Consultation Document: Review of the Prudential Regime for Non-bank Deposit Takers

Submission by: Financial Services Federation Inc

	Section 2 Objectives of the prudential regime	
1	Do you agree with the issues identified with the objectives of the regime? Are there other issues that we should be considering?	The FSF agrees with the identification of issues in respect of the objectives of the regime. As regards responses to those issues, while the FSF accepts that some might doubt if "significant" damage could be caused to the financial system by the failure of a deposit taker, ultimately what is and is not "significant" damage is a subjective value judgment, and opinions may differ. Given that a failure of an NBDT – certainly a larger one like South Canterbury Finance for example – is likely to "damage" the financial system to some degree, the FSF tends to think the objectives of the regime may be better left as presently drafted, including so that they continue to align with the objectives of the bank regime. Any failure of an NBDT – regardless of size – is likely to taint the rest of the sector by association. FSF members have worked hard to overcome perception issues in the minds of the public arising from the failures of finance companies throughout the Global Financial Crisis and are therefore strongly supportive of the regime's objectives. The FSF also believes that NBDT institutions provide valuable diversification opportunities for New Zealand investors and as such are essential to New Zealand's economy. As noted at the beginning of the review, the New Zealand NBDT sector has significantly reduced in size over recent years. The FSF believes it is essential that any regime under which remaining NBDT's are expected to work should not discourage responsible participants to continue to offer deposit alternatives to the public by making compliance too onerous.
2	Which of the three options for the objectives of the NBDT regime that we have identified do you think is preferable? Are there other potential objectives for the NBDT regime that you think we should be considering?	Like the RBNZ, the FSF does not presently have a firm preference to change the regime to either of the possible new options identified in the Consultation Document. As just stated at Question 1 above, in the absence of a clear case being made out to change the description of the objectives to option 2 or option 3, the FSF tends to think the objectives of the regime may be better left as presently drafted.

	Section 3: Definition of NBDT	
3	Do you consider that the current definition of NBDT accurately describes who should be covered in the regime?	The FSF considers that the current definition of NBDT is broadly satisfactory, although it does need refinement in ways that are addressed more specifically below.
4	Are there any parts of the current definition of NBDT that you consider are unnecessary or problematic?	The present incorporation of the Securities Act concept of "offer to the public" is problematic, including because it facilitates avoidance of the regime by some retail funded lenders, who claim that their investors are not part of "the public". However, the Securities Act concept of "offer to the public" will not be featured by the FMC Bill, and the "bright line" tests proposed by the FMC Bill will be less conducive to avoidance. Accordingly even if the definition of NBDT continues to be linked to general securities law (which the FSF is comfortable with) this issue will in effect be fixed by the FMC Bill.
5	How effectively do you consider the Bank has been managing boundary issues relating to the definition of NBDT?	The FSF has in the past raised with the RBNZ the status of a lender that seemed to the FSF possibly to be avoiding the NBDT regime by adopting an aggressive approach to the concept of "offer to the public", apparently relying on the exemptions for relatives or habitual investors. As stated above in answer to Question 4, the FSF hopes that the FMC Bill, when it is passed, will ensure that such avoidance is no longer possible. More generally, any issues arising from the definition of NBDT catching entities that ought not to be caught seem to the FSF to have been managed in a satisfactory way by means of the exemption notices addressed at Question 7 below.
6	What has your experience (if any) been of the process of applying for exemptions under the current regime?	The experience of FSF members who have applied for exemptions under the current regime has been generally positive with members reporting that the process was straightforward with good levels of engagement throughout by the RBNZ.
7	Do you agree that the current definition results in an unnecessary number of entities needing to be carved out of the definition?	No. Leaving to one side "obvious" exemptions from the regime such as for companies in liquidation, six entities are exempted by the Deposit Takers (Funding Conduits) Exemption Notice 2010, 5 by the Deposit Takers (Persons Declared Not to be Deposit Takers) Regulations 2011 and 3 by the Deposit Takers (Payment Facility Providers) Exemption Notice 2009, while Foodstuffs and IAG effectively each have their own exemptions. That totals 16, which does not seem to the FSF to be an alarmingly large number of exemptions. It is certainly a very considerably smaller number than the number of exemptions required from the Securities Regulations.

