

18 November 2020

Proposed guidance:  
advertising offers of  
financial products under  
the Financial Markets  
Conduct Act 2013

Note: We are seeking feedback on this proposed guidance. See the [consultation page](#) for more details.

## About FMA guidance

### Our guidance:

- Explains how we interpret the law
- Describes the principles underlying our approach
- Gives practical examples about how to meet your obligations.

**Guidance notes:** provide guidance on a topic or topic theme. Issuing guidance is just one of the ways we can be transparent and share our intended approach with the market. Guidance notes are not binding, but they help market participants to be confident they understand our approach and how we interpret, and intend to apply, the law relating to their responsibilities.

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

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

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

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# Contents

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<b>Contents</b>	<b>3</b>
<b>Introduction</b>	<b>5</b>
What this guidance applies to	5
Advertising on platforms where content is restricted	6
Regulated offers are subject to specific disclosure requirements	6
Other relevant guidance and resources	6
Contact us to make a complaint	6
<b>Fair dealing and disclosure provisions</b>	<b>7</b>
Fair dealing provisions	7
Who do the fair dealing provisions apply to?	7
Key principles	8
Advertising provisions for regulated offers	9
<b>Advertising standards and guidelines</b>	<b>10</b>
Advertising must be truthful and accurate	10
Dual or multiple language communications	10
Take care when comparing different products	11
Balance risk and reward	11
Take care with phrasing and industry jargon	11
Forecasts must be based on reasonable and supportable assumptions	12
Forecast returns	12
Fixed returns	12
Do not overemphasise performance at the expense of other material information	12
Performance history	12
Benchmarks and performance objectives	13
Tables, charts, graphs, and diagrams	13
Warnings and disclaimers should be prominent	13
Clearly disclose fees and costs	13
Do not claim to be endorsed, approved, or regulated	13
Advertising should be identifiable	14

Identify offers made only to wholesale investors 14

**Enforcement** 15

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Stop orders 15

Civil liability provisions 15

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# Introduction

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The purpose of the Financial Markets Authority (**FMA**) is to promote and facilitate fair, efficient, and transparent financial markets. This guidance sets out our expectations of what good conduct in the advertising of offers of financial products looks like.

We encourage market participants to not only meet the standards expressed in this guidance, but also to consider how their conduct actively assists the investing public to make and appropriate and considered investment decisions.

## What this guidance applies to

This guidance focuses on the specific application of the fair dealing provisions of the Financial Markets Conduct Act 2013 (**FMC Act**) to advertisements made for the purposes of advertising or promoting offers of financial products for issue (**advertising**). Specifically, the guidance will be useful for market participants making advertisements that are “restricted communications”.<sup>1</sup>

Please note that much of the information expressed in this guidance may also be applicable to the advertising of financial services.

Advertising can be via any medium, including:

- social media and professional networking sites, including associated mobile phone applications;
- the internet, including news websites, issuers’ websites, and associated promotion and search tools;
- magazines and newspapers;
- radio and television;
- outdoor advertising, including billboards, signs at public venues, and transit advertising;
- mobile phone messages;
- product brochures and promotional fact sheets;
- direct mail (e.g. written letters or email);
- group presentations, seminars, and advertorials;

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<sup>1</sup> For the purposes of the FMC Act, a “restricted communication” means a form of communication that directly or indirectly relates to an offer (or intended offer) of financial products, is reasonably likely to induce persons to apply for financial products, or is reasonably likely to induce persons to make further contributions, investments, or deposits. In this guidance a reference to “advertising” or an “advertisement” is a reference to a “restricted communication”. See section 464 of the FMC Act.

- newsletters and updates;
- forums where issuers and investors can communicate.

### Advertising on platforms where content is restricted

Some platforms, such as social media and their associated mobile applications, often impose restrictions on the amount or type of content that can be displayed. Persons advertising offers of financial products must comply with the FMC Act, and should follow this guidance where applicable, regardless of any limitations imposed.

### Regulated offers are subject to specific disclosure requirements

Regulated offers of financial products are subject to specific disclosure requirements under Part 3 of the FMC Act. This guidance also provides a summary of the specific requirements that apply in respect of advertising regulated offers.

