RESPONSE TO THE CONSULTATION PAPER

NEW FINANCIAL ADVICE REGIME

MARCH 2017

FinancialServicesCouncil.

growing and protecting the wealth of New Zealanders

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31 March 2017

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

Consultation Paper – New Financial Advice Regime
The draft Financial Services Legislation Amendment Bill and proposed transitional arrangements

The Financial Services Council on New Zealand Incorporated (FSC) thanks the Ministry of Business, Innovation and Employment for this opportunity to make a submission in relation to the consultation paper for the proposed new Financial Advice Regime. We support the Ministry's aim of improving access to quality financial advice, resulting in more informed and confident participation of consumers in financial markets.

The FSC represents New Zealand's financial services industry having 15 member companies and 15 associate members at 31 March 2017. Companies represented in the FSC include the major insurers in life, disability, income, and trauma insurance, and some fund managers and KiwiSaver providers. Law firms, audit firms, and other providers to the financial services sector are represented among the associate members.

This submission provides our view of the key issues within the new financial advice regime and gives voice to the recommendations of our members.

Please contact me on **REDACTED** to discuss our submission.

Yours sincerely

Richard Klipin
Chief Executive Officer

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Who we are

The Financial Services Council of New Zealand Incorporated (FSC) has 15 member companies and 15 associate members at 31 March 2017. Companies represented in the FSC include the major insurers in life, disability, income, and trauma insurance, and some fund managers and KiwiSaver providers. Law firms, audit firms, and other providers to the financial services sector are represented among the associate members.

The FSC's vision is to be the voice of New Zealand's financial services industry, with three areas of strategic intent:

1. Strong and sustainable consumer outcomes
2. Sustainability of the financial services sector
3. Increasing professionalism and trust of the industry through the FSC Code of Conduct

Our purpose is to:

- be recognised as an organisation that represents the interests of the New Zealand financial services industry, including to regulators and Government
- promote best practice and integrity in the financial services industry, including through the institution of codes of conduct, standards and the publication of guidance for industry participants
- promote the financial services industry for the economic benefit of New Zealand and to enhance the sustainability of the industry, whilst recognising the primacy of the interests of consumers
- develop and promote evidence-based policies and practices designed to assist New Zealanders to build and protect their wealth
- promote the financial services industry as a medium for investment and protection for consumers
- promote, assist and generally advance the interests of members

To deliver on our vision and purpose FSC activity centres on five strategic pillars:

Responding to the Consultation Paper - our approach

This submission is the result of an extensive consultation process across our member-base and represents the views of our members and our industry.

The FSC's guiding vision is to be the voice of New Zealand's financial services industry. Given the different business models, diversity and expertise of our members, there are times when there are a range of insights and views. Where this has been the case in relation to this submission, we have adopted the FSC's standard approach to managing significant issues:

- **Principles-based**: keeping the conversation focussed on the big issues while acknowledging the detail
- **Best practice**: ensuring the recommendations and solutions are aspiring to high standards of service for clients and driving consistency within the industry
- **Market competition**: believing a free market will find the balance that works best for the consumer and the industry

Specific Responses – Our Approach

For depth, there are instances in the 'Specific Responses' section where we have included the range of member views. Our intent in doing this is to highlight the material concerns of our members and open the door for continued conversation with MBIE and the FMA.

We acknowledge the time and input of all our members in contributing to this submission.

Strategic Intent - our view

The intent of the proposed changes is clear – improving access to high quality financial advice for New Zealanders. We fully support this intent and believe it is in the best interests of the financial services industry, our members and all consumers.

Putting the consumer front and centre of the financial advice regime means:

- A focus on enabling advice and assistance when and where consumers need it
- Helping consumers make good choices about their financial wellbeing, covering the areas of investing, protecting and borrowing
- Developing a trusted industry where participants put the consumer first with transparent, simple, disclosure of interests
- Making sure consumers have simple and easy recourse when things go wrong

Our view is the changes proposed in the Consultation Paper enable these outcomes. It will be up to market participants to deliver and truly promote a sustainable, consumer-led, industry. We acknowledge that FSC members are striving for the same outcomes as the Government and regulator in this regard.

