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Financial Markets Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
WELLINGTON 6140

Submission on the exposure draft for the Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2019

1. **Introduction**

1.1 This submission relates to the Ministry of Business, Innovation & Employment's (**MBIE**) exposure draft for the *Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2019*, referred to in this submission as the **Draft Disclosure Regulations**.

1.2 This submission contains:

(a) a summary of our submissions in section 2;

(b) a more detailed overview of our submissions in sections 3 to 6; and

(c) our response to MBIE's particular questions in the submission template contained at Appendix 1.

1.3 We act for a wide range of clients engaged in financial services. Our submissions are our own, however, in many cases they also reflect the views of many of our clients. In particular, we support and endorse generally the submissions of the New Zealand Bankers' Association and the Financial Services Council.

2. **Summary**

2.1 We support the development of an effective disclosure regime that will enable consumers to make confident and informed financial decisions. We also support the policy objective of making financial advice more accessible to New Zealanders.

2.2 We believe the Draft Disclosure Regulations are a good first step to meet these requirements and, for many types of adviser will be practical to implement.

2.3 However, while disclosure remains an important part of the regime, the prescribed disclosure must not stand in the way of advice actually being given. This is recognised in the cabinet paper on the *Regulation of Financial Advice: Disclosure and Multiple Providers* released in March 2019 (**Cabinet Paper**). We are concerned that the Draft Disclosure Regulations may, in certain circumstances, mean product providers choose to follow information-only models where the level of disclosure is disproportionate to the limited nature of the advice which is needed (see section 3 below).

2.4 Although intended to effect the guidance provided by the Cabinet Paper, multiple and duplicated disclosures may undermine financial advice given during short and/or one-off advice interactions (see section 4 below).

2.5 In our view, certain disclosure requirements in the Draft Regulations are unnecessary or may have unintended effects (see section 5 below).

2.6 We also have concerns as to whether the Draft Disclosure Regulations meets the aims of providing flexibility and innovation in provision of financial advice (a core purpose of the Financial Markets Conduct Act 2013 (**FMCA**)) (see section 6 below).

2.7 We acknowledge that some of our comments in this submission would lead to some advice recipients receiving less disclosure. We do not believe this should stand in the way of enabling more people to receive the advice they need. There are many protections under the new regime, including through licensing, the Code, competency requirements and enhanced duties. Disclosure is only one part of the picture. In this context, we note the joint report on disclosure issued by ASIC and the Dutch Authority for the Financial Markets (**AFM**) on 14 October 2019.[1] The report found that reliance on mandated disclosure and warnings has often proved ineffective, and at times even backfired, contributing to more consumer harm. One size disclosure does not fit all. As such, we stress the importance of ensuring the disclosure provided is 'fit for purpose' and does not lead (unintentionally) to poor consumer outcomes.

3. *We are concerned that the Draft Disclosure Regulations may, in certain circumstances, mean product providers choose to follow information-only models where the level of disclosure is disproportionate to the limited nature of the advice which is needed*

3.1 Without changes to the Draft Disclosure Regulations, many industry participants may choose to follow information-only models in order to mitigate the compliance burden and associated risk of non-compliance with the disclosure requirements. As a result, consumers will be unable to access quality (or any) financial advice from those industry participants, despite many of those product providers being best placed to advise on their products.

3.2 Despite the removal of the distinction between class and personalised advice, it is still clear that advice arises in different contexts. In some cases, it will be in the best interests of a client/customer to receive short "advice" of a very basic kind, such as a customer asking a bank teller which of two term deposits is recommended. If these interactions are taking place orally, in a bank branch, with a queue of people behind, placing multiple additional disclosure requirements (and consequential recording keeping requirements) on the teller are not practical. In these cases, we are concerned that banks or other businesses may simply decide that customer facing staff cannot give the relevant recommendation or opinion, reverting to a strict and unhelpful information only process.

3.3 Further, product providers who decide to be 'information-only' may choose to disclose less information about their products (for example, the circumstances in which a product is most appropriately used) for fear of crossing the line into financial advice, resulting in less informed financial decision-making by customers.

3.4 In our view, the proposed disclosure requirements are suited to complex advice processes involving more than one client interaction (see our comments under section 4 in this respect).