		The number of exemptions might also be reduced easily in future by drafting the definition of NBDT so as to exclude conduit entities, either in the Act itself or by a generic regulation under section 5(2)(f) of the NBDT Bill.
8	Do you consider that relying on securities law concepts in the definition of NBDT is appropriate?	Yes. The FSF considers that relying on securities law concepts in the definition of NBDT continues to be appropriate, for broadly 2 reasons: 1. Both general securities law and an NBDT prudential regime are each at least partly concerned with investor protection, and accordingly the key concepts of each should be aligned, unless there is a compelling reason not to do so; 2. Departing from that approach would necessitate a wholly separate regime with separate concepts for NBDTs. The costs involved in developing and then operating such a stand-alone NBDT regime would be out of proportion to any benefits that might flow from it. This aspect is returned to later in the Consultation Document and in the FSF's responses below. The FSF adds that if problems have arisen in the past from the definition of NBDT relying on securities law concepts, then that has been due either to – a. Expressions such as "offer to the public" which, as already noted above, will cease to apply to general securities law when the FMC Bill becomes law; or b. Not reversing the general securities law carve outs for high net worth individuals when defining an NBDT, as can and should be done in future (see Question 9 below about that). Reliance on securities law concepts in the definition of NBDT ought not to be so problematic in future accordingly.
9	Do you agree that the types of offers we have identified as raising prudential risks, despite being exempt under securities law, should be covered by the definition?	Yes. The FSF agrees that the offers such as those identified in para 68 of the Consultation Document may raise prudential risks, even if they are exempt under general securities law, and should be covered by the definition of NBDT accordingly. The FSF also believes that the provisions of the FMC Bill and the NBDT regime should be in alignment with regard to these offers. Achieving that while still basing the definition of NBDT on general concepts should be a straight forward drafting matter.
10	Do you agree that we have correctly identified the high level options for the definition of NBDT? Are there any other options you consider we should be looking at?	Yes. The FSF considers that the Consultation Document correctly identifies the three high level options for the definition of an NBDT. There any no other options the FSF suggests should be considered.

11	Do you agree with our assessment of the costs and benefits of the status quo? Are there other costs and benefits of the status quo that we should be considering?	The FSF agrees with the comment in para 72 of the Consultation Document about the advantages of retaining the link to general securities law, and with the comment in para 73 about the ease with which boundary issues in the status quo definition can be addressed. However the FSF does not agree with the comment in para 74 to the effect that having some exemptions outside the statute is a significant problem (see also question 7 above). The FSF also does not agree with the comment in para 74 that retaining the link to general securities law means continuing to recognise all exemptions applying under the Securities Act or the FMC Bill, some of which could certainly be carved out (in the way that option 2, addressed next, effectively suggests for some present exemptions)
12	Do you agree with our assessment of the costs and benefits of this option (ie status quo plus greater use of carve outs)? Are there other costs and benefits of this option that we should be considering?	The FSF agrees with the comment in para 76 that one benefit of this option would be to reduce the need to provide exemptions for entities that might otherwise technically come within the definition of an NBDT. However the FSF does not agree with the comment in para 77 that retaining the link to general securities law necessarily means recognising all exemptions applying under the Securities Act or FMC Bill, some of which could certainly be reversed in the definition of NBDT without losing the benefits of this approach. This has already been addressed above. The FSF's view of the Australian experience where carve outs are used extensively and effectively has been that they provide greater clarity around costs for participants.
13	Do you agree with the statutory carve outs we are proposing as part of this option? Are there other statutory carve outs that we should be considering?	The FSF agrees with 2 of the statutory carve outs proposed in para 75, but it is premature to suggest carving out peer to peer lending – it is by no means a foregone conclusion that such activity will in future be licensed under the FMC Bill. The FSF has significant concerns that allowing a carve out of peer to peer lending is not consistent with the objectives of the NBDT regime as peer to peer lending in our view has greater potential for default, conflict of interest and failure to provide facilities on an arms-length basis.
14	Do you agree with our assessment of the costs and benefits of this option (ie – the option described in para 78)? Are there other costs and benefits of this option that we should be considering?	The FSF does not agree with the assessment of the costs and benefits of this third option. That is mostly because the assessment in the Consultation Document understates – or even does not address – the fact that uncoupling the NBDT regime from general securities law would involve significant costs to NBDTs in transitioning to an entirely new supervisory regime. Those costs do not seem justifiable given that the benefits of this option appear able to be achieved in other less costly ways (namely option 2 or variations of it).

