Feedback: Proposed guidance on substantial product holder disclosures

Please submit this feedback form electronically in both PDF and MS Word formats and email it to us at consultation@fma.govt.nz with ‘Feedback: Substantial product holder disclosures’ and your entity name in the subject line. Thank you. **Submissions close on Friday, 16 June 2017.**

Date: 15 June  Number of pages: 4
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Company or entity: ICI Global
Organisation type: trade body
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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.
Question 3: Do you think the effect of the Interpretation is useful to help prevent the ‘mischief’ outline on page 5 above, and to help promote fair, efficient and transparent markets?

ICI Global\(^1\) appreciates the opportunity to provide feedback on the Financial Markets Authority’s (FMA) consultation paper on “Proposed guidance on substantial product holder disclosures.” Our member firms, regulated funds publicly offered to investors in jurisdictions worldwide, invest in markets throughout the world, including New Zealand, and have significant experience with complying with the large shareholder reporting regimes in various jurisdictions.

We urge the FMA not to adopt guidance that would interpret the FMC Act in a manner that would require an individual managing a fund to file substantial product holder (SPH) disclosures, in addition to any SPH filings that may be required to be filed by the fund that is managed by the individual. In our view, there are more effective and better suited approaches for addressing the FMA’s concerns about conflicts and the FMA’s interest in promoting a fair, efficient, and transparent market.

We do not support the proposed interpretation for the following reasons, many of which were advanced by fund managers that provided targeted feedback to the FMA in late 2016:

1. Requiring individuals who manage funds to make SPH disclosures would make the New Zealand requirements starkly different from current international practice, including that of Australia, the United States, and key member states of the European Union. Investors in global markets value consistency and predictability among markets and their regulatory requirements. Such features play a role in attracting investors into a market. The proposed changes to New Zealand’s current, long-standing market practice, which aligns with international standards, would impact the attractiveness of the New Zealand market for funds and their managers.

2. Requiring both fund firms, as well as fund managers, to make SPH disclosures will lead to confusing disclosures, rather than enhancing transparency, as intended. The FMA itself acknowledges this issue, but dismisses it by recommending that individuals who manage funds and the firms they work for consider disclosing their relevant interests on a single SPH notice where the disclosure relates to the same relevant interest and type of event disclosure. This approach does not adequately eliminate concerns about confusing, and potentially misleading, disclosure. Due to their particular circumstances, fund managers and firms may choose to file separate SPH notices. Additionally, such disclosures become highly complicated where multiple employees of a fund manager (such as members of an investment committee or multiple portfolio managers co-managing a fund) are required to...

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\(^1\) ICI Global carries out the international work of the Investment Company Institute, the leading association representing regulated funds globally. ICI’s membership includes regulated funds publicly offered to investors in jurisdictions worldwide, with total assets of US$25.2 trillion. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of regulated investment funds, their managers, and investors. ICI Global has offices in London, Hong Kong, and Washington, DC.
report their holdings. The intent of the SPH disclosure obligation is to promote an informed market; confusing SPH disclosures do not help achieve this goal.

3. The FMA states that one purpose of the proposed guidance is to eliminate differences in approaches to the way that fund management firms make an SPH disclosure. The proposed disclosure by portfolio managers, however, does not address this issue and in fact will not lead to improved consistency. We believe the proposed approach will lead to additional divergence because additional interpretive questions will arise. For example, complex questions regarding who possesses power and/or what degree of influence or control is required to mandate filing are likely to be interpreted differently, especially as that influence or control may vary in structure from firm to firm. Although portfolio managers may have some degree of control over the purchases and sales of applicable securities, their investment decisions must follow the investment objectives, guidelines and strategies for the fund or client account. Additional complicating scenarios include how to handle temporary absences of fund managers, multiple fund managers co-managing a fund, or certain administrative or organizational changes that change the roles of specific personnel.

4. Monitoring and disclosing beneficial ownership of applicable securities requires sophisticated operational systems to record, aggregate and interpret the holdings of a fund management firm, especially for fund management firms with a global reach. As stated above, the proposed interpretation is not consistent with the requirements in other jurisdictions around the world. Accordingly, fund management firms would need to fundamentally revise their current operational systems to monitor and report the personal holdings of their funds’ portfolio managers in aggregate with those portfolio managers’ funds. An operational change of that scale would cause significant expense to fund management firms and may be a deterrent to investment in the New Zealand market.

5. Mandating SPH disclosures at the portfolio manager level would not accurately reflect any voting patterns that are undertaken at a fund management firm level. Fund management firms typically have firm-level and fund-level proxy voting policies, most of which utilize third-party proxy service providers. Absent special circumstances those firm and fund-level policies – rather than the decision-making of the portfolio managers themselves – will be dictating the voting behaviour of the funds. Portfolio manager-level SPH disclosure will not, therefore, provide accurate information regarding the voting rights attached to securities, and will not result in improved transparency.

As additional justification for the interpretation, the FMA states that its interpretation will provide greater transparency, which may help to deter inappropriate conduct that may occur when an individual has a power or control over a firm’s holding in a listed issuer and also a separate personal holding in the same listed issuer. We do not agree and believe there are more effective ways to address the FMA’s concerns. For example, we believe that many jurisdictions have addressed such issues through their rules related to the aggregation of holdings for large position reporting as well as specific rules targeted at conflicts of interest of manager personnel such as personal trading rules. In the United States, for example, mutual fund personnel (such as portfolio managers) are subject to a rule that prohibits fraudulent, deceptive or manipulative acts by fund personnel in connection with
their personal transactions in securities held or to be acquired by the fund. Additionally, the rule requires that (1) funds and their investment advisers and principal underwriters (“relevant entities”) adopt a code of ethics containing provisions reasonably necessary to prevent fraudulent, deceptive or manipulative acts, and (2) certain persons report their personal securities transactions to their relevant entity initially and at regular intervals. We encourage the FMA to consider whether the manner in which other leading jurisdictions seek to address and mitigate these conflicts could address the FMA’s concerns.

The guidance states that the FMA expects a firm to file an SPH disclosure within one business day of becoming aware of the events that trigger a disclosure obligation. Completing a filing within this timeframe poses significant operational challenges for the many fund management firms located around the world that invest in New Zealand securities. In 2016 we similarly raised concerns about the impact of Norway’s large shareholder requirements on global firms in a letter to the Norwegian regulator. As we explained in that letter, differences in business hours that result in a limited or non-existent overlap in business hours, as well as operational procedures that ensure the accurate aggregation and reporting of positions, make extremely short reporting periods unduly burdensome and problematic for firms with worldwide operations. Firms continuously monitor their holdings and, although firms may have processes in place to anticipate upcoming disclosure obligations, intervening events (such as a large redemption) may cause a reporting threshold to be reached with little notice. The burden of completing an SPH disclosure within one business day of reaching such threshold would be immensely difficult for global fund management firms. Further, this short deadline is not market standard for most jurisdictions with beneficial ownership reporting requirements, including Australia. We urge the FMA to reconsider its expectation.

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2 See 17 CFR 270.17j-1, which is available at https://www.law.cornell.edu/cfr/text/17/270.17j-1.

3 The codes of ethics must be approved by a fund’s board of directors or trustees, including a majority of independent directors of the board. See Rule 17j-1 under the Investment Company Act of 1940.

4 See letter from Dan Waters, Managing Director, ICI Global, to the Norwegian Finansdepartementet, dated 1 June 2016, requesting a change from the Norwegian requirement that large shareholder reports be filed “immediately” https://www.ici.org/pdf/29954.pdf.