Submission on discussion document: *Exposure draft: Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2019*

Your name and organisation

Name	Peter Kenny
Organisation	AMP Wealth Management New Zealand

Response to discussion document

General observations and recommendations

The disclosure regulations are a lesser-heralded aspect of the new financial advice regime. Nonetheless they are a critical aspect to get right. Ensuring that relevant, meaningful disclosure is provided to consumers matters. The current disclosure regime fails on both counts.

Recapping points from our May 2018 submission on the topic:

1. Deficiencies in the current regime should be learned from and not repeated. These include:

    1) insufficient prominence to commissions and incentives
    2) adviser registration status causes confusion from differing requirements
    3) obligatory generic disclosure is not valued/considered by clients
    4) long, impenetrable secondary disclosure is also not valued
    5) legalistic prescribed language bamboozles consumers, and
    6) one-off delivery means it's treated as a compliance irrelevancy/hurdle.

    The proposed regulations largely would address points 2, 4, 5 and 6. Even for those, however, we remain concerned that the repetitive aspects of the proposed requirements will risk repeating 4's problems today. As for 1 and 3, these do not seem to have been addressed adequately. Specifically, prominence to commissions and incentives is diluted when things that consumers will not be interested in, let alone understand, such as "licensing information" distract them from this critical conflict-ridden information. And regarding 3, examples of generic disclosure remain, some repeated up to three times.

2. For benefits to be delivered to New Zealand consumers it is essential for disclosures to be simple, meaningful, very brief, and unobtrusive. We do not consider that these aims would be met with the regulations as drafted for reasons outlined above, though with refinements to the Regulations there remains potential for this to be achieved.

3. Disclosure should be centralised/web delivered, unless critical to assessing a recommendation or pertinent to an immediate consumer decision/need/warning. We consider that the draft regulations fail to deliver on the opportunity to provide most disclosure on websites (or other publicly accessible means). A prominent example is the proposed requirement to provide complaints handling and dispute resolution information when financial advice is given. We consider this unnecessary and, indeed, counter-productive. Unless there is an actual overt complaint, there should not be a need to disclose this information (in detail). In fact, it risks making the client-adviser relationship appear inherently combative, which should be avoided.

The March 2019 Cabinet Paper[1] outlined the following objectives for the disclosure requirements:

1. provide consumers with the key information they need;
2. provide consumers with the right information at the right time;
3. provide information in a way that is accessible for consumers;
4. provide consumers with effective disclosure, regardless of the channel used; and
5. not impose unnecessary compliance costs on the industry

Again, we consider the draft regulations do not optimise the delivery of these objectives; indeed, the proposed regulations probably will fail on these unless modifications are made. Our specific areas of feedback in relation to the discussion document questions, below, outline those modifications in detail.

In general terms, however, we consider:

1. **key information** may not be provided unless more precise wording is used in some instances. For example, making it clear *dollar* value disclosure of commissions and fees is required by default, not percentages or other opaque descriptions (unless dollar value disclosure is impracticable).
2. **the right information at the right time** is only partly delivered. Particularly, the *wrong* information is provided too often with the regulations as drafted. For example, too much information is often required and at the wrong time; complaints information is a case in point, proposed as being required even when no complaint has been received (including at the point of advice recommendations).
3. **accessibility** is partly improved but could be better still. More use should be made of website disclosure. Where requested (rather than offering it by default) this can be supplemented for those who cannot or choose not to access website-delivered disclosure.
4. **effectiveness** is reduced as more disclosure is added; this is the prime area for improvement – i.e. disclose once and only once should be the default aim.
5. **compliance costs** will increase with three distinct points at which disclosure is required. This also fails to consider common industry practice such as one-meeting advice. In such cases the *nature and scope* and *when financial advice given* steps will be temporally indistinguishable. It should be clarified in the Regulations that these points may occur concurrently.

[1] https://www.mbie.govt.nz/assets/b6cd7a7516/cabinet-paper-regulation-of-financial-advice-disclosure-and-multiple-prividers.pdf

Responses to discussion document questions

1	Will the proposed record-keeping requirement be workable in practice?

The record-keeping requirements of proposed reg 192A (prescribing that proof of disclosure having been provided at nature and scope (reg 229D), at time advice given (reg 229E) and if complaint received (reg 299F)) appear simple in principle.