## Other relevant guidance and resources

This guidance should be read in conjunction with other information published by the FMA, including:

- FMA's guide to good conduct - <https://www.fma.govt.nz/assets/Guidance/170202-A-guide-to-the-FMAs-view-of-conduct.pdf>
- Regulatory response guidelines - <https://www.fma.govt.nz/assets/Policies/160824-Regulatory-response-guidelines-policy.pdf>
- Information on fair dealing and stop orders – <https://www.fma.govt.nz/compliance/conduct/fair-dealing-stop-orders>
- Fair dealing guidance specific to crowdfunding and peer-to-peer lending - <https://www.fma.govt.nz/compliance/guidance-library/advertising-and-comms-in-crowdfunding-and-p2p/>
- Fair dealing guidance specific to initial coin offerings - <https://www.fma.govt.nz/compliance/cryptocurrencies/fair-dealing-and-initial-coin-offers/>
- Guidance on vulnerable customers - <https://www.fma.govt.nz/assets/Uploads/CustomersVulnerability-ourexpectationsforproviders.pdf>

Additional guidance notes, information sheets, and other reference materials can be found in the FMA's guidance library: <http://www.fma.govt.nz/compliance/guidance-library/>

## Contact us to make a complaint

Contact us [here](#) if you believe the fair dealing or disclosure provisions have been breached. Please note that consumer credit contracts are regulated by the Commerce Commission.

# Fair dealing and disclosure provisions

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The FMC Act imposes conduct and disclosure responsibilities on persons offering financial products, and sets out the minimum standards of behaviour that those operating in financial markets must comply with. The following section provides an overview of the Part 2 fair dealing provisions of the FMC Act, including the key principles that underpin fair dealing in relation to dealing in financial products, and of certain Part 3 provisions which apply specifically to regulated offers of financial products.

## Fair dealing provisions

Part 2 of the FMC Act requires fair dealing in relation to dealing in financial products.<sup>2</sup> The fair dealing provisions prohibit:

- misleading or deceptive conduct, including conduct which is likely to mislead or deceive;
- false, misleading or unsubstantiated representations; and
- offers of financial products in the course of unsolicited meetings.

Specifically, a person must not, in trade, engage in conduct that is liable to mislead the public in relation to any dealing in financial products, or as to the nature, characteristics, suitability for a purposes, or quantity of financial products;<sup>3</sup> or make an unsubstantiated representation.<sup>4</sup>

### Please note:

In addition to the fair dealing provisions are **stop order** provisions. A stop order is a regulatory tool that the FMA can use to stop or prevent (among other things) advertising that confuses, or is likely to confuse, investors on matters that influence investment decisions. The key difference between the fair dealing provisions and the stop order provisions is the reference to information that is “likely to confuse” – this is a lower threshold than “likely to mislead”.

See the Enforcement section in this guidance document for more detail, as well as the fair dealing and stop orders information on the [FMA website](#).

### Who do the fair dealing provisions apply to?

The fair dealing provisions in Part 2 apply broadly, with few exceptions, to conduct in New Zealand and outside New Zealand by any person resident, incorporated, registered, or carrying on business in New Zealand to the extent that that conduct relates to dealing in financial products – regardless of

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<sup>2</sup> “Dealing in financial products” includes offering financial products for issue, and promoting (by any means) the acquisition or disposal of financial products.

<sup>3</sup> See section 19(1)(a) and section 20 of the FMC Act.

<sup>4</sup> A representation may be unsubstantiated irrespective of whether the representation is judged to be false or misleading. See section 23(2) of the FMC Act.

whether that person is licensed or authorised by the FMA, or whether financial products<sup>5</sup> are issued under a regulated offer.<sup>6</sup>

The provisions also apply to certain restricted communications made to persons outside New Zealand from within New Zealand.<sup>7</sup>

### ***Contravention through involvement***

Persons “involved” in the conduct relating to a financial product or service may also be liable under the fair dealing provisions, even if they did not directly engage in any misleading or deceptive conduct themselves. For example, directors and senior managers of an issuer can be liable for misleading conduct carried out by the issuer if they aided, induced, or otherwise are directly or indirectly a party to the misleading conduct.

The stop order provisions also apply to issuers of financial products, albeit in a more limited set of prescribed circumstances. Refer to the Enforcement section for further information.

### **Key principles**

#### ***It is the overall impression which counts***

Whether an advertisement is likely to mislead or confuse depends on the overall impression as perceived by the investor. This means that:

- advertising which is likely to mislead or confuse, without actually being misleading or confusing, is sufficient to breach the fair dealing provisions;
- intent to mislead or confuse is irrelevant;
- advertising (or conduct generally) is more likely to mislead where a financial product is complex or where the investor base being targeted is vulnerable or ill-informed;
- representations that are true and verifiable in isolation are nonetheless capable, when viewed holistically, of generating a confusing or misleading impression overall. This may be the case where material information or qualifications to a representation (e.g. risks or downsides to a product) is disclosed in fine print.

