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**Submission to the Ministry of Business, Innovation and Employment (MBIE)**

**Consultation on the exposure draft of the Financial Services Legislation Amendment Bill and proposed transitional arrangements**

**March 2017**

**Feedback submission from Perpetual Guardian:**

This submission is made on behalf of Perpetual Guardian. Perpetual Guardian is the trading name of The New Zealand Guardian Trust Company Limited and Perpetual Trust Limited. Both companies are registered statutory trustee companies pursuant to the Trustee Companies Act 1967.

Perpetual Guardian is the result of the coming together of Perpetual Trust and Guardian Trust. As two of New Zealand's oldest trustee companies, we have over 130 years of experience in providing estate planning options for New Zealanders.

Perpetual Guardian has offices nationwide; with over 140,000 Will relationships and administering or supervising assets valued over $100 billion.

Perpetual Guardian is available to meet with MBIE to discuss our submission. We can be contacted at:

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**Preamble:**

Perpetual Guardian fully supports the reform of the Financial Advisers Act 2008. We provide this feedback in order to see the new law improve consumer confidence and participation in financial markets and enable consumer access to effective redress.

(Please note that this feedback is provided by and only relates to the Personal Client Services division of Perpetual Guardian and does not in any way relate to the Corporate Trust division of the Perpetual Guardian business).

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

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| 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, advisers would find it difficult to gain new clients if they could not make an offer in the course of, or because of an unsolicited meeting. As long as the adviser is conducting their service within the rules/code of conduct, there shouldn't be any restriction on their ability to make an offer through an unsolicited meeting.

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| 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? |

The client first provisions and disclosure requirements will provide sufficient protection to clients in this scenario.

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

The purpose of the reform is to dispel confusion and increase understanding; however this isn't being achieved with the proposed adviser designations. The proposed designation of 'financial advice representative' remains confusing and this term does not enable a clear differentiation between the adviser roles and obligations. 'Financial advice representative' should be replaced with either 'restricted adviser' or 'limited adviser.'

## Part 2 of the Bill sets out licensing requirements

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

Extending the FMCA licencing regime to advice providers is sensible as it's a tested, standardised process with considerable resources available to assist with applications. In addition, the ability to use existing ABS's to answer sections where appropriate is particularly useful for smaller entities, as are the existing exemptions from some of the more onerous (for small entities) financial requirements.

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

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| 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? |

The Bill needs to succinctly define the client first requirement and establish what this would require in practice. We agree, the client's interests are paramount, however to be effective the industry must be clear on what actions are required to demonstrate fulfilment of this requirement.

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?

Whilst we don't have any specific comments on the wording used, we strongly agree that no inappropriate payment or incentive should be offered or accepted. Incentive payments would be contrary to any 'client first' provision.

If this is taken to the Nth degree, it implies that the payment of incentive bonuses by life companies will be "illegal" as they encourage the representative to place their own financial recognition above the client's interests.

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?

Advice is advice and there should be no differentiation between wholesale and retail clients.

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

By passing the control and supervision of persons providing financial advice back to the large corporates who will ultimately be responsible for the conduct of their employees, we are going back to a time when Life Companies had dedicated agents, which removed the ability to recommend other products. This is inconsistent with the client first provisions.

The removal of liability and responsibility at an individual level does not achieve the purpose of the proposed reforms which is to increase consumer confidence.

**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 do not consider there to be any implications. The clarity provided is sufficient.

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 further comments.

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

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| 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 the financial advice provider has met its obligations under the Act by providing sufficient training, monitoring and support, the financial adviser should have liability if they have breached their obligations. This would be consistent to the approach taken with many other professions.

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| 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? |

Yes, the financial advice provider should have a defence where the action resulting in any claim is beyond their control. The Bill requires the provider to implement processes and resources to ensure compliance with their duties and if they have satisfied their legal obligations they should be able to rely on this defence.

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| 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, this power is necessary as one of the reasons for this reform was to improve investor confidence and the quality of financial advice. This provision allows the FMA to capture the activities provided by those operating on the outer perimeters of this legislation and ensures access to redress where it may not have otherwise been available. This also ensures that the Act can capture changes in the market and changes to the way in which financial products are presented. The current requirements under the FMC Act are necessary in so far as they require consultation and ensure any designations promote the main purposes of the Bill. The drafting enables a certain level of flexibility which is necessary for a power such as this.

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

Under the wording of the current regime, only those providing a retail service must comply with the standards of ethical behaviour, conduct and client care under the code. However, wholesale clients receiving financial advice should still be able to expect a certain standard and have some protection.

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

No further comments.

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**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, it is a solid attempt at capturing a wider range of scenarios. However the wording is confusing as it contains all negatives. This could be re-worded as "Can't be xx unless the following apply:"

Consideration should be given to whether this would be possible for NZ regulators. In addition, the drafting should be clear in terms of whether any exemptions are being carried over.

The new application should be introduced within one year as it has been well signalled (as long as regulator resourcing is sufficient to police it and that resource is not paid for by local operators).

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?

Yes.

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

Yes. The example of entities refusing to engage with dispute schemes is a good measure. Doing business with New Zealanders should require active involvement with New Zealand processes.

