SIA | SECURITIES INDUSTRY ASSOCIATION

31 March 2017

Financial Markets Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

E-mail: **faareview@mbie.govt.nz**

Dear Sir or Madam,

Ministry Consultation Paper – New Financial Advice Regime

I attach the submission prepared by the Securities Industry Association (SIA) in respect of the draft Financial Services Legislation Amendment Bill and proposed transitional arrangements

No part of this this submission is required to be kept confidential.

Contact information:

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In the event that there are further questions or areas of the submission where the Ministry would appreciate further input or clarification, in the first instance, please contact Rob Dowler, who provides Secretariat services to the SIA.

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Yours faithfully
David Fear, SIA Deputy Chair, pp. for
Nick Hegan

Chairman
SECURITIES INDUSTRY ASSOCIATION

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.

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Submission

From the Securities Industry Association

Consultation Paper – New Financial Advice Regime

The draft Financial Services Legislation Amendment Bill and proposed transitional arrangements

31 March 2017

The Securities Industry Association is an unincorporated body established to represent the New Zealand Sharebroking Industry and provides a forum for discussing important industry issues and developments, managing industry change, and to represent the broking industry in respect of legislative management, operational and regulatory issues that impact the industry as a whole.

The Securities Industry Association members employ circa 400 Authorised Financial Advisers and deal with a combined 300,000 New Zealand retail investors with total investment assets exceeding $60 billion. They also deal with virtually all global institutions with the ability to invest in New Zealand.

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SUBMISSION

Introduction

Thank you for the opportunity provided to complete a submission on the Ministry consultation paper on the new financial advice regime and the draft of the Financial Services Legislation Amendment Bill and proposed transitional arrangements.

In addition to answering the specific questions posed by the Ministry, we include additional comment below identifying the key areas where change is supported, followed by comment on some matters that we suggest be considered that do not necessarily fit within the specific questions posed by the Ministry.

First, our comments on the changes supported at the conceptual level follow.

Level playing field a step forward – We welcome the changes requiring all who provide regulated financial advice service to put the interests of the client first and to only provide advice where competent to do so, as well as bringing such regulated financial advice delivered via a retail service within the ambit of the proposed Code of Conduct. This removes the current situation where two advisers providing the same regulated financial advice service may face different standards.

Enabling Robo and simplifying advice – Allowing any kind of advice to be delivered by a firm is a positive step, as is the decision to remove the class and personalised advice distinction.

Merging the FAA and FMCA – We believe it is sensible to merge the Financial Advisers Act into the Financial Markets Conduct Act. However, we note the FMCA is a long and complex statute and the proposed amendment legislation could be difficult for the industry to navigate. We suggest that it will assist the review and submission process during the Select Committee review phase if a marked up version of the Financial Markets Conduct Act containing the proposed changes is made available.

The complexity of the FMCA underscores the importance of the Code of Conduct as a primary regulatory guideline for advisers.

Our comments now follow regarding the future work required that we suggest be considered but that do not necessarily fit within the specific questions posed by the Ministry.

FMA process

We would like the FMA to provide more definitive guidance on its expectations for licensing. As noted above, it is very much an unknown. The changes that are being mooted within the industry are significant and can accordingly be expected to have a significant impact on the operations of many firms in the industry, not limited to NZX Firms. However, there has been no indication of likely requirements, costs or the like. There should be guidance issued by the FMA as part of this process as soon as possible.

Disclosure statements

We understand the form and delivery process for the new disclosure statements will be undertaken through another consultation process as part of developing the regulations. We see this as another key area and look forward to engaging in this process. While standardisation is desirable, there needs to be consideration of the different types of advice being provided, from insurance, through credit products to investment, and to allow enough flexibility to ensure the most appropriate information for each is provided to consumers without saturating clients with written disclosure to the point that it reduces the effectiveness of the communication.

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?

   No submission comment.

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?
   No submission comment

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

   No

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 submission comment. Each interested NZX Firm will submit individually.

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?

   We understand that Cabinet decided as part of the review that this duty was to extend to all advisers and be contained within legislation. It therefore needs to be clear and concise. We support a general "client first" duty, but have concerns with the current formulation.

