply to an NZX provider to the extent that—

(a) client money or client property is held together with firm money or firm property for the purpose of facilitating or arranging the settlement of 1 or more financial product transactions for a client of the NZX provider; and

(b) it is reasonably necessary for client money or client property to be held together with firm money or firm property.

(2) However, this regulation applies only if the NZX provider is satisfied on reasonable grounds that it has adequate systems and procedures for ensuring that it complies with the applicable duties set out in Schedule 21C.

229Z When firm money or property not held separately in order to facilitate settlements is treated as client money or property

(1) This regulation applies for the purposes of section 431ZC(3)(b) of the Act.

(2) Firm money or firm property (the **money or property**) that is held together with client money or client property under regulation 229Y must be treated as client money or client property for all purposes (subject to subclause (3)).

(3) However, the NZX provider must separate the money or property from the client money or client property in order to comply with clause 3(2)(a) of Schedule 21C (in which case, the separated money or property ceases to be client money or client property).

229ZA Client money not held separately in order to rectify or reduce risk of shortfall

(1) Section 431ZC(2) of the Act does not apply to an NZX provider or a non-NZX provider to the extent that it is reasonably necessary for firm money to be held together with client money in a client money trust account in order to rectify, or reduce the risk of, a shortfall arising in the client money held for a client in that account.

(2) However, this regulation applies to—

(a) an NZX provider only if the provider is satisfied on reasonable grounds that it has adequate systems and procedures for ensuring that it complies with the applicable duties set out in Schedule 21C; and

(b) a non-NZX provider only if—

(i) the provider is satisfied on reasonable grounds that it has adequate systems and procedures for ensuring that it complies with the applicable duties set out in Schedule 21C; and

(ii) the provider has notified the FMA in writing that it intends to rely on this regulation; and

(iii) the provider maintains, at a bank in New Zealand, at least 1 client money trust account in each currency in which it accepts money from or on behalf of clients; and

(iv) the provider has obtained from each bank that holds a client money trust account a written acknowledgement of the trust status of that account; and

(v) the provider has ensured that the words "client funds account", "trust account", "client funds a/c", or "trust a/c" appear in the name of each client money trust account.

229ZB When firm money not held separately in order to rectify or reduce risk of shortfall is treated as client money

(1) This regulation applies for the purposes of section 431ZC(3)(b) of the Act.

(2) Firm money (the **money**) that is held together with client money under regulation 229ZA must be treated as client money for all purposes (subject to subclause (3)).

(3) However, the NZX provider or non-NZX provider must separate the money from the client money in order to comply with clause 4(2)(a) or (c) of Schedule 21C (in which case, the separated money ceases to be client money).

229ZC Provider that holds client money or property together with other money or property must comply with duties

For the purposes of section 431ZC(4) of the Act, a provider must comply with the applicable duties set out in Schedule 21C if the provider relies on regulation 229Y or 229ZA.

Miscellaneous provisions relating to regulation of client money or property services

229ZD Custodianship of property of registered scheme is not regulated client money or property service

(1) This regulation applies for the purposes of clause 22 of Schedule 5 of the Act.

(2) To the extent that the holding of scheme property under sections 156 to 160 of the Act is a client money or property service, that service is not a regulated client money or property service.

229ZE Overseas banks prescribed entities for purposes of section 431ZC of Act

(1) Overseas banks are prescribed entities for the purposes of section 431ZC(1)(b) of the Act.

(2) In this regulation,—

overseas bank means a bank that is—

(a) an overseas person; and

(b) subject to regulatory controls that are substantially the same as those applying in New Zealand in relation to—

(i) the composition of the board of directors or other governing body of the bank; and

(ii) the disclosure requirements relating to the bank's financial position; and

(iii) the requirements relating to the capital adequacy of the bank; and

(iv) the requirements relating to the taking of deposits

overseas person means—

(a) a body corporate incorporated outside New Zealand; or

(b) an unincorporated body that has its head office or principal place of business outside New Zealand.

26 Regulation 248 amended (Assurance engagement)

Replace regulation 248(1) with:

(1) A derivatives issuer who holds derivatives investor money or derivatives investor property must, within 4 months after the issuer's balance date, obtain an assurance engagement with a qualified auditor (including obtaining the assurance report within that period).

(1A) The assurance engagement must be done in accordance with applicable auditing and assurance standards.

27 Schedule 1 amended

(1) In Schedule 1,—

(a) insert the Part set out in Schedule 1 of these regulations as the last Part; and

(b) make all necessary consequential amendments.

(2) In Schedule 1, revoke clauses 40(1), 41 to 43, and 47(4) (as inserted by subclause (1)) on the close of 14 March 2024.

28 Schedule 3 amended

In Schedule 3, clause 34, replace "a financial adviser" with "a financial advice provider".

29 Schedule 4 amended

(1) In Schedule 4, clause 2(1), definition of **individual action fees**, replace paragraph (b)(ii) with:

(ii) fees for financial advice:

(2) In Schedule 4, clause 41(1), replace "If the advised PIR is lower than the correct PIR, you will need to complete a personal tax return and pay any tax shortfall, interest, and penalties. If the default rate or the advised PIR is higher than the correct PIR, you will not get a refund of any overpaid tax." with "If the rate applied to your PIE income is lower than your correct PIR, you will be required to pay any tax shortfall as part of the income tax year-end process. If the rate applied to your PIE income is higher than your PIR, any tax over-withheld will be used to reduce any income tax liability you may have for the tax year and any remaining amount will be refunded to you."

