

DRAFT FOR CONSULTATION

Financial Services Legislation Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill is an omnibus Bill that makes amendments to the Financial Markets Conduct Act 2013 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008. It also repeals the Financial Advisers Act 2008.

The purpose of this Bill is to create a new regulatory regime for the provision of financial advice and address issues relating to the registration of financial service providers. The new regime has been designed in response to the findings of a statutorily required review of the operation of—

- the Financial Advisers Act 2008, which regulates the provision of financial advice; and
- the Financial Service Providers (Registration and Dispute Resolution) Act 2008, which sets dispute resolution and registration requirements for financial service providers.

The review found a number of problems with the existing regime for financial advice, which are hindering investor confidence, participation in financial markets, and informed decision-making.

The new regime addresses those problems in a way that will—

- ensure consumers can access the financial advice they need;
- improve the quality of financial advice;
- not impose any undue compliance costs, complexity, or barriers to innovation;
- ensure access to redress.

It also addresses misuse of the Financial Service Providers Register by offshore entities.

The Bill—

- enables the provision of more types of financial advice. The Bill is technology neutral which means that advice will not need to be given by a natural person. This enables the provision of robo- (or online) advice and helps future proof the regime for technological developments. The Bill does not distinguish between types of financial advice services (for example, class and personalised services), which will make it easier for those giving advice to tailor it to the client, rather than be bound by regulatory boundaries:
- establishes an even playing field and more proportionate conduct and competence requirements. The Bill requires all individuals and robo-advice platforms giving financial advice to place the interests of the consumer first. All those giving financial advice to retail clients will also be required to only provide advice where competent to do so, and be subject to a code of conduct that sets minimum standards of competence, knowledge, and skill, ethical behaviour, and client care. Retail clients are those who are not considered wholesale clients. Wholesale clients are generally large or sophisticated clients such as banks, investment businesses, or high-net-worth individuals who do not require or benefit from the same degree of protection as retail clients:
- requires that the code of conduct include minimum standards of competence, knowledge, and skill that apply to particular types of financial advice and products, recognising that in some cases different and additional standards will be appropriate:
- requires those giving financial advice to retail clients to ensure their clients understand any limitations on the nature and scope of the advice provided. For example, how many products or how many providers they have considered:
- requires anyone providing financial advice to retail clients to operate under a licence under Part 6 of the Financial Markets Conduct Act 2013. To ensure this does not impose undue costs on industry or Government, licences will be able to be issued at the firm level. The specific licensing requirements will be set in regulations and by the Financial Markets Authority (the **FMA**). The requirements will be flexible depending on factors such as the size and nature of a firm and the services it provides, and whether a firm engages financial advisers, representatives, or is a sole trader:
- limits who can give regulated financial advice. The Bill requires that in order to give regulated financial advice an individual must be either a ‘financial adviser’ or a ‘financial advice representative’ both of whom must be giving advice on behalf of a financial advice provider. Financial advisers will be liable to disciplinary consequences if they fail to comply with the legislative obligations and code of conduct:
- requires that financial advice providers will be subject to the Financial Market Conduct Act’s compliance and enforcement tools such as civil pecuniary penalties for various breaches and licensed providers will be subject to licensing actions such as censure and the imposition of action plans. This introduces consistency in approach to enforcement for all licensed financial services:

- maintains disciplinary measures for individual financial advisers. Advisers will be subject to the Financial Advisers Disciplinary Committee. If a financial adviser is found to have contravened any obligation the Committee will be able to censure, impose conditions, require the adviser to undergo training, impose a fine of up to \$10,000 or recommend that the FMA suspend, cancel, or debar the registration of the financial adviser:
- requires disclosure of prescribed information to clients. The Bill requires those giving financial advice to disclose certain information to retail and wholesale clients. The content, timing, and manner of disclosure will be prescribed in regulations:
- exempts some persons from the regulatory requirements. The Bill carries over the exclusions (or exemptions) from the Financial Advisers Act 2008, which exempts some persons from being subject to regulation even if they provide financial advice. This applies to some occupations if the financial advice they give is only an incidental part of their business:
- requires a stronger connection to New Zealand to be registered on the Financial Service Providers Register. The Bill introduces more stringent requirements for entities wanting to register on the Register. The Bill also introduces other mechanisms to reduce the risk of misuse of the register, such as providing a regulation-making power in relation to the statements that can be made about a provider's registration, and providing a power for the Registrar to require information from persons other than the provider, such as a director of the provider:
- carries over the conduct, disclosure, and handling client money and property obligations that apply to brokers under the Financial Advisers Act 2008. No additional obligations are applied to brokers, nor are brokers required to operate under a market services licence.

Supplementary or technical amendments

In addition to the key elements of the Bill outlined above, which seek to achieve the Government's objectives for a financial advice regime in New Zealand, the Bill makes the following supplementary and technical amendments to expedite and simplify implementation of the new regime.

Code working group

The Bill enables a code working group to prepare the code of conduct, as if it were the code committee, prior to the passage of the Bill. This enables the code of conduct to be developed earlier than would otherwise be possible, expediting transition to the new regime.