#### ***Omissions can be misleading***

Confusing information or misleading conduct extends beyond positive actions or positive statements – it also includes omissions, whether deliberate or inadvertent.<sup>8</sup> It is not a defense to “do or say nothing” if silence or partial disclosure (e.g. cherry picking) is likely to leave an overall misleading or confusing impression on the investor.

#### ***Substantiate your claims***

The fair dealing provisions require representations to be substantiated – this means having a reasonable basis at the time the representation is made. Anecdotal evidence, unsupported opinions and assumptions do not constitute a reasonable basis. We are particularly interested in representations regarding the nature, suitability and characteristics of a financial product or service.

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<sup>5</sup> See section 7(1) and section 18 of the FMC Act. “Financial products” for Part 2 purposes are presently debt securities, equity securities, managed investment products, and derivatives.

<sup>6</sup> See section 41 of the FMC Act.

<sup>7</sup> See section 33(2) of the FMC Act.

<sup>8</sup> See section 13(1)(b) of the FMC Act.



A representation remains unsubstantiated even if the representation turns out to be true or is subsequently substantiated.

## Advertising provisions for regulated offers

Persons advertising regulated offers of financial products must also comply with section 89 of the FMC Act when advertising their offer.<sup>9</sup> The purpose of these provisions is to ensure that investors are not persuaded to ignore a Product Disclosure Statement (PDS), or to make investment decisions based on selective information provided to the market prior to the PDS being lodged with the Registrar.

An **advertisement**, for the purposes of Part 3, means any form of communication made to the public (or a section of the public) for the purposes of promoting an offer or intended offer.<sup>10</sup>

For the avoidance of doubt, engaging in the “promotion of an offer or intended offer” may include communicating information about an issuer and/or the financial products that are being offered. To be considered an advertisement, a communication is not required to directly invite applications for the issue of financial products.

For example, a fund manager distributing monthly updates to investors, highlighting the performance of their fund is, in effect, promoting the acquisition of units in the fund (and by extension, the offer of units in the fund).

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<sup>9</sup> See section 89 of the FMC Act.

<sup>10</sup> See section 6(1) of the FMC Act.

# Advertising standards and guidelines

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The following section sets out our expectations for how the principles of fair dealing will be applied in practice to the advertising of offers of financial products, focusing on the key areas where we consider poor conduct is likely to present a higher risk to the investing public. Many of the standards and guidelines established below may also be applicable to other areas such as the supply or potential supply of financial services.

We encourage market participants to not only meet the standards and guidelines expressed in this guidance (as and where applicable to them), but also to consider how their conduct actively assists the investing public to make appropriate and considered investment decisions.

## Advertising must be truthful and accurate

Information used in advertisements for financial products must be current, complete, and accurate throughout the lifespan of the advertisement, and any statements or claims made must be verifiable and substantiated. Information should also be presented in such a way that it will be readily understood by the target audience, and must give prominence to key information (proportionate with the significance or importance of that information). In other words – key information cannot be buried in the fine print.

Advertisements must give consistent information across different communication channels, so that people receive the same impression of a financial product regardless of the source (e.g. radio vs. print advertising).

For the purposes of the FMC Act and this guidance, conduct or representations may be considered false, likely to mislead, deceive, or confuse by reason of:

- the form or context in which the statement or information is made, published, or provided; or
- the omission of any other information that is material in the form and context in which it is made, published, or provided.

## Dual or multiple language communications

Issuers must take care when communicating in more than one language. A reader or listener in one language should receive the same information, and receive a similar impression of the features, benefits, and risks of a financial product, as a reader or listener in another language.

For example, if the main body of a communication is one language, then any warnings, disclaimers, or qualifications must be presented in that same language.

Information provided in one language should be a full and accurate translation of the other in *all material respects* – this may not necessarily be a word-for-word literal translation.

## Take care when comparing different products

Advertisements that compare different financial products have a role to play in investor decision-making, but are also at risk of conveying partial information, which can result in inaccurate or misleading impressions. A comparison need not be explicit for inaccurate or misleading impressions to be formed in the mind of an investor. Again, the key principle is that it is the overall impression that counts.

Direct comparisons between financial products should only be made between products that have sufficiently similar features for the comparison to be meaningful. If dissimilar products are compared, the differences must be highlighted.

The information used to make a comparison must be current, complete, and accurate throughout the lifespan of the advertisement. Sources of the information used and key assumptions used to make the comparison should be clearly disclosed.