Thinking practically about this, however, for face-to-face and phone-delivered advice, various mechanisms of proof are acceptable such as signed acknowledgement of receiving the disclosure or a retained email of the disclosure that was sent to a client. Verbally-delivered disclosure may prove more challenging and require systems changes for some FAPs to comply. This is because the multiple points of disclosure increase the complexity. For example, all those who provide regulated financial advice will be required to be aware of the requirement, and keep a record of the disclosure provided, when a complaint is received. Although the theory of what constitutes a complaint is relatively easy to identify (AS/NZS 10002:2014), the reality is that sometimes FAPs will respond to complaints initially when they appear more as qualified enquiries rather than overt complaints. It may be easy to miss the precise tip-over point at which the enquiry becomes a complaint. Further, from our experience, many expressions of dissatisfaction with a service are treated as complaints by the provider despite the customer not always wanting it treated as such. Mandating that complaints-related disclosure is required in such circumstances (and retaining records of that disclosure) is not a good customer outcomes-focused approach.

2	Do you have any comments on the drafting of the Regulations that will require information to be made publicly available?

Yes. Some of the publicly-available information should be exclusively addressed in that domain. It should not be repeated at the *nature and scope* and *when financial advice given* steps. Specifically, these are:

- LICENSING INFORMATION (proposed Schedule 21A, cl 4(1)(a) and (b)), which is technical licence-related information. Such details will be of interest to few consumers and/or beyond many consumers' understanding, and
- COMPLAINTS HANDLING AND DISPUTES RESOLUTION (proposed Schedule 21A, cl 4(1)(a) and (b)), which should be exclusively detailed only in the publicly available information arena. This is because, apart from when there is an actual complaint, providing this information in the public domain should be enough and not distract consumers from key disclosures such as conflicts and remuneration.

In relation to NATURE AND SCOPE OF ADVICE (proposed Schedule 21A, cl 4(1)(a)(c) to (g)), there may be issues for FAPs in consistently describing the *types* of advice and *types* of financial advice products in relation to which advice is given. With the distinction between personalised versus class advice and category 1 versus category 2 products gone, there is potential for a proliferation of descriptors and inconsistency to occur. For example, ***type***:

- in relation to products, could be "insurance", "life insurance", or "life, trauma, disability and income protection insurance", and
- in relation to advice that does not consider a consumer's personal circumstances or goals, FAPs could use various terms like "general", "generic", "class", or "group".

Inconsistency is certain unless regulatory guidance or another means is employed to ensure

that FAPs describe the ***types*** at appropriate similar levels and consistently.

AVAILABILITY OF INFORMATION. Schedule 21A, cl 4(1)(n) is of questionable value. This publicly-disclosed information commonly will be served on FAPs' websites. As such, making a statement regarding information being available as "an electronic copy" would make little sense because the reader would already be reading that electronic copy. The policy intent of this requirement seems to be to obligate a FAP to provide its publicly disclosable information to consumers in the form that they want it. If that is the case, that specific requirement should be imposed on the FAP. Correspondingly, however, no statement should be necessary on publicly-delivered disclosure itself to state overtly that it is available, when in most cases it will already be being read.

3	Do you have any comments on the draft Regulations that will require the disclosure of information when the nature and scope of the advice is known?

Although in theory splitting the *nature and scope* and *when financial advice given* steps works, in practice much advice-delivery occurs in a single meeting or within a short time frame of only days. It should be clear that it is permissible to combine these two "trigger" points for disclosure where the contemporaneousness is clear or likely. Particularly, if these steps make pausing to provide *nature and scope* disclosure undesirable for the financial adviser and, more importantly, undesirable for their client, it needs to be avoidable.

LICENSING INFORMATION. Schedule 21A, cl 5(1)(a) and (b) would mandate information that is unlikely to be of interest, or beyond many consumers' understanding. Such information should be disclosed on the FAP's website (or other publicly-available-mechanism) only. These paragraphs could be restructured to require a reference/statement as to its *availability* of the information rather than distracting the client with details that are unlikely to be of interest to them or impact the likelihood of their using the FAP's services.

4	Do you have any comments on the draft Regulations that will require the disclosure of information when the financial advice is given?

FEES OR EXPENSES. Schedule 21A, cl 6(1)(d) may require clarification insofar as what "in relation to the giving of the advice" extends to, and also the term "connected with the giving of the advice". Clearly a direct fee for advice is in scope. However, in the example provided (Alice, engaged by the FAP ABC Limited), "a monthly portfolio management fee" is indicated as something Alice must be informed of. Such a management fee may have no ongoing connection to Alice's advice. Clarity is required regarding "connected".

