



## COVERSHEET

<b>Minister</b>	Hon Dr Duncan Webb	<b>Portfolio</b>	Minister of Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023	<b>Date to be published</b>	2 October 2023

<b>List of documents that have been proactively released</b>		
<b>Date</b>	<b>Title</b>	<b>Author</b>
August 2023	Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023	Office of the Minister of Commerce and Consumer Affairs
24 August 2023	Cabinet Legislation Committee LEG-23-MIN-0170 Minute	Cabinet Office

### **Information redacted**

**YES**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of Legal professional privilege.

**In Confidence**

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Legislation Committee

**Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023**

**Proposal**

- 1 This paper seeks authorisation for submission to the Executive Council of the Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023.

**Executive Summary**

- 2 In November 2022 Cabinet agreed [ENV-22-MIN-0048, CAB-22-MIN-0508 refer] to proposals for new regulations to be made under section 548 of the Financial Markets Conduct Act 2013 (**FMC Act**) to help implement the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021 (**CRD Act**). The proposals relate to:
  - 2.1 record keeping and inspection requirements for climate reporting entities; and
  - 2.2 setting infringement fees for failure to meet record keeping and other obligations.
- 3 The Ministry of Business, Innovation and Employment (**MBIE**) have developed regulations, undertaken consultation on an exposure draft of the proposed regulations and considered the feedback received. I seek approval in this paper to submit the final regulations to the Executive Council.

**Background**

- 4 In 2021 the CRD Act was passed and received Royal assent. By amending the FMC Act and the Financial Reporting Act 2013, the CRD Act imposes obligations on approximately 170 entities to disclose their climate-related risks and opportunities in annual climate statements.
- 5 The Financial Markets Authority (**FMA**) are responsible for the independent monitoring and enforcement of the disclosure regime.
- 6 The entities that are required to report are listed issuers, banks, insurers, credit unions, building societies and investment scheme managers that are “large” as defined in the CRD Act. These entities are referred to in the legislation as “climate reporting entities”.
- 7 Section 461V of the FMC Act requires climate reporting entities to keep “records that will enable the climate reporting entity to ensure that the climate statements of the climate reporting entity comply with the climate-related disclosure framework” (**CRD records**).

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- 8 Section 461W of the FMC Act requires climate reporting entities to keep CRD records in the prescribed manner (if any).
- 9 Section 461Y of the FMC Act requires climate reporting entities to make CRD records available, in the manner prescribed by the regulations, at all reasonable times for inspection without charge to the directors of a climate reporting entity, any supervisor (e.g., if the climate reporting entity is the manager of a registered scheme) and the FMA.
- 10 Section 548(1)(p) provides for regulations to be made prescribing the manner in which CRD records must be kept under section 461W and made available for inspection under section 461Y.
- 11 Sections 461W, 461Y, 461ZI and 461ZJ of the FMC Act establish new infringement offences for failure by climate reporting entities to:
- 11.1 keep CRD records in the prescribed manner;
  - 11.2 make CRD records available in the prescribed manner;
  - 11.3 lodge a climate statement on time; and
  - 11.4 include in its annual report a statement that it is a climate reporting entity and a copy of its climate statements.
- 12 I note that from October 2024, the offence in relation to lodging climate statements on time will also apply to assurance reports.
- 13 Section 548(1)(m) of the FMC Act provides for regulations to be made setting the infringement fee for each infringement offence (which must not exceed \$20,000).
- 14 Section 549 of the FMC Act requires the Minister to consult with the FMA before recommending regulations be made.

### Policy

- 15 Cabinet has agreed to proposals for new regulations under section 548 of the FMC Act [ENV-22-MIN-0048, CAB-22-MIN-0508 refer] relating to CRD records that climate reporting entities must keep including:
- 15.1 requirements in terms of the format, accuracy, language, accessibility, inspection, and location of records, including when the records are owned or maintained by a third party pursuant to a contract or licensing agreement;
  - 15.2 that the FMA may prescribe additional requirements relating to the manner in which the records must be made available to the FMA for inspection; and
  - 15.3 setting infringement fees for failure to meet record keeping and other requirements.
- 16 Cabinet also authorised me to:
- 16.1 release an exposure draft of the regulations for public consultation;

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- 16.2 make decisions consistent with the policy decisions in the paper under ENV-22-SUB-0048 on any minor or technical matters arising during the drafting process or as a result of consultation on an exposure draft of the regulations.

### The exposure draft and final proposed regulations

- 17 An exposure draft of the Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023 was prepared in accordance with the policy objectives described in paragraph 15 and released for public consultation from 21 June to 12 July 2023.
- 18 Following consultation, I made further decisions about the content of the regulations in accordance with the authorisation described in paragraph 16.2.
- 19 I propose that the Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023 be submitted to the Executive Council.

### Decisions following consultation

- 20 The consultation on the exposure draft included a question about the location where CRD records are to be kept. It posed two options: to keep the CRD records in New Zealand only, or New Zealand, Australia, and the United Kingdom. In the case of records stored in the cloud this would mean that the physical server must be in a listed country. The FMA prefers confining the location of records to the listed countries for reasons of accessibility, practicality and security.
- 21 Following consultation, I decided that it was not necessary to prescribe in regulations where CRD records must be kept because the regulations already require records to be kept in a way that ensures that they can be produced for inspection.
- 22 The exposure draft also included a regulation specifying that when records are kept by another person, the climate reporting entity must ensure the third party “is under all legal obligations necessary to ensure the climate reporting entity can comply with its obligations to keep and make available CRD records” Legal professional privilege  
[REDACTED]  
[REDACTED]  
[REDACTED]
- I therefore decided that the draft regulation and associated transitional provision should be removed from the final regulations.

