How to have your say

Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by **5pm on Friday 31 March 2017**.

Your submission may respond to any or all of these questions. We also encourage your input on any other relevant work. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please include your name, or the name of your organisation, and contact details. You can make your submission:

- By attaching your submission as a Microsoft Word attachment and sending to ***faareview@mbie.govt.nz***.
- By mailing your submission to:

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

Please direct any questions that you have in relation to the submissions process to: ***faareview@mbie.govt.nz***.

Use of information

The information provided in submissions will be used to inform the development of the Financial Services Legislation Amendment Bill, decisions in relation to the outstanding policy matters, and advice to Ministers.

We may contact submitters directly if we require clarification of any matters in submissions.

Except for material that may be defamatory, MBIE intends to upload PDF copies of submissions received to MBIE's website at www.mbie.govt.nz. MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

Release of information

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If your submission contains any confidential information, please indicate this on the front of the submission. Any confidential information should be clearly marked within the text. If you wish to provide a submission containing confidential information, please provide a separate version excluding the relevant information for publication on our website.

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Part 1 of the Bill amends the definitions in the FMC Act

1. If an offer is through a financial advice provider, should it be allowed to be made in the course of, or because of, an unsolicited meeting with a potential client? Why or why not?

   No, we don't believe this is appropriate because people can be easily pushed into buying a product or service without having time to fully consider the consequences.

2. If the exception allowing financial advice providers to use unsolicited meetings to make offers is retained, should there be further restrictions placed upon it? If so, what should they be?

   Yes, there should be restrictions such as cooling off periods.

1. Do you have any other feedback on the drafting of Part 1 of the Bill?
   Category of products

   We agree that category 1 and 2 products should be removed and agree with the definition of a financial product, apart from the comments regarding property below.

Property is not included in the definition of financial product (under section 7 of FMCA), why is this and how will it be dealt with, given it is so widely used by New Zealanders as a form of investment and often has little if any advice given around it. Property has significant risks attached to it which need to be addressed before informed decisions can be made.

Names and designations
We are concerned that the public will still be confused as to the difference between Financial Advice Provider, Financial Adviser and Financial Advice Representative. We do not believe there needs to be specific names for the provider, adviser or representative. Companies will continue to use their regular brand and state the services they offer e.g. investment planning. Those companies will then continue to call their employees 'business development managers' or 'customer representatives' etc.

The license holder is responsible against standards and to ensure anyone working for them adheres to those. This is consistent with the licensing under FMCA where the license holder is responsible for the conduct of all who work and represent it
For legal purposes, we know that representatives must act to certain standards, the same as the others but that is an internal process of ensuring they do. The public will not be concerned about it at an individual representative level.

The only exception is if people call themselves Financial Adviser, they must have a licence but they could choose to use the words Financial Adviser or something different. We believe that the terminology is more for the provider, adviser and regulator to keep account of the responsibilities and obligations linked to the type of entity/person they are.
The branding to the public can then be kept quite simple so people know that all providers and 'financial advisers' are required to be licensed, otherwise they cannot provide financial advice products or services to the public. We believe it is best left quite simple.

Who provides financial advice
We are concerned that the public is still getting 'ad hoc' and potentially dangerous advice from accountants, lawyers and real estate agents and they are not being held accountable. They are using the loopholes created by the definitions of incidental services and other exemptions, when in fact they are giving financial advice under the definition stated above. This needs to be tightened up considerably and they need to be held accountable.
There is a significant difference between doing the accounts for a business that is being sold and then giving advice on where to put the money.

If you asked the client, they would say my accountant provided that advice as part of ordinary course of business. Often there are some very significant conflicts of interest where accountants or lawyers are suggesting clients put money into a business the accountant is involved in, for example property syndicates.

General comments
Will the regulations define what is meant by 'engage' and ensure that a referral to an adviser from another party is not considered 'engagement on their behalf'? We want to encourage other parties to refer where their area of expertise does not extend to financial advice products and services.

