Submission on Consultation paper: Exposure draft of Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023

Your name and organisation

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Responses to consultation paper questions

1.	Do you consider that regulation 252A is sufficient to meet the intent? If not, why not?
	We support the proposal that climate records must be readily identifiable and comprehensible. We agree that this will support the timely assessment of whether the records are meeting the requirements of the 461V of the FMC Act.
2.	Do you have any comments on regulation 252B?
	We support that climate records be available in a written form on the basis that written form includes making them available in an electronic form. It would be ironic if the written form meant in a paper format given that the records are for CRD. If though the intent is that climate records be available in a paper format, then we would not support 252B. So, clarification of intent would be helpful. We do support 252 (b) that records be easily accessible and convertible into written form. We support the proposal that CRD records may be kept in English or Te Reo Māori reflecting the official languages of Aotearoa New Zealand. We note that 252B provides for records to be kept in a language other than English or Te Reo Māori as long as they are readily convertible into either of those languages. We consider it would be useful if there is always an English version of the records produced to assist primary users.
3.	Do you have any comments on regulation 252C?
	We support the intent of the regulation that records should be available for inspection at all reasonable times and if it is unreasonable to meet the request as specified, they be made available as soon as is practicable and in a reasonable manner. We are concerned though that under all circumstances the records must be made available without charge. While we agree that holding records in a readily available manner will ensure that costs ought to be minimal, it is possible that requests will be made in such a way that the CRD will incur significant costs to comply. This regulation makes no allowance for requests of this nature as it only provides the CRD with more time to comply at whatever cost. We believe this is unreasonable and there should be scope for a CRD to decline an unreasonable request on the grounds of the significant costs that might be incurred. For instance, if a CRD meets the requirements under 252A and 252B, so it is able to have its records readily available and in a comprehensible manner for inspection, then it would be concerning if 252C is suggesting that requests require records to be available in a different manner for which they will incur significant costs. If the intent of 252c (3) is that a CRE is able to provide records "in a reasonable manner' means that can mitigate the costs, then that would be a reasonable approach to take. Clarification of this would be useful.
4.	Do you have any comments on regulation 252D?
	We support this regulation as a logical and necessary step to ensure the effectiveness of the preceding regulations 252A-C.

5.	Do you have any comments on the transitional provisions in relation to records kept by a third party? Do you think that transitional provisions are required in relation to the other record-keeping regulations? If so, why and what form should these take?
	We support the transitional arrangements which avoid impacting existing arrangements prior to the implementation of the regulation and the two-year timeframe to become compliant. However, we believe that additional exceptions should be made reflecting the intent to exercise flexibility in the initial two years. For instance, it would be helpful to clarify the extent to which any records subject to first time adoption provisions are excluded. Our recommendation would be that data supporting progress updates are excluded from the requirements.
6.	Do you have any comments on these infringement fees?
	We note the infringement fees are in line with other fees under the FMC Regulations 2014. We also note these fees exceed those recommended by the Ministry of Justice and that these breaches could include minor breaches. We note that reporting entities are large, sophisticated entities. However, we note that reporting of this type is in its infancy and new for all reporting entities. We recommend that the regulation state that the infringement fees are maximum amounts, enabling the FMA to exercise discretion as to the amount, if any, of a fee. This would align with the FMA's publicly stated intent to play an educative role in the initial reporting period while acting in a punitive manner toward egregious behaviour by CRDs. We note with respect to the offence that arises for not having a link to CRD referenced in the annual report that some CRE will not complete a New Zealand annual report. In these instances, they would include the link in a group wide annual report or in the New Zealand financial statements.
7.	Do you have any comments on these options for location of CRD records? Which do you prefer and why? Are there other options not considered here? If so, what are they?
	We believe there is no need for regulations to prescribe where records are to be kept. The intent of 252A-C is to ensure the records are readily available and comprehensible for inspection to enable the FMA and others requiring the information to carry out their roles. Where records are kept should be immaterial as it is what the records say that is important. Specifying where records are to be kept overreaches and interferes with the operational decisions of CREs. Furthermore, this requirement is reminiscent of the distant past when records were kept physically, and regulations were set on the assumption that keeping records locally meant they would be readily accessible. If though you are asking whether we favour Option 1 (prescribed records must be kept in New Zealand) or Option 2 (prescribed records must be kept in a country listed in the regulations), then our preference would be Option 2. Most CREs are almost certainly using cloud services and most of these will be offshore. Prescribing that records be kept on a server in New Zealand will add costs and duplication for most CREs for little benefit. It should also be acknowledged that many CREs are operate in many jurisdictions and in an environment where more and more countries are making climate disclosures. It is

	important that CREs are able to optimise the way in which they keep their records to meet their international obligations. Option 2 provides more flexibility albeit limited to three jurisdictions. We question the assumption that data protection laws are superior in these three countries to others. Our view is that the European Union's Data Protection laws are one of the most advanced in the world. And while the FMA may have developed relationships with regulators in the three jurisdictions identified, that is hardly a recommendation for stipulating data storage locations. The FMA should be broadening its relationships and specifically with those jurisdictions where climate disclosure reporting is more advanced. Again, there are European jurisdictions that ought to be considered too. Also, climate disclosure reporting is fast evolving in many jurisdictions, so to stipulate just three seems naïve and inflexible. So, Option 2 has its shortcomings and if adopted we would propose the regulation include words after United Kingdom the words "or other countries where an equivalency test has been reached" or words to that effect. To summarise, we do not support prescribing the jurisdictions where records should be kept. If there are concerns about maintaining records in some jurisdictions, it would be better to establish an approval process to satisfy concerns. Simply ruling out the European Union, the United States, Canada, Japan and other jurisdictions based on current, similar data protection laws (which may have shortcomings vis-à-vis other jurisdictions and the FMA's existing relationships has several shortcomings.
8.	Do you have any other comments you wish to make about these regulations that are not covered so far?
	No.