30 Schedule 5 amended

In Schedule 5, clause 37(1), replace "If the advised PIR is lower than the correct PIR, you will need to complete a personal tax return and pay any tax shortfall, interest, and penalties. If the default rate or the advised PIR is higher than the correct PIR, you will not get a refund of any overpaid tax." with "If the rate applied to your PIE income is lower than your correct PIR, you will be required to pay any tax shortfall as part of the income tax year-end process. If the rate applied to your PIE income is higher than your PIR, any tax over-withheld will be used to reduce any income tax liability you may have for the tax year and any remaining amount will be refunded to you."

31 Schedule 7 amended

In the Schedule 7 heading, replace "**NBDT category 2 debt securities**" with "**Simple NBDT debt securities**".

32 Schedule 7A amended

In Schedule 7A, clauses 2 and 3, replace "a financial adviser" with "a financial advice provider".

33 Schedule 8 amended

(1) In Schedule 8, replace clause 23(2)(a) with:

(a) the debt securities are—

(i) bank notice products; or

(ii) call building society shares; or

(iii) call debt securities; or

(iv) fixed term deposit products; or

(v) fixed term redeemable building society shares; or

(2) In Schedule 8, replace clause 27(2) with:

(2) *See* clause 44, which prescribes various financial products for the purposes of clause 21(a) and (c) of Schedule 1 of the Act.

(3) In Schedule 8, revoke clause 29(2)(b).

(4) In Schedule 8, replace clause 37(2)(a)(i) with:

(i) are bank notice products, call building society shares, call debt securities, fixed term deposit products, or fixed term redeemable building society shares; or

(5) In Schedule 8, heading to clause 44, replace "**Category 2**" with "**Certain**".

(6) In Schedule 8, before clause 44(1), insert:

(1A) The following kinds of financial products are prescribed for the purposes of clause 21(a) of Schedule 1 of the Act:

(a) a bank notice product:

(b) a call building society share:

(c) a call debt security:

(d) a fixed term deposit product:

(e) a fixed term redeemable building society share:

(f) a PIE call fund unit:

(g) a PIE term fund unit.

(7) In Schedule 8, clause 44(1), replace "category 2 products" with "financial products".

(8) In Schedule 8, replace clause 44(3) with:

(3) In this clause,—

bank notice product means a debt security issued by a registered bank in New Zealand or a specified unit under which—

(a) the product holder has the right to demand, at any time, repayment in full of the principal sum or withdrawal in full of the unit price or value of the units; and

(b) the issuer has an obligation to pay the amount demanded not later than any period (specified in the terms of issue) after the demand being made; and

(c) no fee or other amount is payable as a result of the amount demanded not having been held by the issuer for a particular period of time

PIE call fund unit means a specified unit in respect of which—

(a) the unit holder has a right to withdraw the unit price or value of the units in full at any time, subject only to the following rights and requirements to the extent that they are described in the terms of issue for the PIE call fund units:

(i) the right of the specified issuer to suspend withdrawals if the withdrawal would prejudice the interests of unit holders in the PIE call fund as a whole or would threaten the relevant specified PIE's eligibility as a multi-rate PIE as defined in section YA 1 of the Income Tax Act 2007:

(ii) the right of the specified issuer to use some or all of the unit price or value to meet any amounts that are owing by the unit holder to the specified bank:

(iii) the right of the specified issuer, on a demand for withdrawal of the unit price or value, to pay less than the unit price or value in full because of any default or impairment of debt securities of the specified bank in which the specified PIE invests:

(iv) a requirement to maintain a minimum account balance:

(v) the right of the specified issuer to withhold payment if the consideration for the units has not been received or cleared:

(vi) a requirement to withdraw a minimum amount:

(vii) the right of the specified issuer, or the trustee of the PIE call fund, to be indemnified for expenses, costs, and liabilities incurred in acting as the specified issuer or trustee of the PIE call fund, to the extent that they relate to, or are attributable to, the relevant units:

(viii) the right of the specified issuer to deduct from the unit price amounts due, or to become due, on account of tax; and

(b) no fee or other amount is payable as a result of the specified unit not having been held by the unit holder for a particular period of time

PIE term fund unit means a specified unit that has—

(a) a fixed term; and

(b) a fixed principal amount; and

(c) a potential penalty if the unit price or value is withdrawn before the expiry of the fixed term

registered bank parent means a registered bank that is the holding company of a specified issuer (within the meaning of section 5 of the Companies Act 1993)

specified bank means,—

(a) if the specified issuer is a registered bank,—

(i) the registered bank; or

(ii) a related company of the registered bank that is also a registered bank; or

(b) if the specified issuer is not a registered bank,—

(i) the specified issuer's registered bank parent; or

(ii) a related company of the specified issuer's registered bank parent that is also a registered bank

specified issuer means an issuer, in respect of 1 or more specified PIEs, that—

(a) is a registered bank that, in the ordinary course of its business, continuously offers specified units; or

(b) is a subsidiary of its registered bank parent that—

(i) is controlled by its registered bank parent within the meaning of section 7 of the Companies Act 1993; and

(ii) in the ordinary course of its business, continuously offers specified units

specified PIE means a unit trust or group investment fund—

(a) that is a multi-rate PIE as defined in section YA 1 of the Income Tax Act 2007; and

(b) in respect of which all of the money received from the public by way of subscriptions for specified units is invested in fixed term deposit products issued by a registered bank, debt securities that are bank notice products, call building society shares, or call debt securities issued by a specified bank

specified unit means a unit in a specified PIE or in a fund of a specified PIE

working day, in relation to a currency forward,—

(a) has the same meaning as in section 13 of the Legislation Act 2019; but

(b) if a payment or delivery under the currency forward is made or received in an overseas jurisdiction, does not include a day that, under the law of that jurisdiction, is a public holiday or a bank holiday in that jurisdiction.