		In addition, the benefit mentioned in para 76 – reducing the need for exemptions - is not especially "significant", and the need for the number of exemption could also be mitigated under the second option above without having to go to the lengths of this option: see the FSF responses to questions 7 and 12 above.
15	Do you agree with the statutory carve outs we are proposing as part of this option? Are there other statutory carve outs that we should be considering	The FSF does not agree with the suggestion that funding from relatives or close business associates should be carved out of the definition of an NBDT. If a large enough number are involved, relatives deserve protection as much as any other members of the public, and as noted at Question 5 above those exemptions may have been abused in the past in order to avoid the NBDT regime. The FSF is comfortable with the suggested carve out for "small offers", on the basis that as a matter of scale such an entity is arguably not really a meaningful deposit taker at all, and the FSF is comfortable with most other suggested carve outs as being in effect 'wholesale' funding.
16	Which of the three options proposed for the definition of NBDT do you prefer? Are there other options we should be considering?	The FSF considers option 2 (status quo plus greater use of carve outs) to be the preferred option. It addresses and rectifies some issues in the present definition but without exposing NBDTs to the substantial transitional (and possibly ongoing) costs that would be involved in uncoupling the NBDT regime from general securities law and giving the RBNZ an enhanced role.
	Section 4: Supervisory arrangements for NBDTs	
17	Do you agree that these were the intended benefits of having trustees act as frontline supervisors under the regime? To what extent to you consider that these benefits of using trustees as frontline supervisors have eventuated?	We agree that paragraph 101 of the Consultation Document fairly outlines the intended benefits of having trustees act as frontline supervisors. As regards the second part of this question, it is not really a matter of such benefits having "eventuated" from the Part 5D supervisory regime. Instead to a material degree those benefits flow from concepts and laws that predate the NBDT regime quite considerably. The FSF believes that in order to be effective the flow of information to both Trustee and the Bank needs to be consistent and standardised in terms of format to the greatest possible extent.
18	How effective do you consider that trustees have been as frontline supervisors of NBDTs?	Overall, the FSF thinks that trustees have performed a useful role reasonably effectively, but certainly not perfectly.

		In the experience of FSF members Trustees have provided a light handed supervision approach in monitoring their business, ensuring on-going compliance and responding to issues as they arise. Evidence concerning past failures in the NBDT sector would indicate that there were potentially gaps in the supervisory framework. The FSF would be concerned to see an increase in the fee structures Trustees charge for their services as this would adversely affect their business and the investing public.
19	How effective do you consider the Bank has been in its broader role in monitoring the sector?	NBDTs are now subject to a prudential regime that did not exist 5 years ago, but which seems mostly to be achieving its objectives at present. That suggests some degree of effectiveness. However, one might also suggest that given the high levels of NBDT failure that more or less coincided with the commencement of the regime, those that remain are so sound that they would have survived anyway, and the NBDT sector would have been much as it is now, even without any prudential regime at all. Some FSF NBDT members have commented that they do not find the RBNZ easy to deal with, and often more reactive than other government agencies they deal with, in the sense of not proactively seeking to build relationships with, and to assist, NBDTs. There is certainly a risk of duplicated effort (and therefore over-regulation) in meeting the needs of both the Trustee and the Bank in response to the same or very similar information requests which needs to be avoided. The FSF would encourage the Bank to make themselves easier for the sector to engage with for the benefit of all concerned.
20	Are there other powers that you consider trustees may require in carrying out their role?	The FSF does not consider that there are any powers that trustees need to perform their role but which they do not presently have. Most NBDT Trust Deeds give trustees wide powers to require information and to act on it if necessary, and those powers are supplemented by existing securities law which gives “bottom line” powers that cannot be excluded. Recent experience with NBDT failures suggests that trustee powers are quite adequate to deal with adverse situations – the FSF does not recall any suggestion that an NBDT might not have failed, or that its investors might have recovered more of their investments, if trustees had enjoyed different powers from those they presently have.

