OCTOBER 2024

Submissions report

Guidance on winding-up requirements for registered schemes

Summary of themes from submissions made on the draft guidance as part of our consultation

FINANCIAL MARKETS AUTHORITY
TE MANA TĀTAI HOKOHOKO

Contents

Executive summary

Between August and October 2023, the Financial Markets Authority – Te Mana Tātai Hokohoko (**FMA**) consulted on proposed guidance on winding-up requirements for registered schemes.

The proposed guidance set out the FMA's expectations for how fund Managers and Supervisors can comply with sections 212 and 213 of the Financial Markets Conduct Act 2013 (FMC Act).

We thank all 10 submitters for their feedback, which provided helpful observations and insights.

This document summarises the key themes raised in those submissions and our comments about what changes have been made to the guidance. It also contains the written submissions, which may withhold some information in accordance with the Official Information Act 1982 and the Privacy Act 2020.

The final version of the guidance is now published on our website.

Feedback themes

The feedback is grouped into the following themes:

1. **Impact** – Concern that following the guidance could have unintended impacts.
2. **Wind-up effective date** – Desired clear definition of 'wind-up effective date'.
3. **Distributions –** Expressed uncertainty about making partial distributions.
4. **Challenge –** Queries around why schemes must allow the opportunity for scheme participants to question proposed distribution of assets.
5. **'Gone no address' tracing –** Concerns that tracing GNA scheme participants is expensive and complex.
6. **Variety of schemes –** The timing of a wind-up may be influenced by the liquidity of a scheme's assets.
7. **Examples** – Submitters agreed they would benefit from more examples.

We have updated the guidance to address these themes.

Impact

Sections 212 and 213 of the FMC Act require schemes to complete certain steps to wind up. However, schemes have some control over when they set the wind-up effective date and wind up the scheme. We consider that following the steps set out in the guidance should not delay wind-up or affect outcomes for investors.

Submissions

- Submitters were concerned that meeting the requirements in sections 212 and 213 could delay their wind-up and result in additional audits and costs.
- Many of the submissions identified potentially redundant and costly reporting obligations caused by complying with section 212 and 213 as well as other FMC Act and FMC Regulations requirements.

Changes to guidance

- We updated the guidance to clarify how Managers or Supervisors may consider timing wind-up dates or aligning reporting obligations to help manage costs.
- We added examples and explanations to show how different types of schemes could organise their wind-up around other applicable obligations such as annual financial reporting.
- We clarified that schemes may reach out to the FMA for relief when the burden of meeting reporting obligations potentially outweighs the benefit to investors.
- We revised the guidance to state the FMA is intending to consult on a class exemption aimed at providing relief for schemes in wind-up.

Wind-up effective date

We define the wind-up effective date and explain why it is undesirable to be the day before or the same day as the final distribution date.

Submissions

- Many submitters asked the FMA to define the wind-up effective date.
- Some submitters wanted an explanation of why it cannot be the same as the final distribution date.
- Submitters had differing views on how the wind-up effective date should be set.

Changes to guidance

- It is important to maintain a standard approach to setting the wind-up effective date. We have made changes to clarify the definition of the wind-up effective date.
- We clarified why Supervisors and Managers should select a wind-up effective date that allows schemes to meet section 212 and 213 obligations.

Distributions

The revised guidance explains that Supervisors or Managers may make distributions during wind-up.

Submissions

- Submitters had differing views on making partial distributions and asked for clearer guidelines for holding funds during wind up, including how much to hold and for how long.
- Some submitters stated that holding funds could be a bad outcome for scheme participants who are owed money at wind-up.
- Submitters noted it is not accurate to state that partial distributions must be allowed or permitted by the governing document.
  - Page 1 of the proposed guidance said that partial distributions were allowed “where permitted by the governing document”; and
  - Page 3 said, “. . . if the governing document allows, the Manager or Supervisor can make partial distributions . . .”

Changes to guidance

- We have revised the guidance to clarify how Managers or Supervisors can make distributions and hold funds to cover fees and costs incurred during wind-up.
- We revised the guidance to clarify that a scheme’s governing document does not permit or allow partial distributions, but it could limit or prohibit them.

Challenge

The proposed guidance described the scheme participants' "opportunity to *challenge*" the proposed manner of distributions during wind-up.

Submissions

- Submitters generally sought clarification about use of the word challenge, the requirement to allow for challenge, and what it means to challenge during wind-up.
- Some submitters asserted there was no need to allow for challenge because they had not previously faced a challenge from scheme participants and believed allowing for challenge could cause delay.

Changes to guidance

- We changed the language in the guidance from "opportunity to challenge" to "opportunity to question the proposed manner of distribution".
- We clarified the rationale for this provision and explained that providing an opportunity to question proposed distributions provides transparency and serves as a check that the proposed distribution is fair and complies with governing documents.

'Gone no address' tracing

Scheme wind-ups require 'gone no address' (GNA) tracing to be conducted to complete final distribution.

Submissions

- Some submitters described various challenges and costs associated with GNA tracing.
- Submitters asked the FMA to set clear expectations for GNA tracing, including whether they must attempt to trace GNAs for some minimum period of time.

Changes to guidance

- We revised the guidance to include the expectation that schemes should take all reasonable steps to locate all scheme participants within a reasonable timeframe.
- We also now include the recommendation that Managers or Supervisors think about whether it is feasible to trace GNA scheme investors prior to the wind-up effective date.

Variety of schemes

The timing of a wind-up may be influenced by the liquidity of a scheme's assets.

Submissions

- Some submitters described how their scheme's assets are unique and as a result, they face challenges in wind-up.
- Submitters explained that schemes hold different types of assets and while some schemes can wind up quickly, others may take more time to sell assets and distribute funds to scheme participants.

Changes to guidance

- We revised the guidance to illustrate how different types of schemes can wind up.

Examples

Nearly all submitters wanted more examples in the guidance. We agree examples are helpful to illustrate how different types of schemes can wind up according to their own timeline and comply with reporting requirements.

Submissions

- Submitters asked for examples showing how their type of scheme might wind-up.
- Submitters believed examples will provide clarity regarding section 212 and 213 requirements.

Changes to guidance

- We added example wind-up timelines to provide a better understanding of how schemes with differing levels of liquidity can meet section 212 and 213 requirements.

Appendix: Submissions received

1. BT Funds Management (NZ) Limited
2. Centuria Funds Management (NZ) Limited
3. Corporate Trustees Association
4. Dentons Kensington Swan
5. Financial Services Council of New Zealand
6. Fisher Funds
7. Mainland Capital Investment Management Limited
8. Oyster Management Limited
9. Stephen Layburn
10. Todd Group Pension Plan Trust

Feedback form

Consultation: Proposed guidance on winding up requirements for registered schemes

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with **Proposed guidance on winding up requirements for registered schemes**: [your organisation's name]' in the subject line. **Submissions close on 5pm on 13 October 2023.** Thank you.

Date: 13 October 2023 Number of pages: 3

Name of submitter: BT Funds Management (NZ) Limited (BTNZ)

Company or entity: BT Funds Management (NZ) Limited (BTNZ)

Organisation type: Licensed manager of managed investment schemes

Contact name (if different): [redacted]

Contact email and phone: [redacted]

Question number	Response
Question 1: Do you agree with our views of the purpose of section 212 and 213?	We agree with the FMA's view on the purpose of section 212. On section 213, we agree that the FMA's view is appropriate for registered schemes with assets that are infrequently valued, difficult to value and in most cases, illiquid (such as private asset schemes). We also recognise that most MISs have assets which are easily and frequently valued (usually each business day), and these valuations are readily accessible to investors. Preparing financial statements for these MISs at the commencement of a wind-up is not necessary or appropriate to achieve fair and equitable treatment for their investors. Providing financial statements at the commencement of the wind-up is also likely to cause delays to investors without providing a clear benefit and risks confusing MIS investors who may rely on the financial statements valuation to assess the value of their investment instead of the more up-to-date daily valuations. For a BTNZ MIS wind-up in particular, the necessary information for investors about the wind-up would be set out in the wind-up notification and investors would at any time, be able to confirm the value of the MIS via the daily valuations. Investors would also be able to contact BTNZ if they needed further information on the wind-up. Further, we do not believe that liquid and frequently valued MISs should be required to hold a proportion of scheme assets until audited financial statements have been provided to all investors. Market practice is to allow investors in retail liquid MISs to withdraw throughout a wind-up process, with the built in safeguards that these withdrawals must be permitted by the trust deed and determined by the MIS manager and supervisor to be equitable and in investors' best interests. Requiring liquid MISs to hold a proportion of scheme assets until audited financial statements have been provided to all investors is likely to result in a delay of around four months in receiving the proceeds from the residual assets. This delay for investors who wish to withdraw after receiving notification of the windup could be contrary to investors' interests and may conflict with the FMA's goal of equitable treatment.
Question 2: Do you agree with our view that the date of final distribution of the scheme's assets cannot be taken to be the wind-up effective date?	Yes. The final distribution date may closely follow the wind-up effective date for liquid MISs, but the dates will not be the same due to the period of time to realise the assets that remain as at the wind-up effective date.

Question 3: Are there any aspects of the proposed guidance you think are unclear or need to be improved?	BTNZ appreciates FMA's proposed guidance on this matter. There are two specific areas where BTNZ would appreciate clarification or improvement. ***Preparation of financial statements*** It would be useful for the guidance to clarify the timing requirements in respect of financial statements as part of a wind-up process. In particular, the guidance appears to suggest that financial statements should be provided at the "commencement" of the wind-up (which is the date that the resolution is passed to wind-up the scheme). However, the timeline for the financial statements in the FMCA is within four months of the wind-up effective date. It would be useful for FMA to clarify how the guidance's expectation that financial statements would be provided at the commencement of the wind-up aligns with the requirement under s213 to prepare financial statements as at the wind-up effective date, which could be a future date specified in the resolution. We note for completeness, that for any wind-up of a BTNZ MIS, BTNZ would currently prepare one set of wind-up financial statements as at the wind-up effective date. ***Tailored guidance to address a range of registered schemes*** The guidance, in particular the requirement that financial statements be provided to investors at the commencement of the wind-up process, appears to be primarily focused on relatively illiquid schemes which are difficult to value and infrequently valued. It would be helpful for the guidance to address a wider range of different schemes, including for example, daily priced and highly liquid MISs where assets can be readily realised and proceeds distributed quickly after wind-up. BTNZ provides further comments on this subject in Question 8.
Question 4: Are there any aspects of the proposed guidance you do not agree with, or you think should not be included?	There are two aspects BTNZ encourages the FMA to reconsider (further explanation is provided in the answer to Question 1 above): • The apparent blanket requirement for all registered schemes to provide audited financial statements to investors at the commencement of the wind-up process. • The requirement for all registered schemes to hold a proportion of scheme assets undistributed until audited financial statements have been provided to all investors. These requirements may be necessary or appropriate for some registered schemes but we don't believe they are appropriate for liquid and frequently valued MISs.
Question 5: Are there any aspects of the proposed guidance you think may have unintended consequences?	BTNZ considers that the distribution of asset proceeds to investors) would be unnecessarily delayed by a need to hold a proportion of scheme assets undistributed until the audited financial statements have been provided to all investors. This delay would not be in the interests of investors for these liquid MISs: the potential cost to investors of a delay of at least four months to realise the full distribution of assets likely outweighs any benefit for these investors in receiving the audited financial statements before distribution. Further explanation on this matter is provided in the answer to Question 1 above.
Question 6: What impact (if any) might the proposed guidance have on compliance costs for the scheme?	No comment
Question 7: Are there any additional areas you consider the proposed guidance should address?	No comment

Question 8: Are the examples useful? Are there any examples that you would like to see changed, clarified, or omitted?	The guidance provides useful examples, especially those related to registered schemes that are less common. The examples help build a clear understanding of FMA's expectations for those schemes. The examples do not appear to be directly applicable to , daily valued and liquid MISs such as standard, retail unit trusts or KiwiSaver schemes. As a general comment, it would be useful for the guidance (including the examples used) to take account of a wider range of fund structures, asset holdings and governing documents. In particular, BTNZ would like the guidance to consider the wind-up of a retail liquid MIS which invests into larger wholesale funds (which hold the underlying securities/assets) and redeems all units/investor holdings at the wind-up effective date (as this is a common fund structure). The guidance states that final distribution of assets will not be taken to have been completed until all scheme participants have been paid their final entitlements or remaining funds transferred to the Treasury or Inland Revenue. BTNZ supports this position, provided it is understood and accepted that for any wind-up of a BTNZ managed MIS, any cash awaiting distribution following the wind-up effective date is transferred out the scheme bank account to a holding account with regular reporting to the supervisor. Accordingly, from this time, while this cash is treated by BTNZ as client money (and hence continues to be appropriately protected), it has no management fee applied to it, does not form part of the MISs assets and the MIS deregistration can proceed.
Question 9: Do you have any comments on the length, format, or presentation of the proposed guidance?	No comment
Question 10: Do you have any other comments on the proposed guidance?	We agree that attempting to trace Gone No Address (GNA) investors prior to the wind-up effective date is important and standard practice of any wind-up plan for a BTNZ MIS. For completeness we note that pre-wind-up GNA tracing is invariably not completely successful in contacting all GNA investors.
Feedback summary – *if you wish to highlight anything in particular*	
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.	
Thank you for your feedback – we appreciate your time and input.	

Feedback form
Consultation: Proposed guidance on winding up requirements for registered schemes

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with **Proposed guidance on winding up requirements for registered schemes**: [your organisation's name]' in the subject line. **Submissions close on 5pm on 13 October 2023.** Thank you.