4. *Multiple and duplicated disclosures may undermine financial advice given during short and/or one-off advice interactions*

4.1 The Cabinet Paper recognises that different pieces of information should be given as it becomes relevant to the client at certain points in the advice process, rather than including all information in a single template given up-front to the client or provided too late in the advice process.[2]

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[1] https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/

[2] Para 5, 15, 16.

4.2 However, the Draft Disclosure Regulations appears to require repeated disclosure of the same or similar information at different points during the course of a customer interaction (including during short and/or one-off advice interactions). In our view, this will detract from the relevant advice being given in the course of simple, "one-step" advice interactions.

4.3 We consider that FAPs should have the flexibility to determine how best to 'package' the relevant disclosure requirements, for the purposes of new regulations 229D and 229E, to avoid advice conversations being artificially interrupted at multiple points, or the same or similar information being repeated in a single advice conversation in order to comply.

4.4 It is possible that the intention of provisions such as Regulation 229A(5) are intended to prevent repetition. If so, it would be helpful if this could be confirmed and clarified.

5. ***Certain disclosure requirements in the Draft Regulations are unnecessary or may have unintended effects***

5.1 We are concerned that the requirement to disclose "reliability events" is too broad and will have unintended consequences. We comment further in Appendix 1.

5.2 We also consider it is unnecessary to disclose the duties (under new sections 431I, 431K to 431M of the FMCA) that the person giving the advice is subject to. For example, the duty to exercise care, diligence and skill is a fundamental duty of all persons giving regulated financial advice to retail clients under the new financial advice regime. We do not believe it is necessary to disclose this duty to customers, on the basis it applies regardless, with consequences for a breach of the duty.

5.3 A client receiving advice will expect that an adviser exercises care, diligence and skill. Telling the client that the adviser is subject to a duty to do what the client already expects, does not help the client make any decision. If it is considered that this should be disclosed, it would be better to be disclosed as part of the publicly available information.

6. ***We also have concerns as to whether the Draft Disclosure Regulations meets the aims of providing flexibility and innovation in provision of financial advice (a core purpose of the FMCA)***

6.1 The Cabinet Paper specifies that the regulations should provide flexibility in terms of precisely how disclosure is provided in order to reflect the range of different types of financial advice covered by the regime.[3] As currently drafted, the Draft Disclosure Regulations do not achieve this purpose and appear to be drafted based on specific advice scenarios (such as a broker advising on multiple products or a financial adviser having multiple conversations with a client before providing advice).

6.2 Digital advice tools which may provide simple financial advice may require significant builds in order to meet all disclosure points and the record-keeping requirements, disproportionate to the complexity of the advice being provided and the consequences of the advice. For example, a loan calculator may be considered financial advice on a consumer credit contract despite being a front-line tool which does not determine whether a person will receive a loan and can be accessed on an ad hoc basis by non-recurring customers.

6.3 Under the existing Financial Advisers Act 2008, many situations were not captured as requiring disclosure by way of the category 1 / category 2 and personalised / class distinctions. The new regime should allow tailored disclosure for similar simple advice or 'cookie cutter' scenarios. We recognise that there is a risk in allowing more flexible disclosure, but consider this mitigated by the new duties imposed under new subpart 5A of the FMCA.

Thank you for taking the time to consider this submission.

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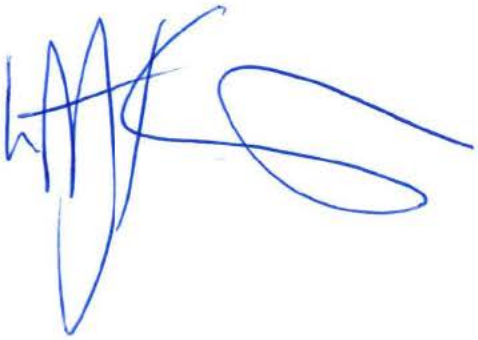
[3] Para 6.

Please contact us using the details below if you wish to discuss any of the matters raised.

