

Proposed exemption to enable dual-language product disclosure statements

About this consultation paper

We are considering using our exemption powers to enable issuers to provide dual-language product disclosure statements (PDS). This would allow a PDS to be provided in full in both te reo Māori and English.

The current regulatory settings prescribe length limits which effectively prevent issuers from providing a PDS in more than one language.

If granted, the exemption will exempt issuers from the prescribed length limits and, if necessary, some prescribed statements and formatting. The two languages provided in the PDS would need to accurately and fully reflect each other, and both would comprise the PDS.

We think this would allow a PDS to be provided in a more engaging and accessible form for those who are more comfortable receiving information in te reo Māori.

The exemption could also extend to PDSs provided in English and any other language, subject to any applicable conditions.

We welcome your feedback on the exemption proposal discussed in this paper. Please use the feedback form to provide us with any comments. In addition to your general feedback, we have included specific questions in this paper.

Submissions close at 5pm on Thursday 17 May 2018.

If you would prefer to meet with us in person to discuss the proposed exemption, please email: consultation@fma.govt.nz by Thursday 3 May.

After we have considered all submissions, we will finalise our policy proposal. We aim to have any exemption in force by mid-2018.

This consultation paper is for issuers of financial products and other interested parties.

It seeks feedback on the exemption proposal to enable issuers to provide dual-language PDSs.



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Document history

This version was issued in April 2018 and is based on legislation and regulations as at the date of issue.

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Background

What is a product disclosure statement?

When an investor is deciding whether to invest in a financial product, it is essential that information to help them make that decision is easily available. A product disclosure statement (**PDS**) does this by providing important information about the financial product in one document. A PDS includes information on how the product works, the potential risks and returns, any fees and charges, and the issuer's details. The issuer is the entity or individual that creates the financial product and provides it to investors.

The issuer of the financial product prepares the PDS, which must generally be provided when offering the product to potential investors. The PDS must generally be provided to the investor before they invest so they have the information available to them when deciding whether to invest in that product. Further background on PDSs is available on the [FMA website](#).

PDSs have a prescribed form, including length limits

The law sets out specific form, content, and length requirements that issuers must follow when preparing a PDS. The Financial Markets Conduct Act 2013 (**FMC Act**) requires a PDS to be worded and presented in a clear, concise and effective manner. The Financial Markets Conduct Regulations 2014 (**FMC Regulations**) prescribe the form and presentation of the PDS and the key information summary (**KIS**) within the PDS. This includes prescribed length limits. For example, regulation 22(4) states a PDS for an offer of managed investment products in a managed fund (such as KiwiSaver) must not exceed 12 A4 pages when printed, or 6,000 words.

The FMC Regulations also contain prescribed wording that the issuer must include in the PDS. For example, specific headings are required for sections of the PDS, and specific statements are required at various points. The prescribed wording is provided in English.

PDS length limits assist effective and efficient investor decision-making

Well-functioning capital markets rely on good information about financial products being available to investors to assist decision-making. PDS length limits and other form requirements were included in the FMC Act and FMC Regulations to assist effective disclosure to investors. It is important that investors have all the relevant information available to them, and that this information is provided clearly, concisely and effectively.

Length limits were imposed to address issues with financial product disclosure documents prepared under the previous Securities Act regime. Those disclosure documents were typically lengthy and compliance-focused, making them difficult for investors to read and comprehend. The fixed length limits were set to allow all of the most important information for investors to be included in the PDS, while preventing it from becoming too long and unwieldy.



A dual-language PDS would breach prescribed length limits

Dual-language versions of a PDS do not appear to have been specifically considered when the FMC Act was developed. It is highly likely, however, that providing a PDS in full in two languages would exceed the prescribed length limits.

The Treaty of Waitangi and the Māori Language Act 2016

The Māori Language Act 2016 affirms the status of the Māori language as the indigenous language of New Zealand, an official language of New Zealand and “a language valued by the nation”, and provides means to support and revitalise the Māori language.

The Courts will generally presume that Parliament intends to legislate in accordance with Treaty of Waitangi principles¹. One of those principles has been described by the Courts and the Waitangi Tribunal as active protection of Māori interests, including the maintenance and development of te reo Māori².

