



Reserve Bank  
of New Zealand  
Te Pūtea Matua

# Enforcement Principles and Criteria

Consultation paper

13 October 2021

CONSULTATION  
PAPER



## Submission contact details

The Reserve Bank of New Zealand – Te Pūtea Matua invites submissions on this consultation paper by 5:00pm on 24 November 2021.

Please note the disclosure on the publications of submissions below.

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Subject line: Enforcement Principles & Criteria Consultation

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## Publication of submissions

All information in submissions will be made public unless you indicate you would like all or part of your submission to remain confidential. Respondents who would like part of their submission to remain confidential should provide both a confidential and public version of their submission. Apart from redactions of the information to be withheld (i.e. blacking out of text) the two versions should be identical. Respondents should ensure that redacted information is not able to be recovered electronically from the document (the redacted version will be published as received).

Respondents who request that all or part of their submission be treated as confidential should provide reasons why this information should be withheld if a request is made for it under the Official Information Act 1982 (OIA). These reasons should refer to section 105 of the Reserve Bank of New Zealand Act 1989, section 54 of the Non-Bank Deposit Takers Act, section 135 of the Insurance (Prudential) Supervision Act 2010 (as applicable); or the grounds for withholding information under the OIA. If an OIA request for redacted information is made, the Reserve Bank will make its own assessment of what must be released taking into account the respondent's views.

The Reserve Bank may also publish an anonymised summary of the responses received in respect of this Consultation Paper.

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## 1 Context

At Te Pūtea Matua, the Reserve Bank of New Zealand, we are *kaitiaki* (guardians) of New Zealand's financial ecosystem, working to enable stability, economic wellbeing and prosperity for all New Zealanders. We achieve this by promoting the maintenance of a sound and efficient financial system.

Following the International Monetary Fund's (IMF) 2016 review of the New Zealand financial system and the Reserve Bank's funding agreement (2020–2025), we are building a modern and responsive regulatory model. We are establishing clear, robust, evidence-based, and fit-for-purpose legislation and regulatory frameworks. Through our more intensive supervision and enforcement activities, we are promoting sound financial institutions and increasing confidence that regulatory standards are met across New Zealand's financial sector.

As part of our regulatory strengthening, we have established an Enforcement Department and we are developing our enforcement framework to achieve our compliance goals, increase the effectiveness of our enforcement actions, and promote confidence and consistency in our enforcement decision-making.

Our Enforcement function is operationally separate from our Supervision function, but the two work closely together to achieve our compliance goals by applying escalating regulatory responses to non-compliance.

The principles and criteria applicable to enforcement action are fundamental considerations for the enforcement framework. We are seeking feedback on the applicable principles and criteria, which are strategically high-level and reflect our current legislation.

## 2 Legislation

We exercise powers across the financial sector under several pieces of legislation:

- Reserve Bank of New Zealand Act 1989;
- Insurance (Prudential Supervision) Act 2010;
- Anti-Money Laundering and Countering Financing of Terrorism Act 2009;
- Non-bank Deposit Takers Act 2013; and
- Financial Markets Infrastructures Act 2021.

Over the next year we will be implementing the new Reserve Bank of New Zealand Act. In addition, drafting of the Deposit Takers Bill will take place over the next 12 months and we will support the Bill through its parliamentary process.

## 3 Compliance goals

Our enforcement framework will be tied to our compliance goals. Our compliance goals across regulated sectors are to:

- incentivise and monitor prudent behaviour;
- promote confidence in compliance; and
- enforce compliance by holding institutions to account for non-compliance.

## 4 Principles and criteria

The *principles* are a set of high-level ideals that guide the direction of our enforcement strategy and inform our approach to applying our enforcement discretion. They are not specific considerations to be worked through when making an individual decision. Our three enforcement principles are: **risk-based**, **proportionate**, and **transparent**.

The *criteria* are specific considerations which will be worked through and weighed against the available evidence when deciding on the appropriate enforcement response. They will be used by the Enforcement Department as a guide to analysing evidence, and will inform the Enforcement Committee's consideration of a particular issue, through their inclusion in referral and enforcement decision memos. Our four enforcement criteria are: **seriousness of conduct**, **responsiveness**, **public trust and confidence**, and **efficacy**.