   In the event the 'conflict' provision remains as worded, we have concerns with the 'any other person' inclusion in s.43IH (i)(a) and s.43IH (2). This is far too expansive and, in effect, could encompass the world at large. This needs to be clearly restricted and 'related' or 'associated' parties may be an option to consider. We think the duty should relate only to provider/client and adviser/client conflicts. Client/client conflicts (such as can arise when advising two clients on the same investment opportunity) should not be captured; there are obvious issues if there is a requirement to put the interests of each client ahead of those of the other clients.

   Secondly, we are concerned that extending the duty to apply whenever "doing anything in relation to the giving of the advice" will have unintended consequences. Without a clear boundary as to when the duty applies, there is likely to be a chilling effect on adviser activities that are not clearly outside the

duty, which in turn is likely to impact on access to advice. Some have suggested that the provision could also imply that an adviser might be compelled to provide regulated financial advice, which would not be an acceptable outcome either. In particular, difficulties potentially arise if the duty applies when giving the client information on the scope of the service, where advisers may in effect feel that they are required to advise the client whether the scope of service is appropriate to meet their needs. It has also been suggested that the duty might extend to capture FX arrangements, settlement, trading out of position, brokerage, etc.

We also agree with the Code Committee's submission that the best way to implement this duty would be to impose a general duty to place clients' interests first in accordance with relevant standards of the code of conduct. This would allow a nuanced approach that, for example, could differentiate between wholesale and retail clients.

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?

   We believe this is a positive step which ensures remuneration is two-dimensional in that it considers both commercial performance of the licensed financial advice provider and the quality of advice provided to customers by financial advice representatives, noting that the provision only applies to financial advice representatives. We agree with the proposed definition of 'inappropriate', as being anything that leads to behaviour that contravenes the conduct obligations outlined in the key advice sections.

   However we think the wording of proposed s 431O(2) should expressly recognise that the assessment of whether an incentive is likely to have the effect of encouraging breaches of the other duty provisions takes place in light of the provider's internal processes and controls.

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 submission comment. Each interested NZX Firm will submit individually.

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

   It was common ground heading into the FAA review that the various acronyms in use in the market (AFA, RFA, QFE, etc.) had created consumer confusion. The replacement terms (FA, FAR, FAP) seem unlikely to alleviate this situation. The draft legislation proposes to use the terms 'Financial Adviser' and 'Financial Advice Representative' to distinguish between registered advisers who will be personally accountable, and those individuals who do not have personal responsibility under the Act by virtue of representing a licensed Financial Advice Provider, the latter taking on the responsibility for its representatives. Simply put, the proposed terms do not clearly elucidate this fundamental difference between the two types of advisers, irrespective of whether the two types of advisers are providing the same or different levels of service, and whether advising on a narrow or broad range of product solutions.

To reduce potential confusion, NZX Firms have suggested that:

(a) the term "financial adviser" be replaced by "authorised financial adviser" as per the current regime. This will allow for continuing use of a term that many consumers are already familiar with.

(b) the term "financial advice representative" is shortened to "provider representative" or, at the provider's option, "XYZ representative" (where XYZ is the trading name of the provider). We believe this shorter name more accurately signals to consumers the kind of advice they are likely to get from financial advice representatives (that is, in many cases, likely to be limited in scope to the provider's products).

We also query why, in proposed s 431E, financial advice representatives should not be subject to disciplinary action in the case of a breach of a duty provision. Under the draft legislation, financial advisers and financial advice representatives are, subject to compliance with the various duties, able to provide the same advice on the same financial products. It therefore seems odd that financial advice representatives are not subject to disciplinary action, when (given the absence of civil liability) this is likely to be an extremely important incentive to comply with the duties (and, given the likely publicity, for the provider to ensure that they comply with the duties). In fact, as drafted the proposed legislation has no accountability mechanism for financial advice representatives at all. We believe that, to avoid the risk of unintended consequences such as were seen with the QFE regime, it is important for the playing field to be as level as possible as between financial advisers and financial advice representatives.

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 submission 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?