Date: 13 October 2023 Number of pages: Four

Name of submitter:

Company or entity: Centuria Funds Management (NZ) Limited

Organisation type: Licensed MIS Manager

Contact name (if different): [redacted]

Contact email and phone: [redacted]

Question number	Response
1.	We disagree with the FMA's view of the purposes of section 212 and 213 other than the point that one purpose is to inform the FMA / IRD Commission about the commencement of a wind up.. In our view, the purpose of sections 212 and 213 is to ensure there is a mechanism where a final report on the financial position of a scheme following its winding up is prepared and audited, which effectively provides a confirmation that all assets have been appropriately distributed. We believe that this view of the purpose is supported by the following language used in section 213 which is expressed in the past tense, indicating that a wind up has been completed: • "The person who **was** the supervisor of the relevant registered scheme"; • "… if there was no supervisor, the person who **was** the manager of the relevant registered scheme" • "The scheme **was** wound up" • "a copy of those financial statements is sent to the FMA and to every person who **was a scheme participant immediately before it is wound up**". In the absence of this requirement, it is very possible that a registered scheme could have its winding up completed between balance dates and no final audit would be completed on the final financial position of a scheme, confirming that all assets have been appropriately distributed in accordance with a scheme's governing document. This is acknowledged in the paper through the possibility of overlapping reporting requirements. It seems unlikely to us that the law intended to have further reporting requirements following completion of a set of financial statements which are legislatively expressed to be "final financial statements". The language of section 212 also supports this purpose as it is forward looking by requiring the winding up resolution or court order to be sent to the FMA / IRD Commissioner "[I]f a registered scheme **is to be** wound up". This language implies that the once a winding up resolution has been passed, the wind up will not have occurred at this point. If one of the purposes was to allow scheme participants to challenge a distribution, we would expect the legislation to expressly provide for a timeframe in which this could occur. While we acknowledge that scheme participants will have this right at law (such as for the manager breaching a governing document or duty owed), if the purpose of the provisions was to expressly ensure investors could challenge a distribution, we would expect the provisions to expressly include a mechanism for this. The FMA's guidance does not set out the basis for its view, including how its view is supported by the words of the legislation. We believe it would be helpful for industry participants to understand how the FMA has formed its view on what the purpose of sections 212 and 213 is

	and what the varying approaches to compliance have been, including whether any of those approaches are consistent with the FMA's view.
2.	We do not agree with the FMA's view that the date of the final distribution of the scheme's assets can not be taken to be wind-up effective date for the same reasons as set out above. We also note that section 212 does not require that a winding up resolution clearly specify the wind-up effective date, contrary to the position noted in the guidance under the heading "Section 212". This position also does not take account of the likelihood that a governing document will have provided for the wind-up effective date. Many of the governing documents of Centuria's schemes state that the effective date of a wind up is the date that final amounts are distributed to investors. This is consistent with section 135(1)(i) of the FMCA which provides that governing documents must provide adequately for the winding up of the scheme but does not prescribe how that winding up should occur.
3.	As noted above, we do not agree with the proposed guidance. However, if it was to be finalised by the FMA in a form consistent with the draft, we believe the following aspects are unclear and should be considered further: • The dates that can be adopted as the wind-up effective date? At the moment there is one date it cannot be and three examples given of possible dates. Greater certainty on the dates that can and cannot be adopted should be given. • How do managers/supervisors determine an appropriate proportion of assets to hold back? In Centuria's single asset schemes, its current practice is to distribute 95 to 98% of net sale proceeds within approximately one week of the property being sold. This reflects that investors approve a sale of a property and have relative certainty on the proceeds that will be available. Those proceeds are generally the sale price (a fixed amount) less bank debt (again a fixed amount) less other debtors (outstanding creditors, any interest owed to a bank, tax obligations etc. which are not a fixed amount). Any suggestion of proportions which are inconsistent with this previous practice will be detrimental to investors as it would cause a delay in receiving funds they would have previously received earlier, likely impacting returns on those funds. The guidance should be clear that managers and supervisors ultimately have the discretion as to what proportion of assets is held back. • How long should managers and supervisors wait for investors to challenge a proposed distribution before the "appropriate proportion" which is held back. Again, in Centuria's single asset schemes, no investor has ever challenged a distribution reflecting the single asset nature of the scheme and that the sale of the single asset has been approved by a special resolution of investors. The only feedback we have received from investors is on the timing of the distribution of the residual 2 to 5% that is typically held back, with investors expressing a desire that this is distributed more promptly. Aspects of the guidance could lead to investors being negatively impacted through a delay in funds being returned if aspects like an appropriate proportion and timing to wait for any challenges are not sufficiently clear in any guidance. • The time period in which an appropriate proportion of scheme assets should be held undistributed should also be clarified. The guidance currently states this should be until financials have been provided to scheme participants. However, this would appear to be inconsistent with the FMA's view of the purpose of the provisions as, if a distribution can then be made, scheme participants will be unlikely to have made any challenge at that point as they will have only received the financial statements at that point. • The guidance does not recognize that in certain managed investment schemes (such as those invested in real property) investors approve the price at which the principal asset of the scheme is sold. This is the appropriate time for investors to challenge the amount they will likely receive by voting for or against a proposal to sell. • What would be an appropriate basis for an investor challenging a distribution. For property, in the absence of fraud or gross negligence, there is likely to be little basis to challenge given sale price is known and approved in advance. The guidance should be

	clearer as the types and natures of investor challenges that should result in a delay to distributing funds to investors. • If the FMA was to consider the date of a winding up resolution as the effective date (and exclude all other possibilities), the FMA should be aware that this does not allow for the possibility in a real estate scheme that a purchaser defaults on settlement and a scheme is left holding its real property. It seems counterintuitive that there would be a requirement for final financial statements in this situation.
4.	We consider that the suggestion to align wind up processes (e.g. a settlement date) with a balance date is not likely to be commercially possible where a sale is being negotiated at a time of the year which is not close to a balance date. Purchasers typically want to acquire an asset as soon as possible and, in any event, on a date which works for the purchaser. They are unlikely to agree to an extended settlement simply to align with a vendor's balance date. It also does not account for the possibility of unsolicited offers.
5.	Unless the definition of an appropriate proportion is clarified, the requirement to hold back an "appropriate proportion" of assets before distributing will be detrimental to investors. AS noted above, Centuria currently distributes 95-98% of the net proceeds within a week of the settlement of a sale with the balance held back until final liabilities, such as creditors and GST are able to be confirmed and satisfied.. If adopted, guidance should be clear as to who can make the decision (which should be consistent with a governing document) and that it is ultimately their discretion as to what proportion is held back. As noted above, there is also a possibility that a scheme is taken to be "wound up" and a purchaser defaults on settlement of a sale of a property. While this could be addressed by requiring the settlement date to be the date on which a winding up takes effect, this is ultimately inconsistent with the FMA's view of the purpose of the provisions. By this point, investors will have approved a sale of the real property and the sale will have occurred. The appropriate point for investors to challenge the amount to be distributed is the meeting to approve the sale, rather than four months after a settlement occurs. In this instance, the audit would simply confirm that settlement has occurred and the proceeds would be received. There is also a possibility that warranties are given to a purchaser in a sale and purchase agreement, with retention amounts held to secure those warranties for a defined period and amounts retained. Final report will be complicated by this and may affect amount to be distributed.
6.	The proposed guidance will likely increase compliance costs as, subject to timing of a property's sale, it will very likely introduce an additional audit in addition to year end audits (unless relief granted). There is also the possibility that a winding up date is in the 1-3 months before a balance date which will see investors receive two sets of financial statements within a close period. This may be confusing for investors. Any relief granted should be considered at the same time as this guidance and consulted on at the same time, so market participants are aware of the FMA's overall approach to this matter (rather than one element, being when a winding up report must be given).
7.	The proposed guidance should address: • The basis for determining a wind up effective date; • The time at which a manager's and supervisors obligations cease in respect of a scheme; • The period for which custodial assurance engagements are required (noting that these are ultimately a cost for the scheme and therefore ultimately its investors).
8.	If the guidance is to be adopted, we consider the examples could benefit from the following: (a) Additional examples of possible wind up dates that can be adopted; (b) Examples of appropriate proportions of assets that should be undistributed until financial statements are provided to investors.

9.	We agree with the length of the guidance which, putting the content aside, we consider is concise.
10.	If the FMA wishes to proceed with the guidance, it should consider a specific exemption for Other MIS who are invested in real estate. This would recognise that MIS invested in real estate are invested in a particular asset class which is not sold in the same manner as assets traded on financial markets (such as equities or bonds). Alternatively, the FMA could consider issuing guidance for two separate classes of managed investment schemes – superannuation/KiwiSaver schemes/managed funds and real estate/forestry schemes. We also confirm that no investors have raised any concerns with Centuria since the FMCA came into force regarding the previous approach of the current approach to date. We therefore do not consider that the guidance is addressing a particular area of concern or focus for investors.

Feedback summary – In summary, we do not believe that the FMA's view of the purpose is supported by the legislation. We also believe there are a number of practical issues which the guidance does not address which are noted above. Finally, it is not clear to us what mischief the guidance is seeking to achieve from an investor perspective. We think it would be useful for the FMA to understand investor views on the information they find most useful in a wind up process and would be happy to introduce the FMA to any of our investors who were willing to discuss this point if the FMA would like to consider this. Finally, we would like to thank the FMA for providing us with the opportunity to submit on this consultation.

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.

Thank you for your feedback – we appreciate your time and input.

18 October 2023

The Financial Markets Authority
PO Box 3724,
Wellington 6140

By email: consultation@fma.govt.nz

Consultation: Proposed Guidance on winding-up requirements for registered schemes

The Corporate Trustees Association welcomes the opportunity to provide comments in response to FMA's Consultation Paper dated August 2023.

CTA is the industry association for New Zealand's five licensed supervisors. Collectively supervising over $500 billion assets under management, and licensed by the Financial Markets Authority under the Financial Markets Supervisors Act 2011, our members fulfil a statutory role under that Act to help enhance investor confidence in financial markets and retirement villages.

We would welcome the opportunity to meet with FMA to discuss this submission, and winding up practices generally. There are a range of issues (for example, when monies should be held back) where it would be helpful for supervisors to understand FMA's policy concerns and share relevant practical considerations with FMA.

Please contact me if you require any further information from CTA members.

[redacted]

Executive Director

1 **Do you agree with our view of the purpose of section 212 and 213? Please explain your view.**

CTA differs with the FMA's view of sections 212 and 213 for the following reasons:

a. Typically the wind up in practice is as follows:
   - a resolution is made to wind the fund up;
   - following the resolution Trust Deeds generally then require that the assets are realised and the fund holds cash;
   - when the assets have all been converted to cash and liabilities paid, the monies are distributed, and/or an interim distribution can be considered; and
   - financial statements produced and sent out after the final distribution.

b. Section 213(1)(a) is drafted in broad terms which allows for the winding up of a scheme to occur taking into consideration the different types of schemes, the unique circumstances relating to the wind-up of a scheme and the specific provisions in trust deeds prescribing the manner in which a scheme is to be wound up. The section is silent on nominating a wind-up effective date, presumably because that date is dependent on those factors.

   As an example, property and mortgage funds were impacted by the Global Financial Crisis (GFC). Once the decision was made to wind up such a scheme or fund, the winding up process was protracted due to the nature of the assets which made realisation difficult. For that reason, specifying the wind-up effective date in the resolution, or as on the date on which the resolution was passed, or on a date other than the date of final distribution is not always feasible.

   The GFC was an extraordinary event, but that set of circumstances illustrates that a restrictive or narrow view of the legislation may not be appropriate for all schemes or in all circumstances.

c. The proposed Guidance notes that " …*The FMA considers that the Manager or Supervisor will need to hold an appropriate proportion of scheme assets undistributed until the financials have been provided to all scheme participants. This is to ensure that the scheme assets are distributed in a fair and equitable manner, and that scheme participants have the information and opportunity to challenge the proposed manner of distribution".*

d. In practical terms, supervisors or managers will exercise discretion and are likely to hold all funds undistributed until the 4 month period expires. Partial distributions are costly, reducing the funds available for investors.

e. For a fund holding liquid assets the winding up process can be short. Taking the FMA's interpretation, a fund will need to continue to hold the cash assets for another 3 or 4 months. At best, the return to investors will be akin to OCR on the cash. As the distribution would be finalised after the 4 month period from when the wind-up effective date expires, and assuming no challenge is made which may entail further time and cost to satisfy, investors lose the opportunity to invest their funds elsewhere. If there is a challenge this then involves additional time and cost (with the potential for further management fees, legal advice, taxation considerations, etc) to the majority of investors who voted in favour of winding up the scheme.

f. The majority of scheme wind ups are not challenged by investors as issues relating to the winding up of a scheme tend to be sorted out prior to a winding up vote.

   Where a voluntary winding up of a scheme is proposed, this usually entails a Special Resolution (75% majority of investors entitled to vote and who do vote either present or by proxy) as set out in the Trust Deed.

   It is also usual for a Trust Deed to provide that the result of a Special Resolution binds all investors.

g. Supervisors generally have oversight of the meeting process. One of the requirements for a meeting where investors are to vote on a Special Resolution is that investors are provided with sufficient information to allow them to make an informed decision on how they will vote.

   Therefore, to allow one, several or a small group of investors the ability to forestall distribution to all investors does not appear equitable nor in the best interests of investors.