Change is unlikely to be easy, and both overseas and in New Zealand, legislation has already significantly disrupted the industry. However, disruption is needed because it is the only way in which we can deliver the twin outcomes of improving the professionalism of the market and lifting consumer trust. We support steps which deliver on these outcomes. As the change progresses we expect to see improved regulations, better training for advisers, consistent higher standards, business models that evolve with the changes and more engaged consumers.

Given the under-insurance and retirement savings challenges the country is facing, we believe the proposed 'level playing field' will aid New Zealanders in making better long-term choices for their wealth, health and lifestyle. Bringing consistency to the skill, competence and knowledge of advisers is a key step along the journey and we endorse the intent of the proposed changes. Care will be needed to ensure sufficient flexibility for all business models in relation to standards, products, process and controls. The final solution may be best achieved through the licensing process.

Future-proofing the regime through the facilitation of robo-advice acknowledges changes in technology, demographics and quite simply, what consumers want and need. We support the intent to get this legislation 'right' and minimise future change.

Our view is, in the main, market participants will endorse the overall aims of the proposed regime, and there will be little debate around licensing or level playing fields.

Our experience suggests the biggest areas of debate, and those which will make the most difference to consumers, are advisers/advice categorisation, client first, conflicts of interest and the transitional arrangements. These topics talk to the heart of enabling consumer access to good quality advice.

In the following section we address these key themes.

Themes and Recommendations

Theme One – The Consumer

A well-functioning market balances the interests of the consumer and the industry. We support the intent of the legislation to align the financial advice regime further with regard to the interests of consumers. The ideal outcome is informed consumers making good financial decisions to grow and protect their wealth.

To achieve this outcome, consumers need:

- Access to the advice and information they need, when they need it, in the way they need it
- Confidence and trust in the sector, knowing they will be treated fairly and with integrity
- To understand their responsibilities and the responsibilities of those they seek advice from
- To accept the outcome of their decisions where they have been informed and treated fairly
- Someone to go to and a way to seek recourse when things go wrong

We acknowledge the proposed legislative changes are one part of the overall solution, together with the supporting regulations, Code of Conduct and market activity. However the legislation is an important part because it sets the overall framework for how market participants will behave. The behaviour of all market participants is key to building confidence and trust.

It is therefore important to have consumer outcomes front and centre when making decisions about the proposed legislation.

Recommendation One
Where there is uncertainty over the best way forward, use the guiding principles of:
a. Putting consumer outcomes at the centre of the solution
b. Helping the consumer understand the part they need to play in putting their interests first

Theme Two – Advisers/Advice Categorisation

A key issue with the current regime is the confusion caused, for both consumers and the industry, by the terminology and definitions relating to advice. We agree with MBIE that an outcome of this confusion is a deterioration in consumer confidence and understanding.

The proposed changes take the industry forward on many fronts and we support the removal of unnecessary complexity such as product categorisation, class and personalised advice. We further support the move away from the confusing adviser designations of ‘registered financial adviser’, ‘authorised financial adviser’ and ‘qualifying financial entity’.

Despite best intentions, the definition of advice remains a grey area, with feedback from our members that further clarity is needed for market participants. A potential unintended consequence of the lack of clarity is further confusion for the end consumer.

In our view, there are two issues to consider when answering the question around adviser categorisation:

1. The consumer needs to be able to understand the differences in the duties and obligations of each type of adviser.
2. The industry needs to understand the duties and obligations for all market participants

As long as these duties and obligations are simply defined and communicated, the question of categories and titles becomes secondary. To aid in this definition and communication we recommend MBIE ensure financial adviser categorisation is channel agnostic.

Our members highlight there is industry confusion over the impact of the word 'engaged', and what this may mean for distribution arrangements between product providers and adviser groups (particularly where an adviser may distribute for more than one product provider).

Recommendation Two
MBIE to provide further clarity on the bounds of advice for Financial Advice Representatives, specifically around determining whether a recommendation has been made and therefore whether the interaction is advice or no advice.

Recommendation Three
MBIE, FMA and industry discuss the potential impact on QFEs, product providers and adviser groups to determine impact and potential amendments, if any.

Theme Three – Client First

In our opinion, this is the most critical element of the proposed legislation to get 'right' ensuring there are no potential unintended consequences for either the industry or the consumer.