Part 2 of the Bill sets out licensing requirements

1. Do you have any feedback on the drafting of Part 2 of the Bill?

   Our concern is that the 'wholesale' exemption may be misused by individuals or organisations to avoid meeting necessary standards. The definitions of 'wholesale' allow for clients of a size, to be designated wholesale even when we know that financial literacy in NZ is generally low. High degrees of wealth don't equate to high degrees of understanding. We would hope that in the majority, advisers are applying the 'retail client standards' for high net worth clients and only using the 'wholesale client standards' when there is a genuine level of sophistication.

   We are concerned with the current definition of 'Wholesale' because Wholesale is referring to the amount of money and the investment experience. There should be a separation between "Institutional and Wholesale". Institutional clients can be Wholesale but for individuals this is more complicated. The definition for individuals should be related to the investment experience, whether they are proven habitual investors, the nature of the client (e.g. whether they are an entity, charity or similar) and their knowledge.

   Our recommendation is that MBIE come back out to industry to redefine this as too many clients may be classified as Wholesale to avoid adherence to the law.

Part 3 of the Bill sets out additional regulation of financial advice

1. Do you agree that the duty to put the client's interest first should apply both in giving the advice and doing anything in relation to the giving of advice? Does this make it clear that the duty does not only apply in the moment of giving advice?

   Yes, we agree that the clients' interests should be put first across all parts of the advice process. However, we are concerned that by putting it into the law it must be quite prescriptive and very clear what is right and wrong.

   If there is a practical approach to applying the words 'putting the client first' the spirit of the law should remain intact. As a minimum, the motivation/agenda for giving the advice should be part of the definition. We also agree that conflicts of interest form a key part of that definition.

1. Do you have any comments on the proposed wording of the duty that a provider must not give a representative any kind of inappropriate payment or incentive? What impacts (both positive and negative) could this duty have?

   We agree the wording is appropriate and the clients' interests should be placed first regardless of any incentives given. Incentives should be related more to the success of a client in achieving their stated goals.

   At present, there is a lot of emphasis on getting new clients on-board. Unfortunately, clients are then often 'forgotten about' and leave the process, jumping into something else in the heat of disappointment. This can significantly 'derail their objectives". Representatives should be remunerated for the ongoing

service as well as for successfully onboarding a client using processes with high integrity and the law should complement this.

2. Do you support extending the client-first duty to providers who do not provide a retail service (i.e. those who only advise wholesale clients)? Why or why not?

   Yes, we support this because if a person is treated as Wholesale for the wrong reasons, at least there is still a requirement to put their needs first and provide specific information for an informed decision. Even sophisticated clients need a base level of care, should have their interests placed first and receive a base level of information. We cannot assume that because they are sophisticated that they don't require a certain level of protection.

3. Do you have any other feedback on the drafting in Part 3 of the Bill?
   No further comments

Part 4 of the Bill sets out brokers' disclosure and conduct obligations

4. What would be the implications of removing the 'offering' concept from the definition of a broker?
   Not applicable

5. Do you have any other feedback on the drafting of Part 4 of the Bill, for example any suggestions on how the drafting of broker provisions could be simplified or clarified?
   Not applicable

Part 5 of the Bill makes miscellaneous amendments to the FMC Act

1. Should financial advisers have direct civil liability for breaches of their obligations, if the financial advice provider has met its obligations to support its advisers? Why or why not?

   This would only affect a person where they are a financial adviser in a provider but not a provider in their own right. How does a client obtain redress for bad advice from the adviser if the provider is found not guilty of breaching their duties?

   If a person wants to call themselves a financial adviser and have the 'status' that comes with that, they should be held accountable personally, when they breach the duties.

   The exception is when a financial adviser is relying on a provider's processes which then lead them to a breach. In this case, the adviser should have a defence against liability. Otherwise you run the risk of companies hiding behind a lot of procedures but not recognising the issues it is causing for the advisers working on their behalf. Companies could put in place incentives which encourage the adviser to make choices that do not put the clients' interests first but they feel they have to, to keep a job.

2. Should the regime allow financial advice providers to run a defence that they met their obligations to have in place processes, and provide resources to enable their advisers to comply with their duties?

See comments for the previous answer

3. Is the designation power for what constitutes financial advice appropriate? Are there any additional/different procedural requirements you would suggest for the exercise of this power?

