

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

Submissions are also subject to the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

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?

Yes, it would assist consumers to get the information they need, or choose a financial adviser

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?

That consumers be given they need to find and choose a financial adviser, without confusion as to whether they are receiving advice or sales. Specifically, it needs to be transparent whether they are dealing with a Salesperson or agent of the 'financial advice provider', selling a limited range of wares, and if so, that activity needs to be clearly distinguished from Advice from suitably qualified Financial Advisers. The Financial Advice Provider need have the same legal obligations, transparency and accountability as Financial Advisers.

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

No comment

Part 2 of the Bill sets out licensing requirements

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

The proposal diminishes the professionalism and public confidence in AFA's. In no longer being the accountable entity, they are likely to be viewed as having less accountability and direct regulation, compared to other professionals (e.g. Teachers, Engineers, Lawyers, accountants, architects etc). The proposals additional complexity costs and regulatory layers, particularly for non-aligned and independent Financial Advisors and sole practitioners, favour institutions, large and established brands.

Investment offerings in NZ are likely to be less flexible or innovative as institutions and big established brands tend to be more focussed on their business risk, than investors; risk or choice.

Innovation is likely to be lesser to the extent the additional imposts on NZ's non-aligned and independent Advisers will reduce their number, erecting a greater barrier to entry for new and innovative products.

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?

It is not possible to comment meaningfully while this 'feelgood' expression remains undefined. This legal obligation and duty - to put the client's interest first - is vague, confusing and its interpretation unpredictable.

If a legal obligation, the defined standard should apply to Financial Advisors as well as Product Reps, Agents or Salespersons, with the latter qualified as to their restricted repertoire.

The legal obligation should not be left to Regulation, or Code to interpret, as to do so would add cost, contribute to uncertainty and may contribute to multiple and disproportionate restrictions on conduct.

A proposed, consumers will almost certainly not have adequate information on what is meant. Poor understanding of fluid and evolving regulation will add to all parties' confusion - likely for months or years.

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?

This seems over-reaching and unnecessary with little scope for regulatory compliance. Better that disclosure of any payments, inducements or incentives which might be considered likely to influence advice or product selection, should be disclosed by Financial Advisors in the Disclosure document. Sale people are most always incentivised

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?

No. This defined duty should be confined to Retail. I am not aware of problems or excesses with the current Wholesale Clients service, which provide reason for additional costs, or should be impeded with additional rules.

8. Do you have any other feedback on the drafting in Part 3 of the Bill?

Non-aligned and Independent Advisors are distinctly disadvantaged, relative to product providers ad large brands. The diminution of professional status, duplication - requirement to register & licence another Entity (soon after considerable effort and expense of Authorization) - with attendant costs, time, applications and distractions, will cause several good Financial Advisors to withdraw from the industry. While this may suit Regulators and some competitors, the loss of some transparency, probity and efficiency of the marketplace in which consumers operate should be recognized.

NZ consumers will be less safe from the reduction of competition, including a stronger non-

aligned or Independent advice industry. It is noted that Independent and non-aligned Advisors have been the whistle-blowers of dodgy practices. ING ANZ's DYF & RYF failures, improper KiwiSaver coercion and performance misreporting, and inappropriate benchmarks facilitating Fund Managers to pay themselves large, undeserved 'performance fees' tend to pass unheralded but for the vigilance and vocal attention of Independent or non-aligned Advisors.

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?

No Comment

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?

No Comment

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?

Yes, if they are to be regarded as professionals, and avoid double standards. The alternative would facilitate confusion; a two-speed industry, where financial advisers who are principals of the FAP will face recourse, while financial advisers in larger shops will have lesser accountability. An opportunity to game the rules to reduce civil liability may otherwise arise.

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?

No. To do so would be an inflexible, unduly prescriptive, and low standard approach. Process or resources inevitably outdate in the face of changing markets, and unanticipated developments. Better that Financial Advice Providers obligations remain principle-based than a prescriptive excuse. Travesties despite a formulaic approach would deservedly undermine public confidence

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?