21	What fees are currently charged by trustees for their supervision of NBDTs?	The FSF is sure that the RBNZ holds this information already. Amongst other things the levels of fees charged will be evident from each supervised NBDTs' financial statements and offer documents.
22	What information is sought by trustees from NBDTs?	It is difficult to provide an across the board answer here – besides the required content of regular reports that Trust Deeds require NBDTs to provide to their trustee and compliance information arising from the Part 5D supervisory regime, any further information requested by trustees tends to be issuer-specific. Information about particular transactions, for example. However, FSF members report their Trustees requiring regular weekly liquidity reports as well as monthly, quarterly and six-monthly reports. The main concern of FSF members is that the Bank's information requirements should be as consistent in terms of frequency, content and format as those of the Trustee as possible to avoid unnecessary duplication of effort and additional cost.
23	What is the nature and frequency of trustees' interactions with NBDTs?	Largely trustees' interactions with NBDTs are very formal and regular in nature. For example the regular reporting required by trust deeds. As mentioned in Question 22 above, this regular reporting is required weekly, monthly, quarterly, six-monthly and annually depending on the content of the reporting.
24	Do you agree with the three potential options we have identified? Are there other options you think we should be considering?	There are no other potential options which the FSF considers the RBNZ should be addressing besides those summarised in paragraph 109 of the Consultation Document. In particular the FSF agrees with the RBNZ's comment in paragraph 110 that the two tier regime raised as a possibility by the original RFPP documents could not now be supported.
25	Do you agree with our assessment of the costs and benefits of the status quo? Are there other costs or benefits of the status quo that we should be considering?	The FSF considers that what is said at paras 112- 115 of the Consultation Document is a fair summary of the costs and benefits of the status quo. In particular the benefits involved in maintaining the historical alignment with securities laws should not be understated – moving away from that to an entirely new regime would involve very significant costs for the NBDT sector, which is already labouring under the very significant increases in internal and external cost that recent and ongoing financial sector reforms (including the NBDT supervisory regime) have involved for NBDTs. As we have previously mentioned however, the FSF believes that clarity of the roles of the Trustee and the Bank are essential to avoid duplication of effort and extra cost to comply.