2 Do you agree with our view that the date of final distribution of the scheme's assets cannot be taken to be the wind-up effective date? Please explain your view.

We recommend that FMA Guidance sets out the factors to be addressed when selecting a wind-up date, rather than banning certain dates, for the following reasons:

h. The final distribution date is often used as the wind-up effective date by managers as a means to save compliance costs (both the cost of an audit and the manager's time). As investors in most schemes pay for the audits out of scheme property, CTA believes that this is a pragmatic, investor centric, and legally complaint approach.

i. Section 213(1)(a) is drafted broadly and provides flexibility to accommodate a range of diverse wind up dates in differing scheme circumstances at the time of a wind up. It does not seek to define the wind-up effective date, but instead, and more importantly in our view, triggers certain compliance requirements from that date.

   It is possible for section 213(1)(a) to apply sensibly in relation to a scheme that still has a number of assets and investors as at the effective date of its wind up, and to a scheme which has no assets or investors remaining at the effective date of wind up.

   For example, where a scheme still has a number of assets and investors as at the effective date of its wind up, the balance sheet prepared as part of the financial statements contemplated by section 213(1)(a) would specify the value of those assets. Where a scheme no longer has any assets or investors as at the effective date of its wind up, the balance sheet would specify a nil value for those assets.

   However, further details of the assets formerly held by the Scheme and distributed to investors would be included in the notes to the financial statements to meet the requirements of generally accepted accounting practice.

j. The disclosure requirements under the FMC Act mean that investors have considered the basis on which they are investing in a scheme including any winding up provisions. Section 135(i) of the FMCA provides that "*The governing document for a registered scheme must adequately provide for …the winding up of the scheme; …*".
This requires an issuer to set out the specific winding up requirements to suit a particular scheme; these provisions may define the date of winding up as section 135(i) does not prohibit a governing document from specifying a date on which the winding takes effect.
Therefore, the contractual terms in a governing document may take precedence over the FMA Guidance proposal.

k. Deferment to the specific provisions of a governing document is supported by the legislation. For example, Schedule 11 of the Financial Markets Conduct Regulations 2014 provides default provisions for meetings of investors where a governing document lacks detail or specificity.

l. Further, section 213(1)(b)(i) contemplates that a scheme would be regarded as wound up once it no longer has investors, when it states that the financial statements must be sent to the FMA and "*every person who was a scheme participant immediately before it was wound up*" within 20 working days after the final financial statements have been audited.

n. Section 213(1)(b)(ii) also contemplates that there may or may not be assets remaining within a scheme on wind up when it requires that "*the FMA and the scheme participants [be] advised in writing as to the manner in which the remaining assets (if any) of the scheme are to be distributed".*

o. Section 213(1)(c) is drafted broadly to contemplate that partial distributions of scheme assets may occur "*at any time before a copy of the final financial statements is sent to the FMA under paragraph (b) (unless prohibited by the governing document)…*".

p. Section 213(d) requires the FMA to be informed "*of the date on which the distribution of assets is completed*". There is nothing in the section to suggest whether this must occur on or after the "effective date of the wind up".

q. The largest distribution (90% + of assets) generally occurs in the first 1-2 business days after settlement. The audit takes around four months to complete. As such the audit does not provide scheme participants timely information which provides them with an opportunity to challenge the 'proposed distribution'. In our view there is no benefit to an audit at distribution date and balance date (which could be just weeks later). It will provide investors with no additional information but will reduce the value of their investment (as they will pay for two audits rather than one).

3 Are there any aspects of the proposed Guidance you think are unclear or need to be improved? If so, please explain what these are and provide your suggested wording or approach to address these.

The proposed Guidance could be made more outcomes based, focused on investors' interest and aligned to the drafting of the legislation.

Based on the Guidance we think that investors will need to wait for the expiry of the four month period or possibly longer to receive their monies and effectively be 'out of the market' for an extended length of time.

We also consider that the FMA's proposed approach adds compliance cost for little benefit.

4 **Are there any aspects of the proposed Guidance you do not agree with, or you think should not be included? Please give reasons for your view.**

Yes as stated above.

Advice or clarification on how the FMA will apply its power under section 213 (2) to extend the time period within which section 2013 must be compiled with would also be useful.

5 **Are there any aspects of the proposed Guidance you think may have unintended consequences?**

The Guidance will lead to extra compliance costs (particularly multiple audits) for little benefit.

With regard to the FMA view that: "If the resolution does not clearly state the wind-up effective date, then it will be taken to be the date on which the wind-up resolution was passed." For schemes that invest in real property, a wind-up resolution will often set a minimum value. The manager may not be able to sell the real property for the amount agreed by investors, or if a sale is agreed the purchaser may not settle. The result of the FMA's interpretation will be a "final" audit on a continuing scheme because the sale of real property did not settle.

We suggest that for schemes with real property there should be an alternative approach: "If the resolution does not clearly state the wind-up effective date for schemes with investments in real property, then it will be taken to be the date on which the final settlement occurs."

For schemes with liquid assets, investors will need to wait longer to receive their monies and effectively be 'out of the market' for longer based on the Guidance.

If schemes are required to continue for years because of an immaterial amount of GNA funds, the scheme may become insolvent due to continued compliance costs for reporting, etc.

Finally, an unintended consequence may be the misunderstanding and uncertainty due to the seemingly contradictory provisions of a governing document on one hand, the provisions of the FMC Act on another hand and the FMA Guidance on yet another hand.

6 **What impact (if any) might the proposed Guidance have on compliance costs for the scheme?**
Compliance costs are likely to increase.

Before going into some detail, here is a one-paragraph summary. If the Guidance requires accounts to be prepared to satisfy S213 at the wind up date and these are final accounts then the Guidance should also state that the scheme is treated as wound up at this time. That means that provided the final accounts include a profit and loss and can comply with Part 7 Financial accounts then there is no requirement to prepare Part 7 financial statements after the wind up date. That would also include any reporting after the wind-up date pursuant to the Trust Deed. It would mean that there are no audited financial statements showing the distribution amount. Note that every additional set of audited accounts after the wind up accounts will incur an audit fee of $50,000 plus.

The FMA's view that: "If the resolution does not clearly state the wind-up effective date, then it will be taken to be the date on which the wind-up resolution was passed. However, in our view the wind-up effective date must not be the final distribution date of the scheme's assets" may lead to the requirement for two or three audits rather than one.

Example 1.

In this example the resolution is not “clear”, and the audit cost is $50,000. In the industry practice column, the manager has extended the balance date by one month and aligned the final distribution with the balance date. Investors get the “Final” financial statements two months later and save $100,000 in audit fees.

Example 1		FMA Guidance		Industry practice	
Resolution Date	28-Feb-24	"Final" Audit	$50,000		
Balance Date	31-Mar-24	Audit 2	$50,000		
Final Distribution Date	30-Apr-24			"Final" Audit	$50,000
Part 7 Financial Statements	31-Mar-25	Audit 3	$50,000		
Total Audit Cost			$150,000		$50,000

Example 2.

In this example the resolution is “clear” and is set to the next balance date. The audit cost is $50,000. In the industry practice column, the manager has extended the balance date by one month and aligned the final distribution with the balance date. Investors get the “Final” financial statements one month later and save $50,000 in audit fees.

Example 2		FMA Guidance		Industry practice	
Resolution Date	28-Feb-24				
Balance Date	31-Mar-24	"Final" Audit	$50,000		
Final Distribution Date	30-Apr-24			"Final" Audit	$50,000
Part 7 Financial Statements	31-Mar-25	Audit 2	$50,000		
Total Audit Cost			$100,000		$50,000

The FMA’s view that: “Managers to provide scheme participants and the FMA with advice on how the scheme assets will be distributed, along with a copy of the audited financial statements, at the commencement of the wind-up process and not after all the assets have been distributed.” This will lead to opportunity costs for investors. Although partial distributions are allowed by legislation, if the FMA’s interpretation of the legislation is correct and that “participants receive information about the wind-up in sufficient time to challenge the proposed distribution”, Managers will need to delay making distributions, leading to opportunity cost.

Example 3.

In this example the schemes assets are liquid and the manager makes the final distribution one week after the resolution date. If the FMA’s Guidance is followed the manager will need to hold onto the funds as cash for a further five months. Five months is assumed as the audit takes four months and investors need a reasonable time to review and challenge. The fund size is $100m and the usual return on the fund is 6% over the cash return. Investors lose $2.5m in opportunity cost.

Example 3		FMA Guidance		Industry practice	
Resolution Date	28-Feb-24				
Final Distribution Date - Industry	7-Mar-24			One week	$0
Final Distribution Date - FMA	7-Aug-24	Five months	$2,500,000		
Total Opportunity Cost			$2,500,000		$0

Holding the funds for five months in cash has an opportunity cost of $2,500,000 (in the FMA guidance column). There is no opportunity cost in the Industry practice column as fund are paid out on a timely basis.

7 Are there any additional areas you consider the proposed Guidance should address? If so, please provide details.

: CTA recommend that the following aspects should be considered within the Guidance:

a) the filing of Quarterly Fund Updates when the scheme is in the process of being wound up. It should be recognised that:

i. when a scheme is being wound up the SIPO cannot be complied with as assets are being realised;

ii. the requirement to file a Quarterly Fund Update (or Annual Fund Updates for legacy schemes) when the scheme has been fully distributed is of no value as there are no investors. The Guidance should explain if this requirement is necessary and if so how it works practically within Disclose. Other reporting requirements under FMCA that could technically be triggered if the scheme is still in existence post balance date are the MIS Scheme Annual Report and the Annual Audit of the Register. Again, for both of these the same applies, that the scheme could still be in existence due to small residual monies and GNA investors, and so there does not seem to be a practical benefit in preparing the reports vs the cost to do so.

b) ss 212 and S213 refer to the winding up of a scheme. We think the Guidance should make clear whether this applies to the winding up of a fund which forms part of a scheme where the scheme continues on. If it does the Guidance should make it clear that only financial statements of the fund need to be prepared as opposed to the scheme.

c) Please include the timing of cut off for custodial assurance engagements under FMCR section 87. Are custodial assurance engagements for wound up schemes required?

d) Sections 212 and 213 refer to "Scheme" and therefore do not apply to a fund being wound up that forms part of a Scheme. (This would mean that the scheme carries on but with one less fund).

e) A further comment concerns flexibility under sections 212 and 213 for terminations of schemes which have prescriptive winding up requirements in Australia.

There are funds which are Australian in origin and which have also been offered and registered in New Zealand under the FMCA. However, the winding up requirements under the relevant Australian law can be very different, and although as prescriptive as those under the FMCA, they do not fit easily with the FMC Act sections 212 and 213. To wind up under a second set of requirements can be a costly compliance exercise for the relevant funds and their managers, which ultimately investors pay for, and it seems impractical and illogical when the same aim and outcome is achieved, albeit through a different process.

Our suggestion is for flexibility in the interpretation and application of sections 212 and 213 where a prescriptive winding up process is being followed under Australian law with oversight by the Australian regulator, e.g. APRA.

8 Are the examples useful? Are there any examples that you would like to see changed, clarified, or omitted? Are there any additional examples that should be included? If so, please provide your suggested wording.

Examples are useful for Guidance only. As noted above, schemes have different requirements for the winding up process and should be allowed to wind up in the manner which provides the best outcome for the investors of that scheme.

Further examples to distinguish between different types of funds e.g. funds with liquid assets and funds with real property assets, would be helpful.

9 Do you have any comments on the length, format, or presentation of the proposed Guidance? If so, please provide details.

We would welcome the opportunity to review the final draft of the FMA's Guidance before it is published.

10 Do you have any other comments on the proposed Guidance?

We make several other comments below. In addition, we draw your attention to our covering letter where we welcome the opportunity to meet with FMA to discuss this submission, and winding up practices generally. There are a range of issues (for example, when monies should be held back) where it would be helpful for supervisors to understand FMA's policy concerns and share relevant practical considerations with FMA.

OTHER COMMENTS:

Consultation page 4: "Clarification on financial statements required under Part 7 of the FMC Act
Financial statements that are provided for scheme wind-ups under section 213 differ from the financial statements that are prepared under Part 7 of the FMC Act. We are considering whether any relief from Part 7 may be appropriate for schemes in wind-up, given the possibility of overlapping reporting requirements."

CTA supports this for all schemes, i.e. to clarify, not only for those currently in wind up but for future wind ups as well. In CTA's view there should be no further audits after the "final" set of financial statements.

CTA's view is supported by the language of the legislation, it is reasonable to interpret that there should be no further financial statements prepare after "final financial statements" are prepared under s213 (1)(a).

If FMA is only considering partial relief, CTA suggests the following.
If the date on which the winding up takes effect is within four months after a balance date reporting under Part 7, a further "final" audit on should not be required. Instead, the Part 7 audit can include any further information necessary in the notes to the financial statements under "Events after balance date".

Balance dates can be extended by up to three months to provide further flexibility here.

If the date on which the winding up takes effect is within four months before a balance date reporting under s213 (1)(a). should suffice, a further Part 7 audit on should not be required. The s213 (1)(a). audit can include any further information necessary in the notes to the financial statements up to year end under "Events after balance date".

Consultation page 4: “In the interim and given Part 7 obligations continue to apply for schemes in wind-up, where possible Supervisors or Managers may want to manage the wind-up process with regard to the timing of the annual balance date, to avoid preparing multiple sets of financial statements. If this is not possible, we encourage Supervisors or Managers to promptly engage with us to see if any individual, tailored relief may be available.