Our principles and criteria are necessarily high-level, as they are intended to apply across all of the areas we regulate where enforcement action may be contemplated.<sup>1</sup> We acknowledge that the application of the principles and criteria will need to be adapted to the different regulatory areas, as unique considerations will likely be involved. The differences will be drawn out in the analysis of the specific facts relating to individual issues and legislation when applying our enforcement principles and criteria.

Internally, the principles and criteria will provide us with a framework through which we evaluate enforcement matters and make decisions on whether or not to take enforcement action. The application of the principles and criteria will guide our consideration of the broader practical and policy outcomes of any contemplated investigative and enforcement action. They will also ensure that our enforcement function is responsive, practical, realistic, and forward looking.

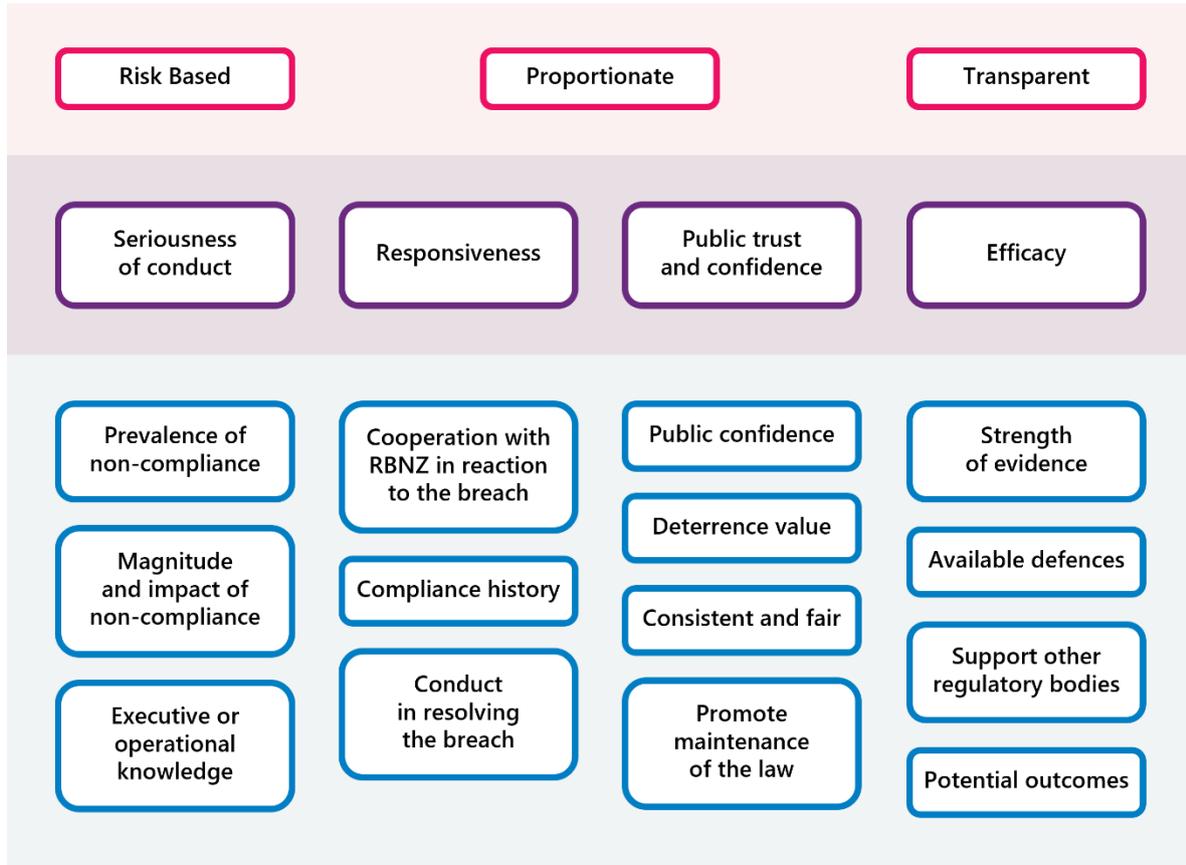
Externally, publishing the principles and criteria will support transparency and help to reassure the public, regulated entities, and other stakeholders that our enforcement processes follow good regulatory practice and that our enforcement decisions will be robust, well-informed, and well-reasoned. It will also help to provide certainty about the way we select matters for investigation, conduct investigations into suspected regulatory breaches, and ultimately take decisions relating to enforcement matters.

In considering potential principles and criteria, we reviewed the approaches taken by other financial regulators including the Financial Markets Authority, Commerce Commission, Australian Prudential Regulation Authority, Australian Transaction Reports and Analysis Centre, Bank of England, and Monetary Authority of Singapore.