(4) Paragraphs (a) to (c) of the definition of **bank notice product** in subclause (3) may, in the case of a specified unit, be subject to the rights and requirements set out in paragraph (a)(i) to (viii) of the definition of PIE call fund unit in subclause (3) to the extent that they are described in the terms of issue for the specified units.

(9) In Schedule 8, after clause 46, insert:

46A Wholesale investor's definition: investment activity criteria

(1) The following are prescribed for the purposes of clause 38(4)(a) of Schedule 1 of the Act (which provides for products that are not specified financial products for the purposes of the investment activity test):

(a) bank notice products:

(b) bonus bonds:

(c) call building society shares:

(d) call credit union shares:

(e) call debt securities:

(f) credit union fixed term deposit products:

(g) credit union savings account products:

(h) fixed term deposit products issued by a registered bank:

(i) fixed term redeemable building society shares:

(j) co-operative shares:

(k) PIE call fund units or PIE term fund units.

(2) In this clause,—

bonus bond means a unit in an approved unit trust within the meaning of section 3(1) of the Finance Act (No 2) 1990

call building society share means a share issued by a building society under which—

(a) the shareholder has a right to demand repayment of the value of the share in full at any time; and

(b) the building society has an obligation to repay the value of the share in full not later than 1 working day after the demand is made; and

(c) the rate of dividend or interest payable or any other benefit provided does not alter as a result of the demand being made; and

(d) no fee or other amount is payable as a result of the principal sum not having been held by the building society for a particular period of time

call credit union share means a share referred to in section 107 of the Friendly Societies and Credit Unions Act 1982, and issued by a credit union, under which—

(a) the member has a right to demand repayment of the value of the share in full at any time; and

(b) the credit union has an obligation to repay the value of the share in full in accordance with section 107(4) of the Friendly Societies and Credit Unions Act 1982; and

(c) the rate of dividend or interest payable or any other benefit provided does not alter as a result of the demand being made; and

(d) no fee or other amount is payable as a result of the principal sum not having been held by the credit union for a particular period of time

fixed term redeemable building society share means a share issued by a building society that is a registered bank if—

(a) it is redeemable in cash at the end of a fixed term or on the liquidation of the building society; and

(b) it bears a rate of dividend set on the issue of the share; and

(c) on liquidation of the building society, the former holder ranks ahead of all other classes of shareholders for the consideration payable on redemption.

34 Schedule 19 amended

(1) In Schedule 19, replace "**an authorised financial adviser**" with "**a financial advice provider**".

(2) In Schedule 19, replace "an authorised financial adviser" with "a financial advice provider" in each place.

35 Schedule 21A amended

In Schedule 21A (as inserted by regulation 14 of the Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2020), clause 6(2), replace "to (g)" with "to (h)".

36 New Schedules 21B and 21C inserted

Before Schedule 22, insert the Schedules 21B and 21C set out in Schedule 2 of these regulations.

37 Schedule 25 amended

In Schedule 25, clause 7, replace "an appropriately qualified financial adviser" with "a financial advice provider".

38 Schedule 26 amended

In Schedule 26, replace "a financial adviser" with "a financial advice provider" in each place.

Part 2
Amendments to Financial Markets Conduct (Asia Region Funds Passport) Regulations 2019

39 Amendments to Financial Markets Conduct (Asia Region Funds Passport) Regulations 2019

This Part amends the Financial Markets Conduct (Asia Region Funds Passport) Regulations 2019.

40 Regulation 10 amended (Effect of recognised offer)

After regulation 10(2), insert:

(2A) Every operator and every foreign passport fund is exempted from the licensing requirement under section 388(ba) of the Act (financial advice services) to the extent that—

(a) the operator or foreign passport fund provides a financial advice service in relation to offering managed investment products under a recognised offer; and

(b) that financial advice service is provided to or through a qualified distributor that is acting in relation to the offer as referred to in section 2(2) and (3) of Annex 1 of the memorandum.

Part 3
Amendments to Financial Markets Conduct (Unlisted Market) Regulations 2015

41 Amendments to Financial Markets Conduct (Unlisted Market) Regulations 2015

This Part amends the Financial Markets Conduct (Unlisted Market) Regulations 2015.

42 Regulation 3 amended (Interpretation)

(1) In regulation 3(1), replace the definition of **approved broker** with:

approved provider means a person who—

(a) is registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 for a regulated client money or property service; and

(b) holds, or is authorised to provide a service under, a licence that covers financial advice services

(2) In regulation 3(1), definition of **material enforcement action**, replace "approved broker" with "approved provider".

43 Regulation 5 amended (Conditions of exemption)

(1) In regulation 5(c), (d), (g)(iv), (i), (l), and (m), replace "approved broker" with "approved provider".

(2) In regulation 5(g)(ii), replace "approved brokers" with "approved providers".

