NEWTON ROSS
PRIVATE WEALTH MANAGEMENT

31st March 2017

Financial Markets Policy
Ministry of Business, Innovation and Employment
PO Box 1473
Wellington 6140
New Zealand
By email: faareview@mbie.govt.nz

Dear Sir/Madam

Submission: Consultation Paper – New Financial advice Regime: the draft Financial Services Legislation Amendment Bill and proposed transitional arrangements

Newton Ross Private Wealth Management are a small, completely independent financial advice firm and licenced Discretionary Investment Management Service (DIMS) provider.

We currently have 5 AFA's and 2 support staff in our business and went through the lengthy and costly exercise of obtaining a FMC Act DIMS licence as we believed this was a "best practice" approach.

We have a mix of retail and wholesale clients and as an independent provider we are able to freely choose the most appropriate investment structure and opportunities for our clients.

We have provided feedback below on those questions where we felt we could contribute to the discussion.

Consultation Paper Question 3:

a. **Financial Advice Product**. We agree with the proposal to remove the categorisation of category 1 and category 2 products and remove the distinction between class and personalised advice. In our view these arbitrary definitions were product based rather than advice based definitions and as such led to outcomes which were confusing to consumers and providers. The risk is now that this same mistake is being made with respect to proposed financial adviser designations.

b. **New Adviser Designations**. We strongly disagree with the proposal to create a new category of Financial Advice Representative (FAR). The name is confusing at best for consumers and at worst misrepresents what the individual is able to deliver to a client. We already have a confusing situation for consumers trying to understand the difference between AFA, RFA and QFE advisers and the proposed change does not provide clarity.

   If there is a good reason to split advice into these two designations then consumers should be able to easily determine that a Financial Advice Representative is not providing the same level or type of advice as a Financial Adviser (FA). For clarity we recommend that only the FA designation include a reference to 'advice'.

That said, we see no compelling argument to create both FAR and FA's. As stated in the Bill a person gives financial advice if they make a recommendation or give an opinion about acquiring or disposing of a financial advice product or if they design an investment plan for a person.

It would appear that the only rationale for creating the FAR designation is to accommodate situations where a FAP wished to have a representative pass on their advice or make recommendations and/or giving a general/class opinion about financial advice products.

In our view this is exactly the area that has created the greatest confusion for consumers. In our view clients will absolutely believe they have been provided with advice if their Financial Advice Representative passes on advice and/or provide recommendations. They will not be able to distinguish between this and a similar discussion with a FA. Surely the easiest and clearest position would be to have only one Financial Adviser designation. Note this still could exclude providing factual information only or carrying out client instructions.

In our view, a FA should be able to use disclosure to easily and clearly show a potential client

- the financial advice provider they are representing
- any limitation of the advice given
- any limitation as to products recommended
- how all parties are remunerated

We do this now as an independent AFA. For example, we confirm to clients that we can recommend any investment products we wish and are unlimited in our investment advice but do not provide advice on areas such as risk.

Assuming a single FA designation does not mean training or oversight has to be the same for all. Depending on their business and operational structure a financial adviser would be able to train to meet minimum standards by either following something similar to the existing AFA training and education requirements, or alternatively by having that training supplied by the Financial Advice Provider. As long as both options meet minimum criteria then clients can have faith that the FA they are talking to is well trained in providing advice.

We do not support the idea that any FAR (or FA trained by a provider in our scenario) can avoid a duty of care and responsibility to their client.

c. **Excluded Circumstances**. We note that the exclusion remains for accountants, lawyers, journalists and real estate agents (amongst others) to continue to provide financial advice with no qualifications or oversight under the Act. In our view this does not support the aim of promoting a credible financial advice industry and improving access to high quality financial advice. The stated aim of the Bill is to establish a level playing field of regulation for all who are proving advice. Retaining these exemptions absolutely tilts the playing field away from financial advisers and towards other trusted advisers who may or may not have the necessary skills and expertise to provide suitable financial advice. Given some of these occupations are already regulated in their own right we do not believe they should necessarily be brought under this regime, but we do believe they should have additional oversight and conditions imposed which ensure they meet the same or similar care, diligence and skill requirements as financial advisers.

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

Your comments on page 16 and diagram on page 17 note that a DIMS will no longer be regulated as financial advice since it is regulated as a separate market service. However a DIMS facility is included as a financial advice product in the Bill and the definition of regulated financial advice is financial advice given in the normal course of business, in relation to a financial advice product, and not excluded under clauses 7-14 of the new schedule 5.

So we question whether a DIMS facility should remain listed as a financial advice product?

Assuming a DIMS is not a financial advice product then could you please clarify exactly who is able to on-board a new client to a DIMS facility and whether any such recommendation or opinion will be considered regulated financial advice.

Likewise we wish to confirm that since DIMS is not financial advice we assume a DIMS facility is therefore not a financial advice service? Hence the DIMs provider is not a Financial Advice Provider.

Consultation Paper Question 5:

We agree that a FA should put a client's interests first in relation to giving advice. However we consider the proposed wording of this duty has been unduly narrowed in the current draft. We prefer to retain a wider reference back to the code of conduct.

A drafted we are also unclear as to how an adviser can meet this obligation at any time in the future. How can a FA possibly be held responsible for advice given today based on the clients unknown position in the future which may or may not be materially different and influenced by a number of factors along the way.

We are unclear as to what is meant by putting the client's interests first when 'doing anything in relation to the giving of advice'. For instance an adviser should always have the ability to decline to provide advice for any reason to any potential client – this may not be in the best interests of the client.