The proposed principles and criteria are set out in Table 1 and discussed below.

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<sup>1</sup> ie in the prudential regulation of banks, insurers, and non-bank deposit takers; and in the regulation of financial markets infrastructure, and anti-money laundering and countering the financing of terrorism matters.

**Table 1: Enforcement Principles and criteria**

## 5 Enforcement principles

### 5.1 Risk-based

A risk-based approach means that our enforcement resources are used where risk is greatest and where they can have the most impact. This will involve an assessment of the nature of the entity, seriousness of non-compliance, significance of the issue, and the circumstances of the breach. We will prioritise the issues that are likely to have a greater impact on our regulatory or supervisory objectives, a high risk of error, or involve high risk to our own reputation.

The risk-based principle, and the criteria underpinning it, will likely need to be adapted when being applied to the different sectors that we regulate:

- The application of the risk-based principle to prudential regulation will involve acting where our statutory objectives are put at risk by an entity's conduct and directing our enforcement resources towards addressing issues that could have the potential to significantly damage the financial system or wider economy of New Zealand, as per our functions and principles under the various pieces of legislation for which we are responsible.<sup>2</sup>
- Applying the risk-based principle to AML/CFT regulation will involve ensuring actions taken are targeted and informed, that resources are used effectively, and maximum impact is achieved to detect and deter money laundering and the financing of terrorism, as per the purposes under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.<sup>3</sup>

<sup>2</sup> For example Reserve Bank of New Zealand Act 1989, section 68; and Insurance (Prudential Supervision) Act 2010, section 4(c)(ii)

<sup>3</sup> See the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, section 3(1).

## 5.2 Proportionate

The proportionality principle means that the burden and cost of enforcement action should be proportionate to the relevant conduct, level of harm involved, and expected benefits from enforcement action, for both us and the entities we regulate. In practice, this means that we will determine our investigative approach and enforcement response after considering aggravating and mitigating factors of a case, the broader compliance context, and internally developed precedent. In addition to applying the proportionality principle to individual instances of non-compliance, we will also have regard to other regulators' responses to similar examples of non-compliance.

As a proportionate regulator, we will seek to apply the regulatory tool that is appropriate to the nature and magnitude of non-compliance, with a willingness to escalate our response as necessary. Applying the proportionality principle ensures that our enforcement response balances and weighs real risks and is calibrated to the individual entity and instance of non-compliance, taking into account factors including the particular non-compliance, the entity's general attitude to compliance, the risk posed by the non-compliant activity, and the public interest in following a particular response.

## 5.3 Transparent

The transparency principle promotes accountability by ensuring that the public, regulated entities, and other stakeholders are aware of our enforcement processes and outcomes. Transparency has two important factors:

- **Transparency of process** – We will publish key guidance in order to increase public understanding of our enforcement function, such as these enforcement principles and criteria. We will ensure we engage openly and honestly with regulated entities during the course of our investigations, consistent with the commitments in our Relationship Charter. The initiation of an investigation generally will not be made public unless it is appropriate to do so, for example because the investigation is a response to public complaint or until it is appropriate in the investigative process for disclosure to be made.
- **Transparency of outcome** – We will publish our enforcement actions on our website unless there are exceptional circumstances that make it inappropriate to do so. We will endeavour to provide the reasons for our actions, to the extent that it is appropriate and permissible. Any decision on publishing enforcement outcomes will be made on the specific circumstances and with regard to our financial stability mandate.

Q1: Do you have any comments on the high-level descriptions of the three principles?

Q2: Do the descriptions above provide clarity on how we apply the three principles? If not, what further information would better help you understand the application of the three principles?

Q3: Are there any additional principles that you think should be included? Please explain how any additional suggested principles would improve our decision-making process.

Q4: Do you have any additional comments on the principles?

## 6 Enforcement Criteria

Our enforcement criteria are set out in **Table 2**. Each enforcement criterion has three or four 'factors' which we will consider when making a decision. To determine each factor we have suggested some guiding considerations. We note that the weight that these considerations are given may be context-dependent, and will inform our risk appetite for enforcement matters.