   Yes, it is appropriate and required to stop providers manipulating services to avoid the law. This aspect should be as strong as possible so people do not look for 'loopholes'.

4. Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?

   No comment here

1. Do you have any other feedback on the drafting of Part 5 of the Bill?

   Yes, the definition for Wholesale re $1m should align across all pieces of law to make interpretation and compliance easier.

Part 6 of the Bill amends the FSP Act

2. Does the proposed territorial application of the Act set out above help address misuse of the FSPR? Are there any unintended consequences? How soon after the passing of the Bill should the new territorial application take effect?

   Yes, we agree that registration should be related to territory as above.

3. Do you support requiring further information (such as a provider's AML/CFT supervisor) to be contained on the FSPR to help address misuse?

   Yes, we support more information which illustrates if a provider on the FSPR has a licence, restrictions on their services and other pertinent information that would affect a person's decision to use them.

4. Do you consider that other measures are required to promote access to redress against registered providers?

   Yes, we agree that the Dispute Resolution Scheme providers could be an effective way to help reduce misuse as long as the public are then aware that the terminated provider no longer has a dispute resolution process in place.

5. Do you have any comments on the proposed categories of financial services? If you're a financial service provider, is it clear to you which categories you should register in under the proposed list?

   No comments, yes, it is clear.

6. Do you support clarifying that schemes must provide information to the FMA if they believe that a provider may be involved in conduct that constitutes breach of relevant financial markets legislation?

   Yes, we agree as long as the scheme does have a certain degree of proof from

reputable sources and not just 'here say' from clients which has no grounding. Clients can become disappointed in their advice for several reasons not related to the quality of the advice, e.g. returns, fees and these may have no bearing on the service provided by the adviser. We would like to know what criteria would be used by the scheme to determine when they report to the FMA. Does this inadvertently set them up as a Supervisor and they now feel inclined to get more involved in the adviser business, to decide when to report to the FMA.

7. Do you have any other feedback on the drafting of Part 6 of the Bill?
   No further comment

Schedule 1 of the Bill sets out transitional provisions relating to DIMS and the code of conduct

8. When should an FMC Act DIMS licence granted to AFAs who provide personalised DIMS expire? For example, should it expire on the date on which the AFA's current authorisation to provide DIMS expires?
   Not applicable

9. Do you have any other feedback on the drafting of Schedule 1 of the Bill?
   Not applicable

Schedule 2 of the Bill creates a new schedule to the FMC Act with detail about the regulation of financial advice

10. Should the FMC Act definition of 'wholesale' be adopted as the definition of wholesale client for the purposes of financial advice? Why or why not?
    Yes, we agree it should be consistent

11. We understand that some lenders consider that they may be subject to the financial adviser regime because their interactions with customers during execution-only transactions could be seen to include financial advice. Does the proposed clarification in relation to execution-only services help to address this issue?
    Not applicable

12. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?
    No comment

13. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?

    No we agree there needs to be a mix of experience, skills and knowledge from varying parts of the industry.

14. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?

    This is not specific enough. The Minister should give them harder objectives on what is to be achieved by this work. The objectives can still be broad enough not to stifle the intention of their work.

15. Does the wording of the required minimum standards of competence knowledge and skill which 'apply in respect of different types of advice, financial advice products or other circumstances' adequately capture the circumstances in which additional and different standards may be required?

    Yes.

16. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?

    No as it looks like there is a double up with the recourse open to the FMA against Providers.
    There should also be a straightforward process for clients to follow that is consistent across all licensed and/or registered people. What is the role of the disciplinary committee, vs FMA, vs dispute resolution?

17. If the jurisdiction of the Financial Advisers Disciplinary Committee is extended to cover financial advice providers, what should be the maximum fine it can impose on financial advice providers?
    Unsure of this.

18. Do you have any other feedback on the drafting of Schedule 2 of the Bill?
    No further comments

About transitional arrangements

19. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?
    No that is sufficient.

