Submission by

PAA | PROFESSIONAL ADVISERS ASSOCIATION

To

Ministry of Business, Innovation & Employment

On

Consultation Paper
New Financial Advice Regime

Draft Financial Services Legislation Amendment Bill and proposed transitional arrangements

31 March 2017

The PAA is pleased to submit our response to the Draft Financial Services Legislation Amendment Bill and proposed transitional arrangements. Whilst we feel a lot has progressed over the term of these reviews there are still areas of considerable concern that we have tried to cover off in our response.

There is still confusion around the designation of advisers. Financial Adviser and Financial Adviser Representative will only confuse the public. This must change and the word "Adviser" removed from the FAR designation. We suggest either Financial Product Representative or Financial Provider Representative.

There is still a blurred line between what is advice and what is not. The above naming regime will not help this either. The public usually do not know the difference between proper financial advice and being sold to. Clear disclosure must be given up front before the "sale" is started to make the public aware of the differences.

It is a stated fact that New Zealanders will be better off financially if they receive good financial advice. Problem is most don't know where to find one. I recall early in the consultation process discussions around how this could be resolved. One suggestion was to open up the FSPR and advertise the benefits of finding an adviser there. This seems to have disappeared since then, and we feel collaboration is needed on this important issue.

In the interests of a level playing field we feel anyone giving financial advice should be responsible and accountable for the advice they give. Suggesting that Financial Advice Representatives (Financial Provider Representatives) **will not be individually accountable for compliance with conduct and disclosure duties** is abhorrent and will cause confusion and lead to potentially unintended consequences with the public. It is not sufficient to place these duties just with the Product Provider. This cannot place the interests of the consumer first.

The PAA has a duty to its almost 1200 members and we want to ensure they are being heard through this submission. We need to ensure they are being treated equally and fairly under the new guidelines. Currently, given the issues stated above and those in the following pages we do not believe this to be the case.

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Response by Professional Advisers Association to Draft Financial Services Legislation Amendment Bill

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. One cannot stop or prevent people walking in of the street looking for assistance, HOWEVER disclosure MUST be clear and upfront that the information offered is not full financial advice but only representing the FAP's product suite.

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?
   Clear and unambiguous disclosure that they are not giving full advice and that they can only offer the FAP's product suite. Clear conduct obligations and recourse solutions are to be made as well.

3. Do you have any other feedback on the drafting of Part 1 of the Bill?
   Financial Advice Representative designation needs to be changed. The word Advice needs to be removed. Leaving this designation as it is proposed will only add to public confusion and offer less clarity than is already the case. We suggest a re-naming to Financial Provider (or Product) Representative. The public must be able to easily differentiate between a person who offers full financial advice and one who doesn't. There must be a way to clearly promote those that offer full service. The current naming intentions do not.
   Secondly, whilst we agree that the Financial Advice Providers be responsible for their own actions (with sizable penalties for failing to adhere to the legislation) we strongly disagree their employees are not required to adhere to, or be compliant with, conduct and disclosure duties. One of the main tenets of the new legislation is to raise tax payer confidence. This is not going to assist that goal. ALL members of the financial services industry offering advice or products to the public MUST fall under the same legal requirements to act in the best interests of the public, and be accountable to those actions.
   Thirdly, there needs to be some way to trap "rogue" advisers and stop them moving from one provider to another without any penalty for wrong doing. There needs to be a register set up that allows product providers (or any FAP) to name advisers who are negligent in their duties to stop them being able to "drift" through the industry with little concern for repercussion.
   There is also a very real risk of alienating the already too few AFA's under the proposed changes to this act. By aligning all AFA's and RFA's into one single

term i.e. FA's, you are essentially demoting the AFA's to the level of the RFA's (no intention here to offend the RFA community; and yes, you could argue that you are promoting all the RFA's to AFA standard). All of a sudden there is no differentiation between those that have (at least) level 5 qualifications and those that have (potentially) none. We think a lot of AFA's will be very displeased and may well opt to become a Financial Product Representative in the future. This will not be good for New Zealand. Therefore, there needs to be naming allowance over and above Financial Adviser to differentiate and highlight those advisers that are qualified over those that are not. We are not against naming everyone a Financial Adviser but there does need to be differentiation.

Part 2 of the Bill sets out licensing requirements

4. Do you have any feedback on the drafting of Part 2 of the Bill?
   No

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 and yes

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?
   The wording around providers not giving inappropriate incentives is clear. However, in my own personal experience, whenever incentives are offered, behaviours change to suit the incentive. Whilst we do not intend for incentives to be removed they will, by nature, create behaviours that may well have unintended consequences, usually to the detriment of the public. Any incentive offered MUST be stated up front to any prospective client, clearly and succinctly.