### Timing and 28-day rule

- 23 The regulations will come into force on 2 October 2023 (being at least 28 days after they have been notified in the *New Zealand Gazette*).

### Compliance

- 24 The proposed regulations comply with:
- 24.1 the principles of the Treaty of Waitangi;
  - 24.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
  - 24.3 the principles and guidelines set out in the Privacy Act 2020;

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- 24.4 relevant international standards and obligations;
- 24.5 the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee (though see below in relation to infringement fee levels).

### *Infringement fee levels*

- 25 The proposed infringement fees range from \$5,000 to \$12,500. The fees are therefore higher than the \$1,000 maximum that is recommended in the Legislation Design and Advisory Committee (**LDAC**) guidelines. However, the infringement fee levels for the new offences have been set at the same level as those already prescribed for similar financial reporting offences under Schedule 22 of the Financial Markets Conduct Regulations 2014.
- 26 MBIE has consulted with the Ministry of Justice about the level of the fees. The Ministry of Justice recommends that infringement fees are designed for behaviour that is easily identifiable and of low seriousness, with a maximum fee level of \$1000. If the behaviour is more complex or requires a penalty of higher than \$1000, LDAC and the Ministry of Justice generally advise that a different enforcement mechanism with more oversight is used. However, the Ministry of Justice noted that as higher penalties already exist for other offences under the FMC Act, consistency with this regime may be preferable.

### **Regulations Review Committee**

- 27 There are no grounds for the Regulations Review Committee to draw the regulations to the attention of the House of Representatives under Standing Order 327.

### **Certification by Parliamentary Counsel**

- 28 Parliamentary Counsel Office has certified that the regulations are in order for submission to the Executive Council.

### **Impact Analysis**

- 29 A Regulatory Impact Statement in respect of the regulations was submitted at the time Cabinet approval was sought for the policy relating to the regulations [ENV-22-MIN-0048, CAB-22-MIN-0508 refer].
- 30 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirmed that the CIPA requirements do not apply to this proposal as the threshold for significance is not met. The potential emissions impact is indirect and unable to be accurately quantified.

### **Publicity**

- 31 The regulations will be notified in the Gazette and published on Parliamentary Counsel Office's 'New Zealand Legislation' website. MBIE intends to notify stakeholders when the regulations have been made.

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### Proactive release

- 32 I propose to release this paper proactively within 30 business days of Cabinet's decision. Any redactions made will be consistent with the Official Information Act 1982.

### Consultation

- 33 The following consultation has taken place in the course of developing the policy and draft regulations.
- 34 Prior to the ENV-22-MIN-0048 and CAB-22-MIN-0508 decision, MBIE consulted with a targeted group of stakeholders on the proposals for the regulations.
- 35 On 21 June 2023 MBIE released an exposure draft of the regulations to the public. MBIE received and considered 11 submissions.
- 36 In accordance with section 549 of the FMC Act, the FMA has been consulted on the regulations.
- 37 In preparing this Cabinet paper and the previous policy decisions on regulations, MBIE has consulted with the Ministry for the Environment, the Ministry of Justice, the FMA, and the Treasury. The Department of Prime Minister and Cabinet was informed.

### Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 **note** that on 14 November 2022 Cabinet agreed to proposals for new regulations under section 548 of the FMC Act [ENV-22-MIN-0048, CAB-22-MIN-0508 refers] relating to records that climate reporting entities must keep including:
- 1.1 requirements in terms of the format, accuracy, language, accessibility, inspection, and location of records, including when the records are owned or maintained by a third party pursuant to a contract or licensing agreement;
  - 1.2 that the FMA may prescribe additional requirements relating to the manner in which the records must be made available to the FMA for inspection; and
  - 1.3 setting infringement fees for failure to meet record keeping and other requirements;
- 2 **note** that the Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023 will give effect to the decision referred to in recommendation 1;
- 3 **note** that Cabinet authorised the Minister of Commerce and Consumer Affairs to make decisions that are consistent with the policy decisions in the paper under ENV-22-SUB-0048 on any minor or technical matters that may arise during the drafting process or as a result of consultation on an exposure draft of the regulations;
- 4 **note** that the Minister of Commerce and Consumer Affairs has, in accordance with the authorisation referred to in recommendation 3, decided:

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- 4.1 not to include a regulation specifying a location requirement for records kept by climate reporting entities;
- 4.2 not to include a regulation and associated transitional provision relating to CRD records kept by another person;
- 5 **note** that section 549 of the FMC Act requires that the responsible Minister consult with the FMA before recommending regulations under section 548 of the FMC Act as proposed;
- 6 **note** the advice of the Minister for Commerce and Consumer Affairs that the consultation requirement has been met;
- 7 **authorise** the submission to the Executive Council of the Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023;
- 8 **note** that the Financial Markets Conduct (Climate-related Disclosures) Amendment Regulations 2023 will come into force on 2 October 2023.

Authorised for lodgement.

Hon Dr Duncan Webb

Minister of Commerce and Consumer Affairs