26	Do you agree with our assessments of the costs and benefits of an enhanced trustee supervisory model for supervising NBDTs? Are there other costs or benefits that we should be considering?	The FSF accepts that para 117 of the Consultation Document is broadly accurate when it says "the costs and benefits of this option are largely the same as those of the status quo." However giving the RBNZ greater powers such as those mentioned in para 117 is bound to add further cost, and as well would involve unnecessary duplication of other statutory regimes. For example, why give the RBNZ power to appoint trustees for NBDTs when the FMA already has such powers under the Securities Trustees and Statutory Supervisors Act 2011? Care would need to be taken to avoid inconsistencies and confusion as to who fulfils what role particularly in times of crisis for an NBDT. Of the 3 options presented, the FSF sees this as the third (and last) choice.
27	Do you agree with our assessment of the costs and benefits of direct supervision of NBDTs by the Bank? Are there other costs or benefits that you think we should be considering	The FSF accepts that the costs and benefits of this option have been correctly identified, but disagrees with the assessment of those costs and benefits. Paragraph 101 of the Consultation Document is correct to identify a key cost of this option as "The costs of … the additional resourcing requirements of the Bank", but the FSF definitely disagrees with the statement at para 119 that "direct supervision is likely, but not certain, to be more cost effective, largely because the Bank does not have the commercial imperative that trustees do to make a profit on their activities". There is no basis for thinking that government can perform some roles of this kind more cheaply than the private sector, and ample evidence to suggest that the opposite is in fact the case. As well as the ongoing costs of the RBNZ having a sole supervisor role, the transitional costs would be very large, and could well result in some NBDTs ceasing to be retail funded. The FSF would see this as not being in the interests of the New Zealand investing public and therefore contrary to the objectives of the NBDT regime. Such a new regime would also be unlikely to be able to be implemented before the FMC Bill disclosure regime is, so NBDTs would need to transition from the Securities Act regime to the new FMC Bill regime, and then from that to the entirely new disclosure regime that would inevitably have to accompany the RBNZ becoming sole supervisor. The costs involved in that alone would be very substantial. As regards the benefits noted, aligning the New Zealand NBDT regime with offshore regimes is no doubt of some benefit, but in the FSF's view is a factor of minimal weight, and the "greater role clarity" noted in para 120 is hardly a compelling factor: greater role clarity would also result from the RBNZ ceasing to have any supervisory role at all!

		In order to realise the benefits of this option and to achieve the efficiencies envisaged complete decoupling from the requirements of the FMC regime would be required for the NBDT sector and better engagement with the sector would be required from the Bank.
28	Do you think that trustees should be retained as frontline supervisors of NBDTs, or do you consider that direct supervision of NBDTs by the Bank is a better option?	The FSF considers that trustees should be retained as frontline supervisors of NBDTs. While it may well be that in the past government might have opted instead for a system involving direct supervision of NBDTs by the RBNZ without trustee involvement, that is not the system New Zealand adopted only a short time ago (effectively, less than 5 years) and there is no demonstrated need to change it, nor did the RBNZ itself apparently see any real need to abandon the present system, given that the NBDT Bill is premised on the continued existence of the present regime. NBDTs have had to bear very significant costs as a result of the unprecedented legislative changes that have affected the NBDT sector in recent years, and there is no reason also to require them now to bear the substantial further costs that would be involved in a change from a prudential regime in which trustees are the frontline supervisors of NBDTs to one involving direct supervision of NBDTs by the RBNZ.
	Section 5: prudential requirements for NBDTs	
29	How have you found the prudential requirements have worked to date?	Prudential requirements have set the benchmark for the sector by using quantitative measures of financial resiliency. FSF members have found these to have worked well to date in allowing them to focus on key issues.
30	Do you think the prudential requirements are appropriate for the NBDT sector?	For the most part the FSF's NBDT members have no major issues with the prudential requirements in respect of capital adequacy, levels of capital, liquidity, risk management and related party lending. The FSF is aware that the cost to obtain a credit rating for NBDTs with liabilities of over $20 million is extremely high given that ratings agencies tend to work on a global pricing model with consequently very large bands. For a small company this requirement can cost the same as a much larger company in the New Zealand market. In addition, section 157L RBNZ Act effectively presently prevents an NBDT's directors being considered "independent" if they are also directors of a subsidiary of the NBDT. That is an odd requirement the objective of which is not apparent, and one which the FSF considers to be unnecessary. The related party category is very broad and has been interpreted as such.

