To: Ministry of Business, Innovation and Employment (*MBIE*)

on the Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2019

8 November 2019

INTRODUCTION

Chapman Tripp welcomes the opportunity to submit on the Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations (the *Regulations*).

We have no objection to our submission being published.

ABOUT CHAPMAN TRIPP

We have been at the forefront of advising on the Financial Advisers Act 2008 (*FAA*), the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (*FSP Act*) the Financial Markets Conduct Act 2013 (*FMCA*) and, more recently, the Financial Services Legislation Amendment Act 2019 (*FSLAA*).

We have experience of the full spectrum of compliance issues from the FAA and FSP Act and understand the issues, challenges and frustrations the industry has faced.

BRADLEY KIDD – PARTNER

TIM WILLIAMS – PARTNER

PENNY SHEERIN – PARTNER

PHOEBE GIBBONS – SENIOR ASSOCIATE

SUBMISSIONS ON THE DRAFT REGULATIONS

Your name and organisation

Name	Bradley Kidd, Tim Williams, Penny Sheerin and Phoebe Gibbons
Organisation	Chapman Tripp

Summary of our submissions

We welcome the opportunity to submit on the draft Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations (*Regulations*). Our submissions focus on three main themes:

- the likelihood that there will be a large amount of unnecessary repetition between the disclosure requirements in respect of initial information and additional information;
- the length of the disclosures that will need to be made for public information, initial information and additional information (which could also undermine the feasibility of verbal or other more agile forms of disclosure); and
- the need to include an appropriate materiality threshold in respect of conflicts of interest and other types of information.

We also submit on a range of other, more detailed points below.

Responses to discussion document questions

1	Will the proposed record-keeping requirement be workable in practice?
	We believe that the views of industry will be particularly important on this issue, as the additional lengthy disclosures contemplated by the Regulations will significantly increase the volume of material required to be retained by providers (which will have various consequences, such as requiring increased electronic or physical storage capacity). **How to keep records of verbal disclosure is not clear** We believe the record keeping obligation needs to flexible enough to reflect the possibility that disclosure may be given verbally or electronically in a manner that does not easily lend itself to the keeping of an individual record for each client. This would be consistent with the flexibility given to the manner of disclosure in regulation 229G(4). **Record keeping should not be required where no regulated financial advice given** We query the need to keep records if regulated financial advice is not ultimately provided to a client. We believe that there will be many examples of clients making enquiries to a provider that mean that the nature and purpose is promptly known by that provider, and there are reasonable grounds to conclude that advice would be given, but in the end advice is ultimately not given. We do not believe that this outcome serves any real purpose, as in the absence of regulated financial advice being given, it is difficult to see any benefit in requiring records to be kept.
2	Do you have any comments on the drafting of the Regulations that will require information to be made publicly available?
	Requirement to name all product providers could be too onerous

We believe the requirement in Schedule 1, clause 4(1)(e), to state the names of product providers could be onerous for some providers, and provide little benefit to customers:

- For some types of advisers, it will be workable (e.g. advisers advising on a small, defined set of products such as mortgages).
- For other types of advisers, such as sharebrokers, this could extend to dozens (if not hundreds) of providers. For example, it would not be unusual for sharebrokers to give advice on many listed companies, as well as fund and other products.

This issue could be solved by allowing disclosure of the class of products on which an adviser may advise (e.g. "listed companies"), if disclosure of every provider is impractical or would otherwise result in a lengthy and largely meaningless list of products. To this end, the approach in clause 4(2), Schedule 21A could be applied also to clause 4(1)(e), allowing the description of products as a class, and specifically stating that providers need not itemise each separate product provider by name if it is impractical to do so.

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?

Clause 5(1)(h) of Schedule 21A requires disclosure of *reliability events* that have happened to the financial advice provider and/or the financial adviser or nominated representative in the five year period prior to the provision of the disclosure information. The term "reliability event" is defined broadly in clause 3, but appears intended to require disclosure of events that have resulted in *publicly disclosed* sanctions.