Schedule 1
New Part 8 inserted into Schedule 1

r 27

Part 8
Provisions relating to Financial Markets Conduct Amendment Regulations 2020

40 Interpretation

(1) In this Part,—

former AFA means a person who—

(a) was, immediately before 15 March 2021, an authorised financial adviser under the Financial Advisers Act 2008; and

(b) on 15 March 2021, is—

(i) a financial adviser; or

(ii) a nominated representative; or

(iii) a financial advice provider; or

(iv) a director or senior manager of a financial advice provider

former code means the code of professional conduct in force under section 94 of the Financial Advisers Act 2008

former QFE means an entity that—

(a) was, immediately before 15 March 2021, a QFE or qualifying financial entity under the Financial Advisers Act 2008; and

(b) on 15 March 2021, is a financial advice provider

transitional period means the period starting on 15 March 2021 and ending on the close of 14 March 2024.

(2) In this Part,—

(a) a reference to former regulation 183 is a reference to regulation 183 (as in force immediately before 15 March 2021):

(b) a reference to new regulation 183 is a reference to regulation 183 (as in force on 15 March 2021).

41 Duty of former authorised financial advisers to retain existing records for at least 7 years continues

(1) This clause applies to a former AFA in relation to the records (the **existing records**) that the former AFA was required to ensure were kept under code standard 13 of the former code.

(2) The former AFA must, during the transitional period, continue to comply with code standard 13 of the former code in relation to the existing records as if that standard were still in force and the former AFA were still an authorised financial adviser.

(3) Nothing in this clause applies to records created on or after 15 March 2021.

42 Duty of former QFEs relating to existing records continues

(1) This clause applies to a former QFE in relation to the records (the **existing records**) that the former QFE was required to ensure were kept under the terms and conditions of the QFE's grant of QFE status.

(2) The former QFE must, during the transitional period, continue to comply with those terms and conditions in relation to the existing records as if the terms and conditions were still in force and the former QFE were still a QFE.

(3) The records referred to in this clause include records relating to the financial adviser services of the former QFE, the former QFE's QFE group (including previous members of the QFE group), or the nominated representatives of any of those entities.

(4) Nothing in this clause applies to records created on or after 15 March 2021.

(5) In this clause, **financial adviser services**, **QFE group**, and **nominated representatives** have the same meanings as in section 5 of the Financial Advisers Act 2008 immediately before its repeal.

43 Complaints after 15 March 2021 about financial adviser conduct under former code of conduct

(1) This clause applies to a complaint that is made on or after 15 March 2021 if—

(a) the complaint is about—

(i) the conduct of a person (**A**) in that person's capacity as a financial adviser under the Financial Advisers Act 2008, where that conduct occurred before 15 March 2021; or

(ii) a breach of code standard 13 of the former code (to the extent continued by clause 41) by a person to whom clause 41 applies (**A**); and

(b) the conduct or the breach is not the subject of a proceeding to which clause 89 of Schedule 4 of the Act applies; and

(c) the complaint is initiated by the FMA or is made by any other person.

(2) The FMA and the disciplinary committee established under clause 49 of Schedule 5 of the Act may deal with the complaint under Part 5 of Schedule 5 of the Act.

(3) However, the disciplinary committee—

(a) may only do any 1 or more of the actions referred to in section 101(3)(d) and (f) to (h) of the Financial Advisers Act 2008 (as in force immediately before its repeal); and

(b) may only do 1 or more of those actions if it is satisfied that A breached the code of professional conduct in force under section 94 of the Financial Advisers Act 2008 (or as continued in effect under clause 41).

44 Exemption for temporary management of portfolio by financial adviser who is engaged by financial advice provider

(1) This clause applies if,—

(a) immediately before 15 March 2021, a person who was an authorised financial adviser (**A**) was able to provide a service to another person (**B**) that was an exempt service under former regulation 183; and

(b) the investment authority referred to in former regulation 183(2) names A as the person who will provide the service; and

(c) A is engaged as a financial adviser by a financial advice provider (**P**).

(2) For the purposes of section 389(3)(b) of the Act, a service provided by P to B is an exempt service if—

(a) the service is provided by A on behalf of P; and

(b) B has agreed in writing that the service may be provided by A on behalf of P—

(i) on the basis of the investment authority granted to A and the client agreement between A and B that applied under former regulation 183; and

(ii) for a stated period that ends no later than the close of 14 March 2022; and

(c) P has notified B in writing that B has a right to immediately revoke the investment authority by written or oral notice to either P or A; and

(d) all of the circumstances specified in new regulation 183(2) apply (but with the modifications under subclause (3) and any other necessary modifications).

(3) New regulation 183(2) applies with the following modifications:

(a) the references to an investment authority are references to the investment authority that applied under former regulation 183:

(b) the references to the service in new regulation 183(1) are references to the service described in subclause (2) of this clause:

(c) the references to P in new regulation 183(2)(b) and (c) must be treated as references to A:

(d) new regulation 183(2)(e) does not apply, but in relation to providing the exempt service,—

(i) P (and A on P's behalf) must comply with the duties that would apply under sections 433(1) and 435 of the Act as if P were providing the service as a DIMS licensee under the Act; and

(ii) P must take all reasonable steps to ensure that P's directors and senior managers comply with the duties that would apply under section 434 of the Act as if P were providing the service as a DIMS licensee under the Act:

(e) new regulation 183(2)(f) does not apply, but instead, if A or P has any rights to be indemnified by B for liabilities incurred in relation to the performance of the service referred to in subclause (2),—

(i) those rights are set out, and agreed to by B, in writing; and

(ii) those rights are available only in relation to the proper performance of the duties referred to in paragraph (d)(i):

(f) new regulation 183(2)(g) and (h) does not apply, but instead,—

(i) immediately before 15 March 2021, there must have been a client agreement between A and B that adequately provided for the matters specified in former regulation 183(2)(f) and (g); and

(ii) P and A must continue to comply with that client agreement to the extent that it provides for those matters (and, for that purpose, P must comply with the agreement as if P were A, including accepting a notice referred to in former regulation 183(2)(g) that is given to either P or A).