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?
   Yes we do. Anyone receiving advice should be covered under the Act and ALL advisers should be responsible to the competency standards and the code of conduct, regardless of retail or wholesale advice.

8. Do you have any other feedback on the drafting in Part 3 of the Bill?
   Yes. Whilst we think everyone offering financial advice should be subject to the code of conduct and rules and regulations applying to it, there is clearly a conflict whereas Financial Provider Representatives cannot put the interests of the client first as they only represent their employer's products and therefore cannot offer a range of

products, instead trying to make the client fit their narrow product offerings. This is not putting the client first.

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 see any issues with removing the word "offering". They are either providing a service or they are not.

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 other suggestions

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?
    All advisers (FA's and FAR's) should be subject to civil liability if they breach their obligations. This adds a further level of redress for consumers above PI and DRS solutions. However, these breaches need to be very clearly described so there is no ambiguity around those breaches.

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. There should be no easy out for the FAP's. This is because under your current remit it is proposed that FAR's will not be individually accountable for compliance with conduct and disclosure (which we disagree with), therefore there needs to be onus on the FAP's to ensure their members comply.

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 is appropriate. We do not wish to add anything else

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

15. Do you have any other feedback on the drafting of Part 5 of the Bill?
    No

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?
    We support the proposed territorial application and consider three months an adequate time to register/deregister under the act

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, if it is for industry use. No, if it is for public use, as the public don't even know the site is there.

18. Do you consider that other measures are required to promote access to redress against registered providers?
    Yes. There should be a requirement for full disclosure under the FSPR and all organisations offering financial services in New Zealand must be registered on it. DRS companies should have the ability to accept/reject these organisations but should be made to report any bad behaviour or rejections to MBIE for further action.

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?
    This needs to include people outside the Financial Services sector but still give financial advice. This includes accountants, family lawyers, real estate agents

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

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

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?
    There should be one common date when all licences expiry together.

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

No

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

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?
    Yes

26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?
    No

27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?
    No although I would have thought the Minister for Commerce and Consumer Affairs would be too far removed from the industry to determine who is a proper fit for the committee. The FMA should still have this determination

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?
    Competence, knowledge and skill should be determined via a properly moderated, resourced, industry led training program leading to large scale completion of an industry standard qualification. It is wrong that the majority of participants in the financial services sector do not need any level of qualification but still be called a financial adviser. This does not help public confidence. A largely unqualified workforce only creates problems in the future. Attaining an industry standard qualification also allows portability across the industry and well as standardisation. Allowing product providers to pick and choose in-house training regimes that reflect their internal needs and aspirations as opposed to the industry and publics needs and requirements, will not add to the low esteem advisers are regarded in today. All new advisers commencing a career must do level 5 or equivalent
    However, having said the above we also support the notion of creating an assessment to test the competency of any adviser. We support a potential mix of academic qualifications completion and work based assessment with reference to current experience as a possibly better option than compulsory examinations or equivalent for all advisers.

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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. Level playing field where everyone is accountable for their actions.

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?
    $100,000 for first breach, no matter how small, $1,000,000.00 for second breach and $5,000,000 for subsequent ones. Let's get serious

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

About transitional arrangements

33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?
    No

Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?
    Yes. You are giving everyone plenty of time to respond to the new requirements.

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?
    Yes. Provided it is not an onerous process six months should be adequate

36. Do you perceive any issues or risks with the safe harbour proposal?
    No. Safe harbour is a good idea as it allows plenty of time to respond to the new requirements and gives certainty to the existing advisers that they can continue to operate as normal throughout the process.

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 although hopefully by then the rules around competency will be defined and they should be included at some point around then

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?
    It is enough time to become fully licenced and to at least have commenced (but not necessarily finished) competency requirements. We would allow a further two years to complete all requirements of the competency rules.

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?
    Yes. They are already there

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
    Yes five years is adequate for the AFA's.

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?
    No. Those standards should be determined by the code committee and published. If it is determined that those standards are in fact level 5 for everyone, then it won't matter as all AFA's would have already achieved that standard. If it is deemed that different standards are required, then AFA's should have the ability to complete those new standards from the outset, but certainly within five years.

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?
    This should be the Code Working Group to determine this

43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
    Yes. Please refer to our response to question 29. If we want to instil some confidence in this industry, we must be seen to be setting quality standards.

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?
    Why 10 years or more? This should be for all advisers regardless of how long they have been in the field.

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?
    This should be for the Code Working Group to establish

Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?
    A phased approach will allow a smoother process to occur. You could always agree that a two-year window to obtain full licencing starts on the day the transitional licence is issued. That way no one is penalised. Alternatively, (given the desire is for a simple licencing process) several months might be enough to licence everyone and therefore there is little time lost in the two-year time frame. If the licencing process is simple, then costs should be minimal

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

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

Demographics

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