The FMA has powers to exempt participants from some financial markets law

The FMA has powers to exempt a person or transactions from financial markets law in certain circumstances. These powers enable us to remove rigidities in the law and ensure requirements for businesses are reasonable and cost-effective.

Exemptions can grant relief from specific provisions of financial markets legislation and can only be relied on if the financial markets participant or transaction fits within the scope of the exemption. An exemption may also specify conditions that must be met by the financial markets participant if they wish to rely on the exemption.

This exemption power would enable us to provide relief from the length limits for dual-language PDSs if particular conditions are satisfied.

Exemptions can be granted to an individual financial markets participant, or to a class of financial markets participants.

Further background on our exemption power is available on the [FMA website](#).

Statutory test

To grant an exemption under the FMC Act, we must be satisfied that:

- it is necessary or desirable to promote any of the main or additional purposes of the FMC Act; and
- the extent of the exemption is not broader than reasonably necessary to address the matters that gave rise to the exemption.

Our decision on the exemption will be based on whether we are satisfied the statutory test is met, and that the exemption will be consistent with, and promote, the purposes of the FMC Act. We will also need to be satisfied that the scope of, and any conditions to, the exemption help to mitigate any risks arising from allowing dual-language PDSs.

¹ Attorney-General v New Zealand Māori Council [1991] 2 NZLR.

² He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal, Te Puni Kōkiri, Wellington (2001), p. 93-100.



Proposed solution – length limit exemption to enable dual language te reo Māori and English PDSs

We propose a class exemption from length limits for te reo Māori and English

We are considering granting a class exemption from the prescribed length limits of a PDS provided in full in both te reo Māori and English. To this end we are proposing a class exemption for all issuers of a dual-language PDS from the prescribed length limits in regulations 22 to 25, and 29 of the FMC Regulations.

Both languages would comprise the PDS and issuer liability would attach to both languages. This includes section 82 of the FMC Act which prohibits false or misleading statements in a PDS.

Issuers would also still be required to comply with other effective disclosure requirements in the FMC Act and FMC Regulations. For example, in providing a dual-language PDS, the issuer would be required to provide a PDS that is both easily readable (see r 30, FMC Regulations), and clear, concise, and effective (see s 61, FMC Act).

We are considering conditions to ensure that the exemption is appropriately targeted, and to minimise risk of discrepancies between the two languages. In the event there was a discrepancy, the existing FMC Act protections would apply, for example, the prohibition on false and misleading statements. A breach of a condition would also mean that the exemption would fall away and the issuer would not be able to rely on the exemption; they would be breaching the length limits in the FMC Regulations.

The FMC Regulations require the PDS to contain specific headings and precise statements. The exact wording is provided in English and can be found in the relevant schedules to the FMC Regulations. Our view is that the issuer would still be required to provide the prescribed headings and statements in English, as specified in the FMC Regulations, and also provide the equivalent headings and statements in te reo Māori. Given that the wording required by the FMC Regulations is so specific, we are particularly interested in hearing if there would be any difficulties providing the equivalent statements in te reo Māori.

Proposed conditions of the exemption

We invite any feedback on the proposed conditions and limits below, and on whether you think further conditions or limits are also required.

Each language must accurately and fully reflect the other

The proposed exemption would be subject to the condition that the information provided in each language accurately and fully reflects the other language.



Length limit applies to the English part of the PDS

The English language part of the PDS would still need to comply with the prescribed length limits in the FMC Regulations. Length limits would not apply to the te reo Māori part of the PDS as this would be required to accurately and fully reflect the English language part, which we recognise may not be possible while maintaining a length limit.

Prominent statement in the PDS

The proposed exemption would require the issuer to include a prominent statement in the PDS in both languages to make clear that:

- the information provided in that language is an accurate and full reflection of the information provided in the other language, and
- further information or correspondence, including prescribed fund updates and annual reports, may only be available in English.

We are also considering whether it would be appropriate for further information to be made available in te reo Māori if requested by the investor. The issuer could provide further information in te reo Māori directly or through a translator. If we include this as a condition we would not require a prominent statement that further information may only be available in English (outlined in the second bullet point above).

Certified translation

We are considering a condition which would require certification that the two languages in the PDS are accurate and full reflections of each other. We could require this certification to be provided by the issuer and/or an independent party. This could include a requirement that the PDS be drafted or at least reviewed by an individual with minimum qualifications in translation.