We agree with the aim of putting the client first, only providing advice where competent to do so and clients understanding the limits of the advice. Together these create a level playing field which makes it easier for consumers to trust in the advice they receive.

As written in the consultation paper, the client first duty applies when both giving advice and 'doing anything in relation to the giving of advice'. We generally agree (given the Financial Advice Provider can agree a scope that excludes advice), but raise a concern around the lack of precision in the expression and the potential unintended consequences that may flow out of the 'doing anything in relation to the giving of advice' part of the duty which may compel advice when it is not required – leading to a sub-optimal experience for the client. It is important legislation be sufficiently clear so those seeking to comply know what is expected of them.

It would be helpful if the duty included an acknowledgment that behaviours required by it are limited by the agreed scope of the engagement.

We also raise the issue of whether the duty to put client's interests first should be restricted to retail clients, relying on the protection wholesale clients enjoy through their contracts. To put this in practice and make sure clients receive the service best suited to their needs, we recommend clear definition of retail vs wholesale.

Further, the wording of the client first duty appears to encompass conflicts of interest with anyone, not just related parties. This appears broad and could impact on the length of disclosure and the ability of an adviser to provide advice.

Finally we are aware of the challenges in Australia arising from the introduction of the 'prioritise the interests of the client' duty and expect there are learnings for New Zealand from the Australian experience.

Recommendation Four
MBIE provides greater clarity, maybe with safe harbour examples and an acknowledgment of the agreed scope to guide market participants on how to interpret the client first duty.

Recommendation Five
MBIE look further at how the similar Australian duty ('prioritise the interests of the client') has been adopted and any challenges that have occurred in Australia since implementation. Discussion with industry about the scope of the duty will reduce the risk of similar challenges in New Zealand.

Theme Four – Conflicts of Interest, Inappropriate Incentives

We welcome the proposed stance on prohibiting inappropriate incentives and note the continuing work in relation to inappropriate incentives and soft-commissions. We acknowledge there will be debate over what is deemed to be 'inappropriate' and this is not an easy issue to resolve.

The 'guide to the FMA's view of conduct' together with the FSC's Code of Conduct (in development) will be helpful in steering the market towards the best solution.

FSC members are seeking further clarity in order to determine potential approaches and impacts. We are keen to work with MBIE on the continuing investigation.

This work needs to be completed before the content of the amended disclosure statements are agreed otherwise consumers will not receive the full picture of the incentives their adviser is receiving.

We note detailed disclosure requirements are yet to be determined and acknowledge the consultation needed to find a balance between consumer protection and simplicity.

Recommendation Six
MBIE work with industry to refine the proposed legislation to reflect a balanced approach to sales incentives and mitigating policies, procedures and controls. We further suggest the FMCA Framework Methodology could be used to further expand and provide guidance on this subject.

Recommendation Seven
MBIE and the FMA work with industry and consumer groups to develop and test the new detailed disclosure requirements.

Theme Five – Transition and Code Development

It has only been six years since the Financial Advisers Act 2008 (FA Act) fully came into force, and the industry is still recovering from the impact of the material regulatory changes. Our members want to do the best thing for the consumer, and are supportive of the Government and Regulators' strategic intent, but only have limited resources. Time spent on regulation may mean less time spent developing products and services that truly meet consumer needs. The proposed transition period is critical to mitigate this risk.

We fully support the transition period, however our members have expressed concern over potential business model impacts should there be any delay in developing the Code. Until the Code is developed, market participants will be unable to ascertain the true impact of the regime. Our view is the composition of the Code Working Group (and the Code Committee) will be key to shaping the future of the industry.

With regard to potential business model impacts, our members have questioned the transitional arrangements for both ex-QFEs and non-QFEs in relation to onboarding new employees. We are seeking further specific assurance on how this will work in practice.

Further, given the proposed length of the transition and the guidance that only currently provided services are permitted during transition, our members have asked if there is a better way to obtain a licence for new services, such as robo-advice.

Finally, we look forward to working with MBIE as the licensing consultations progress to ensure costs and obligations are proportionate to a range of business models. We believe there is an opportunity to learn from overseas experience where consolidation shrunk the number of market participants and therefore reduced the ability of consumers to access financial advice.