We note the term 'broker' is used through the draft Bill and FMCA when we believe the industry would normally use the term 'custodian' (i.e. to describe a firm that holds money or property on behalf of a consumer). The term broker is widely used in the finance sector to describe those who buy or sell a financial product, e.g. insurance broker, mortgage broker and share broker. We understand the term is used in the FMCA to describe those who receipt or hold client money and property on behalf of others. For similar reasons to the decision to move away from use of the term "agent" (e.g. to reduce or remove potential confusion), we submit that a change in the use of the term 'broker' should be considered. We suggest that the term 'custodian' or 'custodial service provider' would potentially be a better term to use in the FMCA than 'broker'. Another alternative suggestion is that the term could be "holding agent" (and "holding service" instead of "broking service").

Section 77P(1A) of the Financial Advisers Act 2008 is carried over to the exposure draft of the legislation as s431X. This section prohibits brokers from holding client money or client property together with the broker's own money or property (referred to as commingling).

This prohibition gives rise to two significant practical issues for NZX Participants, in summary that:

(A) - holding firm money together with client money in client money trust accounts is critical for the management of the risk of shortfalls arising in those accounts; and

(B) - under current NZX settlement systems, firm money and property is held together with client money and property during the settlement process.

As a result of these issues, NZX firms have obtained an FMA exemption allowing commingling on certain conditions for these purposes (Financial Advisers (NZX Brokers - Client Money and Client Property) Exemption Notice 2015). As part of seeking this exemption, NZX firms investigated other options for compliance with the commingling prohibition, and concluded that:

(A) - Outside allowing the current practice of maintenance of a "buffer" of firm money, there did not appear to be any practical and workable options to address the risk of shortfalls arising in client money trust accounts.

(B) - In relation to settlement of transactions, there did not appear to be any practical and workable options to address the commingling of client and firm property that occurs as part of the NZX settlement process, or issues that may arise when trading for clients on offshore markets. A partial solution could exist in relation to the commingling of client and firm money that may occur during settlement, but this was relatively costly.

This situation has not changed, nor is any near or medium-term change likely. The position therefore remains that the blanket prohibition against commingling is inconsistent with a large portion of secondary capital markets activity in New Zealand.

Against this background, we believe it is appropriate to revisit whether the blanket prohibition of commingling should be carried over "as is" to the new legislation. We note that:

(A) - To our knowledge, there was no consultation with industry at the time that the prohibition of commingling was introduced. It therefore seems likely that the relative costs and benefits of the prohibition have not properly been assessed, if at all.

(B) - The fundamental concern that appears to be sought to be addressed is that, in the event of the insolvency of a broker, commingling of firm and client money could result in a receiver or liquidator freezing the broker's client funds accounts until the position could fully be ascertained, resulting in investors losing access to their funds. However, it is relevant to note that the legislation requires records of client money and property to be kept (s 77R, new s 431Z), and provides statutory protection for client money and property held on trust (s 77T, new s 431ZC). In those circumstances, it is difficult to see what additional investor protection is afforded by the blanket prohibition on commingling.

(C) - On the other hand, the prohibition creates real costs for brokers, as illustrated by the experience of NZX firms thus far outlined above.

We do not suggest that the prohibition should be done away with entirely. However, we believe that commingling should be permitted to the extent it is reasonably necessary for the purposes of the broker's business. We believe that this would be a better cost/benefit result than the current position and submit that the legislation be amended to permit this.

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?

    We do not believe that there would be any useful purpose in extending civil liability to financial advisers, who (unlike licenced providers) are not subject to any financial resources or insurance requirements and are thus able to arrange their affairs to ensure that they do not have any assets.

    The draft Bill provides dual accountability for advice, against both a financial adviser and their financial advice provider. We understand the form of any liability is a disciplinary process for financial advisers and civil liability for a financial advice provider. We believe this is appropriate.

    If civil liability was to be extended to financial advisers, then logically it should be extended to financial advice representatives also.

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?

    Some NZX Firms expressed support for such a defence but some fundamentally believe that financial advice providers should stand behind the actions of their advisers and representatives. In many cases a statutory defence of the type envisaged would not actually protect financial advisers in any case, as the relevant contract is likely to be with the provider, not the adviser or representative, meaning that the provider would likely be liable for contract damages anyway.

    Some firms are of the view that a defence from civil liability for the financial advice provider would be appropriate, particularly when an adviser has been deliberately circumventing the policies of the firm (notwithstanding that the firm may not have contracted out of this liability in the agreement with the client). That approach is consistent with the exposure draft's proposal to make both financial advice providers and their advisers responsible for the advice.