As part of this we are also considering whether small changes to a dual-language PDS should require the same level of certification, or whether a lesser level of certification would be sufficient.

We are considering this certification condition to mitigate the risk of discrepancies between the two versions, and promote investor confidence that both languages provide all of the relevant information. Proof of the certification would need to be made available to the FMA if we requested it. We are interested in your views on how to most effectively verify that the two languages accurately reflect each other.

Format and layout of the dual-language PDS

We are considering whether to include a requirement that the dual-language PDS be formatted in a particular way, eg with the two languages side by side. Layout requirements could ensure that the dual-language PDS is structured in a way that allows the issuer to compare the two languages easily. However, if we do not impose a layout or formatting condition, the issuer would still be required to provide a PDS that was easily readable, and clear, concise, and effective. It would be up to the issuer to determine how to best format the dual-language PDS in a way that complies with these requirements.

Benefits and risks associated with the exemption

As noted above, PDS length limits were introduced to assist effective disclosure to investors. The length limits were set at a level intended to allow all of the most important information for investors to be included in the PDS, and to prevent lengthy and compliance-focused statements which can undermine effective investor decision-making.



Benefits

There are a number of benefits if we grant the proposed class exemption from the prescribed length limits for PDSs provided in te reo Māori and English.

The content requirements of the PDS will stay the same, and investors can continue to have confidence that all of the most important information about the financial product is provided in the PDS. As both of the languages will comprise the PDS, investors can also have confidence that the issuer is responsible for the information provided in both languages. Having the two languages within the same document could also allow investors to easily cross-refer between them as required.

Providing a PDS in te reo Māori and English also has the potential to improve engagement and therefore effective decision-making for investors who are more comfortable when engaging with content provided in te reo Māori. We suspect that issuers seeking to rely on this exemption would have a target market of investors who are more confident and engaged when information is provided to them in both te reo Māori and English. The exemption could assist effective disclosure by providing the information in a way that is more engaging and relatable to those investors.

The class exemption to allow a full PDS in both te reo Māori and English would also be consistent with the purposes of the Māori Language Act by providing a means to support the use of te reo Māori. This would also be consistent with the judicial interpretation of the Treaty of Waitangi principle of active protection, including the maintenance and development of te reo Māori.

Risks

There are also risks associated with PDSs provided in te reo Māori and English. Having two languages could be confusing for investors who are not familiar with both languages, and reduce investor confidence that they understand the information provided. A prominent statement could mitigate this risk by making clear that the two languages are accurate and full reflections of each other. As noted above, we also suspect that issuers would only prepare a dual-language PDS where their target audience was comfortable engaging in both languages.

A dual-language PDS will be approximately double the length of a PDS provided in one language. While it does not introduce new information, it is possible that the additional length could discourage some investors from reading it.

There is also a risk of a mistake or discrepancy between the two languages. This risk could be mitigated by a condition requiring an independent party or the issuer to certify that the two languages in the PDS are accurate and full reflections of each other. The issuer will also remain responsible for both the te reo Māori and English versions, which will both comprise the PDS.

In providing a PDS in te reo Māori and English, investors could make an investment decision based on the te reo Māori portion of the PDS. While this would be the same as the English version, it could create issues if the investor prefers to, and is unable to, obtain further information or make a complaint in te reo Māori. This could be particularly problematic if the investor is not as confident engaging in English. We are of the view this risk could be mitigated through conditions – either by the issuer making a translator available, or by including a prominent statement on the PDS that further information may only be provided in English.



Additional proposal – length limit exemption for English and other languages

We are considering expanding the proposed exemption to other languages

We are also considering whether to expand the proposed exemption to include languages other than te reo Māori and English. This would allow a dual-language PDS to be provided in English and one other language. This could extend to all languages, or be limited to the official languages of countries we have agreements with. For example, signatories to the [Asia Region Funds Passport](#) Memorandum of Cooperation (ARFP MOC)³.

The same conditions as above would be imposed to ensure that the exemption is appropriately targeted, and both languages would comprise the PDS.

Many of the key benefits associated with an exemption for te reo Māori and English PDSs are likely to also apply to an exemption for dual-language PDSs in English and other languages. Providing the information in another language will assist investors who are more confident engaging in that language. Offering the information in a second language means the information will be more accessible to a larger number of investors.