Recommendation Eight
MBIE work with industry to understand the business model impacts from different scenarios and examples during transition.

Recommendation Nine
The Code Working Group includes membership criteria for experience in wealth management, insurance services and mortgage (among other specific areas of expertise) to ensure a thorough understanding of the complexity of the industry.

Recommendation Ten
MBIE consider allowing providers to apply for a robo-advice licence during the transitional process, and ahead of a full licence.

Theme Six – Robo-Advice

Recent research[1] reinforces consumer appetite for robo-generated financial services advice (banking and insurance), with 78 percent of the 33,000 people surveyed saying they would welcome robo-advice for traditional investing and 74 percent for help in purchasing insurance. However the study also found consumers still want human interaction in relation to servicing and complex products.

In our view, online access is part of the larger solution in providing consumers with the advice and assistance they need, and in our experience the consumer's channel of choice will change in different lifestages and circumstances. It is therefore important for the legislation to enable a variety of channels.

We endorse how the proposed legislation opens the door to robo-advice and online capabilities. In our view this reflects changing consumer behaviour and future-proofs the legislation.

We seek clarity on minimum requirements for robo advice including monitoring and expect there are learnings from the Australian experience.

Recommendation Eleven
Given the close economic relations between Australia and NZ it would be desirable for FMA to take the ASIC Regulatory Guide 225 (digital financial product advice for retail clients) into account when determining its approach to licences covering robo channels.

[1] 2017 Global Distribution & Marketing Consumer Study, Financial Providers: transforming distribution models for the evolving consumer, Accenture Consulting

Specific Responses

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?
   Yes, this aligns to the overall intent of maximising consumer access to quality financial advice. An offer through a Financial Advice Provider should be allowed through an unsolicited meeting provided once the engagement is made there is full compliance with the Code of Conduct. We support retaining the current exception in the FMC Act.

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?
   Our members have a range of views:
   a. No, given the consumer protection on Uninvited Direct Sales via the Fair Trading Act.

   b. Yes, documented advice should apply in all cases, especially where the unsolicited advice relates to a type of product the client already holds (replacement business).

3. Do you have any other feedback on the drafting of Part 1 of the Bill?
   Our members provide three areas of detailed feedback. Please note not all members share these views:
   a. On a principles basis, we recommend simple and clear definition of the advice categorisations (refer Theme Two). Notwithstanding this, the term 'Financial Advice Representative' could lend itself to similar consumer confusion the AFA and RFA terms previously gave rise to. We note the suggested amendment MBIE issued in the FAQ (8 March 2017) to 'Financial Provider Representative' (or [licensee name] Representative if the adviser sells only the licensee's products) which could potentially more clearly align the staff member to the Provider and remove the word "Advice" from the title.
   Please note not all members share this view given both Financial Advice Representatives and Financial Advisers can provide advice.

   b. We consider the term 'engaged' to be broad and that it could inadvertently extend to multiple levels of contracts. For example, where a Financial Adviser is employed by a Financial Advice Provider who is a member of a distribution group selling a manufacturer Financial Advice Provider's products. We note some Financial Advisers are presently engaged by more than one business. The draft Bill allows this and we draw attention to it to ensure that FSPR and FMA licensing processes also allow it.

   c. Clauses like 431B which define what is financial advice should refer to four possibilities – acquiring or disposing of, or varying or renewing a financial advice product. The existing law imposes obligations when advice is given in relation to acquiring or disposing of a financial advice product. This does not cover variations or renewals (e.g. of insurance products) which are neither acquisitions or disposals. We suggest the definition of acquire in clause 5(3) could be changed to include renewals or variations.

Part 2 of the Bill sets out licensing requirements

4. Do you have any feedback on the drafting of Part 2 of the Bill?
   We have no further feedback on the drafting of Part 2 of the Bill.

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

5. 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?
   In our opinion, this is the most critical element of the proposed legislation to get 'right' ensuring there are no potential unintended consequences for either the industry or the consumer.

   We generally agree (given the Financial Advice Provider can agree a scope that excludes advice), but raise a concern around the lack of precision in the expression and the potential unintended consequences that may flow out of the 'doing anything in relation to the giving of advice' part of the duty which may compel advice when it is not required – leading to a sub-optimal experience for the client. It is important legislation be sufficiently clear that the those seeking to comply know what is expected of them.