“Determining whether final distribution of assets is completed
The final distribution of assets will not be taken to have been completed until all scheme participants have been paid their final entitlements or the remaining funds have been transferred to the Treasury (for schemes that were set up as trusts) or Inland Revenue (if set up otherwise). This ensures that ‘Gone No Address’ funds continue to be protected where scheme participants cannot be reached. It also enables scheme participants to easily confirm any unclaimed monies that may be owed to them, given the publicly available information on unclaimed monies held by the Treasury and Inland Revenue.

“If a Supervisor or Manager considers that any entitlements payable to a scheme participant do not need to be paid to the Treasury or Inland Revenue to enable completion of the final distribution of assets, we expect the Supervisor or Manager to explain to us their reasons for this view. We may also require a supporting legal opinion.”

A governing document may provide specifically that funds are to be held for a specified number of years for ‘Gone No Address’ (**GNA)** investors. Other governing documents do not. It may assist if the Guidance allowed for GNA funds to be held by the Supervisor on trust for the investor or transferred to the Treasury or Inland Revenue.

In regard to both these situations, GNA funds are generally not large and the practice has been to transfer these sums to the trustee/supervisor to be held in trust for the individual investor at no cost for five years before paying to the IRD under the Unclaimed Money Act.

Once GNA funds are transferred to the trustee/supervisor, they are considered vested in the individual. This is an efficient process which allows a scheme to be wound up promptly for the benefit of the majority of investors.

Given that this process is governed by the provisions of the Unclaimed Money Act, is efficient and has no or very little cost to investors, we see no reason to change it, nor to provide an opinion for a process which is governed by legislation.

We recognise that in some cases supervisors may be able to take advantage of section 149 of the Trusts Act but this may not always be the obvious path due to the nature of the “trust”. It can be considered on a case by case basis.

The FMA proposal would, in our view, complicate the straight forward winding up of a scheme and cause unnecessary cost such as five years of compliance costs including management fees, additional audit fees, etc.

Consultation page 4: “We encourage Supervisors and Managers to be proactive and consider whether tracing ‘Gone No Address’ scheme investors prior to the wind-up effective date is feasible. This may assist in expediting the wind-up process.”

Notwithstanding, managers pro-activity, their level of engagement with investors and their tracing efforts for known GNA’s, there will always be investors that cannot be found. In addition with wind ups you only find out if a distribution bounces after you make the final payment.

General Comments

1. Section 212 (1)(a) provides that the supervisor (or the manager if there is no supervisor) must notify the FMA give a copy of any order or resolution within 120 working days to the FMA.

   To clarify, our interpretation of this section is a requirement to notify the FMA that a decision has been made to wind up a scheme and to provide the evidence supporting that notification i.e. a resolution or Court order.

   There is no requirement under section 212 for a supervisor or manager to " *…ensure the minutes of the meeting …are finalised in a timely manner to enable the provision of the wind up resolution to the FMA within the required timeframe"*. Supervisors acknowledge it is good practice to do so, acknowledge the right of the FMA to request the minutes and are happy to provide them as additional supporting documentation to the notification requirement under section 212(1)(a) to the FMA.

   In practice, as the meeting to resolve to wind up will have been a Manager board meeting, the Manager, in addition to providing the formal resolution, may certify to the Supervisor the manner in which the wind up would be completed. (Supervisors rely on the relevant provisions of the trust deed that provides for the Supervisor to be able to rely on any certificate, notice, instruction, direction of other communication signed by directors of the Manager.) Note that although the notification to FMA under s212 comes from the Supervisor (where there is one), it is not at a meeting of the Supervisor where the resolution to wind up is passed.

2. We do not see that there is significant benefit in defining the date on which the winding up of a scheme becomes effective. We believe that the current sections 212 and particularly the requirements of section 213(1)(a) which are triggered from the effective date of the wind up, can all be met by current processes as outlined above. The sections were drafted broadly to take into account the different types of schemes, the unique circumstances relating to the wind-up of a scheme and the specific provisions in trust deeds prescribing the manner in which a scheme is to be wound up.

3. We think that any Guidance from the FMA should be outcomes focused. The most important part of a "final" audit is investors being provided with an independent assurance that they have been repaid the correct amount and that all assets have been distributed. This includes nominating the wind-up effective date the final distribution date to save audit costs.

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13 October 2023

Submission on Consultation: Proposed guidance on winding-up requirements for registered schemes

1 This is a submission by Dentons Kensington Swan on the Financial Markets Authority's ('**FMA**') draft *Consultation: Proposed guidance on winding-up requirements for registered schemes* ('**Consultation Paper**') dated August 2023. The Consultation Paper is primarily for supervisors of registered schemes regarding requirements set out in part 4 of the Financial Markets Conduct Act 2013 ('**FMC Act**').

About Dentons Kensington Swan

2 Dentons Kensington Swan is one of New Zealand's premier law firms with a legal team comprising over 100 lawyers acting on government, commercial, and financial markets projects from our offices in Wellington and Auckland. We are part of Dentons, the world's largest law firm, with more than 12,000 lawyers in over 200 locations.

3 We have extensive experience advising a range of supervisors and managers of managed investment schemes that will be affected by the proposed guidance set out in the Consultation Paper.

Specific comments

4 We are generally supportive of the guidance set out in the Consultation Paper. We consider it useful that the FMA is attempting to clarify key wind up matters noting the limited coverage in the FMC Act. However, below we set out some additional matters to consider and areas for further refinement.

Not just supervisors

5 We note that the proposed guidance is framed as being for supervisors (and if there is no supervisor, then managers) of registered schemes. Although the obligations under sections 212 and 213 of the FMC Act rest with the supervisor, in practice it is the manager that facilitates and drives the wind-up process albeit in conversation with the supervisor.

6 In our view, the guidance should be framed as being for both supervisors and managers as it is relevant to the winding-up of schemes as a whole rather than to any specific entities involved. Perhaps approaching the guidance from the scheme level is more appropriate, i.e. simply stating it is guidance for those involved in winding-up a registered scheme.

Partial distributions

7 The Consultation Paper suggests that partial distributions are permitted 'if the governing document allows'. However, this is not what the FMC Act states. Rather, section 212(1)(c) of the FMC Act provides that a partial distribution of assets can occur 'unless prohibited by the governing document'. The governing document does not need to expressly permit partial distributions. So long as there are mechanisms by which distributions can be made and there is no express prohibition, a partial distribution can occur. The final guidance should be amended to reflect this position.

8 We suggest the final guidance also go further than what is contained in the Consultation Paper regarding partial distributions. In our view, for most schemes – and in particular managed funds – a good proportion of assets could be distributed prior to the final financials being completed. The guidance could clarify that partial distributions can be over (say) 75% of entitlements and up to 80% or 90% of assets can be distributed in advance of the final financial statements being sent to the FMA and scheme members.

9 In our view, the guidance should reiterate that the key is to retain enough assets to cover wind up costs and fees and, in particular, to provision for tax liabilities as well as ensuring that any calculation or payments errors can be corrected. In our experience, and especially under current legal settings, the fairness and equity of winding up distributions are seldom in doubt, as distributions simply reflect the proportionate value of members' interests in the scheme, usually expressed in units. We feel a focus on ensuring that scheme participants 'have the information and opportunity to challenge the proposed manner of distribution' is misplaced, and may result in an unduly conservative approach to partial distributions, unnecessarily locking up members' entitlements for an extended period of time against the remote chance that a well-defined distribution methodology might be challenged.

10 Schemes should be encouraged to make near full distributions as swiftly as practicable following a decision to wind up a scheme, on the basis that it is in the best interests of members to do so, i.e. not unreasonably restricting members' access to their funds so they can deal with them as they see fit and in an expedient manner.

Timing of communications

11 The Consultation Paper sets out the FMA's view that, given the purposes of sections 212 and 213, supervisors (or managers where there is no supervisor) must provide scheme participants and the FMA with advice on how the scheme assets will be distributed, along with a copy of the audited financial statements, '*at the commencement of the wind-up process*'. The FMA suggests this could be when no new members will be accepted or when steps begin to be taken to realise the scheme's assets. We disagree with the framing of this as an 'expectation', and the implication that responsibility should primarily fall on supervisors, noting managers are the ones with the ability to readily communicate directly with scheme members.

12 Importantly, we note that audited financial statements are only required to be available within 4 months of the date on which the winding up takes effect. This means in practice there will be a lag as to when those statements will be available to be sent to member participants, i.e. the wind up will have commenced well before the financials are available. It is not physically possible to provide audited financial statements at the 'commencement' of the wind-up process.

13 Perhaps the wording in the proposed guidance should be that the FMA 'encourages' supervisors (or managers where there is no supervisor) to provide scheme participants and the FMA with information as to how scheme assets are intended to be distributed 'at the commencement of the

wind-up process' i.e. as best practice guidance outside of the express statutory obligation. Scheme participants and the FMA must simply be provided a copy of the audited financial statements as soon as possible and no later than '4 months after the date on which the winding up takes effect', along with confirmation of the manner in which the remaining assets of the scheme are to be distributed.

14 A number of variables also come into play when facilitating the wind up of a scheme, including the specific terms of the trust deed and the nature of the assets involved. Any communication of a wind up needs to be carefully managed to ensure that the wind-up process can be implemented in an orderly manner. Although most schemes have certain withdrawal suspension powers, not all do. Any announcement of a wind-up could cause members to rush to withdraw or transfer following the wind-up announcement thus causing liquidity issues for the scheme. Such a run would also be inequitable on remaining members as wind up costs would need be covered by an ever smaller pool of members. A scheme without the express ability to suspend withdrawals may therefore need to adopt a more measured approach to communications and the timing of such communications to scheme members.

15 We think the statement regarding communications and timings be reframed as one of best practice rather than an imposed expectation, particularly in so far as it attempts to go further than the law envisages.

Exemptions

16 The Regulatory Initiatives Calendar Q2 2023 published by the Council of Financial Regulators suggested that a proposed new class exemption for managed investment schemes in wind-up from certain financial reporting, audit and assurance requirements would be available for consultation around August 2023. The latest Regulatory Initiatives Calendar for Q3 2023 dated 29 September 2023 now suggests a proposed new class exemption will not be ready for consultation until at least March 2024. This is a lengthy delay for this much anticipated form of practical relief from an inappropriate technical regulatory burden and it is unfortunate that delay had not been flagged much sooner.

17 We believe that such an exemption is vital to reduce the compliance burden on schemes in wind-up, noting costs often ultimately flow through to scheme members. The requirement results in a poor outcome for affected members and the drafting of a class exemption should be expedited. If not, clear engagement with participants that 'no action' relief is available as required should be confirmed publicly (including in the proposed guidance).

Conclusion

18 We would welcome the opportunity to discuss any of the points we have raised regarding the Consultation Paper. Thank you for the opportunity to submit.

Yours faithfully

[redacted]
[redacted]

[redacted]
[redacted]

[redacted]
[redacted]

Wednesday 25 October 2023

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Proposed guidance on winding-up requirements for registered schemes

This submission on the proposed guidance on winding-up requirements for registered schemes consultation (the Consultation Paper) is from the Financial Services Council of New Zealand Incorporated (FSC).

As the voice of the sector, the FSC is a non-profit member organisation with a vision to grow the financial confidence and wellbeing of New Zealanders. FSC members commit to delivering strong consumer outcomes from a professional and sustainable financial services sector. Our 115 members manage funds of more than $95bn and pay out claims of $2.8bn per year (life and health insurance). Members include the major insurers in life, health, disability and income insurance, fund managers, KiwiSaver, and workplace savings schemes (including restricted schemes), professional service providers, and technology providers to the financial services sector.

Our submission has been developed through consultation with FSC members and represents the views of our members and our industry, noting we have removed the questions which our members have no comment at this time. We acknowledge the time and input of our members in contributing to this submission.

We welcome the opportunity to provide feedback on the proposed guidelines (the Guidelines) to ensure more consistent market practice in a windup situation and that scheme participants are given information about the assets held by a scheme and how they will be distributed in sufficient time to provide an opportunity to challenge the proposed distributions. We hope this in turn will resulting in greater efficiencies and decreased compliance costs.

Key points of feedback/submission:

- We do not agree with the Financial Markets Authority's stated view of the purpose of the wind-up provisions in the Financial Markets Conduct Act 2013. As we see it, those provisions contemplate it commonly being in scheme participants' best interests to make prompt partial distributions of liquidated assets before preparing final financial statements.
- In our view:
    - a better articulation of the purpose of the wind-up provisions is to promote a prompt, orderly and transparent winding up process, and

    - the ordinary core function of final audited financial statements is to give scheme participants an independent assurance that they have received the correct amounts and all assets have been distributed.
- The guidance is in our view incorrect where it observes that managers cannot make partial distributions before distributing final financial statements unless doing so is permitted by the governing document. In our view the correct interpretation is that subject to acting equitably and in scheme participants' best interests, managers may make partial distributions unless expressly prohibited by the governing document.
- We consider that the currently proposed guidance may lead to inappropriate delays in distributing readily liquidated, reliably valued assets to scheme participants following scheme wind-ups.
- We consider that the finalised guidance should also cover:
    - the wider reporting and disclosure requirements that are dis-applied once a wind-up process commences;
    - alternatives for dealing with gone no address monies;
    - the dis-application during a wind-up period of the usual limit break reporting requirements; and
    - when PDS and/or OMI updates should be treated as necessary pre-wind-up;
- Several of the examples given need clarifying and more generally, it would be helpful if the guidance placed more emphasis on the more common types of scheme structures and clearly outlined the FMA's expectations for those schemes.

We welcome continued discussions and engagement. [redacted], to discuss any element of our submission.