**Table 2: Enforcement Criteria**

Enforcement Criteria	Factors	Considerations
<b>Seriousness of conduct</b>	Prevalence of non-compliance	We will consider the number of breaches that have occurred, the period of non-compliance, and whether the non-compliance is repetitive (either occurring multiple times within the same entity or multiple times across different entities).
	Magnitude and impact of non-compliance	<p>We will consider any aggravating and mitigating factors, including whether the breach is technical, its broader impact on the public and/or the regulated industry, the degree and nature of non-compliance, and the absence of adequate controls or the failure to follow controls.</p> <ul style="list-style-type: none"> <li>For prudential matters, we will consider the risk of systemic impact or risk to financial stability more broadly. We may also assess the significance of conduct and/or fit and proper concerns.</li> <li>For AML/CFT matters we will focus on the nature of the relevant conduct, number of breaches, value of the transactions involved, and any systemic failings in the entity's compliance programme.</li> </ul> <p>The magnitude and impact of non-compliance will also involve an assessment of the harm. This will involve considering, the actual harm or impact resulting from the breach, and any likely or potential harm that could have resulted. Of particular importance will be a consideration of whether the public has been, or is likely to be, placed at risk, and the likelihood of whether there was, or will be, a direct financial impact on the public, and if so, the magnitude of that impact.</p>
	Executive or operational knowledge	We will consider the extent that issues were known within the entity, who knew (including at senior leadership and/or management levels), how they found out or why they did not find out, and any relevant steps taken. We will also consider the duration of non-compliance, how quickly it was identified and reported through the entity's management structure, and the degree to which it was deliberate, negligent, or reckless.
<b>Responsiveness</b>	Cooperation with RBNZ in reaction to the breach	Cooperation is a key consideration under the responsiveness criterion.

Enforcement Criteria	Factors	Considerations
		<p>We will consider whether the matter was promptly and voluntarily brought to our attention when discovered, or whether breach reporting was delayed, incomplete or misleading in any way.</p> <p>We will also assess the extent of the entity's cooperation with our investigation, and whether it was necessary to use coercive powers to conduct the investigation (such as through compulsory interviews or document requests).</p>
	The entity's compliance history	We will consider our previous interactions with the entity. Where there are longstanding concerns around the entity's general supervision or compliance history and/or where there have been previous adverse findings or enforcement action taken in respect of similar non-compliance, a more severe enforcement response may be appropriate.
	The entity's conduct in resolving the breach	When assessing the entity's response to the non-compliance or breach, we will have regard to any proactive remedial action undertaken by the entity, including the effect of that action on remediating any harm caused by the breach and whether the remediation was undertaken voluntarily or under instruction from us or another regulator.
<b>Public trust and confidence</b>	Public confidence	<p>We will consider whether taking enforcement action would promote public confidence in the law or in the financial system. In some cases this may involve balancing the benefits of public action against any immediate risks to financial stability.</p> <p>We will weigh the seriousness of the non-compliance against whether enforcement action (including prosecution) is required in the public interest.</p>
	Deterrence value	<p>We will take enforcement action to provide a credible threat of enforcement in order to promote broader compliance. Specific and general deterrence will play an important role in creating the credible threat.</p> <p>We will consider whether enforcement action is likely to change or stop the entity's behaviour, and whether action is likely to modify the behaviour of others by demonstrating or explaining the consequences of failure to comply.</p> <p>We will also consider the impact of other similar cases taken by us or other regulators and whether they have sent a sufficient deterrence message.</p>
	Consistent and fair	We will consider whether the response is consistent with previous enforcement responses we have taken in respect of similar conduct. This may involve considering the enforcement responses of peer regulators.