   It would be helpful if the duty included an acknowledgment that behaviours required by it are limited by the agreed scope of the engagement. This would provide the client with the ability to choose whether they receive advice where there is a conflict.

   Our members are seeking greater clarity, with safe harbour examples on how to interpret the proposed duty.

   Specific issues raised by our members are:
   a. The duty as written is broad and may be interpreted as compelling advice in all cases and extending across the value chain. For example, Financial Adviser A refers a client to Financial Adviser B for advice. Should Financial Adviser A be subject to the duty to put the client' interest first?

   b. The definition of "client interests first" (431H) could be interpreted as effectively banning commission or incentive because receiving it is unclear whether this is 'anything in relation to giving advice'. If it is, advisers should potentially rebate commission if they put clients' interests first.

6. 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 welcome the proposed stance of prohibiting inappropriate incentives and acknowledge there will be debate over what is deemed to be 'inappropriate'. We acknowledge FSC members are striving for best practice in this regard and are seeking further clarity in order to determine potential approaches and impacts.

   Our members have a range of views on the wording and the potential impacts:
   a. The clarity provided in s431O(2) is helpful in defining 'inappropriate'.

   b. If this duty changes the way financial advice providers structure the remuneration packages of their representatives then this would have a positive reputational and behavioural impact on the industry.

c. There needs to be greater clarity about what is an inappropriate payment or incentive. While we are against payments or incentives that are extraordinary or highly unusual, there should be no prohibition on payments or incentives which reward good sales people and motivate them to sell products to consumers that need those products. Also there should be clarity about what soft commissions are covered.

d. Financial Advice Providers should be able to raise a defence they have put in place appropriate controls and processes to monitor their obligations and duties and to mitigate representative conduct being incentive driven.

e. This duty should extend to all Financial Advisers.

7. 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?
If wholesale clients are appropriately defined the balance of power between adviser, client and client's abilities should allow for sufficient protection under their contract and a level playing field is then already achieved. Compliance costs of retail protections would unnecessarily increase costs for the wholesale client. We therefore do not support extending the client first duty to wholesale clients

We seek further discussion on the definition of wholesale and retail categorisation in order to prevent unintended consequences from this proposal. Refer to our response to Q24.

8. Do you have any other feedback on the drafting in Part 3 of the Bill?
Our members provide a range of other feedback. Please note not all members agree on all of the following points:

a. A single definition could apply to cover both 'financial advice' and 'regulated financial advice' with better/clearer drafting i.e. by using appropriate exclusions/carve outs of what is not regulated financial advice. The proposed definition of regulated financial advice does not capture advice that does not recommend products, unless it is investment planning. In future, financial advisers may charge a small fee to recommend a mix and volume of product types, without product selection. There is risk for the consumer in this advice and it should be captured. Section 431B (cl 24)

b. Note advisers sometimes work for multiple firms. While the exposure draft does not limit financial advisers to be employees of one firm, regulations and licensing processes should keep this in mind. Clarity could help answer the question of whether Financial Advisers and Financial Advice Representatives can belong to more than one Financial Advice Provider.

c. Prescribing a format and time for disclosure has the potential for suboptimal outcomes for clients. For example, in online tools, disclosure could be drip-fed. Small parts of required disclosure could be presented to the client at the most appropriate times during the advice process. A prescribed time and format would limit this.

d. Replacement business should always require advice unless the client proactively and expressly refuses advice.

e. Using the term "Agree" in 431G could prove to be a significant operational undertaking with limited client benefit. If a provider is required to document a client's agreement prior to providing regulated advice (particularly through Financial Adviser Representatives in a retail network) this could become commercially prohibitive to increasing access to quality advice. We suggest instead using options around disclosure to meet the objective of ensuring the client understands the scope / product set / type of advice they are receiving.

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

9. What would be the implications of removing the 'offering' concept from the definition of a broker?
   We see no impact from removing the 'offering' concept and support this simplification.