Advertisements that compare financial products should not emphasise (or overlook) certain aspects of financial products at the expense of other aspects that are important for investor decision making.

Even where individual facts or details included as part of a comparative advertisement are literally true, the overall impression of the comparison may be still be false, misleading, or deceptive (or likely to mislead or deceive). Note that subsequent disclosure (e.g. footnotes, etc.) may not be sufficient to correct a misleading first impression (especially where a comparison is inappropriate or unreasonable) – e.g. comparing non-bank financial products to registered bank term deposits.

## Balance risk and reward

Advertisements must not make false or misleading representations in respect of the nature, effect, conditions, or benefits of a financial product. A balanced message is important for ensuring that the overall investor impressions and expectations are realistic.

For example, advertisements must not state, imply, or otherwise give an impression that a financial product is safe or free from risk, investors are immune from losing their investment, or that returns are guaranteed where this is not or cannot be substantiated. Nor should they exaggerate or give undue prominence to the potential benefits of a financial product, or portray returns at the expense of clear information on significant risks.

Careful consideration should be given to the use of certain terms or phrases. Some, such as 'safe', 'relatively secure', 'limited poor returns', 'guaranteed', 'inflation proof', 'recession proof', and 'highly liquid' may easily result in an investor generating an impression about an offer or product that is not correct.

Examples of mistaken impressions may include that investors are immune to losing their investment or that a product is secured, returns on a product are guaranteed, or that an investment can be withdrawn/redeemed on short notice where this is not necessarily the case.

## Take care with phrasing and industry jargon

Terms and phrases should not be used where their actual meaning is inconsistent with the meaning commonly recognised by investors.

In addition, industry concepts and jargon should be avoided unless they are sufficiently explained and will be understood by the audience. Issuers should not assume that their investors will understand specific terminology or jargon, and such language should be used only where it is necessary for a complete and accurate understanding of an offer or financial product.

## Forecasts must be based on reasonable and supportable assumptions

### Forecast returns

Advertisements for financial products must only include information on forecast returns when there are reasonable grounds to do so – e.g. when forecast returns have been derived from prospective financial information prepared in accordance with generally accepted accounting practice (NZ GAAP) and Financial Reporting Standard 42 (FRS-42).<sup>11</sup> The basis of any forecast return should be made clear, and references to where further information on the underlying assumptions can be found should be included.

Forecast returns used in an advertisement should be stated net of fees and costs. Where the level of fees or costs is variable, either the maximum fee or cost should be deducted, or a “reasonable estimate” should be used and the existence and basis on which this estimate has been made disclosed.

- If advertised returns are subject to change, this must be clearly indicated.
- Care should be taken where forecast cash distributions are advertised – as “distributions” is not necessarily synonymous with “returns”.<sup>12</sup>

### Fixed returns

If returns on a financial product are advertised as being fixed (e.g. an interest rate on a fixed-term debt security), but are subject to change, this must be clearly indicated. Advertisements must not state, imply, or otherwise give an impression that a financial product is safe or free from risk, investors are immune from losing their investment, or that returns are guaranteed where this is not or cannot be substantiated.

See also *Balance Risk and Reward*.

## Do not overemphasise performance at the expense of other material information

### Performance history

Past performance information must be meaningful, and be presented in a balanced way. Data that is “cherry-picked” to create a more favourable impression, or is overly reliant on additional information for understanding, may result in a misleading impression.

Performance history for periods of more than 12 months should be annualised, and the effects of commissions, fees, other charges, and tax should be disclosed.

The past performance of a financial product should also not be the most prominent feature of an advertisement. Overemphasis on performance history, or stating that a product has a good performance history without qualification may:

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<sup>11</sup> Prospective financial statements. See <https://www.xrb.govt.nz/accounting-standards/for-profit-entities/frs-42/>

<sup>12</sup> Noting for example that returns will take into account any change in value of the financial product.

- result in an unrealistic expectation that high returns will continue into the future; and
- distract investors from other important information such as fees, and risks.

Advertisements that disclose past performance should include a prominent warning statement that past performance is not a reliable indicator of future performance. The reference period, and source of information, should also be clearly stated.

### Benchmarks and performance objectives

If references are made to benchmarks or performance objectives, an advertisement should also disclose the benchmark/performance objective or provide a link to where further information on the benchmark/performance objective be found.

