

Feedback: The new accountability framework - Governance under Part 4 of the FMC Act

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with 'Feedback – Governance' in the subject line. Thank you.
Submissions close on 7 July 2014.

Date: 7 July 2014

Number of pages: 5 pages

Name of submitter: The Financial Services Federation Inc ("FSF")

Company or entity: Incorporated Society and industry body, as expanded on next.

Organisation type: The FSF is the industry body for finance and leasing providers who maintain standards of responsible and ethical behaviour towards their customers. The FSF's members who are affected by the FMC Act principally comprise non-bank deposit takers ("NBDTs").

Besides being an NBDT, one FSF member is also involved in managed funds, and may make its own submission on the application of Part 4 to managed funds. The FSF's comments below are accordingly only directed to so much of the Consultation Document as relates to debt securities.

Contact name (if different): Lyn McMorran, Executive Director

Contact email and phone: lmcmorran@fsf.org.nz (04) 4721 731

Responses to specific questions

Section#	Question #	Response
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You don't need to quote from the consultation document if you use section and question numbers. You may attach extra pages - please label each page with your name and organisation.

1	1	<p>What other factsheets could we develop to help you understand Part 4? With one exception, the FSF's NBDT members are only concerned with Part 4 as it applies to debt securities. As a result, the only fact sheet mentioned in para 12 of Section 1 of the Consultation Document that is relevant to them is that regarding issuers of debt securities and their supervisors, which they have found useful as a starting point. Except in so far as the proposed fact sheet about auditors and others may impact on auditors' roles in respect of debt securities, none of the other proposed fact sheets referred to in in para 14 are likely to be relevant to the FSF's NBDT members, and there are no other areas of part 4 in respect of which the FSF's members feel further FMA fact sheets relevant to them are required at this time.</p>
1	2	<p>What other guidance do you need to help understand our expectations? The FSF notes from para 15 of Section 1 of the Consultation Document that the FMA intends to produce guidance notes on the role of supervisors and amendments to governing documents, and welcomes that. The other proposed guidance notes mentioned in para 15 are not relevant to most FSF NBDT members. There is one further area where FSF members feel a guidance note would be helpful and that is on the subject of managing the relationship of the way in which the relationship</p>

		<p>between the issuer and the RBNZ under licensing and the FMA is expected to be managed. FSF members are concerned that there is real potential for crossover in those relationships and seek clarity with regard to the regulatory responsibilities of both RBNZ and the FMA to avoid that. A guidance note detailing what FMA requires over and above what is required when an issuer is separately licensed by the RBNZ would be particularly helpful to FSF members.</p>
1	3	<p>What Part 4 matters should we prioritise for guidance? Elsewhere in these responses, the FSF requests clarification on certain parts of Part 4. Aside from matters addressed elsewhere in these responses, there is no other material which the FSF would suggest the FMA prioritise for further guidance at this time.</p>
1	4	<p>What is your view on FMA issuing targeted guidance rather than frameworks and methodologies? The FSF and its NBDT members would generally prefer guidance on issues to prescription by the FMA in respect of them. Consequently, the FSF is comfortable with the FMA's comment at para 17 that it is not planning to issue frameworks or methodologies for the matters listed in para 16 at this stage (of which only the first is relevant to most of the FSF's NBDT members).</p> <p>The possible exception mentioned in para 18 is not relevant to most FSF members.</p>
1	5	<p>If you consider that particular matters should be prescribed by frameworks and methodologies please [explain]: In view of the FSF's response to the previous question, this question does not arise at this point.</p> <p>The FSF does however add that when the final form of the FMC Regulations is known, it is possible that some of its members might then want to revisit the possibility of more FMA frameworks and methodologies.</p>
2	1	<p>Do you agree that licensed supervisors should have more control over the development of governing documents to ensure they are effective and fit for purpose? The FSF sees this question as being principally addressed to trustees rather than to NBDTs, but notes that the FSF is strongly opposed to the concept of trustees having any more control over the content of NBDT trust deeds than is already provided for.</p> <p>Except in so far as part 4 contains new provisions relating to trustee control of trust deed content, in respect of NBDT trust deeds the Act's approach to the development of trust deed content is broadly the same as has existed for some time and which has mostly worked well in practice, including in recent times when the introduction of prudential supervision for NBDTs and subsequently NBDT licensing has necessitated material changes to NBDT trust deeds. The FSF accordingly sees no reason to consider further changing this aspect at this time.</p>
2	2	<p>What else should we include in guidance to help clarify our expectations for supervisors? This question also seems to be addressed to trustees rather than to NBDTs, but the FSF would comment in respect of it that if guidance is given to supervisors, a level of pragmatism needs to be built in</p>

