

Submission

OM FINANCIAL LIMITED

OM Financial Limited is an NZX Clearing and Market Participant,
and an FMC Licensed Derivatives Issuer

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

31 March 2017

Introductory comment

Thank you for the opportunity to make a submission on the Financial Services Legislation and transitional arrangements.

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?

Enter text here.

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?

Enter text here.

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

Enter text here.

Part 2 of the Bill sets out licensing requirements

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

Enter text here.

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?

Yes. A duty can't be turned off and on again. Note: The client first duty is a new statutory duty that doesn't exist anywhere. We envision a great deal of clarification and regulation will be required to properly give effect to and describe the duty in statute. One only has to look at the law governing fiduciary duties to understand the scope of the task. A comprehensive duty needs to address avoiding conflicts, fees, disclosures, standards of research and competency, etc.

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?

Enter text here.

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?

Enter text here.

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

The existence of fiduciary obligations of advisors under equity must be addressed in the legislation to avoid confusion. Currently at common law persons in a position of trust and reliance, which would commonly include most financial advisors, owe fiduciary obligations to their clients. Those equitable obligations have not been replaced or changed by the proposed statutory duty to put client interests first. However, the proposed statutory duty conflicts and differs with these fiduciary obligations, and overlaps in many areas. The resulting uncertainty and confusion must be resolved.

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?

Enter text here.

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?

Enter text here.

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?

Bear in mind that many advisors will be liable directly to their clients as fiduciaries quite independently of civil liabilities under the proposed legislation. This should be recognised under the legislation, and steps taken to ensure that clients' equitable relief and recourse against an advisor is not impacted or affected in any way by the imposition of statutory remedies under the legislation (or alternatively, if it is instead intended to avoid some form of dual liability, that be expressly stated).

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?

Enter text here.

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?

Enter text here.

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

Reluctantly, we don't think it is workable in practice. There are too many ways for services to be structured "wholesale", some legitimate, some less so, to have a regime which licenses retail but not wholesale. To provide a comprehensive licensing regime wholesale providers must be licensed in the same way that retail providers are. Light-handed licensing of wholesalers is one thing – no licensing is another.

It is also confusing as to which areas are regulated and which aren't. For example, wholesale derivatives issuers don't need to be licensed, but they do need to comply with the FMC 2014 client funds regulations. These various areas of distinction are not always readily apparent. A single licensing regime for both wholesale and retail would address this.

It would also align with the Australian licensing regime. Currently there are several areas where we have, rightly, aligned our laws to take into account the position in Australia.

However, often those alignments don't seem to recognise the fact that wholesaler providers are licensed in Australia, which leads to further inconsistency in treatment.

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

Enter text here.

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?

The definition of service provider should closely mirror reporting entities under the AML legislation in order to ensure compliance with FATF recommendations. The pending Phase 2 changes are important in that regard.

Further, currently the FSP applies to persons in NZ servicing only overseas clients, yet the licencing and other regulatory regimes, in say the FMCA, don't apply to those services. That gap needs to be closed. Anyone registered on the FSP should be subject to the full regulatory/licensing regime as it applies in NZ. That will also address the potential for abuse or misuse.

We also consider that the register should not be publically accessible, or permitted to be used as a promotion tool for providers. With the proposed licensing of all financial advisors, the opportunity should be taken to correct the historic errors created by publishing the register and remove it from public scrutiny as there will no longer be any need to publish financial advisors registration as that will now be part of a proper licensing regime.

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?

Disagree. The FSP is a register only. Any steps taken such as this will merely exacerbate the misconception that there is some sort of licensing element to the register. There isn't.

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

Enter text here.

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 omission of trust and company service providers from the FSP appears to be a glaring and obvious gap, at least insofar as the register is used for FATF or AML purposes.

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?

Enter text here.

21. Do you have any other feedback on the drafting of Part 6 of the Bill?

As an aside, the FSP website incorrectly states that all banks operating in NZ are required to be registered with the Reserve Bank. That's not strictly correct. Banking business as such is no longer licensed in NZ. Accordingly, a company carrying on banking business (i.e. a "bank") does not need to register with the Reserve Bank (noting they can't use the word "bank" in their name or otherwise represent that they are so registered, etc). That statement on the FSP website should be corrected accordingly.

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?

Enter text here.

23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?

Enter text here.

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?
Yes. It's critical to reduce the plethora of different definitions and categories. There only needs to be one class of wholesale client/investor.
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?
Enter text here.
26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?
Enter text here.
27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?
Enter text here.
28. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?
Enter text here.
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?
It is essential that close attention to be given to the minimum standards required for specialist areas. Of particular concern is the regulatory regime governing derivatives (futures) advisors. Derivatives are an extremely complex and risky product. Specialist skills and knowledge is required, both in terms of the product, and the leveraging associated with that product. However, with the repeal of the Securities Markets Act there is no longer any accreditation or licensing required for derivatives advisors. Any AFA or RFA can now give derivatives advice. The only protection is the general requirement that an advisor needs to be competent. However that is not prescribed. For the above reasons we think it is imperative that specialist standards and qualifications be specifically prescribed for derivatives advisors in particular.
30. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?
Enter text here.
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?
Enter text here.
32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?
Enter text here.

About transitional arrangements

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

Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?
Enter text here.
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?
Enter text here.
36. Do you perceive any issues or risks with the safe harbour proposal?
Enter text here.
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?
Enter text here.
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?
Enter text here.

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?
Enter text here.
40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
Enter text here.
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?
Enter text here.
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?
Enter text here.
43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
Enter text here.
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?
Enter text here.
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?
Enter text here.



Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?
Enter text here.
47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?
Enter text here.
48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?
Enter text here.

Demographics

1. Name:
Brent Weenink
General Counsel – Head of Compliance & Regulatory Affairs
OM Financial Limited
Level 2, 37 Galway Street,
Britomart, Auckland
1. Contact details:
REDACTED
2. Are you providing this submission:
 As an individual
 On behalf of an organisation
(Describe the nature and size of the organisation here)

The principal activity of OM Financial Limited is to provide clients access to global financial markets, in order to trade financial instruments that includes futures, options, foreign exchange, contracts for difference, various equity instruments (derivative contracts) and carbon units. This is a mix of retail and wholesale work, with a number of Give-up arrangements in place with wholesale providers.

The Company also operates a wholesale inter-bank brokerage operation, where banks execute various financial instruments through our Wellington office on a give-up basis, resulting in commission revenue. The Company invoices the trading banks for commission revenue on a monthly basis.

Clients deposit funds to enable the trade of contracts and to keep these contracts open. All client money is segregated into client bank and client fund accounts as required by the FMCA Regulations 2014, and in accordance with NZX rules.

We hold a FMC derivatives issuer license, which is required for issuing and trading regulated offers of derivatives as more particularly described in certain Product Disclosure Statements issued by OMF and published on or about 2 July 2015 under Offer numbers OFR10198, OFR10197, OFR10195, & OFR10199. We issue regulated derivatives products to both retail and wholesale clients.

We are a registered Financial Service Provider (FSP15922). We are also an NZX Trading & Advising Firm (Derivatives), an NZX Advising Firm (Equities) and a Clearing and Depository Participant (Derivatives).

As an NZX Participant, OMF and its employees are subject to regulation and supervision by NZX to ensure compliance with NZX Rules. As an FSP and FMC License Holder we must comply with an array of financial service legislation, and are subject to regulatory oversight by the FMA.

OMF deals with wholesale and retail clients in products not issued by OMF, such as carbon contracts, and exchange products such as futures and ETOs, and in the wholesale interbank markets.