45 When clause 44 ceases to apply

(1) Clause 44 ceases to apply if A is or becomes engaged as a financial adviser by more than 1 financial advice provider.

(2) In all other cases, clause 44 ceases to apply on the close of 14 March 2022.

46 Exemption for temporary management of portfolio by financial adviser who becomes financial advice provider

(1) This clause applies if,—

(a) immediately before 15 March 2021, a person (**P**) who was an authorised financial adviser was able to provide a service to another person (**B**) that was an exempt service under former regulation 183; and

(b) the investment authority referred to in former regulation 183(2) names P as the person who will provide the service; and

(c) P is a financial advice provider.

(2) For the purposes of section 389(3)(b) of the Act, a service provided by P to B is an exempt service if all of the circumstances specified in new regulation 183(2) apply (but with the modifications under subclause (3) and any other necessary modifications).

(3) New regulation 183(2) applies with the following modifications:

(a) the references to an investment authority are references to the investment authority that applied under former regulation 183:

(b) the references to the service in new regulation 183(1) are references to the service described in subclause (2) of this clause:

(c) new regulation 183(2)(e) does not apply, but in relation to providing the exempt service, P must comply with the duties that would apply under sections 433(1) and 435 of the Act as if P were providing the service as a DIMS licensee under the Act:

(d) new regulation 183(2)(f) does not apply, but instead, if P has any rights to be indemnified by B for liabilities incurred in relation to the performance of the service referred to in subclause (2),—

(i) those rights are set out, and agreed to by B, in writing; and

(ii) those rights are available only in relation to the proper performance of the duties referred to in paragraph (c):

(e) new regulation 183(2)(g) and (h) does not apply, but instead,—

(i) immediately before 15 March 2021, there must have been a client agreement between P and B that adequately provided for the matters specified in former regulation 183(2)(f) and (g); and

(ii) P must continue to comply with that client agreement to the extent that it provides for those matters.

(4) This clause ceases to apply on the close of 14 March 2022.

47 Transitional arrangements for custodians' assurance engagement duty

(1) This clause applies to a person (a **custodian**) who, immediately before 15 March 2021, was subject to regulation 9 of the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014 (the **2014 regulations**).

(2) The relevant date that applied to the custodian, immediately before 15 March 2021, under regulation 9 of the 2014 regulations continues to be the relevant date of the custodian under regulation 229U of these regulations (until that date is changed under regulation 229U(6)(b)).

(3) Regulation 229U of these regulations applies to the custodian in relation to relevant periods (as defined in regulation 229V(3)) that end on or after 15 March 2021 (and regulations 9 and 10 of the 2014 regulations continue to apply to the custodian in relation to any relevant period that ends before that date).

(4) The Financial Advisers (Overseas Custodians—Assurance Engagement) Exemption Notice 2018 continues to apply to a custodian in relation to a relevant period to which regulations 9 and 10 of the 2014 regulations continue to apply as if the Financial Services Legislation Amendment Act 2019 had not been enacted.

48 Transitional provisions relating to Financial Advisers (Non-NZX Brokers—Client Money) Exemption Notice 2017

(1) This clause applies to a person (**A**) who was a non-NZX broker under the Financial Advisers (Non-NZX Brokers—Client Money) Exemption Notice 2017 and who is a non-NZX provider under Schedule 21C.

(2) If A notified the FMA under clause 5(2) of the Financial Advisers (Non-NZX Brokers—Client Money) Exemption Notice 2017, the notification must be treated as a notification under regulation 229ZA(2)(b)(ii).

(3) If A gave information to a client under clause 7(1)(b) of the Financial Advisers (Non-NZX Brokers—Client Money) Exemption Notice 2017, A must be treated as having complied with clause 5(1)(a) of Schedule 21C in relation to that client.

(4) If A holds a current acknowledgement under clause 7(1)(c)(i) or (iii) of the Financial Advisers (Non-NZX Brokers—Client Money) Exemption Notice 2017 in relation to a bank account, A must be treated as having complied with regulation 229ZA(2)(b)(iv) in relation to that account (but a new written acknowledgement must be provided under clause 5(1)(b) of Schedule 21C if there are any subsequent changes as referred to in that paragraph).

(5) A's relevant date under clause 7(2) of the Financial Advisers (Non-NZX Brokers—Client Money) Exemption Notice 2017 must be treated as A's relevant date under clause 5(2) of Schedule 21C (until A changes that date).

49 Amendments to information in PDS do not apply to PDS lodged before 15 March 2021

(1) The amendments made by regulations 9, 13, and 28 of the Financial Markets Conduct Amendment Regulations 2020 do not apply to a PDS that is lodged before 15 March 2021.

(2) Subclause (1) does not prevent the PDS from being amended to comply with regulation 20 or 49E or Schedule 3 of these regulations (as amended by the Financial Markets Conduct Amendment Regulations 2020).