CONFLICTS OF INTEREST AND INCENTIVES. Schedule 21A, cl 6(1)(f)(iii) states the "amount or value" of a commission or other incentive must be provided. An amount or value appears intended to mean a dollar figure. However, the parenthetical wording that follows, i.e. "(or how that would be determined)" has created ambiguity. Some FAPs will read this as providing an alternative, and, perhaps provide a percentage or other referential explanation as to commissions. This subparagraph should be reworded to ensure that where the dollar amount is known, able to be estimated, or will fall within a range or series of potential values, it must be stated in dollar terms. Consumers are poorly informed when such values are instead expressed in obscure ways. For example, "I will receive $5,000" is clear. Conversely, "I will receive an upfront payment of 200% of API" is not. Both may meet the proposed regulation, but only one prioritises the customer's interests. Consequently, this subparagraph should only allow referential or "how it would be determined" statements where it really is not possible to state the amount, range or, or potential amounts depending on factors yet

unknown. A practical example may be: "If your health is assessed as 'standard' I will receive $5,000 commission from *provider*. This could be $7,500 if you receive a 50% health loading or $10,000 if you receive a 100% health loading."

COMPLAINTS HANDLING AND DISPUTES RESOLUTION. Schedule 21A, cl 5(1)(g), (h) and (i): these paragraphs should be deleted. There is no need to repeat complaints disclosure information when it is already disclosed publicly when there has not been a complaint. A one sentence reference to things that are disclosed publicly, and where to find it, would seem to be a suitable approach, i.e. something like: "Information about licensing status, complaints and disputes resolution procedures, and duties under the Financial Markets Conduct Act 2013 are available on our website, *website.co.nz*"

DUTIES INFORMATION. Schedule 21A, cl 5(1)(j) and cl 5(2): this paragraph and subclause should be deleted. This is information that also should be addressed in public disclosure. It is questionable whether citing duties under the FMCA is of interest to many consumers. However, a one sentence statement, provided it was prescribed text and very short, could minimise undue distraction from key information (fees, expenses, and conflicts) created by this information. We consider prescribed text within public disclosure as the optimal solution. Clause 5(2) is particularly unhelpful because, given these duties are universal, "so long as it gives an adequate statement of their general effect" seems inappropriate. Enabling and endorsing variability will mean some FAPs overemphasise, whereas others will inadequately state these duties.

Making these changes would significantly reduce the detail of the disclosure provided and increase the likelihood that consumers would focus on important fees, expenses, and conflicts information and not on the abstruse and/or not yet relevant ones.

5	Do you have any comments on the draft Regulations that will require the disclosure of a provider's complaints handling and dispute resolution processes when a complaint is received?

As noted in the answer to Question 1, above, although this seems sensible in theory, the reality is that complaints about advice are not always overt. The requirement should be tempered to make it clear that "complaint received" requires a formal acknowledgement/confirmation from the client that they are literally complaining. Provided that is included, the requirements to provide details of the complaints process (if any) and the disputes resolution process are appropriate. However, it would be optimal if it was confirmed that providing a link to the website where such information is located is adequate.

Regulation 229F(3)(b) requires revision: "a failure to provide a service" alone may not be grounds for a complaint. For example, the service may not be something that the FAP even provides. Changing this to "a failure to provide a financial advice service available from P" or similar could address this gap.

It is also worth noting that complaints about advice versus about administration or products are relatively rare. Guidance may be required for financial advisers to ensure that they are aware that these provisions relate to complaints about advice only and not all the complaints that they may receive.