We submit that the term "regulatory action", where it is used in clause 3(1)(b) of the definition of reliability event, requires clarification to make it clear that it means regulatory actions that have been made public or that have resulted in a publicly notified sanction. Without such a clarification, the Regulations will require disclosure of a large range of regulatory actions that are intended to remain private. For example:

- Would a letter from a regulator providing recommendations for improvement as a result of a monitoring visit be a "regulatory action in relation to a contravention"? We assume it is not the intention to require disclosure of such items.
- Disclosure of a private warning should not be required, as the decision to make the warning private was presumably because the relevant regulator does not believe the matter ought to be publicly disclosed. It would be strange if the Regulations were to "trump" that decision by requiring disclosure.

We further submit that the mere fact that a publicly notified regulatory action has been taken in respect of a financial advice provider, financial adviser or nominated representative is not of itself determinative of whether disclosure of that action is relevant to the provision of financial advice by that person. The term "regulatory action" should, therefore, also be limited to actions that have some degree of relevance to the provision of financial advice.

See also our comments below in response to Question 4.

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

Avoid duplicative disclosure

We consider that there is significant overlap between the "initial information" and the "additional information" that must be disclosed. For example:

- in both cases identifying information is required (see clause 5.2(a) and clause 6.1(a)

	of Schedule 21A); and • similarly, conflict of interest information is required under both clause 5.2(e) and clause 6.1(e) of Schedule 21A. Where the same information will be disclosed as part of both the initial information and additional information, in our view there is no need for it to be disclosed again. Apart from being duplicative, it could confuse customers and add unnecessary length to the additional information disclosed. We therefore submit that the language already used in clause 6.1(d) of Schedule 21A – *"to the extent not already given under clause 5.2(d)"* – should apply generally to disclosure of additional information under clause 6. **Allow combined disclosure (where appropriate)** In addition, there will be many instances where there is a very short interval (or no interval) between the time at which the nature and scope of the advice is known and advice actually being given. We submit that there should be flexibility to allow *combined* disclosure of the initial information and the additional information, to cater for this occurrence. If this is not done, then it could potentially lead to a "stilted" customer experience, which is interrupted by a rigid requirement to disclose the initial information, pause, then disclose additional information. We see little customer benefit in this outcome, and in fact it is more likely to confuse customers and lead to information overload, or a reluctance to proceed with an advice conversation when the process is seen as being too arduous. This flexibility could be easily achieved by expanding the regulation 229G to allow a provider to combine information where they consider it appropriate, taking into account customer needs.
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?
	Definition of "complaint" Regulation 229F(3) currently defines a complaint simply to "include" a complaint about advice given, conduct or a failure to provide a service or give advice. We submit that further clarity is required as to the definition of what constitutes a complaint. For example, providers routinely receive negative comments from customers, but often they are not "complaints" in the ordinary sense and, in many instances, are easily remedied. We do not believe that these types of circumstances should be elevated to "complaint" status. Instead, a complaint should be limited to a scenario where a "formal" complaint is made, such that the seriousness of the consequences (as will be disclosed to the customer under regulation 229F), is warranted.
6	Do you have any comments on the draft Regulations that set the manner in which information must be disclosed?
	We have no comment on regulation 229G generally, although we believe that the record keeping obligation in relation to disclosure should be flexible enough to accommodate the various ways in which disclosure may be made (see our answer to Question 1 above for further context).

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.

We anticipate that, for many of our clients and other providers, it is entirely possible that regulation 229D could apply to someone who does not ultimately give the advice (e.g. a person in a call centre fielding an initial enquiry before handing it over to a financial adviser or nominated representative).

Accordingly, it is important that the Regulations recognise that this occurrence could be quite common, and does not result in any duplication of disclosure material (or unnecessary disclosure).