Enforcement Criteria	Factors	Considerations
		<p>We will also consider the overall fairness of an enforcement response in light of case-specific factors as well as the overall wellbeing of the financial system.</p>
<b>Efficacy</b>	<p>Promote maintenance of the law</p>	<p>We will consider whether enforcement action will contribute to the performance of our regulatory objectives and/or promote the policy objectives of the relevant legislation. We will also consider whether there is a significant need to clarify, or define the boundaries of the law or reinforce the application of the legislation.</p> <p>To this end, we will consider cases of similar nature, and balance competing factors such as the need for clarity, certainty, and/or consistency.</p>
	<p>Strength of evidence</p>	<p>Where potential enforcement action includes the possibility of criminal proceedings (or even civil proceedings), we will undertake an assessment based on the Solicitor-General's Prosecution Guidelines' Evidential Test. The assessment and any decision to take or not take action must be based on the strength and admissibility of the evidence gathered as well as any gaps in the evidence.</p>
	<p>Available defences</p>	<p>When deciding whether or not to take enforcement action, we will consider whether the entity has any available or credible legal defences and the evidence available to prove those defences. However, if the issue is finely balanced, impartial decision-makers, such as the courts, may be better placed to resolve the matter.</p>
	<p>Support other regulatory bodies</p>	<p>We will consider the full regulatory environment, the relevant functions and powers of other regulatory agencies and the potential for regulatory overlap. We will liaise with other regulatory agencies and work with them in appropriate cases.</p> <p>We may also consider how the proposed enforcement action impacts on other stakeholders, such as trustees and creditors.</p>
	<p>Potential outcomes</p>	<p>We will consider all relevant potential outcomes of proposed enforcement action, including in respect of specific entities and overall financial system stability, and whether the action is likely to result in a conviction, compensation, penalty, or public censure.</p> <p>Additionally, we will consider whether other enforcement or supervisory responses are available or appropriate (e.g. warning, public notice, court enforceable undertakings). We will consider all available options for resolving a matter.</p>

- Q5: Do you have any comments on the high-level descriptions of the criteria?
- Q6: Do the descriptions above provide clarity on how we apply the criteria and factors when making enforcement decisions? If not, what further information would better help you understand how the criteria and factors are applied?
- Q7: Are there any additional criteria and/or factors that you think should be included? Please explain how any additional suggested criteria and/or factors would improve our decision making process.
- Q8: Do you have any additional comments on the criteria and factors?

## 7 How the criteria link to the principles

The principles and criteria are intended to support and promote each other. The principles describe our approach to enforcement: the Bank should be a risk-based, proportionate, and transparent regulator. The principles should not be applied specifically to the given facts of a case, rather they are the lens through which the criteria are assessed.

For example, if we are considering the deterrence value of a particular enforcement outcome, we may weigh the deterrence value of that action against the seriousness of the non-compliance in question and ask ourselves whether the proposed enforcement response is proportionate to the harm caused through the non-compliance.

Below we illustrate how some of the criteria relate to the principles. The examples described below are illustrative only and the considerations must be weighed and assessed on a case-by-case basis.

- The **seriousness of conduct** criterion and its constituent factors relate to the **risk-based** and **proportionate** principles.

If the 'prevalence of non-compliance' is high, the risk-based principle should indicate that greater enforcement resource should be applied to that matter. Conversely, if the risk of 'magnitude and impact of the non-compliance' is low, then the proportionality principle may indicate that a lower level of enforcement outcome may be required, such as a public notice, warning or an enforceable undertaking.

- Analysis of the 'the entity's conduct in resolving the breach' and 'cooperation with RBNZ in reaction to the breach' factors under the **responsiveness** criterion will contribute to the assessment of the **proportionate** principle.

If the entity promptly and voluntarily brought the matter to our attention, cooperated with our investigation, and took proactive steps to remedy the breach, a higher-level enforcement response such as prosecution may not be proportionate.

- The 'deterrence value' factor under the **public trust and confidence** criterion supports all three of our enforcement principles. An assessment of the likely effectiveness of deterrence on the entity's future conduct and the conduct of other entities in the industry will influence the resource that we are willing to spend on a particular matter (**risk-based**) and the appropriate level of the enforcement response (**proportionate**). Deterrence also relies on the publication of enforcement responses so that other industry participants are aware of the outcome, this aligns with our **transparent** principle.

Where the prosecution of a key industry participant may prevent that entity from continuing to engage in the conduct and will send a message to the wider industry to promote overall compliance, the decision to undertake that prosecution may be proportionate and the devotion of significant enforcement resources to that investigation may be appropriate on a risk-based model.

- The 'consistent and fair' factor under the responsiveness criterion supports the **proportionate** and **risk-based** principles. Considerations of consistency and fairness will weigh heavily in determining the ultimate enforcement outcome and the amount of enforcement resources that we are willing to devote to a matter.

We will endeavour to respond constantly to similar conduct by different entities, while taking into account the unique factors of an individual case. For example, high-risk matters should be dealt with in a consistent manner to other high-risk matters, taking into account the unique factors of each individual case and assessing the overall fairness of the enforcement response.

- The 'support other regulatory bodies' factor under the **efficacy** criterion supports the **proportionate** and **transparent** principles. It does this by ensuring that we communicate and cooperate with other regulators to reduce the risk that an entity may be placed under excessive regulatory burden or doubly-penalised for substantially similar non-compliance which would not be proportionate to the breach.