Yours sincerely

[redacted]
Chief Executive Officer
Financial Services Council of New Zealand Incorporated

1. Do you agree with our view of the purpose of section 212 and 213? Please explain your view.

The Consultation Paper describes the overarching intention of sections 212 and 213 as being *"to ensure scheme participants are given information about the assets held by the scheme and how they will be distributed in sufficient time to provide an opportunity to challenge the proposed distributions"*.

Based on that view, the draft guidance states the expectation that supervisors or managers will provide scheme participants and the FMA with advice on how the scheme assets will be distributed, along with a copy of the audited financial statements, *"at the commencement of the wind-up process and not after all the assets have been distributed"*.

We do not agree with the purpose statement.

The purpose statement aligns with the purpose which we understand the Financial Markets Authority (*FMA*) ascribed to section 21 of the now-repealed Superannuation Schemes Act 1989, on which sections 212 and 213 are based.

However, a key point of difference between section 21 and sections 212 and 213 is that:

- under section 21:
    - when distributing copies of financial statements prepared as at the effective wind-up date, a superannuation scheme's trustee was required to advise the FMA and members in writing as to *"the manner in which the assets of the scheme are to be distributed"* (section 21(1)(d)(ii)); and
    - there was no provision enabling an earlier partial distribution; but
- under section 213:
    - when distributing copies of financial statements prepared as at the effective wind-up date, the manager must advise the FMA and members in writing as to the manner in which the *"remaining"* assets *"(if any)"* of the scheme are to be distributed (section 213(1)(b)(ii)); and
    - section 213(1)(c) expressly allows an earlier partial distribution unless the governing document prohibits that occurring.

Additionally, section 212(2) recognises that in the case of a KiwiSaver scheme wind-up the assets in practical terms *must* be distributed before financial statements can be prepared and audited, because in that case the manager must apply the voluntary and involuntary transfer provisions in sections 50 to 52 and subpart 3 of Part 2 of the KiwiSaver Act.

We agree that there will be circumstances from time to time where:

- the relevant scheme's assets are illiquid or hard to value; and/or
- there is uncertainty about how costs should be apportioned or how any reserve assets should be distributed.

In those situations, it may not be in the scheme participants' best interests to make a partial distribution before producing and distributing audited financial statements and an accompanying explanation of how assets will be distributed.

However those circumstances will be the exception rather than the rule, as most managed investment schemes have assets that are liquid and already valued regularly (and in ways that scheme participants can see by reason of the valuation and pricing methodology information included on the Disclose Register under clause 53(1)(l) of Schedule 4 to the Financial Markets Conduct Regulations 2014).

Additionally any general reserves held in accounts-based schemes will most often be a relatively minor portion of total scheme assets, with the allocation of reserves on any wind-up not being a source of material risk to scheme members. The large bulk of member entitlements will already be recognised through unit pricing or another regular investment earnings rate determination and allocation mechanism.

As we see it, the relevant provisions within section 213 have been added in clear contemplation of it commonly being in the scheme participants' best interests to make prompt partial distributions of liquidated assets (even to the point of holding back only the amount assessed as necessary to meet wind-up costs) rather than forcing all members to await the preparation, auditing and distribution of financial statements.

The prevailing market practice is to advise scheme participants in a *pre*-wind-up notice how scheme assets are to be distributed and it will usually be inequitable, indeed detrimental, to force members to await audited financial statements which:

- do not provide additional materially relevant information; and
- will likely of course have been rendered incorrect by reason of market fluctuations between the effective wind-up date and when the scheme's investments were then fully converted to cash.

For completeness it would be inappropriate in our view - particularly given the inclusion of the words *"(if any)"* in section 213(1)(b)(ii) – to construe section 213 as inhibiting a manager distributing all scheme assets to scheme participants promptly after the effective wind-up date where:

- that prompt distribution is permitted (see below) and is assessed as being both equitable and in the scheme participants' best interests; and
- the manager (as the instigator of the wind-up) has agreed to meet all wind-up costs itself rather than attributing and charging them to scheme participants.

Pulling all of that together, as the effect of a wind-up is that the assets to be distributed should as soon as practicable be realised and held in cash pending payment, it is considered good practice (generally speaking) to distribute most if not all assets as quickly as practicable, subject to holding back a reliably sufficient portion to meet anticipated remaining expenses and liabilities.

Conversely, it is generally considered sub-optimal for scheme participants for a significant proportion of scheme assets to remain undistributed until financial statements as at the wind-up date have been prepared, audited and distributed. The potential out-of-market costs, opportunity costs and other downsides will in most cases materially outweigh any perceived informational benefits.

It must be borne in mind that a scheme participant's ability to take any action with their investments is effectively frozen from the wind-up date until the date of distribution. If scheme assets are to remain undistributed until financial statements are prepared, audited and distributed, this means that during that period any change in a scheme participant's personal circumstances which makes access to their investment funds necessary or desirable cannot be accommodated by the manager in any way, irrespective of the merits.

The finalised guidance should appropriately reflect those considerations, while noting that there will of course be exceptions (and outlining what those might be).

As to a possible alternative articulation of the purpose of sections 212 and 213, we suggest considering something along the lines of *"to promote a prompt, orderly and transparent winding up process"*.

By extension, rather than ensuring scheme participants are given information about scheme assets and how they will be distributed *"in sufficient time to provide an opportunity to challenge the proposed distributions"*, we think that the core function of final audited financial statements (at least in the ordinary course) should be treated as being *"to provide scheme participants with an independent assurance that they have been paid the correct amount and that all assets have been distributed"* (or similar).

2. Do you agree with our view that the date of final distribution of the scheme's assets cannot be taken to be the wind-up effective date? Please explain your view.

Generally speaking, yes – the effective wind-up date is the date when the wind-up process *commences* (being the effective date stated in the wind-up resolution, the date when any prescribed wind-up pre-condition set out in that resolution is satisfied or – as the default – the date of the resolution itself).

That said, some governing documents may contain explicit over-arching prescriptions regarding when a wind-up is to be treated as taking effect, and managers should be permitted to give effect to those provisions (which are contractual) as written.

3. Are there any aspects of the proposed guidance you think are unclear or need to be improved? If so, please explain what these are and provide your suggested wording or approach to address these.

Under *Providing a copy of any order or resolution to the FMA* the Consultation Paper observes that *"The Supervisor or Manager must ensure the minutes of the meeting at which the resolution was passed are finalised in a timely manner to enable the provision of the wind-up resolution to the FMA within the required timeframe".* Wind-up resolutions commonly take the form of unanimous written board resolutions (passed without a board meeting) and we suggest that this possibility should be acknowledged.

We also suggest that it would be useful to clarify what is meant by the comments regarding wind-up financial statements differing from the usual financial statements prepared under Part 7 of the Financial Markets Conduct Act 2013 (*FMCA*), and the "relief" from overlapping reporting requirements that is being considered. Section 213 (1)(a) in our view makes it very clear that wind-up financial statements are the *"final financial statements of the scheme"*, so we query the statement regarding *"the possibility of overlapping reporting requirements"* in that context.

The references to the possibility of aligning the effective wind-up date with the scheme balance date are understood, but it might also be helpful to refer explicitly in the guidance to the availability and mechanics of the facility (in sections 41 to 43 of the Financial Reporting Act 2013) to extend a scheme's final balance date by up to 3 months with Inland Revenue approval.

4. Are there any aspects of the proposed guidance you do not agree with, or you think should not be included? Please give reasons for your view.

The following points are additional to those made under (1) above.

The Consultation Paper characterises section 213(1)(c) as allowing partial distributions to scheme participants (before a copy of the final financial statements is sent to the FMA) only if doing so is affirmatively *"permitted by the governing document"* or "*if the governing document allows"*.

This is interpretatively incorrect in our view. The effect of the words "*unless prohibited by the governing document"* is that the starting presumption works the other way – subject of course to complying with its duties to act equitably and in scheme participants' best interests, the supervisor or manager may choose to make a partial distribution *as of right* unless *prohibited* by the governing document (i.e. unless the governing document expressly requires otherwise).

The Consultation Paper also states that where a prior partial distribution is made, the stated reason for the need to "*hold an appropriate proportion of scheme assets undistributed until the financials have been provided to all scheme participants"* is to ensure that:

- scheme assets are distributed in a fair and equitable manner; and
- scheme participants have the information and opportunity to challenge the proposed manner of distribution.

We do not agree with this as a blanket purpose statement, for the reasons noted under question 1 above.

We ask that these aspects of the proposed guidance be reconsidered.

5. Are there any aspects of the proposed guidance you think may have unintended consequences?

Yes, we consider that the currently proposed guidance regarding the core purpose of sections 212 and 213 (and the stated interpretation of section 213(1)(c) more specifically) may lead to inappropriate delays in distributing readily liquidated, reliably valued assets to scheme participants following scheme wind-ups.

6. What impact (if any) might the proposed guidance have on compliance costs for the scheme?

No comments additional to those above.

7. Are there any additional areas you consider the proposed guidance should address? If so, please provide details.

Wider reporting and disclosure requirements
As indicated above, section 213(1)(a) in our view makes clear that wind-up financial statements are the final financial statements of a scheme (and that accordingly Part 7 of the FMCA otherwise ceases applying) so it is incorrect to state that *"Part 7 obligations continue to apply for schemes in wind-up".*

However, there is less clarity regarding whether or not various other year-end and regular reporting and disclosure requirements continue to apply during a wind-up period.

It would be helpful if the guidance could include a clear statement to the practical effect that during the period between when a wind-up takes effect and the eventual completion of the wind-up and scheme deregistration process, none of the various other "business as usual" reporting and disclosure requirements that applied when the scheme remained in operation continue applying – and that therefore (for example) there is no ongoing requirement to prepare Fund Updates, obtain custodial or scheme participant audits or prepare and distribute Annual Reports.

Alternatives for dealing with GNA monies

In the section of the Consultation Paper headed *Determining whether final distribution of assets is completed*, the suggestion is that winding up cannot be completed until all gone no address (*GNA*) participants' entitlements are transferred to Treasury or Inland Revenue under the relevant unclaimed money rules.

The delay in effecting such transfers can be a practical headache for managers, as well as delaying completion of the wind-up process. In the interim, additional costs continue being incurred, and to the extent paid (or accrued) out of scheme participants' funds those costs diminish residual scheme assets.

We therefore urge recognition that GNA monies can be held on separate trusts while the process of transfer to Treasury or Inland Revenue is being finalised (so that the wind-up can otherwise be completed).

SIPO compliance

In a wind-up, asset allocation ranges will typically fall outside the range limits prescribed in a scheme's Statement of Investment Policy and Objectives (*SIPO*) as assets are realised and converted to cash. It would be useful for the guidance to endorse the view that this does not constitute a "material" limit break for which reporting obligations are triggered under section 167 of the FMCA. We understand this is the prevailing market view, but it would be useful to have some supporting guidance to avoid the issue recurring.

PDS or OMI updates pre-wind-up

A decision about winding up a scheme will usually be made at some point before the actual wind-up date. It would be useful for the guidance to provide the FMA's view on whether and when disclosure documents such as the PDS or the OMI need to be updated to signal any actual or potential decisions that have been made about the closure and wind-up of the scheme. We would typically expect that:

- no changes would need to be made until the time that a formal decision to wind up the scheme has been made (which might be in advance of the wind-up date and would likely coincide with the date of the wind-up resolution); and
- disclosure documents would not need to be updated if the offer were closed to new investors (and existing investors were informed of the winding up) at the time of that decision.

8. Are the examples useful? Are there any examples that you would like to see changed, clarified, or omitted? Are there any additional examples that should be included? If so, please provide your suggested wording.

As noted under (2) above, we agree that the effective wind-up date is (as applicable) the date stated in the wind-up resolution, the date when any prescribed wind-up pre-condition set out in that resolution is satisfied or (as the default) the date of the resolution itself.

The first example given in the Consultation Paper (at the top of page 2) appears incorrect according to that logic. A resolution that "*following the sale of the Partnership's assets, the Partnership will be dissolved"* in our view references (in the words of the Consultation Paper) "*a future specific event (e.g. when a sale and purchase agreement for the scheme's assets is made unconditional, or when the settlement of the scheme's assets occurs)"* and by logical extension the effective wind-up date:

- will be the date on which the pre-condition is satisfied; and
- is not the date of the resolution itself.

We suspect the intended meaning may be "now that the Partnership's assets have been sold". In that case the example should be clarified accordingly.

The wording of the third example is somewhat curious because it would be unusual for a manager to have the mandate *pre-wind-up* to convert all assets to cash and distribute them to members.

Both within the examples and more generally, we consider that it would be helpful if the guidance placed more emphasis on the more common types of scheme structures and clearly outlined the FMA's expectations for those schemes – i.e. more liquid retail managed investment schemes which simply invest into underlying wholesale funds and thus can readily redeem all investments on or very shortly after the effective wind-up date.

9. Do you have any comments on the length, format, or presentation of the proposed guidance? If so, please provide details.

Given the issues raised, we would be grateful for a brief opportunity to review and comment on a provisionally final draft of the guidance before it is published.

Feedback form

Consultation: Proposed guidance on winding up requirements for registered schemes

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with **Proposed guidance on winding up requirements for registered schemes**: [your organisation's name]' in the subject line. **Submissions close on 5pm on 13 October 2023.** Thank you.