6	Do you have any comments on the draft Regulations that set the manner in which information must be disclosed?
	Regulation 229G(1)(b), "if it is presented with other information, is given prominence", is not sufficiently precise. Does this mean "within" another document is allowed? (e.g. including the disclosure information within a Statement of Advice) Or does it only permit the "Disclosure Statement" to be made in parallel with other documentation, but is still required separately? We *presume* it may be provided within another document provided the disclosure-related information is sufficiently prominent? Regulation 229G(1)(c), requiring the information to be given free of charge may be problematic. For example, if "presented with other information" such as a Statement of Advice, if the financial adviser charges a fee for advice then there is a blurring of that charge? Regulation 229G(2), requiring "hardcopy or an electronic copy if requested" is ambiguous. Does this mean an electronic copy, if requested, but otherwise a hardcopy is mandatory? Clearer wording is required here. Also, if given verbally (and the record is an audio recording), would providing a copy of the digital recording be considered "electronic"? Requiring a hardcopy transcript of verbally-delivered disclosure could be a significant burden to FAPs.
7	Are there instances in your business when regulation 229D might apply to someone who is not the one to give advice to the client? Please give examples and provide any comments on how the draft Regulations apply in such scenarios.
	This may be possible, for example, where a nominated representative refers a customer as part of the overall advice process to a website that provides digital advice for a specialist aspect of the overall advice being provided. Provided combining disclosure steps is accommodated, and removal of mandatory repetitive disclosure is addressed in the final regulations, this type of scenario should be workable.
8	Do you have any further comments on new regulation 229A to 229H of the draft Regulations?
	Consideration should also be given to disclosure that would assist a client determine whether advice to replace a product is being made where P and/or A stand to gain substantially more than the client. Particularly in the case of life insurance products, it is common for the replacement of a product to involve many thousands of dollars of "new business" upfront commission. Sometimes there may be minimal benefits to the client of perhaps in the order of only a hundred dollars and/or marginal product feature differences. When the risks of such replacement are not adequately explained and/or fulsome like-with-like comparisons of the key differences between the incumbent and recommended products are not provided, the asymmetry of information combined with the inherent conflict of interest in such a recommendation is stark. It should be clear to a client in a replacement advice scenario the difference in commission that will go to P and/or A if the recommendation is followed as well as the commission that which would be received if the status quo occurred, or otherwise if an adjustment to the existing product is made, e.g. increasing or decreasing the incumbent cover rather than replacing it. The FMA has had particular focus on life insurance replacement business advice. It is noticeably absent from the Regulations, and we suggest that this omission, if left unaddressed, will contribute to ongoing poor customer outcomes relating to replacement

business.

We would be happy to share findings, wordings, and templates with MBIE that we have used in relation to life insurance replacement business advice. This is an area where we have observed marked reductions in such business when part of the requirements placed on advisers involved disclosing like-with-like policy information, dollar remuneration comparisons, mandatory lists of inherent risks involved, and so forth.

9	Do you have any further comments on new Schedule 21A in the draft Regulations?

Schedule 21A, cl 4(1)(e) could be extended to prescribe that the FAP should disclose the approximate level of remuneration from new business sales attributable to each of the providers listed. This would aid consumers in ascertaining whether the adviser/FAP who they are dealing with truly ***uses*** many/several providers or whether there is one or two that are used, and the remainder are there to provide an appearance of independence/impartial advice.

More examples should be provided – ideally one for every paragraph under each regulation. If this is considered too much, including examples where advisers have traditionally had trouble thinking about what may be relevant is needed – a leading example is *conflicts (other than a commission or other incentives)* (i.e. Schedule 21A, cl 6(1)(e)).

There is scope for some wording to be prescribed where the information is universal. The obvious example is the *Duties information* in Schedule 21A, cl 5(1)(j) (notwithstanding that we consider this should be removed from cl 5 and that it be moved to public disclosure).

An additional requirement should be added to *when financial advice given* disclosure is provided. If the LICENSING INFORMATION, COMPLAINTS HANDLING AND DISPUTES RESOLUTION, and DUTIES INFORMATION is omitted, as we hope it will be, a one sentence statement that these things may be found in the publicly disclosed information should be retained. As suggested above, this could be: "Information about licensing status, complaints and disputes resolution procedures, and duties under the Financial Markets Conduct Act 2013 are available on our website *website.co.nz*"

10	What (if any) transitional provisions should be included in the regulations?

Creating transitional provisions between the old AFA, QFE and RFA requirements is impracticable, so any transitional relief would have to be in the form of exemptions or phasing in of provisions. As such, it may be simplest, and an elegant solution, to add regulation 229I enabling the FMA to provide transitional relief within a transitional FAP licence. That would enable FAPs that consider they cannot meet the requirements to justify their concerns. The FMA, which will be reviewing transitional licence applications, could determine whether the issue really is so material that it is too hard for the FAP to implement according to requirements by June 2020 and, on a case-by-case basis, allow the FAP to postpone such aspect(s).