10. 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?
    The use of the colloquial term of 'broker' as a money-handler has been a source of confusion and could be addressed in this review. For example, insurance broker, mortgage broker, are not necessarily 'brokers' in the sense of the FA Act or the FMC Act. We suggest changing the term 'broker' to 'money handler', 'custodians and custody outsourcers', 'custody representatives' or 'client money handlers'.

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

11. 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?
    Our members generally agree that Financial Advisers should have increased accountability in situations where they have materially deviated from the Financial Advice Providers' processes. This increased accountability should provide recourse to clients. The model as proposed limits the primary exposure of a financial adviser to the disciplinary committee. We are concerned there is limited ability to require a financial adviser to put right a problem of his or her creation without a client commencing proceedings against the adviser. The regime should make it easier for the client who relies upon the individual advice of a financial adviser to seek redress from that adviser when there is a problem.

12. 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?
    The guiding principle is, ultimately, a client must have recourse and a means of redress whether the advice was provided by a Financial Advice Representative or a Financial Adviser.

    Financial Adviser
    We understand the licensing regime will require providers to ensure they have controls, processes and systems in place to meet all obligations and this should provide the Financial Advice Provider with a defence to any criminal proceeding or claim for pecuniary penalties. Clients must have an accessible and effective means of redress when he or she suffers loss because of breach of any of the obligations or duties. As such, it should be considered in tandem with the liability and insurance requirements for Financial Advisers.

    Financial Adviser Representative
    We question the recourse provided for consumers where a Financial Adviser Representative has erred and the Financial Advice Provider mounts a successful defence (if such a defence is allowed). Clarity on this point will be helpful.

13. 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, the designation power is appropriate. It is unlikely to be used often if at all. We do not believe there are any additional/different procedural requirements needed. General principles

of administrative law provide sufficient protection. It is also appropriate to consider whether an administrative panel should be appointed to hear appeals from decisions made by the FMA. Currently the only option for a market participant who does not agree with the decision made by the FMA is to seek judicial review. A mature regulatory regime would include an appeals process from administrative decisions of the regulator.

14. Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?
Our members support treating clients as individuals and focussing categorisation at the client level, not the service level. Doing this will mean retail treatment for retail clients, and wholesale treatment for wholesale clients. In practice firms will need to overcome the challenge of a wholesale client becoming a retail client after the service has been provided (for example because their turnover decreases in a financial year to below the threshold).

Firms that want to treat all clients the same can use the greater requirements. For example, if a firm wishes to do so, it is likely to be possible to create a disclosure document than can be used for both retail and wholesale clients (which is likely to entail over-disclosing to wholesale clients).

Please note our response to Q24 in relation to the categorisation of wholesale clients. Our members highlight a client may be sophisticated for one product (e.g. investments) and know less about another product (e.g. insurance).

15. Do you have any other feedback on the drafting of Part 5 of the Bill?
The value of the Financial Advisers Act regime is it enables individual registration of RFAs. In Australia, where there is no such individual registration, consumers have suffered loss when 'bad apple' representatives moved from one licensee to another, repeating the same misconduct with each new product provider. Further consideration needs to be applied to ensuring this practice cannot happen in New Zealand

Part 6 of the Bill amends the FSP Act

16. 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, this is an improvement to the current requirements and our members support implementation as soon as possible.

17. Do you support requiring further information (such as a provider's AML/CFT supervisor) to be contained on the FSPR to help address misuse?
Our members generally agree that enhancing requirements for information to be included in the FSPR allows the public to make more informed decisions and should be supported. Such information needs to be meaningful and helpful to consumers and we are not sure how helpful including a provider's AML/CFT supervisor would be to a consumer.

Our members highlight the FSPR is not much used by consumers and therefore there may be little benefit gained from requiring further information on the FSPR.

18. Do you consider that other measures are required to promote access to redress against registered providers?
Measures suggested by our members:
a. Addressing the current timing problem with consumer recourse to Dispute Resolution Schemes. Situation (hypothetical, with dates for illustrative purposes):
    - In 2014, Adviser A advises Client C to replace her insurance product. Client C replaces

the product as advised.
- In 2015, Adviser A decides to leave the advice industry, deregisters from the FSPR, cancels membership of her DRS, and becomes a plumber.
- In 2017, Client C discovers she cannot claim on her new insurance product. She discovers Adviser A gave poor advice, and she would have been able to claim on her former insurance product (which is now cancelled).
- The DRS with whom Adviser A was a member at the time of the advice in 2014 cannot adjudicate Client C's complaint in 2017. The harm occurred in 2014 when Adviser A was a member, but the complaint occurred in 2017 when Adviser A is no longer a member.

b. Increasing the compensation Disputes Resolution Schemes can dispense because in our experience, if a financial adviser is at fault, the DRS will come to the product manufacturer and say, "the adviser harmed the consumer, how much are you willing to pay?"