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?

Yes, this is much better. Presumably the levies regulations will need to be updated to reflect this.

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?

Yes. In order to achieve the goals of confidence in the financial markets, there must be transparency.

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

The new section 37 (2A) may lead to Privacy Act breaches, and/or accounting confidentiality and legal privilege issues.

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

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| 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? |

After first expiry – this should be the same as other DIMS licences. Financial Advisers' should be able to choose their current expiry (if that's sooner) as they may prefer to remove the limitations.

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

All carry-over provisions are sensible.

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

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| 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. A consistent definition of 'wholesale' across products, issuers and financial advice is desirable. The $1 million dollar threshold is arbitrary (and arguably low based on factors such as real estate assets) and not necessarily indicative of a person's financial acumen and the need for the protections afforded by the retail investors definition under the FMC Act.

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| 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? |

Bankers / lenders are seeking to give financial advice believing that they are exempt from providing financial advice when making certain comments. For example, when investing in residential property, the consumer might be told to expect capital appreciation over the term of ownership. Such comments may encourage a client to take up the loan offer to purchase rental property and imply that any investor in residential rental property cannot go wrong with such an investment, for which history has shown on several occasions, is not always the case. If lenders want to make financial advice comments they should be qualified like all other financial advisers, namely holding the appropriate qualifications, experience and undertaking ongoing CPD requirements.

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

We believe there are unintended consequences resulting from the wording: "ordinary course of business." See additional comments below in 32.

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

No. We believe the criteria are suitable. The removal of the FMA from the proposed proceedings provides simplification and reduces conflicts of interest.

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

Yes. We favour the simplification. The proposed draft is not restrictive and gives the committee scope to adapt to changes and on-going requirements of the industry.

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?

Yes. One of the objectives of the law reform is to give consumers access to effective redress.

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?

Unlike financial advisors, financial advice providers as a group are likely to have a wider range of factors such as product offering, distribution network size, client numbers and dollar value of funds advised on. We therefore favour a maximum penalty consummate with the size of the largest organisations and would suggest up to $1,000,000.

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

We are of the view that the statement "ordinary course of carrying on that occupation" is too broad. Many of the exclusions (s7(3)(iii), (iv), (vi), (ix) and s11) can and do act as impediments to consumers seeking financial advice with the protections afforded by the proposed bill. The outright removal of these exemptions may be viewed as placing obligations on the previously exempt occupations. However in the context of their ordinary course of business where financial advice is required there is, in our view, little impediment to those occupations seeking financial advice from authorised individuals or organisations and conveying that advice.

## About transitional arrangements

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

The licencing should be per adviser as well as at firm level. The licence should be relevant to the advice they provide, with the ability to expand this given the meeting of educational and competency requirements. All persons giving financial advice must be qualified.

## Proposed transitional arrangements

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

The staged transition appears appropriate to enable providers to meet all the requirements of the new legislation. While many large institutions have significant resources that can focus on meeting the requirements, many financial advisers and financial advisory firms are small and will require external assistance to change systems etc.

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?

Six months from the approval of the Code of Conduct should be enough time to enable industry participants to shift to a transitional licence.

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

The safe harbour proposal for a period of two years seems reasonable as this will only apply to industry participants operating under a transitional licence and who provide the same services as they currently provide. It is a grace period to give industry participants time to meet the new code of conduct competence, knowledge and skills standards which is fair and reasonable.

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?

The client first provision should take effect in the transitional period as this is paramount to the reform. As the code of conduct has not yet been defined, we have no further comments on what should or shouldn't take effect with the transitional licence.

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?

Two and a half years should be sufficient time for industry participants to become fully licensed and meet new competency standards.

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**Possible complementary options**

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| 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? |

AFA's need to be given time to comply with the competence, knowledge and skill standards proposed under the new legislation (if they don't already meet those standards). If the goalposts have been moved, it is only fair and reasonable that a grace period is given for AFA's to comply. Five years would be a more reasonable timeframe for the exemption. There is some possibility that confusion could arise among industry participants and consumers around financial adviser qualifications & competence if an extended exemption period is granted.

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

Five years is a sufficient period of time for advisers to comply.

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| 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? |

If the standards currently required are still adhered to, then there should be no confusion.

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| 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? |

Instead of an 'option' to consider, the regulations/terms of reference should make it a requirement to 'include' this in the code.

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| 43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not? |

We support the competency assessment as it gives the financial advice industry more credibility with the public and ensures a certain standard has to be met by all industry participants.

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| 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? |

This is appropriate given their experience and the costs involved in completing higher education. If the Government's aim is to have everyone at the same level, consideration should be given to requiring those with more experience to undergo a bridging course instead.

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| 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? |

Instead of an 'option' to consider, the regulations/terms of reference should make it a requirement to 'include' this in the code.

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**Phased approach to licensing**

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

The benefit is that the costs of compliance are spread over a period of time as opposed to imposing a significant expense in year one.

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

Incentives could include discounted levies and costs of obtaining a full licence. Another incentive may include the FMA providing free bridging courses to increase competency.

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

It is critical that during the transition there is no reduction in the level of competency required to be displayed by the adviser.