50 Amendment to information in SDS is not mandatory until 15 March 2022

If an SDS is provided before 15 March 2022, the SDS may be in accordance with—

(a) regulation 204(1)(f) as in force immediately before the amendment made by regulation 23 of the Financial Markets Conduct Amendment Regulations 2020; or

(b) regulation 204(1)(f) as amended by regulation 23 of the Financial Markets Conduct Amendment Regulations 2020.

51 Amendment to confirmation information for KiwiSaver schemes is not mandatory until 15 March 2022

If a statement under regulation 71AA(2)(b) or (3)(b)(ii) is made available before 15 March 2022, that statement may be in accordance with—

(a) clause 2 or 3 of Schedule 7A as in force immediately before the amendments made by regulation 32 of the Financial Markets Conduct Amendment Regulations 2020; or

(b) clause 2 or 3 of Schedule 7A as amended by regulation 32 of the Financial Markets Conduct Amendment Regulations 2020.

52 Amendment to warning statement does not apply to offer for which notice is lodged before 15 March 2021

(1) The amendment made by regulation 37 of the Financial Markets Conduct Amendment Regulations 2020 to Schedule 25 does not apply to a warning statement for an offer for which the Australian offeror has lodged a notice under regulation 266 before 15 March 2021.

(2) Subclause (1) does not prevent a warning statement from being amended to comply with Schedule 25 (as amended by the Financial Markets Conduct Amendment Regulations 2020).

Schedule 2
New Schedules 21B and 21C inserted

r 36

Schedule 21B
Financial advice not regulated financial advice in certain circumstances

r 229K

1 Workplace financial products advice given to employees of related entities is not regulated financial advice

(1) Financial advice is not regulated financial advice if it is given—

(a) by or on behalf of a body corporate (**A**); and

(b) to an employee of—

(i) an entity that is related to A; or

(ii) a limited partnership if A and the general partner are related bodies corporate; and

(c) in relation to a financial advice product that is made available through the employee's workplace.

(2) In this regulation, an entity (**A**) is **related** to another entity (**B**) if—

(a) B is A's holding company or subsidiary within the meaning of section 5 of the Companies Act 1993; or

(b) more than half of A's voting products (other than voting products that carry no right to participate beyond a specified amount in a distribution of either profits or capital) are held by B and entities that are related to B (whether directly or indirectly, but other than in a fiduciary capacity), or vice versa; or

(c) more than half of the voting products (other than voting products that carry no right to participate beyond a specified amount in a distribution of either profits or capital) of each of A and B are held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or

(d) the businesses of A and B have been so carried on that the separate business of each entity, or a substantial part of that business, is not readily identifiable; or

(e) there is another entity to which A and B are both related.

Compare: SR 2011/50 r 11

2 Retirement village operators advice about occupation right agreement is not regulated financial advice

(1) Financial advice is not regulated financial advice if—

(a) it is given by or on behalf of an operator of a retirement village in the ordinary course of business of an operator of a retirement village; and

(b) the retirement village is registered under the Retirement Villages Act 2003; and

(c) the advice relates to acquiring or disposing of an occupation right agreement for the retirement village.

(2) In this regulation, **occupation right agreement**, **operator**, and **retirement village** have the meanings set out in the Retirement Villages Act 2003.

Compare: SR 2011/50 r 12

3 National Provident Fund and Annuitas Management Limited advice may not be regulated financial advice

(1) Financial advice is not regulated financial advice if it is given by or on behalf of the Board of Trustees of the National Provident Fund to a member (or an authorised representative of a member) in relation to the member's existing scheme.

(2) In subclause (1), **member** and **existing scheme** have the same meanings as in section 2 of the National Provident Fund Restructuring Act 1990.

(3) Financial advice is not regulated financial advice if—

(a) it is given by or on behalf of Annuitas Management Limited; and

(b) it is given—

(i) to the Board of Trustees of the National Provident Fund, to the Government Superannuation Fund Authority, or to any other Crown-related entity; or

(ii) on behalf of the board of trustees of the National Provident Fund under subclause (1); or

(iii) on behalf of the Government Superannuation Fund Authority or any other Crown-related entity if the advice, when given by that authority or entity itself, is not regulated financial advice under clause 11 of Schedule 5 of the Act.

Compare: SR 2011/50 r 10

Schedule 21C
Duties that apply when client money or property is held together with other money or property

rr 229X–229ZC

1 Overview

This schedule sets out duties that must be complied with when client money or client property is not held separate from other money or property under regulations 229X to 229ZC.

2 Interpretation

(1) In this schedule and regulations 229X to 229ZC, unless the context otherwise requires,—

client money trust account means a trust account required by section 431ZC(1)(b) of the Act

financial product transaction means a transaction involving the acquisition or disposal, or the variation of the terms of an acquisition or disposal, of a financial product or other dealing in relation to a financial product

financial product transaction business means the business of facilitating or arranging the settlement of financial product transactions on behalf of, or for the benefit of, clients

firm money means money held by or for an NZX provider or a non-NZX provider on their own account

firm property means property held by or for an NZX provider on their own account

good provider practice means exercising the care, diligence, and skill that a prudent provider of a client money or property service would exercise in the conduct of a financial product transaction business in the same circumstances

non-NZX provider means a provider of a client money or property service that is not an NZX provider

NZX Participant Rules means the NZX Participant Rules made by NZX Limited

NZX provider means a provider of a client money or property service that is a Market Participant Accepting Client Assets (or that has any equivalent replacement designation) within the meaning of the NZX Participant Rules.