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. Allowing the FMA the power to respond if they discover a provider is purposely avoiding the Act by allowing them to deem a service financial advice when it is advice in substance if not form.

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

Yes. We believe it should be workable.

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?

Yes, this helps to address misuse.

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?

No submission comment.

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?

We support the amendment to the list of financial services. We would welcome guidelines (like the example given at the end of page 29) to help ensure consistent application across the sector.

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, provided that view is reasonably substantiated. Current AFA conditions require material breaches of legislation and Code to be reported and we would also support a continuation of the materiality threshold in this new reporting obligation.

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?

No submission comment.

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

No submission comment.

a. 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 submission comment. Each interested NZX Firm will submit individually.

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 submission comment.

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

No submission comment.

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

No. Appear appropriate in our view. We recommend a minimum number of members with the appropriate skills, knowledge and experience across all categories of financial advice.

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?

Yes, it is clear, in our view.

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

We think the Committee should be able to consider complaints against providers (as well and financial advisers and financial advice representatives – see Q8 above). The adverse publicity from disciplinary proceedings is an important incentive for providers to ensure that their advisers and representatives comply with their duties, particularly in cases of lower-order infringements where litigation costs mean that civil action is unlikely.

Providers essentially become advisers as they can deliver advice (via Robo or human advice processes), and therefore must be held to account for this advice.

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?

The level of fines should be meaningful but appropriate in the context of the market. Section 9 of the NZX Discipline Rules may provide a useful reference point.

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

We note that the Bill carries over the existing "ancillary services" carve-outs for accountants and lawyers. We note that this carve-out is not well policed and that anecdotal evidence suggests that some accountants and lawyers are offering financial advice that goes well beyond what would normally be considered to be "in the ordinary course" of carrying out those occupations. To

avoid doubt, the drafting could perhaps be amended to state that the advice would need to be a "necessary incident" of carrying out the occupation in the relevant case.

We also note and support the Code Committee submission that the exclusion from regulated financial advice that the relevant occupations enjoy should be rendered subject to the condition that the practitioners in question still be subject to specific conduct obligations. As a bare minimum, a condition of their relief should be that they be required to comply with the proposed new section 431i (duty to exercise care, diligence, and skill).

About transitional arrangements

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

We support the transitional objectives while noting that it is not sufficiently clear that research analysts (who are currently able to operate without being registered or being an AFA) can continue writing, presenting and publishing class advice on behalf of the firm during the transition period. The consultation document implies that you can continue doing what you are currently "registered" to do, including a firm. We believe there is ambiguity with respect to individuals who are not registered financial providers in their own right, but who play a critical role in the provision of research services by a firm. It is essential that this function can continue during the transition period.

Proposed transitional arrangements

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

Yes.

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?

It will depend on potential system and process changes required to obtain a full licence. We expect more time will be offered if required, once the Code details are known.

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

No.

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.

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?

In the absence of information about what the new competency standard might be, it is not possible to express an opinion in response to this question, or to the subsequent questions (39-45).

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?

Refer to the answer to question 38.

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

Refer to the answer to question 38.

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?

Refer to the answer to question 38.

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?

Refer to the answer to question 38.

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

Refer to the answer to question 38.

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?

Refer to the answer to question 38.

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?

Refer to the answer to question 38.

Phased approach to licensing

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

    A phased approach would appear the most workable approach to manage volumes.

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

    No submission comment.

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

    No submission comment.

Demographics

49. Name:

    Securities Industry Association (SIA)

50. Contact details:

    Rob Dowler, Provider of secretariat services to the SIA
    REDACTED

51. Are you providing this submission:
    ☐As an individual
    ☒On behalf of an organisation

    The Securities Industry Association is an unincorporated body established to represent the New Zealand Sharebroking Industry and provides a forum for discussing important industry issues and developments, managing industry change, and to represent the broking industry in respect of legislative management, operational and regulatory issues that impact the industry as a whole.

    The Securities Industry Association members employ circa 400 Authorised Financial Advisers and deal with a combined 300,000 New Zealand retail investors with total investment assets exceeding $60 billion. They also deal with virtually all global institutions with the ability to invest in New Zealand.

52. Please select if your submission contains confidential information:
    a. ☐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.
    b. Reason: The submission is not required to be kept confidential.