No Comment

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

No comment

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

The proposals with new costs, entities, obligations & and new requirements inadvertently favour, or are perhaps deliberately captive to, the bigger institutions product providers and their interests. New imposts, cost and expected reduction in the ranks, numbers and especially the development of non-aligned or independent Advisors is an adverse impact for Consumers from the proposals.

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?
No comment
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?
No. To do so would reduce flexibility and efficiency.
18. Do you consider that other measures are required to promote access to redress against registered providers?
No
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 easiest and increasingly attractive category will be AFA (Ret'd
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?
It sounds good, but is probably ineffective. 'Believe' and 'may' are significant qualifiers that will in reality allow non-investigating and ignoring of possible breaches. Better to omit than add confusing, 'feelgood' waffle
21. Do you have any other feedback on the drafting of Part 6 of the Bill?
No comment

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?
No, DIMS approval should be rolled over to five years from the date of transition. The transition should seek to minimize cost, application distractions and defer regulatory burden, while recognizing that DIMS operators are very prescriptively controlled throughout, and remain subject to regulatory supervision throughout, and able to respond should challenges arise.
23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?
The least additional costs, requirements and regulatory burden should be imposed on AFA's, Wholesale Advisors and DIMS operators. Non-aligned and independent operators are perilously few in number in NZ as it is.

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?

No. The Wholesale category and existing exemptions under the FAA are working well. 'First do no harm'

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?

No comment – (unfamiliar with execution-only transactions)

26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?

No comment

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

The Current Code Standard One will be superseded by the statutory duty, and therefore redundant. Generally, the Code Standards tend to be overly prescriptive, as distinct from Principle-based, which will necessitate eternal 'tweaks' in response to market developments.

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

No comment.

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.

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

Absolutely – Consumers would better understand the regulatory framework if all Financial Service Providers were subject to the same rules and standards. To create exemptions risks facilitate gaming of the rules, allowing some operators to arrange their affairs for 'worst practice'.

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?

No comment

32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?

Ability to impose penalties should be proportionate to the size, FUM or Revenue of the errant perpetrator. A \$5 million penalty on sole-trader is uncollectible & silly.

About transitional arrangements

33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?

They look about right – adjusted for delayed to the starting date of the legislation.

Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?
Yes. Particularly for smaller operators there are many, many changes – complete revision of Plans, precedents, brochures, advertising material, website, letterhead, business-cards, printing, directories, client reports & staff-training – as well as seminars, new applications to complete, entity licensing, possible course-work either to up-skill or comply. The transition is a relatively short period for the major upheaval the draft indicates.
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?
Potentially challenging for smaller operators if travel or sickness intervene. 9 months would be better.
36. Do you perceive any issues or risks with the safe harbour proposal?
No comment
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?
Old letterhead and stationary should be permissible for at least 12 months.
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?
Challenging but potentially achievable – qualified by there not being anything too onerous or obtuse in the replacement Code of Conduct.

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?
No. AFA ascension was tainted with many 'grandfathered' exemptions for elderly but variably skilled operators. Level 5 Certificate is a universally available, is a quality assured academic credential and constitutes reasonable minimum standard.
40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
No comment
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. Some have credentials; some have only a trade designation they were able to propagate into an AFA designation.
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?
Not set in legislation. Delegate to Code Working Group is preferable. 'Decisions made at the lowest competent level ...'
43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?

No. The Lvl 5 Certificate is a modest minimum standard; is readily challenged by those with adequate competency, and results in an easy framework for consumers to understand. Multiple avenues to assessment will complicate public understanding of the system.

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?

Level 5 Cert

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?

Not set in legislation. Delegate to Code Working Group is preferable

Phased approach to licensing

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

Costs would be considerable, in cash outlays, fees, and time. Precise quantification of time & outlay is fraught ahead of determination of specifics and Code

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

No. The period is brief as it is

48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?

No Comment

Demographics

49. Name:

Norman Stacey, Diversified Investment Management Services Ltd

50. Contact details:

REDACTED

51. Are you providing this submission:

As an individual

On behalf of an organisation

Diversified Investment Management Services is a small, 1-Advisor, 1 Support Person entity, operating with back-office support from Foundry Asset Management Ltd.

52. 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: [Nothing Confidential]