		Prudential measures should extend to include specific capital measures around market and operational risk. This requirement would both raise awareness of these risks and reinforce the explicit management of these risks. Australia has simple measures for calculating risk exposures.
31	Are there any prudential requirements that you consider should be added, removed, or amended?	As indicated above – 1. The FSF would support increasing the liability threshold at which a credit rating is required; 2. The fact that section 157L may operate to prevent an NBDT's independent directors from being directors of subsidiary companies is not necessary, is an impediment to the efficient operation of NBDTs, and should be removed.
32	Do you agree that it would be preferable to set capital, liquidity and related party exposure requirements via conditions of licences or standards rather than regulations? Are there other costs or benefits of this option that you think we should be considering?	The FSF has real reservations about this suggestion. In particular – 1. capital, liquidity and related party exposure requirements are major matters of considerable impact on NBDTs and in respect of which the ability for the RBNZ to apply different requirements to different NBDTs by means of differing licence conditions is potentially at odds with the competitive neutrality that should exist in respect of regulatory requirements; 2. from a constitutional perspective, these regulatory requirements are of such fundamental importance to NBDTs that they should be "law" in the sense of regulations, rather than licence conditions which can be changed by the RBNZ in its discretion. The FSF made this point in its submissions on the NBDT Bill. Its position has not changed since. It does however add that it does not see the fact that many regulatory requirements in respect of banks are imposed via conditions of registration means the same must necessarily apply to NBDTs. Both sides of a bank balance sheet are typically considerably more complex than an NBDT's, and as a result the need for the RBNZ to be more flexible exists to a greater degree with banks (and insurers) than with NBDTs. The FSF agrees with what is said at para 152 of the Consultation Document about that.
33	Do you think that the other prudential requirements should be set via conditions of licences or standards, or by regulations?	The comments the FSF has made in respect of the previous question also apply here.

	Section 6: Disclosure requirements for NBDTs	
34	Do you agree with the costs and benefits of this option [ie – the status quo] that we have identified? Are there other costs or benefits that we should be considering?	There are effectively no *new* costs of this option (the status quo) as compared with the other 2 options – while they are not insignificant, the costs implicit in the status quo are being borne already.
35	Do you agree with the costs and benefits of this option [ie – adding prudential requirements to the disclosure regime] that we have identified? Are there other costs or benefits that we should be considering?	In broad terms, yes the FSF agrees with the comments about the costs and benefits of this option. It also notes that many NBDTs already voluntarily include in their disclosure documents disclosures about their compliance with prudential requirements. In those cases any additional cost involved in this option is likely to be minimal accordingly – assuming of course that the degree of compliance disclosures required is realistic. The FSF notes that the Ministry of Business Innovation and Employment has recently addressed this subject in a Discussion Document about the possible content of regulations under the FMC Bill. It should be possible to align those regulations with the NBDT regime in a manner that does not impose material new levels of costs and in a manner that minimises any impact there may be in the second point in para 188 of the Consultation Document (about the undesirability of the RBNZ and the FMA having overlapping responsibilities in this area). The FSF does not see that as a new concern in any case – it is effectively the position now. The key issue is that NBDTs are required to provide clear, concise and effective disclosure now. The more prudential disclosure is required the more technical the disclosure documents become and the less understandable they are to the investor as a result. The FSF notes that there is already a requirement for NBDTs to disclose anything material. Overall, the FSF is comfortable in principle with this option.
36	Do you agree with the costs and benefits of this option [ie – a disclosure regime for NBDTs separate from the Securities Act / FMC Bill, similar to that applicable to banks at present] that we have identified? Are there other costs or benefits that we should be considering?	The FSF disagrees with many of the comments about the costs and benefits of this option. Specifically: 1. as regards para 189, the FSF doubts very much if option 1 or option 2 above really would not "leave open the possibility of inconsistent approaches being adopted for… banks and NBDTs". They might still be different, as they are now, but that does not necessarily mean they would also be undesirably inconsistent, and further the ability to create a different NBDT-specific disclosure regime is actually presented in para 190 as a positive feature of this option! 2. As regards the claim in para 190 that a benefit of this option is that it facilitates future changes to