**Q9:** Do the examples above illustrate the link between the criteria and principles, and how they are applied? If not, what further information or examples would better help you understand this link and application?

## 8 Links to our strategic priorities

We are *kaitiaki* (guardians) of New Zealand's financial ecosystem, working to enable stability, economic wellbeing, and prosperity for all New Zealanders. We achieve this by promoting the maintenance of a sound and efficient financial system through adherence to our core values – *Wānanga*/Innovation, *Tauira*/Integrity, and *Taura*/Inclusion. These values guide decision-making and enable us to be a better *kaitiaki*. In developing the enforcement principles, we have ensured they support and reinforce our values.

- **Wānanga/Innovation** – we will encourage the use of innovation for greater efficiency in financial markets and recognise that the benefits of financial innovation need to be balanced and weighed against a range of relevant risks.

- **Tauira/Integrity** – our regulatory approach seeks to build confidence in the financial system and institutions’ compliance with regulatory requirements. We will apply a trusted, transparent, and consistent escalating regulatory response to non-compliance, pursuing regulatory excellence and consistent with the commitments of our Relationship Charter.
- **Taura/Inclusion** – we recognise that our financial system is made up of a range of different entities across a number of different sectors, all of which have a role in maintaining a sound and efficient financial system.

Q10: Do you have any comments on how the principles and criteria link to our strategic priorities?

## 9 Risk appetite statement

The enforcement principles will allow us to conduct investigations and make decisions on enforcement responses in line with our financial stability risk appetite. In particular, making decisions in accordance with our enforcement principles will:

- support credible enforcement of compliance breaches by regulated entities, where our enforcement criteria are met;
- support our goals of educating, encouraging, and enforcing compliance, to mitigate the impact of non-compliance, poor conduct, and firm failures; and
- reduce the risks of poor supervisory outcomes that could impair the health of the financial system, undermine economic wellbeing, and affect public confidence; and
- reduce the risks of events that materially damage financial system stability, including the failure of high-impact firms or firms that are systemic in the regulated industry.

## 10 Further enforcement guidance being developed

Over the next six months, we will produce further guidance that will be informed by the principles and criteria which will be applied across the entire enforcement investigation and decision-making process.

Q11: Is there any additional guidance that would help you understand our enforcement function?

Q12: Are there any final comments you have on this consultation paper?

## 11 Summary of questions

Table 3: Summary of questions

<b>Q1:</b>	Do you have any comments on the high-level descriptions of the three principles?
<b>Q2:</b>	Do the descriptions on page 6 provide clarity on how we apply the three principles? If not, what further information would better help you understand the application of the three principles?
<b>Q3:</b>	Are there any additional principles that you think should be included? Please explain how any additional suggested principles would improve our decision-making process.
<b>Q4:</b>	Do you have any additional comments on the principles?
<b>Q5:</b>	Do you have any comments on the high-level descriptions of the criteria?
<b>Q6:</b>	Do the descriptions above provide clarity on how we apply the criteria and factors when making enforcement decisions? If not, what further information would better help you understand how the criteria and factors are applied?
<b>Q7:</b>	Are there any additional criteria and/or factors that you think should be included? Please explain how any additional suggested criteria and/or factors would improve our decision making process.
<b>Q8:</b>	Do you have any additional comments on the criteria and factors?
<b>Q9:</b>	Do the examples on page 11 illustrate the link between the criteria and principles, and how they are applied? If not, what further information or examples would better help you understand this link and application?
<b>Q10:</b>	Do you have any comments on how the principles and criteria link to our strategic priorities?
<b>Q11:</b>	Is there any additional guidance that we could develop that would help you understand our enforcement function?
<b>Q12:</b>	Are there any final comments you have on this consultation paper?

## 12 Have your say

We encourage anyone to provide comment throughout the Review. We are particularly seeking commentary on the questions in this consultation document summarised above. However, we would also welcome any general comments on enforcement principles and criteria.

Use this email: [Enforcement.Consultation@rbnz.govt.nz](mailto:Enforcement.Consultation@rbnz.govt.nz) to provide comments and include "Enforcement Criteria & Principles Consultation" in the subject line. Please clearly indicate which question or section your comments relate to.

Comments or submissions should be received by 5pm on 24 November 2021. Submissions received after this date will not be considered.

It is our practice to publish submissions received unless specifically requested not to. We may also publish an anonymised summary of submissions received.