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Financial Markets Policy
Ministry of Business, Innovation and Employment
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Submission – Options Paper – Review of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ("Options Paper")

Introduction

1. Financial Services Complaints Limited (FSCL) welcomes the opportunity to make a submission on the Options Paper.

2. Our submission is made from our experience as an approved dispute resolution scheme for over 6,000 financial service providers, including over 1,300 individual financial advisers and 330 QFEs or large companies which have a further 3,000 (approximately) advisers.

3. We have not commented on aspects of the Options Paper which are not directly relevant to our work as a dispute resolution scheme or to issues we have considered in our complaint investigations.

4. FSCL is happy for this submission to be made public as part of the consultation process.

General submissions

5. We strongly support the proposals in packages 2 and 3 of the Options Paper to make it a base requirement for any person holding themselves out as a financial adviser to always put the interests of the client first and to act with integrity. We believe this requirement is necessary if the regime's objectives, particularly that of promoting public confidence in the professionalism of financial advisers, is to be met.

6. We support a requirement that all financial advisers have minimum standards of competence, knowledge and skills tailored to the type of advice they are giving. We understand that the proposal is that there be principles based competency,

that is that experience and good practice could be sufficient depending on the level of advice being give, rather than requiring all advisers to have a formal qualification.

7. We also suggest there be a requirement that when an adviser is asked to give advice on a product or service they are not familiar with, they have an obligation to refer the client to an adviser who is qualified to give the level of advice the client is seeking.

Adviser designations

8. We support removal of the designations of AFA, RFA and QFE adviser. As stated in our original submission dated 21 July 2015, consumers do not understand the difference between the different types of adviser. As such, we do not support statutory recognition of an "expert adviser" category. Such a category would, in our view, only perpetuate consumer confusion.

Wholesale clients

9. We strongly support a requirement that clients opt into being a wholesale client, rather than automatically being treated as a wholesale client if they meet the criteria in the Act. Again, we repeat our previously expressed concern that the definition of wholesale client is unhelpful. The current regime and definition, with a relatively low asset threshold, captures a lot of people as being "wholesale clients". However, the fact a person has some high value assets does not necessarily mean they are experienced or sophisticated investors. Nor does it mean that they understand they will not be classed as retail clients, with all of the protection that brings, such as access to a dispute resolution scheme, unless they opt out of being a wholesale client.

Robo advice

10. We suggest that any licensing regime of online or robo advice must include a requirement that the provider of the online platform is a member of a dispute resolution scheme so that robo advice customers have the same level of consumer protection as those customers taking advice from a natural person. We also consider that a warning should be given to the consumer that the robo advice may not be suitable to the consumer's needs and requirements and that if a consumer wants personalised advice, they should speak to a person qualified to provide advice.

Salespeople

11. If the regime allows for a group of persons who are simply selling products, as opposed to providing advice, there is a strong argument that the salespeople cannot be called "advisers". To call someone who is simply a salesperson an adviser, may lead to consumer confusion. However, salespeople will still be providing a financial service, and will still be subject to consumer protection law such as the Fair Trading Act 1986 and the Consumer Guarantees Act 1993 and as such should still be registered on the Financial Service Providers Register and a member of a dispute resolution scheme.

12. Further, it is very important that consumers be made aware both that:

- the transaction is a sale, as opposed to financial advice about the product, and
- the consequences of the transaction being a sale.

A consumer will not know what they do not know. In other words, it is important that the consumer be told when being sold a product that there may be other products available from other providers that may be as suitable, or more suitable, for their requirements and, therefore, the consumer may wish to seek advice from an adviser.

Conflicted remuneration

13. We note that a ban or restriction on commissions is not currently a preferred option. However, to ensure complete transparency and fairness and to help meet the regime's objective of raising consumers' confidence in the professionalism of financial advisers, we think it essential, at the very least, that full disclosure, including amounts of commissions, soft commissions and sales targets with bonuses, be fully disclosed to the consumer. In our view, it is not sufficient for an adviser to say "I receive a commission from the product provider" or similar – the amount of the commission must also be disclosed.

Entity licensing

14. If entity licensing is ultimately the preferred option, the extent of an entity's responsibility for employees' and nominated representatives' compliance needs to be carefully considered and set out. By way of example, at present most individual businesses or advisers aligned to a dealer group or similar are responsible for their own complaints. If, in future, those individual businesses or advisers become part of a licensed entity, and the entity is responsible for those advisers' and businesses' compliance, will the entity also be responsible for any complaints that may be made against a business or adviser (including payment of any compensation that may be awarded by the dispute resolution scheme and any dispute resolution scheme case fee)?

Individual licensing and Code of Conduct

15. We consider it would be very useful to have a new code of conduct applying to all advisers which could address specific standards and requirements for the particular types of financial advisers and types of advice. We support a universal code, rather than various industry bodies setting their own rules and standards. A universal code will assist in raising consumer confidence in advisers.

16. When investigating complaints against advisers, it is very useful for a dispute resolution scheme to be able to refer to a code of conduct which sets out, in more detail than a statute, the minimum standards of professional conduct an adviser is expected to meet. A code is also more "nimble" in reacting to changes in standards or accepted behaviour that may be necessary from time to time. In other words, the code can be used as a benchmarking tool.

17. Further, if there were multiple codes applying to different types of advisers, there is the danger of consumer confusion and inconsistency, which runs counter to the regime's objective of promoting public confidence in financial advisers' professionalism.