		to this. It is FSF members' experience that requirements which may have been immaterial in the past are now very process-driven and therefore changes require more than just a telephone conversation. This extra level of supervision therefore creates further costs for issuers.
5	1	<p>Is there anything in particular we should include in guidance to help clarify our expectations for debt issuers? In para 8 of section 5, the Consultation Document states <i>"We will have an increased focus on working with and through your supervisor in the first instance wherever appropriate, rather than directly with you. In some circumstances it may be appropriate for us to engage directly with you ..."</i></p> <p>The FSF's NBDT members would welcome any further clarification of when it is expected that they will "engage directly" with FMA, rather than with their trustees (or the RBNZ). For FSF's NBDT members this is a question of which master do they serve and therefore it needs to be very clear as to when FMA may "engage directly" with them. Given that the FMA is the supervisor of trustees, it would seem reasonable that they may only engage directly with issuers when there is an issue with their trustee or their offer document. Any issues with regard to operations or governance of an issuer should be taken up by the RBNZ.</p> <p>Aside from that and from others matters addressed elsewhere in these responses, there is no other material on which the FSF's NBDT members would appreciate further guidance at this time.</p>
6	1	<p>Does our proposal that FMA consider only changes to governing documents that would otherwise require investors consent create difficulties for you? If so, please explain what those difficulties might be:</p> <p>The FSF is not comfortable with the FMA's comment at para 3 of Section 6 of the consultation document to the effect that the FMA will not accept applications under section 109 for approval of changes that can be made with trustee approval, as opposed to those that need investor approval.</p> <p>There are bound to be "hard" cases from time to time where Trustee approval cannot be readily obtained for whatever reason, and while the FSF certainly supports FMA's view that Trustees should make decisions themselves and not unnecessarily involve the FMA, the FSF believes it would be wrong for the FMA to limit its preparedness to act in this way when the Act itself does not do so. The Act envisages that the FMA may be available as an alternative to Trustee approval in some cases, and the FMA should be prepared to act in all such cases accordingly.</p> <p>That said, the FSF does note that the manner in which the FMA's power to approve changes is expressed in section 109 is relatively narrow, and accepts that as a result there may prove to be cases when the FMA is not able to approve particular trust deed changes, even if it were otherwise prepared to do so. However, the FSF cannot presently foresee exactly what those changes may in future be.</p>
6	2	<p>Where FMA consent is sought, do you agree that it is appropriate for FMA to focus primarily on the substance of changes and not the legal drafting effecting those changes? If not, why not? The FSF definitely agrees that FMA should focus primarily on the substance of changes rather than on their drafting. However, while drafting may rightly be considered secondary to substance, poor drafting may prevent substantive objectives from being achieved, and where FMA considers there to be a risk of that being the case, the FMA should be prepared to</p>

		rectify that too.
6	3	<p>What practical difficulties might our consent process create for you? Aside from matters addressed in its responses to other Questions regarding Part 6, the FSF does not foresee any particular practical difficulties arising from the FMA’s proposed consent process.</p>
6	4	<p>What is your best assessment of the amount of change your governing documents will need to comply with the FMC Act? The FSF’s NBDT members are mostly at a relatively early stage of engaging with their trustees about Trust Deed changes that may be needed to comply with the FMC Act which, when coupled with the fact that some such changes are likely to be driven by the final content of the FMC Regulations which is not yet known, makes it difficult to respond to this question in any detail at present. As a result of this FSF’s NBDT members report that change to their governing documents is only at project planning stage currently.</p> <p>Despite that, the expectation of the FSF’s NBDT members is that while changes will certainly be required, they may not be great in number nor major in effect. Much of what the Act requires of NBDT Trust Deeds is set out in sections 104 – 109, but aside from sections 108 and 109 (which address trust deed changes differently from existing trust deeds) much of sections 104 – 107 is either effectively already reflected in many Trust Deeds, or should not be especially difficult to provide for.</p> <p>As a result, the FSF’s NBDT members are optimistic that making Trust Deed changes as necessary to comply with the FMC Act ought not to be a major exercise. That said, the FSF’s members are realistic enough also to note that Trustees and their lawyers often do not see such subjects in quite the same way as the FSF’s members do.</p>
6	5	<p>What is your best assessment of whether, and if so, when, you might seek FMA consent to amend your governing documents (or those of your clients)? It is difficult to foresee exactly what circumstances might in future mean that FSF members will need to seek FMA approval of Trust Deed changes. The expectation of most of the FSF’s NBDT members is presently that they will generally seek approval to a Trust Deed change from their Trustee in the first instance, at least in most cases where the Trustee can approve the change without an investor meeting. As has already been noted above at the FSF’s response to Question 1 in respect of this section, the FSF considers that the FMA must remain prepared to assist in such cases, even in respect of changes that can be made with trustee approval.</p> <p>As regards Trust Deed changes that could not be made with trustee approval and which would otherwise require investor approval, the FSF sees section 109 as potentially very useful, and expects that debt security issuers are likely to ask the FMA to use that power in situations such as the following:</p> <ol style="list-style-type: none"> 1. A Trust Deed change needs to be made urgently, and it is not desirable to defer making it until after an investor meeting has been called and held, for example because the delays that involves might be adverse to investors’ interests. This is a realistic scenario, as in the experience of the FSF’s NBDT members quorum requirements for investor meetings can sometimes be

		<p>too high to achieve a quorum initially, so that the meeting has to be adjourned;</p> <ol style="list-style-type: none"> 2. A Trust Deed change needs to be made which, for technical reasons, is not one where the change is able to be approved by the Trustee, but in respect of which the – often very significant – costs of calling a meeting of investors to approve it are out of proportion to any impact the change may have on investors. 3. Where specific guidance is required on a specific issue. <p>In such cases, the FSF sees section 109 as a useful alternative to approval by investors, but as above the section is also written in terms that mean that it should also be an alternative to Trustee approval in all cases.</p>
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Feedback summary – if you wish to highlight anything in particular

The FSF’s NBDT members would welcome the opportunity to provide feedback on any further guidance documents the FMA may put out. FSF’s NBDT members report that they have found the disclosure guidance to be invaluable and would welcome any other similarly helpful pieces of guidance. They stress however that guidance should not be used to rewrite the Act or Regulations but should be the first port of call for clarification purposes only. Apart from that, there are no further matters that the FSF wishes to raise or to highlight.

Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.