		the disclosure regime being made by the RBNZ, the FSF doubts if that is likely to be seen as a significant advantage by sector participants other than the RBNZ itself; 3. The FSF definitely disagrees with the statement in para 191 that a separate disclosure regime for NBDTs may be a "necessary consequence" of the future FMC Act and regulations no longer featuring Securities Act concepts like "offer to the public". That may well be a reason to revisit the terminology presently used in the definition of what is an NBDT (see questions 5 and 8 above), but if the definition of an NBDT and the FMC Bill disclosure regime feature common concepts in a manner analogous to now, there is no reason why the future FMC Bill regime should not govern NBDT disclosures in a perfectly satisfactory way; 4. As regards the statement in para 192 that "the compliance cost associated with complying with a bank-like disclosure regime may not be materially different from complying with securities law disclosure requirements", that obviously depends on the content of the "bank-like disclosure regime" proposed for NBDTs. If it were comparable to the very detailed present bank disclosure regime, the ongoing costs would very likely be greater for NBDTs than now; 5. What para 192 does not address at all is the initial cost to NBDTs of transitioning to a new NBDT-specific regime: that cost would be very considerable, and quite likely materially greater than the costs of transitioning from a Securities Act regime to the future FMC Act regime which, while different from now, still seems likely to be similar. The FSF is opposed to this third option and to a separate disclosure regime for NBDTs. The FSF considers the status quo or adding prudential requirements to the existing disclosure regime each to be preferable options. We would not want to see a significant deviation from the requirements of effective disclosure as outlined in the recent Guidance Notes and as proposed in the Financial Markets Conduct Regulations.
37	Do you consider that a separate disclosure regime for NBDTs would be appropriate, or should prudential disclosures for NBDTs be integrated into the disclosures required under securities law?	The FSF does not consider that a separate disclosure regime for NBDTs (ie – option 3) would be appropriate. It would strongly prefer either the status quo or adding prudential disclosures for NBDTs into the disclosures required under general securities law.
	Section 7: Crisis management powers	
38	Do you agree that a tailored statutory management regime for NBDTs should be provided for in legislation?	There is no reason to think that the statutory management regime that is presently potentially applicable to NBDTs is inadequate. After all it does closely follow the statutory management regime for banks that continues to exist in the RBNZ Act, and is a regime which has in the past worked well enough for large NBDTs like DFC and Equiticorp.

		However that regime would be better located in the NBDT Bill, and it would be sensible if statutory management of NBDTs ceased to be the FMA's responsibility under the Corporations (Investigation and Management) Act 1989 and was given back to the RBNZ where it resided at the time of DFC. The FSF would support such a proposal. In particular a statutory approach would provide clarity in process, roles and responsibility in the event of crisis and the swiftest response which would provide greater confidence in the sector.
	Section 8: Offences and penalties	
39	How do you think the current offence and penalty regime has worked?	The FSF believes that the current offence and penalty regime has not worked well and that a range of options is necessary to allow for degrees of offending to be taken into consideration.
40	Do you think a hierarchy of penalties, where there is a more proportionate response to the breach, would be more appropriate?	The FSF certainly agrees that penalties should be a proportionate response to the breach to which they relate. However having 4 tiers of penalties as in the NBDT Bill should be enough of a hierarchy to permit "proportionate responses" to breaches. If there are issues as to the size of the penalties provided for by the RBNZ Act at present (and also in the NBDT Bill), they may be as to where the range of penalties begins: the lowest level of fine ($200,000) is applicable to trustees only, and the lowest level of fine applicable to an NBDT is $500,000. That seems a very substantial potential fine for what might be a relatively minor breach of the (potentially rather technical) change of ownership provisions in the NBDT Bill, for example.
41	Would the use of infringement notices be a better way of ensuring compliance with certain lower level requirements?	Yes it would. The FSF would support this.
42	Would the use of civil pecuniary penalties provide for a more proportionate response to some breaches where a conviction may outweigh the wrongdoing?	If imposed on an organisation, such as on the NBDT itself, there is little real difference between civil pecuniary penalties and fines: each involves very considerable expenditure on legal services and a pecuniary penalty of $200,000 has precisely the same economic impact as a fine of $200,000. The FSF does not wish to appear unnecessarily cynical, but the main difference in this context between civil pecuniary penalties and fines is probably that the former are easier for regulators to prove, given the lower civil standard of proof.