### Tables, charts, graphs, and diagrams

Tables, charts, graphs, and diagrams can assist with presenting information to investors, in a way that is easier to understand. Issuers must ensure that tables, charts, graphs, or diagrams:

- are presented so that information is clear concise and effective;
- fairly present the information – for example, do not distort or misrepresent; and
- provide clear captions, labels, keys, scales, and/or time periods.

### Warnings and disclaimers should be prominent

Warnings, disclaimers, and qualifications contained in advertisements must be prominent and consistent across different communication channels. Subsequent disclosure of information, or qualification of a headline claim (e.g. in footnotes) may not be sufficient to correct a misleading first impression generated from a false, misleading, or confusing headline claim.

The more that a qualification to a headline claim is required to balance that claim, the more likely it is to be false, misleading, or likely to confuse. Where qualifications to headline claims are unavoidable, they must be prominent, as information is less likely to be noticed or understood if it is in fine print, or contained within a block of text.

### Clearly disclose fees and costs

Fees must be consistent with the relevant disclosure documents, and must be disclosed such that they give a realistic impression of the overall level of fees and costs an investor is likely to pay (including any indirect fees or costs) over a relevant period. Where a particular fee or cost has been described, or a fee or cost has been broken down into its individual components, the description must also be clear and not misleading.

Fees and costs should be shown in NZ dollars, and be inclusive of GST that is payable.

### Do not claim to be endorsed, approved, or regulated

No issuer is permitted to include the FMA logo in advertising materials, and issuers must not claim to be 'governed', 'approved', 'authorised', or 'regulated' by the FMA, Reserve Bank of New Zealand, the Commerce Commission, or any other regulatory body, unless the claim is current and verifiable.

Issuers must not make any statement, or use any name, that suggests endorsement or approval by a government agency, professional body, or independent agency, unless the claim and endorsement are current and verifiable.

Issuers must not falsely claim to be a member of a disputes resolution scheme.

## Advertising should be discernible from other content

Advertising should be clearly identified as such, and should not be masked as something other than an advertisement – e.g. paid or sponsored content should be clearly identifiable from other content. This includes content that appears on social media platforms.

## Identify offers made only to wholesale investors

If an offer of a financial product is only available to wholesale investors<sup>13</sup> the advertisement should make it immediately and prominently clear that it is not suitable for retail investors<sup>14</sup>, e.g. by way of a statement such as “this offer is available to wholesale investors only and is not suitable for retail investors. The requirements to meet the wholesale investor criteria are described in the Financial Markets Conduct Act 2013.”

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<sup>13</sup> See clause 36 Schedule 1 FMC Act.

<sup>14</sup> An investor is a retail investor if they are not a wholesale investor, see clause 35 of schedule 1 of the FMC Act.

# Enforcement

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The FMA has a variety of enforcement options available to address false, misleading, deceptive or confusing behaviour. The action taken will depend on the severity and level of misconduct.

For example, there may be instances where engagement through dialogue is sufficient to address a breach. Alternatively, this may extend to formal feedback letters, monitoring reports, or issuance of a public warning or a stop order.

For more information on the enforcement options available to the FMA, please refer to our [Regulatory Response Guidelines](#).

## Stop orders

A stop order is a regulatory tool that the FMA can use to stop or prevent advertising or disclosure that is false or misleading, or is likely to mislead or confuse<sup>15</sup> consumers or investors, on matters that influence their investment decision. A key difference between the stop order provisions and the fair dealing provisions is the reference to disclosure that is 'likely to **confuse**' – this is a lower threshold than 'likely to **mislead**'.

The FMA can issue a stop order to prevent or stop an issuer of a financial product from:

- distributing a PDS, other disclosure document, or advertisement (including keeping its website live)
- continuing to offer a financial product
- accepting applications or deposits from customers for a financial product.

If the FMA considers that it is in the public interest to do so, we may issue an interim stop order while we consider the grounds for a stop order.

The FMA can issue a stop order without any need to go to court. Failure to comply with a stop order can result in a fine of up to \$300,000.

More egregious breaches of the fair dealing provisions may result in the FMA taking court action.

## Civil liability provisions

The fair dealing provisions are civil liability provisions. This means the courts have the discretion to issue civil liability orders, such as a pecuniary penalty order or compensatory order, for a breach of a fair dealing provision. In addition, civil liability orders can be made against not just the person in contravention, but also against those involved in the contravention. The aim is both to sanction the issuer for its misleading conduct and, where necessary, to seek redress for affected parties.

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<sup>15</sup> A stop order can be used in other situations, and can apply more broadly than advertisements of offers of financial products. See section 462 of the FMC Act.