

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

Your name and organisation

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Organisation	Code Working Group

Responses to discussion document questions

1	Will the proposed record-keeping requirement be workable in practice?
2	Do you have any comments on the drafting of the Regulations that will require information to be made publicly available?
3	<p>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?</p> <p>Draft regulation 229D requires that a person who gives advice (A) must give the client all of the initial information that is applicable if A knows or ought reasonably to know “the general nature and scope of the advice that the client is seeking” and there are reasonable grounds for concluding that advice may be given. We have these submissions on that draft regulation:</p> <p>(i) General nature and scope</p> <p>The concept of <i>nature and scope</i> of advice is central to the financial advice provisions of the Financial Markets Conduct Act 2013 (FMC Act) and the Code of Professional Conduct for Financial Advice Services prepared in accordance with Part 4 of Schedule 5 of the FMC Act (Code). In particular:</p> <ul style="list-style-type: none">• section 431J of the FMC Act requires that A must not give advice unless A has taken reasonable steps to ensure that the client understands the nature and scope of the advice being given, including any limitations on the nature and scope of the advice;• Code standard 3 requires that A must ensure that the advice is suitable for the client, having regard to the nature and scope of the advice; and• Commentary to Code standards 1 (treat clients fairly), 3 (give financial advice that is suitable), and 4 (ensure that the client understands the financial advice) refer to the nature and scope of the advice as a factor that qualifies the extent of A’s obligations under the relevant Code standard. <p>It is unhelpful and potentially confusing for both persons who give advice and clients that the draft regulations introduce a new concept of “the general nature and scope” of the advice, as</p>

a distinct from “the nature and scope” of the advice. The complete list of matters that would be considered to be part of the nature and scope of the advice when given, but not part of the general nature and scope of the advice that may be given, is uncertain. We suspect that what is intended is that the initial information should be given when A has sufficient understanding of the nature and scope of the advice that may be given to be able to give to the client all of the initial information that is applicable. That interpretation is consistent with the purpose set out in draft regulation 229D(3). Regulation 229D(1) should be reworded in a way that does not introduce possible confusion over the meaning of a term that is so important to the efficient and effective operation of the FMC Act and the Code.

(ii) Advice that a client is seeking

The obligation on A applies only where the client is “seeking” advice. The purpose of the obligation, however, is to enable retail clients to make an informed decision about whether to seek advice from a particular person or provider. In that context, there are many situations in which A might offer to provide advice to a client where it would be appropriate for the initial information to be given to the client before the client actually seeks advice (whether in response to A’s offer or otherwise). Regulation 229D(1) should be extended to include those situations.

Submission

To address both those problems, we submit that regulation 229D(1)(a) should refer to the time when A “has or ought to have sufficient understanding of the nature and scope of the advice that may be given to the client for A to be able to give the client all of the initial information” or words to that effect. The reference to the client seeking advice then can be removed. Similar adjustments should be made to clause 5 of Schedule 21A.

(iii) Exhaustiveness of nature and scope

We understand that the matters under the headings “nature and scope” in draft clauses 4 and 5 of Schedule 21A are not intended to be an exhaustive list of the elements of nature and scope. However, they could be interpreted and applied in different ways.

Submission

For the avoidance of doubt, we submit that it should be made clear that the list of items required to be disclosed about nature and scope does not limit what might comprise the nature and scope of the advice. That could be done, for example, by a statement to that effect, and explanatory note and/or by an example. An example could be used to illustrate that “types of advice” should be construed broadly and a limitation or restriction on the nature and scope of the advice is a departure from what a client might reasonably believe or expect to be the service to be provided.

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

(i) Statement of advice

The examples in draft regulation 229E refer to “statement of advice”. This phrase has a particular meaning in the Australian regime. In developing the Code, we took care to avoid using the term so as not to create the impression that a written document equivalent to the Australian “statement of advice” must be provided. Instead, advice may be given in many ways, provided that the person giving the advice complies with the standards in the Code

Submission

We recommend that the phrase “statement of advice” be avoided in the regulations and replaced simply with “advice”.

(ii) Informed decision about whether to act on the advice

The matters prescribed by draft regulation 229E (and clause 6) do not extend – appropriately – to ensuring that the client is given the explanations and information necessary for the client to understand the financial advice itself, which is addressed in Code Standard 4. Because draft regulation 229E purports to give retail clients information that will **help them** make an informed decision about whether to act on advice, there is a risk that it may be read in isolation to imply that clause 6 is an exhaustive list of the factors that may be required by a client to make an informed decision about whether to act on the advice.

Submission

We recommend that the wording of draft regulation 229E be adjusted – or an explanatory note provided – to clarify that the regulation does not limit the factors that may be required by the client to make an informed decision about whether to act on the advice.

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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?

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Do you have any comments on the draft Regulations that set the manner in which information must be disclosed?

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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.

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

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

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