Kind regards



Jeremy Muir and Lloyd Kavanagh

MinterEllisonRuddWatts

Contact:

Jeremy Muir, Partner

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Lloyd Kavanagh, Partner

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enclosures

Appendix 1

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

Your name and organisation

Name	Jeremy Muir and Lloyd Kavanagh
Organisation	MinterEllisonRuddWatts

Responses to discussion document questions

Will the proposed record-keeping requirement be workable in practice?
• We have concerns that the record keeping requirement will not be workable in practice because it fails to recognise the different situations that a client may receive advice in. With the removal of the distinctions between class / personalised advice and category 1 / category 2 products, every customer interaction (including a short conversation about a simple product) or piece of collateral may now be financial advice and will be subject to full disclosure and record-keeping requirements. For the reasons outlined in section 3 of our submission, we do not believe this should be required in all circumstances. • We support keeping a record of financial advice provided to a client where it is advice provided directly to an individual on what financial advice products to obtain relating to their individual circumstance. However, as currently drafted, a financial advice provider would have to keep a record of each piece of material provided to a client which may contain financial advice – such as the use of an online tool to decipher what fund to invest into, or the use of a brochure on credit cards which spells out which credit card is best suited to different circumstances. This is a major change from the existing FAA regime and may impose significant compliance and build costs onto financial advice providers.
Do you have any comments on the drafting of the Regulations that will require information to be made publicly available?
• As a general comment, making information publicly available is straightforward (as most adviser businesses will have websites where such information can be posted and obtained easily). • We would support additional parts of the disclosure (e.g. disclosure in relation to the duties which apply to advisers) being moved into this part of the Regulations.
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?
• Please see our submissions at section 4 of our submission above. • The regulations should allow a financial advice provider to ascertain whether all or a greater part of the information to be provided at this stage could be provided up front

(including by making it publicly available). This discretion would be exercised, of course, subject to the duty in the Act to ensure the client understands the nature and scope of the advice under new section 431J, meaning that for more complex advice interactions the full suite of nature and scope disclosure may still need to be given.

- We are also concerned that the definition of 'reliability event' is very wide. It includes any successful civil or criminal proceeding or regulatory action (whether in New Zealand or overseas) in relation to the contravention of any financial markets legislation (including, for example, the FMCA, the AML/CFT Act, the Companies Act and the Reserve Bank of New Zealand Act 1989) in New Zealand or overseas.
- Regulatory action is also particularly wide. For example, even a private formal warning under the AML/CFT Act would need to be disclosed to every advice client, even though it may be private and unrelated to financial advice, and immaterial to the performance of the financial advice service for that customer.
- For many large and longstanding financial institutions (or other large businesses which have a financial advice component), there may be multiple potential disclosures to be made in this context, many of which may not be particularly relevant to the customer.
- In all of these cases, we consider the requirement to disclose a reliability event should be limited to circumstances where the nature of the event are likely to be material to the decision of the customer to obtain the financial advice or the weight to be given to the advice.

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

- In practice, for many financial advice situations there is little difference between the point in time when the nature and scope of the advice is known and the point in time when the financial advice is given.
- We consider that the same information should be specified by the regulations to be provided at each point in time, with flexibility for a financial advice provider to determine which point in time is the most ascertainable and relevant for the customer to receive the information at. This could be accompanied by a duty to ensure that any other relevant information is disclosed to a client at the time when the financial advice is given, including any material change to the previous disclosures. Additionally, as highlighted above, the duty in new section 431J would ensure that the client receives further disclosure relevant to the receiving of the advice if the financial advice provider chooses to disclose all information when the nature and scope is known.

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?

- No comment.

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

- In our view, proposed regulation 229G(1)(b) (if disclosure is presented with other information, it must be given prominence) will be difficult to interpret and comply with in practice given the amount of disclosure required and the variety of different advice contexts. We would not like disclosure to be more prominent than the advice, or to

become distracting, where often straightforward communication of the advice would be most effective. We suggest this be removed as 229G(3) will sufficiently mitigate the risk that disclosure information is hidden amongst other information.

- Proposed regulation 229G(1)(c) should make clear that it does not restrict the ability of the financial adviser to charge for the advice itself.

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.

- No comment.

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

- In Regulations 229D(2) and 229E(1), we query what is the scope of the requirement that a person discloses all of the information "... that is applicable". Is this intended to give the financial advice provider an element of discretion to provide or not provide information that it considers to be material to a customer? Or is only intended to carve out information which is plainly irrelevant?

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

- See our comments above in relation to the definition of "reliability event" and associated consequences.

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

- For many financial advice providers, there are likely to be significant system changes required to be made to give effect to these regulations. We are sure that MBIE will receive and consider closely the industry submissions carefully on this point.