Date: 13 OCTOBER 2023 Number of pages: Two (2)

Name of submitter: [redacted]

Company or entity: Fisher Funds

Organisation type: MIS manager

Contact name (if different):

Contact email and phone: [redacted]

Question number	Response
Q1	The guidance states one of the general purposes of sections 212 and 213 is to provide audited financials and details of intended distribution manner in a timely fashion to the FMA to allow for oversight of the winding up and to scheme participants to provide opportunity for challenge before all assets are distributed. There is nothing in section 213 which provides for an 'FMA oversight' or 'member consideration' period. Section 213(1)(c) implies final distribution cannot be undertaken until the final financials are sent to the FMA (noting the details regarding manner for distributing remaining assets only applies if there are remaining assets by use of the phrase "if any" in clause 213(1)(b)(ii)) but it does not state that final distribution cannot be made immediately after the sending of the financials to the FMA and members.
Q2	We agree. We are of the view wind-up effective date is the date contributions and withdrawals are stopped and assets can be to be realised and transferred to cash. The SIPO no longer applies and although assets must be sold in an orderly manner there is no active investment in terms of long-term returns. We agree the final financials are for the period ending at the wind-up effective date, being a date where the Scheme continues to have assets and not final distribution date. We note the final financials will generally take 3-4 months for preparation, audit, and final sign off. This means there will be a 3–4-month period between wind-up effective date where the Scheme had assets and the date for when FMA and members receive the audited final financials. It is during that 3–4-month period in our view that Scheme assets will be converted to cash.
Q3	Yes. The expectation re the period between sending the final financials to FMA and members and the date of final distribution. The law allows final distribution immediately after the sending of the final financials. The wording of the guidance creates the appearance the FMA has expectations above the legal requirement. Use of the phrases 'winding-up effective date' and 'commencement of wind-up process date'. There is no clear distinction between the two. Are they the same date or intended to be two different events? Clarify 'commencement of wind up process' in the following sentence, under the heading 'impact of wind-up effective date on the financials', relates to the end date for the period for the final financial statements and not when the financials must be sent to FMA and members : *Given our view on the purposes of sections 212 and 213, we expect Supervisors or Managers to provide scheme participants and the FMA with advice on how the scheme assets will be*

	distributed, along with a copy of the audited financial statements, at the commencement of the wind-up process and not after all the assets have been distributed.
Q7	We support FMA considering relief for schemes in wind up and obligations under Part 7 of the FMC Act. In addition, we suggest the FMA consider relief for schemes in wind up from other obligations in the FMC Act triggered by balance or period end dates such as the requirement for annual reports, annual members statements and fund updates. Relief could be for schemes where the effective wind-up date has passed, and the only scheme asset is cash need are exempt from these obligations.
Q8	Example timelines could also prove helpful for explaining FMA expectations. This could cover various scenarios. An example for a scheme which invests in liquid shares for example: 1 Jan: Resolution to wind up scheme effective 31 March executed. 3 Jan: Copy of resolution provided to FMA; members advised. 31 March: wind-up date. 1 April: Preparation of final financial statements for period ending 31 March begins. Orderly conversion of scheme assets to cash commences. Request for instructions from members re interim and final payments sent. GNA work commences. 30 April: Partial distribution. 17 July: Final audited financial statements and written details for matters pertaining to final distribution sent to FMA and members. 20 July: Final distribution to all known members. 30 July: Payment of final distribution to Treasury for GNAs. 31 July: Wind up process complete. Scheme no longer exists.
Q10	It appears the guidance is seeking to address specific issues the FMA has seen but that the common reader might not be aware of. We acknowledge the guidance is to cover a wide variety of scheme types and therefore including specifics can be difficult however it is unclear what specific harm or mischief this guidance is trying to resolve. For simple wind ups it would be good to see carve outs from some aspects of the guidance, specifically the right to challenge where a simple wind up is a unit trust, with no illiquid assets, which are converted to cash, no costs are charged to scheme or members for wind up and distribution is as per member account balance (subject to market movements).

Feedback summary – *if you wish to highlight anything in particular*

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.

Thank you for your feedback – we appreciate your time and input.

Feedback form

Consultation: Proposed guidance on winding up requirements for registered schemes

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Date: **13 October 2023** Number of pages: **1**

Name of submitter: [redacted]

Company or entity: **Mainland Capital Investment Mangement Limited**

Organisation type: **MIS Manager – MIS Other**

Contact name (if different):

Contact email and phone: [redacted]

Question number	Response
3	*Are there any aspects of the proposed guidance you do not agree with, or you think should not be included? Please give reasons for your view.* Having to wait for wind-up financial statements before making the final distribution could mean investors are waiting a number of months to receive their final payments out of the scheme. This is likely to be stressful for investors and seems unnecessary given the oversight of the supervisor and assurance by auditors. In Mainland's opinion it is better to distribute remaining scheme assets as soon as reasonably practicable.
4	*Are there any aspects of the proposed guidance that you think may have unintended consequences?* Having the annual financial statements audited as at the wind-up effective date without having all assets distributed may result in there having to be two audits (one at the wind-up effective date and a further audit once all assets have been distributed). This would not be in the best interests of investors as this would be an unnecessary additional cost.

Feedback summary – *if you wish to highlight anything in particular*

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Thank you for your feedback – we appreciate your time and input.

Feedback form

Consultation: Proposed guidance on winding up requirements for registered schemes

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with **Proposed guidance on winding up requirements for registered schemes**: [your organisation's name]' in the subject line. **Submissions close on 5pm on 13 October 2023.** Thank you.

Date: Number of pages:

Name of submitter: [redacted]

Company or entity: Oyster Management Limited

Organisation type: Managed Investment Scheme Manager

Contact name (if different):

Contact email and phone: [redacted]

Question number	Response
1	*Oyster Management Limited (Oyster) does not agree with the view of sections 212 and 213.* *The standard process of a windup of a Scheme:* *1. Resolution to sell underlying Investment property and to windup the scheme. This includes providing all investors the opportunity to raise concerns or queries, as well as the manager provides a guide to the breakdown of the expected final return. The resolution as per Deed must achieve over 75% In favour.* *2. Settlement date of sale of Investment property* *3. Partial distribution (majority of the liquidised assets) to investors on day of or within 1-2 working days of settlement.* *4. Retained funds are utilised for final settlement of property related expenses and windup expenses such as final supervisor fees, NZ Companies Office filing fees and legal and audit fees.* *5. Final distribution of all remaining liquidised assets (on day of or prior to balance date).* *6. Preparation of financial statements for the financial year end, and subsequent audit of final set of financial statements. Depending on settlement of property, an extension to financial year end may be requested up to a 15-month period to ensure sufficient time to wind up.* *7. Audit signed off, financial statements sent to all investors and lodged on appropriate registers.* *In our view the wind-up effective date is the financial year end date when all activities to wind up the Scheme are resolved such as liquidising all assets and liabilities, with only the final distribution to investors to be made.* *Oyster has undertaken 4 Scheme windups over the past 4 years, with no challenges by investors after the original resolution to sell the Investment property.* *The supervisor has oversight over the above process including the initial resolution meeting, where sufficient time and information is to be provided to investors to make an informed decision.*

2	*Oyster does not agree that the final distribution to investors and the wind-up effective date cannot be the same.* *If the windup effective date was to be settlement of the property, there is still assets and liabilities on the balance sheet of the Scheme to liquidate, therefore further operations by the manager is required liquidise the remaining debtors/creditors on the balance sheet which is considered winding up activities.* *Whereas it is considered a Scheme no longer has any assets or liabilities or investors at the effective wind-up date, and the balance sheet would be nil.* *Section 213(d) requires the FMA to be informed "of the date on which the final distribution of assets is completed", and there is no mention in the section to suggest where this must occur on or after the "effective wind-up date". As a manager Oyster aligns the final distribution date and balance date, to reduce costs associated for compliance such as supervisor fees, annual accounting fees and audit fees.* *There is no benefit to the investors to receive an additional audit for distribution date, as indication of return has already been provided including the breakdown of final wind-up costs. The introduction of a second audit to windup only increases the cost to the investor and lowers their return as the Schemes assets are utilised to pay these costs.* *There is also the likely unintended consequence of not making final distribution (rather thanthe interim and residual final distributions) until all other assets and liabilities are liquidised, to ensure audits (additional compliance costs) do not have to occur upon each final distribution. Upon each distribution the manager discloses the supporting calculations and documentation to the supervisor to review.*
3	*Focus on the investor experience of the windup and ensuring their best interests are kept front of mind. As a manager all aspects are visible currently to investors, and an introduction of additional compliance costs is not favourable to the investor.*
5	*The proposed guidance introduces additional compliance costs to the investor (particularly audit costs).* *With the compliance costs on pre distribution and again after, likely that no funds would be distributed from 'effective wind-up' date until was audited and investors 'challenge' the funds to be distributed, therefore hindering the investor of utilising the funds for their own liquidity or future investment opportunities.*
6	*As noted in response to question 5, additional compliance costs will ultimately be incurred by the investor as all scheme costs are borne by the scheme.* *The below recent example of wind-up of Khyber Pass Proportionate Ownership Scheme.* *If following Oyster standard practice, final balance date would be the windup date, with one final audit.* *Upon engagement with Supervisor and FMA consultation and application of updated guidance, two audits should be conducted on settlement date and again on final distribution.*

	On agreement with all parties, the balance date was brought forward, Oyster ensured the windup was completed prior to 31 March 2023, with audit report received no later than the 4 months from settlement date.
8	*Would suggest providing a clear diagrams/pictorial of timelines.*
Feedback summary – *if you wish to highlight anything in particular*	
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.	
Thank you for your feedback – we appreciate your time and input.	

26 October 2023

Consultation
Financial Markets Authority
Wellington

By email: consultation@fma.govt.nz

Consultation: Proposed guidance on winding-up requirements for registered schemes

1. I regret that the August guidance paper and consultation did not come to my attention until the afternoon of 13 October. It did not come directly to me – or through the usual Law Society channels. Consequently, despite my optimism that I would assemble my thoughts quickly, these notes have been picked up and put down a number of times. Consequently, I am delivering these comments a little later than requested.

2. One of the (many) issue that I kept coming back to me as I edited these notes is that, given the impact of what is proposed, I wonder if the FMA should consult more widely. For example, this might be wider than just a subset of major market participants and, as a longstanding member of the Commercial & Business Law Committee of the New Zealand Law Society, might extend to the Law Society and the Law Association (the former ADLS).

Introduction

3. By way of background, these comments are largely shaped by my experiences, particularly since 2019, advising the directors of the general partners for 9 small, registered schemes, each of which is structured as a limited partnership, as they seek to navigate the winding up process. In each case, the relevant scheme was founded in the late 1980s or early 1990s – primarily as a scheme for investment in a single rotation forest.

4. The offer documents for each scheme were, more or less, comparable to many such small schemes of the period. Typically, this has meant that they were far less prescriptive than would have been the case had interests in the schemes being offered under the FMC Act. Nonetheless, I think it is fair to say that a combination of some broad principles outlined in those offering documents and the existence of a handful of a precedents (in the form of small schemes of similar vintage) have provided adequate guidance for most events in the lifecycle of those small schemes.

5. Nonetheless, each of the schemes have encountered difficulties when departing from the linear progression contemplated, 30 years ago when they were established, in order to cope with unforeseen events - whilst seeking to maintain compliance with the FMC Act. Specifically, winding up and compliance with sections 212 and 213 of the FMC Act have been particularly challenging.

Rule of law question

6. One of the other issues that occurred to me as I edited these notes is that, given the impact of what is proposed, I think the FMA should be asking itself if there is a 'rule of law' issue in the proposed guidance. From where I sit, the FMA is seeking to develop

something more than merely 'guidance' and is imposing what I see as substantive new obligations on managed investment schemes – in a manner that risks being seen as law-making.

7. Rather than see the door being left open to challenge, after the event, I suggest that the FMA satisfy itself that (if this is the case) it has the power to do so. Without running this issue to ground, and stepping out of my lane into substantive issue of public law, I suggest that a starting point might be to raise this question with the experts on the LDAC[1].

Responses to Questions

8. I provide a response to each of the questions raised in the table below. The background to those responses is contained in the appendix to this letter.

##	Response
1	The statement of general purposes in the guidance seems to be missing something rather fundamental. Surely, the purpose of any winding up regime must be to provide a clear and coherent set out of rules that provide the best opportunity to ensure that the winding up of a scheme is conduct in a timely and efficient manner so that investors' funds are distributed to them – according to their entitlements. There is little in sections 212 and 213 to indicate that, either as a matter of practice or policy, they must impute some unstated grace period to provide investors with a window of time in which to challenge the proposed manner of distribution. And, whilst there must be adequate and timely flows of information to investors about the conduct of winding up, the statements in the proposed guidance about the FMA's oversight role – require clarification. Specifically, in what circumstances that oversight might either be called on – presumably to dislodge the decisions made by the manager and the supervisor. Without that clarity, the scheme risks being gamed – which risks undermining the goal of efficiency and timeliness. Finally on the first question, greatly clarity is needed about the timing of the winding up accounts. Certainly, investors should receive adequate (and up to date) information about the value, or likely value, of the scheme's net assets at the time they vote of a winding up resolution. But the statements on pages 1 and 3 of the draft guidance about providing audited financial statements at the commencement of the winding up process – require better explanation.
2	The steps that have led to the view that the date of final distribution of the scheme's assets cannot be taken to be the wind-up effective date create some difficulties (both as to the relevant policy and in application). It seems that the primary driver for the view that the wind-up effective date must be a date prior to the date of final distribution – is to preserve

[1] The Legislation Design and Advisory Committee

##	Response
	the unstated grace period for challenge. As noted above, the policy underpinnings for this grace period are difficult to pinpoint. And, as well as the practical difficulties that I note in more detail in the Appendix, it seems to contradict the stated view that a scheme's financial reporting obligations under Part 7 of the FMC must continue – seemingly after the effective date.
3 & 4	It follows from the responses to 1 & 2 above – that I think a number of aspects of the proposed guidance require more work. Please see the appendix to this letter for more detail. However, in the short time available to me, I have not considered alternative wording.
5	As discussed briefly in the appendix to this letter, I think a number of aspects of the proposed guidance may have unintended consequences. Primarily, this hinges on the unintended grace period and opacity of the oversight role of the FMA. Without greater clarity – the window is left open for the situation to be gamed – at the cost and risk of investors.
6	Delays and uncertainty have costs and risks associated with them. It is difficult to quantify them. Instead, I simply note that in the age of the keyboard warrior, where complaining is seen by some as a cost-free, risk-free exercise – the suggestion that the FMA might second guess the work of the manager and the supervisor will be seen by some as a licence to complain.
7	In brief, I have suggested that the guidance needs more work,
8	Similarly, I suggest that a wider range of examples is needed.
9 & 10	In the short time available to me – I have nothing further at this stage.