19. 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?
The proposed categories appear an improvement on previous ambiguity. Further improvements for consideration during the development of the final list:

a. Reconsidering the use of (or providing clearly definition around) the term 'broking services' as we understand this term has caused confusion in the past. Refer to our response to Q10.

b. Providing guidance on where companies who offer sales without advice register

c. Ensuring the categories in the legislation align with the online registration options

20. 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?
Our members have a range of views:
a. Yes

b. No. Clear direction should be retained as to when information must be communicated, otherwise this requirement could be used wilfully and have negative commercial outcomes for those identified, especially when this information could be incorrect.

c. The current section 67 of the FSP Act has a materiality threshold requirement which ensures there is substance to any reporting. Lowering this threshold could potentially result in "over-reporting" by schemes who want to ensure they meet their obligations.

So, while we support the intent of protecting the consumer, if this goes ahead we recommend clear guidance be provided to the Dispute Resolution Schemes to ensure a consistent application of this obligation. For example a clear direction to whether "all" complaints should be referred or a definition of material or systemic supplied. This guidance should help to limit the potential for mistakes and unintentional reputational damage.

21. Do you have any other feedback on the drafting of Part 6 of the Bill?
We have no other feedback on the drafting of Part 6 of the Bill.

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

22. 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?
    We have no comment.

23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?
    We have no other feedback on the drafting of Schedule 1 of the Bill.

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

24. 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?
    A consistent definition is simpler and we support aligning to the current definition in the FMC Act. Our members highlight wealthy clients should not automatically be treated as wholesale, recommending removal of wealth tests when classifying clients. Alternatively, wealthy clients should be able to opt-out of retail disclosure, rather than opting-out of wholesale disclosure. Should a wealth threshold be maintained, a $1,000,000 threshold in today's housing market means many consumers could be classified as wholesale when they need retail support.

25. 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?
    The proposed clarification helps. A clear statement that execution-only cannot be used at the end of an advice process, or to avoid the client first provisions could help. Alignment of language between the Code of Conduct and Responsible Lending Code could help, as could clarity that collecting personal information to assess credit or identifying the best lending product for a client's needs is not the same as providing advice.

26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?
    Yes, our members have highlighted the following unintended consequences:
    a. Interpretation of conversations currently considered 'class advice' as excluded under the new 'general opinion or recommendation' clause. Clarification of the definition would resolve this.

    b. Limitations on the provision of advice due to the change from 'information' to 'factual information'. Clarifying the reason for this change may help market participants interpret it better.

    c. a Financial Adviser who advises on only a single provider's products could find it difficult to comply with the exclusion in clause 6(c) around a kind of 'financial advice product in general'.

27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?
    Our members generally agree the criteria and proceedings are clear. Given the extent to which the code committee will shape the future of the financial services industry, offer the following suggested improvements:
    a. Include a membership criteria for diversity
    b. Include a membership criteria for experience in wealth management, insurance services and other major services such as mortgage broking to ensure a thorough understanding of the complexity of the industry.

c. Proceedings to include consultation with product manufacturers and distributors to ensure the operational workability of the final code.

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

29. 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. It provides sufficient clarity while also allowing for flexibility in determining the best way to meet the standards.

30. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?
    Our members have a range of views:
    a. No, The FMA has the existing tools and expertise to consider complaints against Financial Advice Providers.

    b. Yes, an alternate body that consumers can use to obtain redress supports the policy's objective.

    As a guiding principle, we believe simplicity and clarity is key to the final solution, making it easy for consumers to seek recourse.

