Forsyth Barr Limited
Level 22
NTT Tower House
157 Lambton Quay
PO Box 5266
Wellington 6140

T: +64 4 499 7464

0800 367 227
www.forsythbarr.co.nz

15 November 2019

Financial Markets Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment

By email: faareview@mbie.govt.nz

Dear Sir/Madam

Disclosure Requirements in the New Financial Advice Regime

1. As an NZX Participant firm, QFE and one of the largest single employers of AFAs, Forsyth Barr has a unique perspective on the operation of the financial advice industry.

2. We have contributed to the Security Industry Association (**SIA**) submission, but also wish to provide a separate submission on what we see as some key issues raised by the consultation paper. We otherwise support the SIA submission.

3. No part of this submission is confidential.

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

4. The draft regulations set out a wide range of information that is to be provided to clients at various times. The risk is that there is unnecessary duplication, detracting from the purpose of the disclosure provisions.

5. Currently, there does not seem to be a mechanism for incorporation by reference of the publicly available information in either the initial or additional information that is to be provided. We suggest that this would be a useful mechanism to avoid duplication. We believe it should be open to providers to (for example) set out their conflicts of interest disclosure in a publicly available document, which is then incorporated by reference in the initial and additional information provided. This is a similar approach to that used for managed funds under the FMCA (where detailed conflict of interest material is placed on the Disclose register) and works well in that context.

#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?

6. There is a particular risk of duplication in ongoing advice relationships (such as between a client and a sharebroking firm) where advice is given periodically or on demand within the context of an agreed scope of service. In those circumstances,

the parameters of the relationship are in place at the outset and clients will generally not expect additional disclosure at the time the advice is given (and nor would such disclosure be useful). In these circumstances, we think it should be open to providers to provide an annual disclosure document, which then need only be updated during the year if there is a material change. While this approach appears to be consistent with the spirt of the regulations, there are a number of drafting fish-hooks:

a. Initial information does not seem to be able to be refreshed voluntarily by the provider. We suggest that r 229D is amended to contemplate that. "Initial information" could perhaps be renamed to avoid the implication that it is only given once – for example it could be called "service information".

b. Previously-provided initial information can only be relied on for a period of 12 months (r 229D(7)). We suggest this period is increased to 13 months, to allow providers some operational flexibility around timing of annual updates (and not being tied to providing the information on exactly the same day each year).

c. As drafted, there are elements of the additional information that cannot be provided as part of the initial information: for example a dollar estimate of fees in relation to acting on the advice (Schedule 21A, clause 6(d)(iii)(B)). We suggest that the drafting of clauses 5 and 6 is aligned in this respect.

d. In relation to additional information, previously provided information can only be relied on where both initial and additional information has been provided in the last 12 months (r 229E(5)). We suggest that:

    i. the period should be 13 months, for the reasons given above; and

    ii. the requirement be that initial or additional information has been provided, as long as the aggregate of the information that has been provided covers the additional information that would otherwise be required.

Class Advice

7. If "class" or general advice is made available by a provider in circumstances where there is no pre-existing relationship with the recipient (for example, general securities recommendations made by a research analyst in a public presentation or to an audience of interested potential clients), then as the regulations are drafted the initial information would in effect have to be provided immediately prior to the advice. This is likely to present insurmountable difficulties for live presentations whether in person or via radio, television or streaming services. We submit that, in these circumstances, the regulations should allow the relevant

initial information to be incorporated by reference (for example, by providing a link to a web page).

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

8. In the definitions of "conflict of interest" and "commission or other incentive" we suggest that limb (b) should refer to circumstances that would "materially influence the advice given by A" (c.f. Schedule 4 clause 2 of the current disclosure regulations). As drafted there is no express reference to materiality, which in our view is likely to lead to over-disclosure of non-material conflicts of interest.

9. In limb (b) of the definition of "reliability event", reference is made to "regulatory action". This term is not defined. Financial providers will have a range of interactions with their regulators and regulatory responses can range from informal good practice recommendations to formal notices, warnings or required actions, which themselves may or may not be made public by the regulator. It is not clear which of these items are considered to be "regulatory actions" for disclosure purposes. We suggest that the drafting be clarified in this respect, and suggest that an appropriate threshold would be any formal notice, warning or action that has been made public by the regulator.

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

10. Moving to the new disclosure requirements will be a significant undertaking, requiring systems planning and implementation as well as processes for the design, layout and updating of the relevant documents.

11. In our view, there should be a period of at least 12 months between finalisation of the regulations and the time by which full compliance is required.

12. We understand that MBIE is considering simplified disclosure requirements for a transitional period. We are concerned that this will in of itself require significant work, and suggest any transitional relief be based around re-use of existing disclosure statements where possible (edited where required). We encourage MBIE to consult further on the provisions of any transitional relief proposed.

Yours sincerely
Forsyth Barr Limited

Nick Hegan
Head of Legal and Compliance