9. Having spent some time over the weekend of 14- 15 October and subsequently compiling these comments, I would be happy to discuss in more detail.

Yours faithfully

[redacted]

Appendix
Consultation: Proposed guidance on winding-up requirements for registered schemes

The purpose of section 212 and 213

Grace period

1. Despite the fact that the machinery of sections 212 and 213 is based on the Superannuation Schemes Act 1989, some of the purpose description seems difficult to understand and, if adhered to, will lead directly to practical difficulties in implementation.

2. Whilst, at a policy level, the policy of the FMA having oversight of the winding up is in keeping with the legislative framework of the FMC Act and, ultimately, provides an element of regulatory backstop (on the basis discussed below) – that conceptual framework must not overlook the important practical role played by the supervisor. For example, the supervisor does (and should) have detailed input into the key building blocks of the winding up process. Typically, this will include:

    a. a hands'-on role in the planning for the meeting that (usually – but may not always) determines the effective date of winding up; and
    b. the determination of the process steps for distribution of the winding up proceeds.

3. As a result, I think that it is vital that any regulatory oversight provided by the FMA not risk being confused with the roles of the manager (or the external administrator of an insolvent scheme) and the supervisor. The FMA should not be seen to be ready to step in and/or second-guess the manager or the supervisor respectively. And, conversely, the manager and the supervisor should not have a wide latitude to defer judgment to the FMA.

4. In most cases the winding up process should be a relatively straightforward administrative exercise – underpinned by a number of managerial and administrative decisions and good financial reporting information. For example, in the case of small (typically, single asset) schemes – the assets will be realised, and the process will largely require a linear progression through a decision to wind up (in conjunction with the asset sale program) and the calculation of the net proceeds of sale and any necessary deductions in order to determine the final amount available for distribution on winding up. In these examples, the role of the manager and the supervisor (and for that matter the scheme auditors) should involve decisions that are little more complicated that when the scheme is "alive".

5. But in other examples where there may be multiple classes of assets or where the process itself may be less straightforward (and, borrowing from some of the examples with which I have been involved, needs to accommodate various upstream fund flows) the role of the manager and the supervisor (and for that matter the scheme auditors) may require many more decisions and take on a hugely different complexion than those required when the scheme is continuing. In my experience, the input of both the supervisor and the auditors can be very helpful in reviewing both the methodology and the application of such factors as cash flow waterfalls and cost allocations that may need to be applied to determine the winding up distributions.

6. In each of those primary examples, if either the manager or the supervisor requires expert / experienced input into the decision-making processes, it is readily available in the market. Whether it is practical advice in dealing with various classes of assets or advice on dealing with distribution methodologies – the range of suitable experts may include those with skillsets in the relevant asset class, legal advice and that from valuers, accountants, corporate advisory professionals and insolvency practitioners. I specifically mention the last two categories of adviser – because their experience (skillset) in running assets sales programs and applying distribution methodologies can be highly relevant.

7. None, or very little of this, is the type of input that I would expect the manager or the supervisor to seek from FMA. Similarly, I would not expect the FMA's oversight to extend beyond receipt of reporting from the supervisor (and on occasion of the manager). This is not a criticism of the FMA (and should not be seen as such). Instead, if there is any suggestion that the FMA's oversight is anything more than requiring itself to be satisfied as to the steps and methodologies (and level of reporting) applied by those primarily charged with conducting the winding up – then the FMA risks becoming lobby fodder. It is then only a short hop from that – for the FMA to be placed in the position where it has to instruct external advisers to perform the same roles that the manager and the supervisor, and their respective professional advisers, are required to perform.

8. Next, it is difficult to understand why the discussion seems to be premised on some (unstated) grace period between the completion of the exercise described above (with the oversight of the supervisor – and backstopped by audited winding up accounts) – and the making of final distributions. Instead, I suggest that the underlying emphasis should be set on finalising, and making, the distributions to investors. In my experience, the scheme managers, supervisors and the auditors are all acutely aware – that it is the investors' money they are dealing with. And that they must act in investors' best interests.

9. To this end, I see the significance of section 213(1)(d), enabling the making of a partial distribution of [the net] assets of the scheme before sending a copy of the winding up accounts to the FMA as useful encouragement. That is encouragement to make interim distributions in order to get investors' money into their hands – quickly.

10. In the short time available to me, I cannot find any authority for the proposal that it is the purpose of winding up accounts is to allow investors to challenge how assets are distributed in the winding-up. This begs the question about the necessity to have some sort of unstated grace period before making the final distributions.

11. In seeking other sources of guidance, I note the most relevant ASIC guidance is that which is largely focused on external administration of the winding up of Australian managed investment schemes. That is insolvent or near insolvent schemes. However, that guidance notes[2], by reference to decided Australian case law, that the winding-up of a registered scheme should follow the same path as the winding-up of a company. Whilst this should be seen as confined to those schemes are subject to the Corporations Act 2001 – the ASIC guidance indices that a similar approach should be applied to the winding-up of trust-based schemes. However, a brief review of the two Australian cases[3] that underpin that guidance indicate that the analogy was applied

[2] See RG 174, Relief for externally administered companies and registered schemes being wound up.
[3] Mier v FN Management Pty Ltd (2005) 23 ACLC 1,888 and the earlier decision referred to in *Mier* (Australian Securities and Investments Commission v. Commercial Nominees of Australia Ltd (2002) 42 A.C.S.R. 240).

simply, in absence of clear guidance in Part 5C.9 of the Corporations Act, to refer to primary steps of the realisation of the assets of the scheme, the discharge of liabilities and the distribution of any surplus to investors.

12. Absent clearer policy settings (which may include anything that can be taken from the legislative foundations of sections 212 and 213), I suggest that the advancement of an argument in favour of such a grace period concept would need to demonstrate why managed schemes should depart so widely from a company liquidation. Whilst there is an important point of difference with the appointment of an external administrator (typically a liquidator) with clear statutory duties and/or duties to the Court, both the manager and the supervisor also have clear statutory duties. Put another way, why is an investor in a managed scheme put in a different position to the shareholder of a company?

13. From a policy perspective, making investors wait for some unstated grace period before receiving their final distributions seems wrong (and unfair). On a simple, time value of money assessment, there are costs inherent in any such delay. Those costs seem unnecessary given the involvement of the supervisor (as well as the assurance provided by audited winding up accounts).

Wind-up effective date ≠ distribution date

14. The proposed guidance notes the FMA's view that the wind-up effective date must not be the final distribution date of the scheme's assets. This view is predicated on the view of the purposes of sections 212 and 213. In turn, this leads to an expectation [by the FMA] that investors, and the FMA, will be provided with advice on how the scheme assets will be distributed, along with a copy of the winding up accounts - at the commencement of the wind-up process and not after all the assets have been distributed.

15. However, the material sent with the wind-up resolution would typically include advice on how the scheme assets will be distributed. Logically, that material should also include some information about the likely proceeds of realisation. In this way investors can make an informed decision. If investors wish to challenge the proposed basis for distribution – surely this is the appropriate time. It is not readily apparent why a second opportunity is needed.

16. Any such challenge, such as on the basis that the proposed distribution plan does not comply with the governing document or is inequitable, may or may not need to bring about a pause in the winding up process (including the sale of scheme assets). It is not immediately clear that challenge at a later date, such as settlement of the sale of the scheme asset (if a single-asset scheme) or completion of the sale of a portfolio of investments, provides a better / more opportune time.

17. If anything, challenge at a point in time when scheme assets have been realised but are not distributed (and an "appropriate proportion" remain undistributed for the grace period) only amplifies my concerns about the risk of gaming.

18. I make the next point, not with the aim of marking my own homework, but because I wish to make the point that departures from the usual process applicable to the winding up of a company should be underpinned by sound (and clearly articulated) policy grounds. Having advised the advising the directors of the general partners for 7 out of a pool of 9 small, registered, schemes on winding up processes on the basis of winding up resolutions that provided for:

a. the sale of primary scheme asset – to an identified buyer at a specified price;
b. the distribution of the remaining assets of the scheme (including the net proceeds of sale of the primary scheme asset); and
c. dissolution of the scheme on the final distribution date,

I will observe that the process steps followed those that can be observed in a typical company winding up process.

19. Whilst I would not recommend following that stepwise process again, my reasons for advising against doing so are informed equally by the practical experiences that followed the investor approval process. These include the lack of clarity about the ongoing/overlapping compliance obligations – and the condensed timeframes and uncertainties that impacted on almost every step in the final parts of the journey towards completion of winding up and the eventual de-licensing of the schemes so that they could be given an orderly burial.

20. This was a very frustrating, and very stressful, experience for all concerned. Despite the fact that it was both a parallel pathway to that followed for (more complicated) forms of company winding up and, so all relevant parties understood, mirrored the process undertaken by a number of single-building property syndicates that were registered schemes.

Effective date of winding up

21. The guidance that a winding up resolution should clearly specify the effective date of winding up is helpful. As is the expression of the FMA's view of a range of practical examples.

22. However, the guidance needs to consider a wider range of practical scenarios. It seems that the authors of the guidance had been thinking of the complexities of some schemes, when they note that the [winding up] date chosen will often depend on the nature of the scheme assets and the plan for realisation.

23. I would observe that the guidance is practical and relevant, particularly where the scheme holds:

a. a single asset; or
b. classes of readily saleable assets (typically listed investment securities),

where a settlement date (particularly for a single-asset scheme) is readily identifiable. Similarly, in a managed scheme which holds liquid / readily realisable assets, the completion date for a managed selldown program (e.g. a portfolio of investment securities) provides a readily identifiable finish line.

24. However, for some, small, legacy schemes with illiquid assets – the issue is much more complex. For example, a workable solution may be to identify some sort of bright line test by reference to a proportion of scheme assets. But if a material proportion of the scheme assets are, themselves, illiquid – and (for example) are dependent on the winding up of another scheme, then headaches will ensue.

25. The signalled approach may also be unworkable for a private equity fund that is structured as a managed investment scheme. A quick and relatively unscientific survey does not identify any legacy schemes that are private equity funds. It is my understanding that this is not the case in Australia – in an economy with a much deeper pool of savings and capital as a result of a number of factors, including a much

longer history of compulsory superannuation. Consequently, the FMA may wish to consider whether this approach is another barrier to entry, for retail investors, to accessing a market that demonstrates (at least in other jurisdictions) the ability to generate more attractive yields than may always be the case for (say) single building property syndicate.

Section 213 – partial distributions

26. In keeping with the general theme of my comments above, I suggest that the commentary about partial distributions needs further discussion (or a re-think). Distributions and getting the investors' money into their hands must be pilot light for the winding up process. In my experience partial distributions are a matter that will be a priority agenda item for dialogue between the manager and the supervisor – and, absent the situation where a scheme is already cashed up, must clearly be in the best interests of investors – barring any extenuating circumstances.

27. Absent any specific concerns, particularly on the part of the supervisor, about the proposed distribution plan, the idea that an appropriate proportion of scheme assets must held undistributed until the winding up accounts have been finalised – should be little more than a detailed plan that consider what is adequate to meet budgeted winding up and distribution costs. In most cases, the manager will have developed a budget and discussed it with the supervisor. In turn, the growing body of experience of supervisors provides guidance for building and reviewing those budgets (including such issues as building an adequate contingency for unforeseen costs / cost escalations). As noted above, this is also an area where both managers and supervisors can draw on expertise from a range of professional advisers. Insolvency practitioners, especially, have skillsets and expertise that can be applied to such a decision-making process.

28. Again, the suggestion that (absent known concerns or a disagreement between the manager and the supervisor about the winding up and distribution plan) that some unstated, but clearly material, proportion of the net assets available for distribution should be withheld pending a challenge is, I suggest, both inefficient and unfair. At worst, it invites an unhappy minority to delay the majority from receiving the proceeds of winding up. And it will risk a default setting of putting the FMA in the uncomfortable position of having to second guess every distribution plan. This will inevitably take time as complainants seek to argue what is "fair and equitable". Taken to extremes, this could leave the door open for a greenmail opportunity, in which an unhappy minority seek to leverage their position to delay a final distribution unless the manager and/or the supervisor see things their way. Absent further or better explanation, the FMA seems to be isolated on this vital policy issue. In the short time available to me, I have not located any commentary or policy platforms in Australia that support this approach.