Allowing a PDS to be provided in English and another language has some additional benefit in terms of scale as this could benefit more investors.

As above, dual-language PDSs could be confusing for investors who do not understand the other language, or the length could discourage the investor from engaging with the entire PDS. There is also a risk that there will be discrepancies between languages, although this could be mitigated by requiring certification.

An investor could also decide to invest based on the information provided in the other language, and then only be able to access further information or resolve a dispute in English. This could create adverse investor outcomes if the investor is unable to speak English confidently. As noted above, we could impose a condition to mitigate this, such as a translator or a statement in the PDS that further information may only be provided in English. While we still see these risks as low under this additional proposal, there is some additional risk in terms of scale, as more issuers will be able to take up this option if it is available for languages other than te reo Māori.

³The ARFP MOC is an agreement between Australia, New Zealand, Republic of Korea, Japan and Thailand. Once implemented, the ARFP MOC will allow a managed fund based in one jurisdiction to make offers more easily to investors in other participating jurisdictions. The ARFP MOC was signed in April 2016 and the aim is for the regime to become operational in the second half of 2018.



Questions

Length limit exemption to enable dual-language te reo Māori and English PDSs

1. Do you support the proposed exemption to enable PDSs to be provided in both te reo Māori and English in full? Please give reasons for your view including any changes you would like to see.
2. Do you have any comments on the benefits outlined in this consultation paper?
3. Do you have any comments on the risks outlined in this consultation paper?
4. Have you identified any other benefits or risks associated with this exemption that have not been provided in this consultation paper? Please specify any further benefits or risks you have identified and give reasons for your view.
5. Other than the length limits in regulations 22 to 25, and 29 of the FMC Regulations, do you think an exemption is required from other regulations or legislation in order to allow a dual-language PDS? Please specify any legislation or regulations you have identified and give reasons for your view.
6. Do you agree that the existing FMC Act protections are sufficient to deal with a discrepancy between the two languages in the PDS? Please specify any further conditions you think may be required to deal with a discrepancy and explain why these are necessary.
7. Given the specific nature of the prescribed wording required by the FMC Regulations, do you think there are any difficulties providing the equivalent statements in te reo Māori? Please specify any prescribed wording that you think may be difficult to provide in te reo Māori, and provide alternatives if possible.
8. (For issuers) would you intend to rely on the proposed exemption if granted for te reo Māori and English?

Conditions

9. Do you agree that the issuer should be required to include a prominent statement in the PDS in both languages stating that:
 - a. the two languages are accurate and full reflections of each other, and
 - b. further information, such as fund updates and annual reports, may only be available in English?

We are also considering whether, as an alternative to the statement in 9.b, it would be appropriate for further information to be made available in the other language if requested by the investor (either through in-house capability or an external translator). Please state any preference and give reasons for your view.

10. How do you think we could best mitigate against the risk of discrepancies between the two languages? For example, whether the two languages must be certified by a qualified independent party and/or the issuer as accurate and full reflections of each other.
11. Do you agree that the prescribed length limits should still apply for the English part of the PDS on its own? Please give reasons for your view.

Questions continued over page

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12. What format or layout requirements do you think we should impose for a dual-language PDS, if any? Please specify any requirements and give reasons for your view.
 13. Are there any other conditions you think we should impose to ensure that the exemption is appropriately targeted and risks are mitigated? Please specify any additional conditions and give reasons for your view.
 14. Do you think any of the proposed conditions could impose unnecessary compliance costs? Please specify any conditions which could impose unnecessary compliance costs and give reasons for your view.

Length limit exemption for other languages

14. Would you support the proposed exemption to enable PDSs to be provided in full in both English and any other language? Please give reasons for your view including any changes you would like to see.
15. Have you identified any other benefits or risks for investors if we expand the proposed exemption to include languages other than te reo Māori and English? Please specify any further benefits or risks you have identified and give reasons for your view.
16. Do you think the exemption should be expanded to include all languages, or are there any particular languages you think should be approved in addition to te reo Māori? For example, for countries that are signatories to the AFRP MOC.
17. (For issuers) would you intend to rely on the exemption if granted for other languages? Please specify what language you would look to include in a dual-language PDS.