31. 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?
    The original purpose of the FADC was to be a quick and efficient means to consider Code breaches. While our members have different views on whether the jurisdiction of the FADC should be extended to cover Financial Advice Providers, as a guiding principle any solution should reflect the intent of the FADC i.e. a high potential penalty would appear inconsistent with 'quick and efficient'. Our members generally support a maximum fine consistent with the maximum fine for financial advisers (being $10,000).

32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?
    We have no other feedback on the drafting of Schedule 2 of the Bill.

About transitional arrangements

33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?
    The key principle is to ensure consumers have access to quality advice during the transition process. Specific objectives recommended by our members:
    a. The early introduction of personalised robo-advice

    b. Optimising the number of advisers who transition / encourage financial advisers to transition

    c. Flexibility should circumstances change during the course of the transition process

    d. Ensuring market participants can continue to provide class advice during transition

Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?
    Yes. This approach has worked well with other legislation such as the FMC Act.

35. Is six months from the approval of the Code of Conduct sufficient time to enable existing industry participants to shift to a transitional licence?
    Our members believe six months is achievable on the basis full compliance with the new Code (including demonstration of new competence, knowledge and skills requirements) will only apply on full licence.

    Given the unknown shape of the new disclosure requirements or content of the revised Code (notwithstanding the competence, knowledge and skill standards will only apply on full licence), 12 months is more realistic.

36. Do you perceive any issues or risks with the safe harbour proposal?
    Generally no, however it depends on the final competence, knowledge and skill standards and how much they differ from existing requirements. In line with the guiding principles of simplicity and consumer protection, we do not support introducing anything that either brings complexity, risk or potential consumer-harm. The final decision will need to be made in conjunction with the final decisions on questions 39 and 43.

37. 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 proposals seem appropriate and we generally endorse the inclusion of the new legislative duty to put the client's interests first (subject to our comments earlier).

38. 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?
    Based on the currently available information, yes. However until the Code of Conduct is finalised and content known it is difficult to estimate the size and impact of change on industry participants.

Possible complementary options

39. 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?
    We support the principle of lifting standards across the industry, bringing consistency and a level playing field.

    Our members have a range of views:
    a. The answer to this question depends on the final competence, knowledge and skill standards and how much they differ from the existing AFA requirements. In line with the guiding principles of simplicity and consumer protection, we do not support introducing anything that either brings complexity, risk or potential consumer-harm. We also do not support anything that introduces an imbalance to the industry in relation to existing AFAs and RFAs. The final decision on AFAs will need to be made in conjunction with the final decision on questions 36 and 43.

    b. Presently AFAs are required to have a higher qualification than RFAs (RFAs are not required to have any qualification). Therefore, whatever the new requirements are, RFAs will have to do at least as much as, and most likely more than, AFAs. So it does not make sense that AFAs get more time to comply than RFAs.

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
    Refer to our response to Q39

41. 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. An exemption would likely cause both industry and consumer confusion and appears contrary to the policy objective of preventing 'unnecessary complexity that prevents adequate consumer confidence and understanding'.

42. 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?
    We have no comment.

43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
    Our members have raised concerns advisers will exit the market if they need to meet extensive new qualification criteria without acknowledgement of existing qualifications or experience. As a guiding principle, in line with the intent of simplicity and a level playing field, we recommend this is handled in the Code Working Group and legislation takes a broad approach to allow for simple pathways to compliance. Until the new Code standards are agreed, the likely impact is unknown.

44. 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?
    No. Competency is not necessarily linked to time in the industry or reflective of competence, knowledge and skill.

45. 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?
    Please see our response to Q43. We recommend this is handled by the Code Working Group.

Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?
    Our members highlight the complexity involved in this approach and the potential unfairness in allocating time windows for participants. To achieve a level playing field, we recommend participants be free to choose when they apply within the transitional period. Having a shortened transitional period could lead to increased tangible costs for market participants and opportunity costs through resource diverted to compliance rather than to consumers.

47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?
    Yes, we suggest the FMA could prioritise working with industry groups such as the FSC, FANZ and adviser associations to leverage existing resources, knowledge and relationships to make it easier for market participants to meet the new requirements and obtain licences. Other suggestions from our members are:
    a. Provide discounts for early applicants
    b. Provide extra support for early applicants
    c. Note there is already an incentive for those wanting to extend their services (for example, robo-advice) to apply early

48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?
    We have no further comments