Winding up accounts vs annual financial statements

29. The existence of potentially overlapping financial reporting obligations calls for relief. As noted above, whilst the manager of a scheme in wind-up should be seeking to manage the wind-up process with an eye on the annual balance date, this is not always possible.

30. As a starting point, I do not suggest that a scheme in wind-up mode should automatically get some sort of free pass to dispense with (or suspend) its financial reporting obligations under Part 7 of the FMC Act. Any such deferral or suspension should be the subject of an application to the FMA. I am doubtful that a form of 'class

relief' is achievable. However, guidance as to the relevant criteria for granting individual relief is called for.

31. In the case of insolvent, or near insolvent schemes, some guidance is available from Australia, where ASIC will consider individual of financial reporting obligations where, either:

   a. the scheme is insolvent but has not been insolvent for at least 12 months before the end of the relevant financial year or half-year; or
   b. (for court-appointed winding-up processes) – in the reasonable opinion of the court-appointed external administrator, the scheme is likely to be insolvent.

   In either case – ASIC must be satisfied that compliance with the financial reporting obligations will impose unreasonable burdens.

32. I suggest that, absent insolvency or near insolvency, a starting point to consider is to consider the information needs of investors in a scheme that is in wind-down mode, and will continue in that mode beyond the end of the current financial year. It is possible that those information needs could be met more effectively (and without imposing an unreasonable compliance burden) by other means. Regular reporting should be at the forefront. One possible benchmark may be a modified form of the 6-monthly reporting that is required under section 255(2)(d) of the Companies Act – in respect of a company in liquidation.

33. Also on this topic, if the effective wind up date triggers winding up accounts under section 213, conceptually, the scheme's financial reporting obligations under Part 7 of the FMC Act must (surely) cease on that date.

34. Consequently, I suggest that something much clearer is needed – than just a general suggestion that managers or supervisors who cannot line up the effective date with the annual balance date may wish to engage promptly about the availability of individual, tailored, relief.

When has final distribution been completed?

35. I suggest that the discussion about the practical steps required in order to complete a final distribution requires further practical input. At first blush, the statement that final distributions are only completed when they have either been paid to investors or transferred under the unclaimed moneys regime - has a compelling logic. It mirrors the legislative prescription in Australia[4] which requires that:

> **Unclaimed money to be paid to ASIC**
>
> If, on completion of the winding up of a registered scheme, the person who has been winding up the scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the scheme property, the person must, as soon as practicable, pay the money or transfer the property to ASIC to be dealt with under [the Australian unclaimed money regime].

36. However, the experience of winding up of some small legacy schemes is that there are a number of practical problems associated with making distributions to investors who cannot readily be found (GNA) or who have not completed the requisite AML/CFT

[4] See Corporations Act, section 601NG.

formalities to enable a distribution to be made. For the reasons discussed in the next paragraph, this experience has pointed to the need for practical workarounds to be available in some cases. In short, there is the need to allow (at least) a third way to complete a distribution – short of immediately resorting to the unclaimed moneys regime[5].

37. Without such a third way – investors who may still be traceable or still require some help with the final administrative steps (such as the AML/CFT paperwork) are subjected to a further roadblock to accessing their money. Other, relatively common practical hurdles include deceased estates that are still in the process of completing administration and those where there are competing claims to the distribution. As a result, the supervisor can be pragmatic and make available a facility for holding funds (by means of a separate, identified trust) for small numbers of GNAs and other such cases – for short periods of time. Such an arrangement has the advantage of minimising the number of hurdles facing those stragglers to claim their distributions.

38. I suggest that a number of factors, including an aging population and the collision of a number of trends that are making it harder for GNAs to be traced (such as changes to the patterns of postal delivery and the reduced number of people with landlines) when coupled with the difficulties the many investors seem to experience with AML/CFT form-filling mean that this issue needs to be consulted on further. Specifically, it should be canvassed with the two main share registries and the insurance industry – who will all have practical experience to add (at scale).

39. Whilst I do not expect that managers and supervisors should have a laundry list of available options, I expect that a small-scale amount of focused industry consultation will yield some suitable guidelines for a third way that largely already exists. The requirement for one-on-one discussions, with or without a supporting legal opinion, is very cumbersome.

[5] Sending the distribution to the IRD or Treasury as the case may require.

Feedback form

Consultation: Proposed guidance on winding up requirements for registered schemes

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with **Proposed guidance on winding up requirements for registered schemes**: [your organisation's name]' in the subject line. **Submissions close on 5pm on 13 October 2023.** Thank you.

Date: 20th September 2023 Number of pages: 4

Name of submitter: [redacted]

Company or entity: Todd Group Pension Plan Trust SCH11444 (TGPPT)

Organisation type: Restricted Superannuation Scheme, Trust – non complying

Contact name (if different):

Contact email and phone: [redacted]

Question number	Response
1	***Do you agree with our view of the purpose of section 212 and 213? Please explain your view.*** Yes. This view is also consistent with the Duties of Trustees in Part 3 of the Trusts Act.
2	***Do you agree with our view that the date of final distribution of the scheme's assets cannot be taken to be the wind-up effective date? Please explain your view.*** Yes. This view is also consistent with FMCA 213 *"Impact of wind-up effective date on the financials"* It's obviously ideal to align the effective wind-up date with a Schemes annual balance date to avoid duplication of accounts, resources & costs. The Scheme will then subsequently communicate & commence final distributions; as noted by the FMA's consultation proposal, the value of assets for distribution may change during the wind-up process. Following final distribution, a standard end of financial year IRD return should then be sufficient final disclosure of the Schemes termination & a subsequent financial year annual reporting process including final audit should not be required. The Guidance could confirm this. *"Clarification on financial statements required under Part 7 of the FMC Act"* The FMAs pragmatic initiative in considering relief from Part 7 of the FMC Act for Schemes in wind-up is commendable & their offer of interim engagement on tailored relief appreciated. It's efficient & cost effective to align the effective wind-up date with a Schemes annual balance date to meet the requirements of Section 213. The Guidance could recommend this as a best practice approach.
3	***Are there any aspects of the proposed guidance you think are unclear or need to be improved? If so, please explain what these are and provide your suggested wording or approach to address these.*** *"Determining whether final distribution of assets is completed"* It is understood that GNA tracing is implicit in the good faith requirements of the Duties of Trustees & may also be a requirement in a Schemes Trust Deed (TD) For eg TGPPT's TD requires "…reasonable diligence in tracing…".

	While not all scenarios can be anticipated, it would be very useful to have a pragmatic statement in the guidance document on what the FMA considers to be an “acceptable solution” as regards the feasibility of tracing historical GNAs to avoid Trust’s excessive expense & inefficiency going back & forth to the FMA on each occasion. While the reasonable extent of tracing efforts is debatable for historical GNAs, clarification in the Guidance reflecting FMA/Trustee alignment on this would be mutually beneficial & mitigate unnecessary inefficiency. Transfer to Treasury: the proposed transfer of Gone No Address (GNA) to Treasury should consider the potential for conflict with the Scheme’s TD. Many TD’s have a sunset clause on the participants eligibility for claiming a benefit. For example, TGPPT participants are deemed ineligible & forfeit their entitlement after 6 years have elapsed since becoming eligible (3 remaining eligible participants are now all within this 6 year period). Trustees have no legal obligation to make payments to ineligible participants. Only participants who remain eligible at the effective wind-up date are legitimate claimants. The Guidance should explicitly state that only eligible GNA participants & their entitlements are required to be transferred to Treasury. The Trusts Act (TA) 152 defines Treasurys obligations extend only as far as “…a notice to be published on an Internet site maintained by or on behalf of the Treasury setting out all property transferred to the Crown under section 149 in the previous calendar year and identifying the trustees or trusts from which the property was transferred…the notice remains available on the Internet site for inspection by participants of the public for at least 3 years.” There appears to be no obligation on Treasury to proactively seek & inquire into potential claimants beyond publishing the transferred Trust name & it’s property; Trust schemes already provide & maintain this information publicly on the Disclose Register for current schemes. With reference to the aforementioned example of a TD sunset clause it is certain that, unless claimed in the interim, all of the eligible GNA transferred to Treasury will become ineligible at some point within the 6 year period; could they then still be able to claim their entitlement from Treasury ? TGPTs TD provides for Trustee discretion which occasionally has been exercised in the participants favour: for eg could Scheme Trustees provide Treasury with specific direction on this point and any other relevant questions when transferring Trust money? What is the process for Treasury to be able to confirm the identity & eligibility of historical GNAs ? Frequently only a historical name & entitlement balance is all that could be provided. What, if any, additional information could be required from Trustees to be transferred to Treasury to support this validation? (for legacy restricted schemes such as TGPPT that closed over 30 years ago any available information is pre digital historical paper archives). Once Trust money is transferred to Treasury there is an obligation 151 2(c) for Treasury to return money to the Trustee on request; what is the process for activating this request? Eg. to avoid conflict with TA 152 4 “After the expiry of a period of 6 years after the date on which the transferred property was transferred to the Crown, the Secretary to the Treasury may transfer the trust property that consists of trust money to a Crown Bank Account.”
4	***Are there any aspects of the proposed guidance you do not agree with, or you think should not be included? Please give reasons for your view.***
5	***Are there any aspects of the proposed guidance you think may have unintended consequen****ces?* Yes. I think the tracing of GNAs & the transfer to Treasury may have unintended consequences. For eg. comment in the consultation that transfer to Treasury “…enables scheme participants to easily confirm any unclaimed monies that may be owed to them, given the publicly available information on unclaimed monies held by Treasury and IRD” does not seem to be adequately supported by Treasury’s obligations for participant notification, inquiry & identity verification. Please refer to my comments in Q3 above & Q6 below.

6

What impact (if any) might the proposed guidance have on compliance costs for the scheme?

The most obvious area of significant & unknown costs is the tracing of GNAs. TGPPT have some experience of this over the years & the potential to go down unproductive & expensive “rabbit holes”, particularly when it is understood many GNAs have returned decades ago to family overseas to countries without established tracing services & supporting infrastructure. Our experience with inquiry agents is that very little progress can be made without basic information such as Date of Birth, last known address etc. The obligations of the new Privacy Act may also inhibit inquiry options.

It will be useful & efficient to have joint Scheme/FMA clarity & consensus on the wind-up process to be followed in the Guidance, this should mitigate against unnecessary duplication & costs.

Other than the tracing cost question & associated feasibility, probably a low impact overall.

7

Are there any additional areas you consider the proposed guidance should address? If so, please provide details.

Timeline: As noted by the FMA in their consultation purpose for this proposed guidance, the wind-up process is complex & impacts/engages with several Govt functions & legislative Acts/Regulations. Therefore, it would be very helpful & promote mutual efficiency for the FMA to include as part of the Guidance document a basic timeline template with the key steps & timings noted.

Eg.

	1	2	3	4	5	6	7	8	9
	April	May	June	July	August	Sept	October	Nov	Dec
31-Mar	Annual accounts								
	Financial accounts & audit								
1-Apr	Resolution Windup Effective date								
	Copy FMA	10 Days							
				AGM					
31-Jul				Financials+Audit+Distribution to FMA, members (Disclose)					
31-Aug					Treasury ?				
31-Aug					Advise FMA Final Distribution				
31-Mar	(following year)						→	Final IRD return	

Notification: Under FMC Act, the audited financials are to be sent out to participants & the FMA’s view is that Schemes should then allow sufficient time for challenges. For GNAs, concurrent publishing of the financial documents on Disclose Register is the only option to provide this information, as has been done annually.

Timeframe: There appears to be no explicit/mandated/legislated wind-up timeframe between the notification & the final distribution of assets for any participants challenges to be raised. Nor has the FMA suggested this in it’s Guidance proposal. While this provides for flexibility subject to a Schemes scope & scale, for the sake of clarity & the avoidance of doubt a minimum period (eg 1 month as above) could be included in the Guidance for Schemes such as TGPPT whose participants are 100% GNAs.

Records: Following Scheme Wind-up & transfer of unclaimed moneys to Treasury, the Guidance should provide clarity on any residual obligation to retain Trust records, including any of eligible participants historical records. Noting that following transfer to the Crown (Treasury) under the Trusts Act Part 8 149(5) “A trustee is discharged from any further responsibility with regard to trust property transferred to the Crown under this section.”

	FMA, Treasury & IRD appropriate transfer links &/or contact details could also be included in the Guidance for clarity.
8	***Are the examples useful? Are there any examples that you would like to see changed, clarified, or omitted? Are there any additional examples that should be included? If so, please provide your suggested wording***
9	***Do you have any comments on the length, format, or presentation of the proposed guidance? If so, please provide details*** I have found the FMAs other Guidance documents to be typically clear, well structured for commonsense & in plain English.
10	***Do you have any other comments on the proposed guidance?*** I commend the FMA for their initiative in proposing this Guidance & engaging in consultation with participants. TGPPT anticipate a wind-up in 2027 as their last participant becomes ineligible in late 2026, so it will be useful & efficient to have FMA clarity & a confirmed consensus on the process to be followed. The Guidance will also promote & facilitate process consistency in the event of any key staff changes in either Schemes or FMA. Please advise me of anything that I may have misunderstood.

Feedback summary –

The 3 key issues I would like to see the Wind-up Guidance explicitly address are:

- GNA tracing: clearly explain the consultation consensus on reasonable “acceptable solution” requirements.
- Transfer to Treasury: for the sake of clarity & the avoidance of doubt, Guidance should confirm that only the eligible participants & their entitlements are required to be transferred to Treasury.
- Timeline template: provide a simple schematic outline of the key steps & timings for the Wind-up process.

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.

Thank you for your feedback – we appreciate your time and input.

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