

26 September 2019

Cavan O'Connor-Close
Manager, Prudential Operational Policy
Financial System Policy and Analysis Department
Reserve Bank of New Zealand
PO Box 2498
Wellington 6140

Sent by email: fmibill@rbnz.govt.nz

Dear Cavan,

Securities Industry Association submission on Financial Market Infrastructures Bill: Exposure Draft

Please find attached the submission prepared by the Securities Industry Association (**SIA**) in respect of the **Financial Market Infrastructures Bill: Exposure Draft** (August 2019).

The Securities Industry Association represents the shared interests of sharebroking, wealth management and investment banking firms that are accredited NZX Market Participants.

SIA members employ more than 500 accredited NZX Advisers, NZDX Advisers and NZX Derivatives Advisers, and more than 400 Authorised Financial Advisers nationwide. The combined businesses of our members work with over 300,000 New Zealand retail investors with total investment assets exceeding \$80 billion, including \$40 billion held in custodial accounts. Members also work with local and global institutions that invest in New Zealand.

No part of this submission is required to be kept confidential. Note, some SIA member firms may make an individual firm submission based on issues specific to the business of their firm. Those issues and views may not be reflected in this submission.

If you have any questions about this submission or require further information, in the first instance, please contact:

Bridget MacDonald, Executive Director, SIA
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Yours faithfully



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Chairperson
SECURITIES INDUSTRY ASSOCIATION
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Introduction

1. The Securities Industry Association (**SIA**) thanks the Reserve Bank of New Zealand (**RBNZ**) for the opportunity to make a submission on the *Financial Market Infrastructures Bill: Exposure Draft* (August 2019).
2. SIA agrees that well-managed and operated Financial Market Infrastructures (**FMI**) are essential to the operation of a sound and efficient financial system.
3. While we are respectful of the purposes and intentions of the draft Financial Market Infrastructures Bill (**Bill**), SIA has concerns with some of the proposed legislation that is likely to result in unintended consequences for NZX Clearing Participants. These points are discussed below.

Regulation of designated FMIs under the Bill

Direction to participant to comply with FMI's rules

4. We refer to section 81, where the rationale for the power proposed to give a direction to a participant to comply with the FMI's rules in accordance with the direction is unclear. SIA believes that if the FMI's rules are inadequate or not adequately enforced, then the remedy should be to amend the rules or the enforcement mechanism, and not to give directions to participants.

Enforcement and penalties

5. The Bill proposes a criminal liability regime. For example, an intentional failure to comply with a direction notice under section 81 would give rise to criminal liability for a participant (section 82), and also potentially its directors (section 128).
6. We consider that criminal liability for any breaches of requirements by participants would be disproportionate. The cover note for the Bill does not explain why criminal liability is thought to be appropriate for participants and their directors. As set out in the Legislation Design and Advisory Committee's Legislation Guidelines:¹

Offences are one of a variety of alternative mechanisms for achieving compliance with legislation and should not be seen as the default response to breaches of legislation. Before settling on enforcement by criminal offence, officials must conduct an analysis as to whether the policy objective can be achieved effectively:

- *without state intervention, for example, where it can be achieved by self-regulation by the applicable industry, or through civil claims or civil complaints investigation processes;*
- *by non-criminal state measures, such as education campaigns, informal warnings, or other methods of persuasion, such as codes of practice or national standards; or*
- *by other forms of State enforcement, such as civil remedies (including pecuniary penalties or taking action under a licensing regime).*

¹ Legislation Design and Advisory Committee, *Legislation Guidelines: 2018 Edition*, Chapter 24.

7. This analysis does not appear to have been provided as part of the consultation process. We suggest that it would be appropriate to do so.
8. In our view, a civil pecuniary penalty would be more appropriate for breaches by participants. Participants are taking part in a system provided and operated by another party, not operating the system themselves, and so a lower level of liability is appropriate. In addition, financial penalties are likely to be a sufficient deterrent to non-compliance.
9. If criminal liability is to apply, we believe that there should be an “absence of negligence” defence where a participant has taken reasonable steps to comply. Participants should not be liable for a breach if, for example, where the breach is due to circumstances outside their control. In the Bill as drafted, there is no defence to the section 82 offence.

Increased compliance costs

10. SIA understands that the proposed Bill could result in additional requirements being imposed on NZX Clearing’s compliance systems and processes that won’t necessarily enhance risk mitigation, but could result in increased compliance costs for NZX Clearing that would likely then be passed on to NZX Clearing Participants.

Conclusion

11. In general, SIA supports an enhanced regulatory regime that is fit for purpose and aligned with international best practice.
12. SIA welcomes further discussion on the points raised in this submission. Please get in touch at your convenience should you like to meet with SIA or its members or if additional information is required. Contact: Bridget MacDonald, Executive Director, Securities Industry Association. T: 021 345 973 E: bridget@securities.org.nz