Consultation Paper Question 6:

We would agree that there should be no inappropriate payments or incentives. However to clarify exactly what this means we would prefer a clear direction as to what is deemed inappropriate and what is appropriate.

As independent financial advisers we would prefer that there were no incentives allowed, particularly those which are related to the volume of product sales rather than the value of the advice and the success of the product.

Consultation Paper Question 7:

We support extending the client-first duty to all providers including those who only advise wholesale clients. However we would go further and recommend that providers who currently provide a DIMS facility or financial advice service to wholesale clients only should be required to obtain a licence. Specifically they should be carved out of the wholesale service exemption due to the significant risk to Mum & Dad investors. Many of these wholesale clients (particularly those that are wholesale merely by virtue of the size of their investment capital) are not experienced investors. Often their wealth is

generated by inheritance, windfall gains or the sale of a business and they have no investment expertise at all. We believe this loophole could be used by unscrupulous operators (such as was the case with the David Ross situation) to provide services outside of the regulatory regime with no oversight or controls in place.

We also note that wholesale only operators benefit from a significant cost and resource advantage when compared to a licenced provider. This means the playing field is tilted away from licenced providers to those who are un-licenced.

Consultation Paper Question 8:

The Duty to put client's interests first includes an obligation for the FA to know or reasonably know that there is a conflict between the interests of any other person. This obligation should be limited to any other person associated with the FA, otherwise the scope is too broad.

We support retaining an obligation in law for all parties to work towards encouraging public confidence in the professionalism and integrity of financial advisers.

Consultation Paper Question 11 and 12:

Individual advisers (either FA or FAR) should not face civil liability. In our view both FA and FAR advisers should be held personally accountable for the compliance with the Code. This obligation would assist in raising the bar for the industry and improve public confidence. Anecdotally we are aware of a real difference in perceived obligations between those currently under the QFE regime (and hence the 'protection of the corporate' and an AFA who is personally liable.

Removing the liability of the FAR appears to run contrary to the law of agency in tort or contractual dealings. Does the proposed FAP-FAR structure mean that clients will not be able to sue both parties? Surely the FAR is acting as an agent for the FAP and as such is acting under authority and accountable. If the FAR is not personally accountable how is the FMA going to regulate those individuals and stop them moving from one disaster to another? The suggestion of some form of register appears to be the ambulance at the bottom of the cliff approach.

If FARs are allowed to operate without any direct accountability then Financial Advice Providers need to be responsible, not only to provide proof that there was a process and resources in place but that the FAR was properly trained in those processes and that these were adequate and delivered appropriately. However a very poor outcome would be a situation whereby a FAP has done everything correctly and a rogue FAR commits a damaging action against a client and is allowed to walk away scot free.

Consultation Paper Question 14:

Our assumption is that a Financial Advice Provider can provide more than one Financial Advice Service under a single licence. If this is the case then the definition of retail service vs wholesale service makes sense as a FAP could tailor more than one service offering to different segments of the market. If a FAP can only provide one FAS then this would be unworkable in practice.

Consultation Paper Question 24:

Clients are being given the opportunity to opt out of being a wholesale investor (we understand this is not currently an option under the FMC Act but is under the FA Act) with very little notice. The short timeframe could prove substantively difficult for FAPs who will presumably need to fire their client or be forced to establish a retail service offer.

The definition of a wholesale investor should be aligned with the broadest criteria between the two acts and therefore carry over the FA Act criteria. However as per our answer to Question 7 we would support licencing of all DIMS and FAPs regardless of whether they offer a service to retail, wholesale or both types of clients.

Consultation Paper Question 26:

As per our answer to Question 3, in our opinion the exclusion which allows a FAR to pass on FAP advice and/or make recommendations and give a general opinion about financial advice products creates significant confusion for clients. It is very difficult if not impossible for them to determine any difference between this relationship which is not considered financial advice, and similar comments from a FA which is considered financial advice.

Consultation Paper Question 28:

It certainly makes sense to us to ensure that the new Code Committee, MBIE and the FMA all have clear and segregated responsibilities and authorities. If the Code Committee is to be extended and filled with experts then they will be best placed to make recommendations and enact change. To that effect we would like to see sufficient resources allocated to the Committee and ensure that the scope of their activity and responsibilities under legislation is broad enough.

Consultation Paper Question 32:

FAR's should be subject to the Financial Advisers Disciplinary Committee for client complaints on matters of conduct and client care. This would provide a more robust and transparent process than leaving such matters to the FAP which employs them.

FAPs should not be accountable to the FADC as they are already subject to civil liabilities.

Consultation Paper Question 34:

We support a staged transition.

Consultation Paper Question 37:

Under the proposed regime only a QFE will be able to employ FARs for the several years during the transitional period. This provides an unfair competitive advantage to existing players over potential new entrants or existing providers who wish to change their business model. Any FAP should be able to employ FARs as soon as they have the necessary structures and processes in place.

Consultation Paper Question 38:

This will depend on the requirements and process for achieving a full licence and meeting any new competency standards.

Consultation Paper Question 39:

We support AFAs being exempt from having to meet different qualification criteria to achieve the same level of competency which they have already demonstrated in becoming an AFA. There should be no need for an exemption period for existing AFAs.

We appreciate the opportunity to comment and thank you for your consideration of our submission.

Yours sincerely,

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Wayne Ross Director	Mike Newton Director