(2) In this schedule and regulations 229X to 229ZC, a practice or an action of an NZX provider or a non-NZX provider that involves client money or client property being held together with firm money or firm property is **reasonably necessary** if—

(a) the provider has taken reasonable steps to investigate alternatives that would overcome or reduce the extent to which client money or client property is held together with firm money or firm property; and

(b) the provider is satisfied on reasonable grounds either that, in the circumstances, there are no alternatives available or that any such alternatives—

(i) would pose an undue risk to the prudent and orderly conduct of their financial product transaction business; or

(ii) are not able to be accessed or implemented without exposing the provider or their clients to an unreasonable level of cost or delay or risk; or

(iii) would be contrary to the best interests of their clients in being able to undertake financial product transactions in a timely and prudent manner.

Compare: LI 2020/233 cl 4; LI 2017/169 cl 4

Duties where client money or property is not held separately in order to facilitate settlements

3 Duties that NZX providers must comply with

(1) This clause applies if an NZX provider relies on regulation 229Y.

(2) The NZX provider—

(a) must hold client money or client property relating to a particular client together with firm money or firm property for no longer than is reasonably necessary to ensure the prudent and orderly settlement of 1 or more financial product transactions for the client; and

(b) must take all reasonable steps to ensure that the client money and client property relating to a particular client remains separately identifiable from other money and property; and

(c) must not hold client money or client property together with firm money or firm property for any purpose other than the settlement of 1 or more financial product transactions for a client of the NZX provider.

(3) Subclause (2) does not apply to the extent that the NZX provider relies on regulation 229ZA and complies with clause 4 of this schedule.

Compare: LI 2020/233 cl 6

Duties where client money is not held separately in order to reduce risk of client money shortfalls

4 Duties that both NZX providers and non-NZX providers must comply with

(1) This clause applies if an NZX provider or a non-NZX provider relies on regulation 229ZA.

(2) The NZX provider or non-NZX provider—

(a) must take reasonable steps to ensure that firm money is held together with client money only to the extent that is reasonably necessary for the purposes of the provider conducting their financial product transaction business in a prudent and orderly fashion; and

(b) must not deposit firm money into the client money trust account for any purpose other than facilitating or arranging the settlement of 1 or more financial product transactions for a client, or rectifying, or reducing the risk of, a shortfall arising in the client money held for a client in that account; and

(c) must take reasonable steps to ensure that the amount of money deposited in a client money trust account under paragraph (b) is no more than an amount that is reasonably necessary to facilitate or arrange the settlement of 1 or more financial product transactions for a client and to rectify, or cover the risk of, a shortfall arising in the client money held for their clients at any time; and

(d) must take all reasonable steps to ensure that the money deposited under paragraph (b) remains identifiable; and

(e) must document, implement, and monitor processes that are consistent with good provider practice and that are appropriate to manage the risks to clients associated with not separating firm money from client money, in reliance on regulation 229ZA, in the context of the provider's financial product transaction business.

Compare: LI 2020/233 cl 8

5 Additional duties that non-NZX providers must comply with

(1) In addition to clause 4, the following apply if a non-NZX provider relies on regulation 229ZA:

(a) the provider must give each of their clients the following information in writing before the provider holds any client money for that client or, if a client is an existing client when this clause comes into force, as soon as is reasonably practicable after that date:

(i) a statement that all client money received by the provider for or on account of the client will be held on trust for the client and deposited in a client money trust account; and

(ii) a summary of the terms of that trust; and

(iii) a statement to the effect that an amount of money held by or for the provider on their own account may be deposited by the provider in the client money trust account to the extent that is reasonably necessary to rectify, or reduce the risk of, a shortfall arising in the client money held for a client in that account and otherwise in accordance with the requirements of this schedule; and

(iv) a description of any risks to clients that the provider is aware of that exist or are likely to arise as a result of client money not being held separate from firm money in reliance on regulation 229ZA:

(b) the provider must obtain from the bank that holds a client money trust account a new written acknowledgement of the trust status of the account as soon as practicable after the date of a change to the name, account number, or status of the account:

(c) the provider must take adequate steps, on each business day, to reconcile the records for each client money trust account with the records of the bank that holds the client money trust account for the purpose of identifying whether there is any shortfall in the client money held for a client in the account or any risk that a shortfall may occur:

(d) if, on any business day, the provider identifies that there is a shortfall or a risk that a shortfall may occur, the provider must take reasonable steps to rectify the shortfall or prevent that shortfall occurring by paying into the account, before the end of that business day, by way of, or on account of, a buffer an amount of firm money that is not less than the amount of the shortfall or anticipated shortfall:

(e) the provider must retain written records of the operation of each client money trust account that include the following information, and make those records available to the FMA as soon as practicable after the FMA makes any request:

(i) details of any shortfalls that occurred in the client money held for a client in the client money trust account; and

(ii) details of any risks that a shortfall might arise in the client money held for a client in the client money trust account identified by the non-NZX provider; and

(iii) details of any payments of firm money into a client money trust account by way of, or on account of, a buffer:

(f) the provider must obtain, within 4 months after each relevant date, a report from a qualified auditor regarding the non-NZX provider's compliance with the requirements in this schedule and regulation 229ZA(2)(b)(iii) to (v) during the relevant period and provide a copy of that report to the FMA within 20 working days after it has been obtained:

(g) the provider must ensure that the qualified auditor provides to the FMA any information that the FMA may request from the qualified auditor regarding the non-NZX provider's compliance with the requirements in this schedule and regulation 229ZA(2)(b)(iii) to (v) during the relevant period as soon as practicable after the FMA makes any request:

(h) the provider must provide the qualified auditor with all necessary access to its systems and records, and otherwise co-operate fully with the qualified auditor, to enable the qualified auditor—

(i) to assess ongoing compliance by the provider with the requirements in this schedule and regulation 229ZA(2)(b)(iii) to (v); and

(ii) to provide the reports and other information required by this schedule:

(i) the provider must provide the FMA and the qualified auditor with a written consent authorising the qualified auditor to provide the FMA with the information required by this schedule:

(j) the provider must ensure that the report obtained from the qualified auditor under paragraph (f) is prepared in accordance with the applicable auditing and assurance standards issued by the External Reporting Board under section 12 of the Financial Reporting Act 2013 (for example, the Standard on Assurance Engagements 3100 Compliance Engagements (SAE 3100)).

(2) In this clause, unless the context otherwise requires,—

buffer means firm money belonging to the non-NZX provider that is deposited into a client money trust account and retained in that account for the purpose of rectifying, or reducing the risk of, a shortfall arising in the client money held for a client in a client money trust account

business day means a day on which banks are open for trading in Auckland and Wellington

relevant date, in relation to a non-NZX provider, means either of the following, provided that the first relevant date is before the first anniversary of the date on which the non-NZX provider notifies the FMA that it intends to rely on regulation 229ZA:

(a) the provider's balance date:

(b) an alternative date in each calendar year determined by the non-NZX provider and notified to the FMA in writing to be its relevant date for the purposes of this schedule (but that first relevant date need not be in a particular calendar year)

relevant period, in relation to a non-NZX provider, means a 12-month period ending on the relevant date of the provider, and if, as a result of the date on which it became a non-NZX provider or a change of the relevant date of the

provider, the period ending on that date is longer or shorter than 12 months, that longer or shorter period is a relevant period.

Compare: LI 2017/169 cl 7

Michael Webster,
Clerk of the Executive Council.

Explanatory note

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

These regulations, which mainly come into force on 15 March 2021, amend the Financial Markets Conduct Regulations 2014 (the **2014 regulations**).

The 2014 regulations prescribe matters for the purposes of the Financial Markets Conduct Act 2013 (the **FMCA**).

The regulations include changes as a consequence of the Financial Services Legislation Amendment Act 2019 (the **2019 Act**). That Act, among other things, introduces a new regime for financial advice services under the FMCA. It also repeals the Financial Advisers Act 2008 (the **FAA**).

The main changes in these regulations include—

- replacing terminology from the FAA. For example, references to category 2 products have been replaced with references to certain types of simple financial products such as call debt securities and term deposit products:
- replacing references to financial advisers with references to financial advice providers:
- clarifying when assurance reports for assurance engagements must be obtained by custodians:
- providing for certain provisions of the Trusts Act 2019 to not apply to trusts relating to PIE call fund units and PIE term fund units. These trusts are instead subject to governance requirements under clause 28 of Schedule 8 of the 2014 regulations. This amendment comes into force on 30 January 2021:
- prescribing eligibility criteria for an entity that wants to be an authorised body under a licence that covers a financial advice service:
- prescribing circumstances in which financial advice is not regulated under the new regime. These circumstances substantially reflect exemptions in the Financial Advisers (Definitions, Voluntary Authorisation, Prescribed Entities, and Exemptions) Regulations 2011:
- prescribing requirements for providers of custodial services that relate to financial products. These requirements include duties to provide information to clients, to reconcile records of client money and property, and to obtain assurance

engagements. These provisions replace obligations under the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014:

- clarifying that a custodian that holds scheme property under sections 156 to 160 of the FMCA is not providing a regulated client money or property service:
- prescribing limited circumstances in which a provider of a client money or property service is not required to hold client money and property separate from firm money or property. This includes prescribing duties to protect the interests of clients. These provisions replace the Financial Advisers (NZX Brokers—Client Money and Client Property) Exemption Notice 2020 and the Financial Advisers (Non-NZX Brokers—Client Money) Exemption Notice 2017:
- updating the information that must be disclosed to investors about the tax consequences of investing in managed investment schemes that are portfolio investment entities (PIEs). The change is as a consequence of amendments made by the Taxation (KiwiSaver, Student Loans, and Remedial Matters) Act 2020 that provide for the refundability of overpaid PIE tax. This change comes into force on 18 January 2021:
- providing for various transitional arrangements that are necessary or desirable for the orderly implementation of the 2019 Act. These include—
    - continuing duties imposed by or under the FAA for former authorised financial advisers and qualifying financial entities to retain records:
    - ensuring that complaints about former authorised financial advisers may continue to be dealt with by the disciplinary committee under the FMCA:
    - allowing existing exemptions for the temporary management of investment portfolios by financial advisers to continue.

These regulations also make amendments to—

- the Financial Markets Conduct (Asia Region Funds Passport) Regulations 2019. The amendments include a new exemption from the licensing requirement for financial advice services. The exemption relates to advice given in relation to offers of interests in a foreign passport fund. Under those regulations, the offer of interests in a foreign passport fund is primarily regulated under the laws of the fund's home country (instead of New Zealand law):
- the Financial Markets Conduct (Unlisted Market) Regulations 2015 as a consequence of the 2019 Act.

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