Proposed transitional arrangements

20. Do you support the idea of a staged transition? Why or why not?

    Yes, we support staged transition. As we saw with the MIS licensing process, it can take a significant amount of time and resource. It is a positive process for the business but can be time consuming as well.

21. Is six months from the approval of the Code of Conduct sufficient time to enable existing industry participants to shift to a transitional licence?

    Yes, six-months is sufficient time if there is also an ongoing communication process with the participants to allow them to prepare. If there are significant changes to expectations, advanced warning would be appreciated. We have seen the positive outcomes of this approach with the introduction of AEOI and how the IRD has involved industry early on and this has worked well to date.

22. Do you perceive any issues or risks with the safe harbour proposal?

    No, we don't not see any issues with the safe harbour proposal as you have

stopped people changing the services offered to move around the law.

23. Do you think there are any elements of the new regime that should or shouldn't take effect with transitional licences? What are these and why?

    No, the elements in force for transition appear fair and in the best interests of clients.

24. Is two and a half years from approval of the Code of Conduct sufficient time to enable industry participants to become fully licensed and to meet any new competency standards?

    Yes, it is sufficient time to meet the requirements.

Possible complementary options

25. Do you support the option of AFAs being exempt from complying with the competence, knowledge and skill standards for a limited period of time? Why or why not?

    No, it should be 5 years from the date of enactment of the law. It is essentially 9 years from now which is too long. If people are actively engaged in further study there can be considerations made if there is a hard finish date.

26. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
    See comments above

27. Is there a risk that this exemption could create confusion amongst industry and for consumers about what standards of competence, knowledge and skill are required?

    Yes there is and the emphasis should be on ensuring that clients are able to get advice to a consistent standard from day one for each area of the industry. We don't believe individual consumers are concerned about the specific qualifications held, as long as they know there is a standard that needs to be met and they can rely on this.

28. If you support this option do you think it should be set in legislation or something for the Code Working Group to consider as an option as it prepares the Code of Conduct?

    It should be left in the Code and the law kept to proving the right level of competence, skill and knowledge. This allows flexibility when new types of services or products are created and so types and degrees of competence evolves.

29. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?

    Yes, it does allow people to call on their existing experience to show competence which is usually more relevant than a qualification attained 20 years ago. This experience should be relevant to the service being offered/product sold.

30. Is it appropriate for the competency assessment process to be limited to existing AFAs

and RFAs with 10 or more years' experience? If not, what do you suggest?

Yes, we agree that 10 years is a good time period as anything under that and we would expect people to have started getting an up to date qualification and then moved into practice.

31. If you support this option do you think it should be set in legislation or something for the Code Working Group to consider as an option as it prepares the Code of Conduct?

    It should also be in the Code to allow for change.

Phased approach to licensing

32. What would be the costs and benefits of a phased approach to licensing?

    The costs for those going early may be more significant if they are not ready and need to employ additional resources. If businesses can begin preparation as part of BAU, they will not have to significantly resource up to meet the requirements.

1. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?

   You may be able to require some groups to move early if you can give plenty of guidance on what the licence requirements are. They can then build it into BAU processes. EG start reviewing their advice process now in light of needing to prove it meets obligations in 1-2 years' time.
   Businesses will want to go later to see what others are experiencing and make allowances and to let the FMA remove some of the 'kinks' from the process.

   Incentives for early licensing is to approach those groups you would want to go early, engage and give guidance on what is required. Help them include it as BAU as much as possible.

2. Do you have any other comments or suggestions regarding the proposed transitional arrangements?
   No further comments

Demographics

3. Name:
   Kim Gabites (Compliance Manager) on behalf of the Directors of Accordia Services Limited. Directors include Selwyn Paynter, Mark Wooster and Andrew Verrall

4. Contact details:
   REDACTED

5. Are you providing this submission:
   ☒As an individual
   ☒On behalf of an organisation

   A small-medium sized financial advice organisation focussing on investment advice. Investment

management is provided by Accordia Asset Management Limited (a MIS licence holder).

6. Please select if your submission contains confidential information:

☐I would like my submission (or specified parts of my submission) to be kept confidential, and attach my reasons for this for consideration by MBIE.

Reason: Enter text here.