43	Should the level of penalties reflect whether the regime focuses on systemic risk to the NBDT sector or systemic risk to the financial system?	If the view was that the supervisory regime in respect of NBDTs should be focussed on systemic risk to the NBDT sector as opposed to systemic risk to the wider financial system, then yes the FSF would agree that would be a factor strongly in favour of lower penalties being applicable to NBDTs.
	Section 9: Other matters	
44	Do you have any views on the provisions in the Bill dealing with the issue and cancellation of licences and the Bank's ability to impose conditions of licences?	So far as the provisions in the Bill dealing with the cancellation of licences are concerned, as the FSF noted in its submission on the Bill, Clause 20(f) of the Bill makes ***any*** breach of an NBDT's Trust Deed grounds for licence cancellation, without any materiality threshold and without any trustee involvement. The FSF continues to think that is potentially too draconian. As regards the RBNZ's ability to impose conditions on licences, in its submission on the Bill the FSF said - "*It is also not appropriate for the RBNZ to be able to impose conditions which "modify any of the requirements that would otherwise apply to the NBDT": that may effectively allow the RBNZ itself to amend the Act and the regulations under it, which seems at odds with constitutional principles.* *Further, in allowing the RBNZ to do so in respect of some NBDTs but not others, that may effectively remove the level playing field between NBDTs that would otherwise apply to all NBDTs. That is not consistent with the principles in clauses 8 (a) and (d) of the Bill which emphasise the need for "consistency in the treatment of similar institutions" and "the need to maintain competition within the NBDT sector*." The FSF's views about the wide scope of the RBNZ's ability to impose conditions on licences remain as just quoted with the addition of the comment that the Bank needs to place greater emphasis on consultation, review and dialogue with NBDTs so that cancellation of licences would be a last resort.
45	Do you have any views on the operation of the suitability assessment process in the Bill at present?	As the suitability assessment provisions in the Bill are not actually operational at present, the FSF assumes this question is directed to their potential operation. On that basis the process seems to the FSF likely to be a satisfactory one. The FSF does however note that regulations specifying the "suitability concerns" have yet to be made, and their content might have an impact on the extent to which the process is satisfactory.
46	Do you have any views on the structure of the change of ownership provisions in the Bill?	The FSF considers that the threshold levels to the change of ownership provisions in the Bill are set too low: although these thresholds may be appropriate for large listed entities like New Zealand's principal banks, an ability to appoint 25% of the board will confer no real ability to influence a typical NBDT's

		activities, and nor does a 20% shareholding confer any meaningful element of control. The FSF suggests the threshold for each should be set at 50%, as it is only at that level that real shareholder influence in a non-listed company arises and therefore allows a shareholder to change the way in which a company is run. The FSF believes that this is appropriate to the nature of the NBDT industry in New Zealand. That too is the same as the position that was taken by the FSF in its submission on the NBDT Bill.

Membership List as at 1st May 2013

Debenture Issuers - (NBDT) Non-Bank Deposit Takers	Vehicle Lenders	Finance Company Diversified Lenders	Credit Reporting	Insurance	Affiliate Members
Rated • Asset Finance (B) • Avanti Finance (BB) • Fisher & Paykel Finance (BB+) • Heartland Building Society (BBB-) • Medical Securities (A-) **Non-Rated** • Mutual Credit Finance • Prometheus Finance	• BMW Financial Services • European Financial Services • Mercedes-Benz Financial Services • Motor Trade Finances • ORIX NZ • Toyota Finance NZ • Yamaha Motor Finance	• Centracorp Finance 2000 • Dorchester Finance • Equico Limited • Finance Now • Future Finance • GE Capital • Instant Finance • John Deere Financial • Oxford Finance Ltd • Rent Plus • Thorn Rentals	• VEDA Advantage **Debt Collection Agency** • Baycorp (NZ) • Receivables Management (NZ)	• Protecta Insurance • QBE Lenders Mortgage Insurance **Associate Members** • Southsure Assurance	• Buddle Findlay • Deloitte • Ernst & Young • PriceWaterhouseCoopers • Russell McVeagh • SimpsonWestern • Visa Worldwide(NZ) Ltd