Disclosure

18. We agree with the proposal for standard and simplified disclosure across all advisers. It is essential that the standard disclosure contains details for the adviser's dispute resolution scheme (DRS). In our experience, consumers rarely read lengthy disclosure documents. However, consumers are also rarely told of the importance of reading the disclosure document. Therefore we suggest that, coupled with simplified disclosure, there needs to be a highlighted warning to consumers, both verbal and in writing, of the importance of reading the disclosure documents before purchasing a product or implementing advice received from their adviser.

Dispute resolution

19. We are pleased to note that, given the lack of any evidence of negative impacts of competition, it is not proposed to replace the current multiple scheme model with a single scheme. We note that many submissions on the Issues Paper did not answer the questions related to dispute resolution schemes, which would tend to indicate that submitters are satisfied with the status quo. We also note that there is no evidence that "forum shopping" is taking place, which seems to have been a concern for some submitters. Contrary to some submissions on the Issues Paper, competition helps to drive schemes' efficiency, resulting in annual fee levels remaining steady or reducing (for example, last year FSCL delivered a 15% reduction in scheme participants' annual fees). Ultimately lower costs benefit consumers as well.

20. We support changes (if required) to improve the transparency and consistency of dispute resolution schemes, and to promote greater access for consumers. At present there is very low consumer awareness of the schemes. Low awareness hinders consumers' accessibility to the schemes.

21. Specifically:

- We strongly support a mandatory requirement for financial service providers to inform consumers at the time a complaint arises which dispute resolution scheme they belong to and how to access it. We also suggest that such a requirement should also define a "complaint" using the international definition of "an expression of dissatisfaction made to a financial service provider related to its products or services where a response or a resolution is explicitly or implicitly expected". We have seen a number of instances where a financial service provider has failed to recognise an expression of dissatisfaction as a complaint because, for example, the consumer has omitted to use the word "complain" or "complaint". A requirement to inform consumers at the time a complaint is made will increase awareness of schemes, and that can only lead to consumer confidence in financial markets.

- **The $200,000 jurisdictional limit**: We refer to our submission dated 21 July 2015 made on the Issues Paper that while the $200,000 jurisdictional limit is sufficient for the size of most consumer complaints, it is no longer sufficient for many complaints involving insurance (life and disability, as well as property insurance). As the dispute resolution schemes have historically been seen as an alternative to the District Courts for the determination of financial complaints, we repeat our earlier submission that consideration should be given to pegging the schemes' jurisdictional limits to those of the District Court, or allowing a complainant to waive an amount of a claim that is over $200,000 up to, say, a maximum of $350,000. A third option would be to have different jurisdictional limits applying to different types of complaints, although such an option may be confusing for consumers.

- We agree that there should be consistency of scheme rules and how the $200,000 jurisdictional limit is applied. We understand that for three of the four schemes (including FSCL), if the consumer is claiming or could claim a loss of more than $200,000, the scheme cannot consider a complaint. The fourth scheme allows the consumer to waive the amount being claimed that is in excess of the $200,000 jurisdictional limit, in order to have the complaint considered by the scheme.

  Increased transparency and monitoring of dispute resolution schemes: However, we note that schemes are currently required to produce an annual report on its activities and case statistics for the Minister each year and that schemes are required to undergo an independent review at least once every five years. We also note that all schemes currently publish case notes on their websites.

- **Mandatory professional indemnity insurance for financial service providers:** We agree that this is worthwhile considering. However, there is a need to ensure that professional indemnity cover is available for all types of financial service providers, and that the policy would cover the types of complaints that are considered by the dispute resolution schemes. For example, FSCL has had a recent case involving a financial adviser who gave unsuitable advice to a consumer about a residential property investment. The adviser's professional indemnity insurance policy did not cover him for claims arising from advice on residential property investments.

  Obviously, the cost of professional indemnity insurance will ultimately be passed on to the consumer and it would need to be carefully considered whether the benefits and extent of professional indemnity insurance outweighed the cost.

  Of more concern is where a financial service provider (particularly advisers) has left the industry by the time a complaint arises, meaning the consumer no longer has the ability to access the dispute resolution scheme. And, where an adviser has changed employer and a complaint later arises about the adviser's conduct or advice given while they were an employee of their previous employer. We have had cases where it has been difficult to investigate the complaint because the employee's previous employer does not wish to take

responsibility for the employee's action and, in any event, may be unable to obtain the employee's cooperation in any complaint investigation. In other cases, the employee concerned cannot access the client's records because those records are held by the previous employer.

Consumer surveys: We also support the gathering of information from consumers on their experience with dispute resolution after a dispute and note that FSCL already surveys both consumers and scheme participants on their experience, upon closure of all dispute investigation files. We are willing to assist in preparing or contributing to a survey with common questions for all schemes to use.

22. In answer to the questions posed on page 35 of the Option Paper:

- Question 22: There is no evidence that the existence of multiple schemes is leading to poor outcomes for consumers.
- Question 23: We believe there is already a good deal of consistency between scheme rules and processes. However, we support greater consistency, if a need for greater consistency is demonstrated.
- Question 24: We consider further research needs to be carried out and questions answered before making professional indemnity insurance compulsory for all financial service providers.

Conclusion

23. We are happy to work with the Ministry over the months ahead to discuss issues raised by our further submission and to answer any questions that the Ministry may have.

Yours sincerely,
Redacted

Susan Taylor
Chief Executive Officer