8	Do you have any further comments on new regulation 229A to 229H of the draft Regulations?

Disclosure will be too lengthy

We are concerned that, viewed in the round, the requirements of clauses 5 and 6 of Schedule 21A could lead to lengthy and confusing disclosure. The level of prescription in these clauses is significant, which does in our view give rise to a real risk of providers "over-disclosing", to ensure they do not risk omitting something that should (with the benefit of hindsight) have been disclosed. This could, in turn, undermine the objective of "clear, concise and effective" disclosure.

We believe the views of industry participants will be very relevant on this topic. We would also encourage MBIE to look to offshore jurisdictions (such as Australia and the United Kingdom) to assess the extent to which length of disclosure has been problematic in those jurisdictions.

Will verbal / other types of disclosure be possible?

An outworking of a disclosure regime which gives rise to overly lengthy disclosure is that disclosure will not be easily able to be provided verbally, or in other more "agile" ways (such as on a tablet or through online chat). We encourage MBIE to consider this factor when assessing the risk of lengthy and/or repetitive disclosure (which we outline above).

Updating a disclosure

We are not convinced that the requirement for updated disclosure under regulation 229D(7) or 229E(5) is necessary if nothing has changed since disclosure was last made.

If a person has received the initial information – and has established (or already has) a relationship with a provider – and nothing changes before the next engagement with the customer, we see little customer benefit in updating the initial information disclosure. We query what customer outcome that would serve (more likely, it would confuse customers).

We believe the same reasoning applies to the requirement to provide updated additional information disclosure in regulation 229E(5).

We therefore submit that:

- the 12 month "look back" should not apply to the requirement in regulation 229D(7) and 229E(5); and
- accordingly, that updated disclosure of initial information and additional information only be required where there has been a material change to the information, or if the customer requests it.

We consider that this would be consistent with the statement made in paragraph 40 of the

	Cabinet Paper entitled "*Regulation of Financial Advice: Disclosure and Multiple Providers*" (*Cabinet Paper*), where the Minister recognised *"that many financial advisers have an ongoing relationship with their clients and that providing repetitive disclosure could add unnecessary compliance costs for them, particularly if the service provided remains the same."* However, if a time period is considered critical in this context, then we consider that a period of at least two years would be appropriate.
9	Do you have any further comments on new Schedule 21A in the draft Regulations?
	We have a number of other comments on Schedule 21A: • In the definition of "conflict of interest" in clause 2(2), the word "materially" should be added before "influence" in clause 2(2)(a), to align with the indications in the Cabinet Paper that the information to be disclosed in respect of conflicts of interest is information relating to commissions, incentives and other conflicts of interest that a client might perceive as having the potential to *materially* influence/impact the financial advice. • Clause 4(1)(h) should be amended to align with clause 5(2)(d) and 6(1)(d), to require disclosure of fees, expense or other amounts *"to A, P, or another person connected with the advice…"*. • In addition, we believe the phrase *"the giving of the advice"* should be simplified to *"the advice"* in clause 5(2)(d) and 6(1)(d), to make it clear that disclosure is only required of fees related to the advice, rather than there being an argument that it extends to **any** amounts that may be payable to the provider by the client. • For similar reasons, the words *"or acting on the advice"* should be removed from clause 6(1)(d). • In many cases, absolute dollar values of fees payable may not be known until very late in the advice process, or even after the advice has been given. We therefore submit that the fee disclosure requirements in clause 5(2)(d) and 6(1)(d) be flexible enough to allow disclosure of fees as a range, or as a percentage of the value of a transaction.
10	What (if any) transitional provisions should be included in the regulations?
	Our experience of advising clients in the lead up to full implementation of the Financial Advisers Act in 2010 /2011 was that the system, process and operational changes required to implement new disclosure requirements were significant, and took longer to plan and implement than was anticipated. We do not believe it will be any different this time around. In fact, we believe that the staged disclosure requirements contemplated by the Regulations will be more difficult to implement. For these reasons, we would support a transitional period which is aligned with the 2 year transitional period for full licensing (with providers having to comply from the time they obtain their full licence, or the end of that period, whichever is the earlier).