Discretionary investment management services

The Bill requires authorised financial advisers who provide personalised DIMS under the Financial Advisers Act 2008 to be regulated under the Financial Markets Conduct Act 2013 if they wish to continue providing DIMS. This avoids DIMS being regu-

lated it two slightly different ways under the same Act. To ensure minimal disruption the Bill enables the existing personalised DIMS providers to be automatically granted FMC Act licences, subject to conditions.

Hon Jacqui Dean

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Financial Services Legislation Amendment Act **2017**.

2 Commencement

This Act comes into force on [to come].

3 Principal Act

- (1) This Act, other than **Parts 6 and 7**, amends the Financial Markets Conduct Act 2013 (the **principal Act**).
- (2) **Part 6** amends the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

Part 1

Amendments to Parts 1 and 2 of the FMC Act (Preliminary provisions and Fair dealing)

4 Section 5 amended (Overview)

- (1) In section 5(1)(f)(i), after “example,”, insert “providers of financial advice services,”.
- (2) After section 5(1)(f)(ii), insert:
 - (ia) imposing further obligations on providers of financial advice services and persons who give financial advice:
 - (ib) providing for disclosure and conduct obligations for brokers:

5 Section 6 amended (Interpretation)

- (1) In section 6(1), repeal the definitions of **authorised body**, **authorised financial adviser**, **category 2 product**, **discretionary investment management service**, **QFE** or **qualifying financial entity**, and **QFE adviser**.
- (2) In section 6(1), insert the following definitions in their appropriate alphabetical order:

authorised body, in relation to a market services licence, means an entity that is authorised under section 400 to provide a market service under the licence

broker has the meaning set out in **section 431Q**

broking service has the meaning set out in **section 431R**

code of conduct or **code** means the code of professional conduct in force under **clause 35 of Schedule 5**

consumer credit contract has the same meaning as in the Credit Contracts and Consumer Finance Act 2003

controlling owner has the same meaning as in section 4 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008

DIMS facility means an agreement for the provision of a discretionary investment management service

disciplinary committee means the disciplinary committee established under **clause 45 of Schedule 5**

discretionary investment management service has the meaning set out in **section 432A**

financial advice has the meaning set out in **section 431B**

financial advice product means—

- (a) a financial product (as defined in section 7); or
- (b) a DIMS facility; or
- (c) a contract of insurance; or
- (d) a consumer credit contract; or
- (e) any other product declared by the regulations to be a financial advice product; or
- (f) a renewal or variation of the terms or conditions of an existing financial advice product

financial advice provider means a person that provides a financial advice service (*see* **section 431C**)

financial advice representative means an individual who—

- (a) is engaged (whether as an employee or otherwise) by a financial advice provider (A) to give financial advice on A's behalf (where A holds, or is

authorised to provide a service under, a licence that covers financial advice services); and

- (b) is not a financial adviser

financial advice service means the service of giving regulated financial advice as referred to in **section 431C**

financial adviser—

- (a) means an individual who is registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 in relation to a financial advice service; but
- (b) does not include a financial advice provider

product provider, in relation to a financial advice product, means—

- (a) for a financial product, the issuer:
- (b) for a DIMS facility, the person to whom the investment authority is granted:
- (c) for a contract of insurance, the insurer:
- (d) for a consumer credit contract, the creditor:
- (e) for any other financial advice product, the person specified in the regulations

regulated broking service has the meaning set out in **section 431R**

regulated financial advice has the meaning set out in **section 431B(3)**

retail client, in relation to a financial advice service or a broking service, has the meaning set out in **clause 2 of Schedule 5**

wholesale client, in relation to a financial advice service or a broking service, has the meaning set out in **clause 3 of Schedule 5**

- (3) In section 6(1), definition of **acquire**, replace paragraph (c) with:
- (c) in relation to a derivative, a consumer credit contract, or a DIMS facility, includes entering into the legal relationship that constitutes the derivative, contract, or facility; and
- (d) in relation to a renewal or variation of the terms or conditions of an existing financial advice product, includes entering into the legal relationship that provides for the renewal or variation
- (4) In section 6(1), definition of **DIMS licensee**, replace “392” with “**432A**”.
- (5) In section 6(1), definition of **disclosure document**, paragraph (d), after “subpart 4”, insert “, **5A**, or **5B**”.
- (6) In section 6(1), definition of **dispose of**, paragraph (b), after “financial product” insert “or other financial advice product”.
- (7) In section 6(1), definition of **dispose of**, after paragraph (b), insert:

- (ba) in relation to a renewal or variation of the terms or conditions of an existing financial advice product, includes withdrawing from or terminating the product or refusing to agree to the renewal or variation; and
- (8) In section 6(1), definition of **investment authority**, replace “392” with “**432A**”.
- (9) In section 6(1), definition of **market service**, after paragraph (e), insert:
- (ea) acting as a provider of a financial advice service:
- (10) In section 6(1), definition of **provider of a discretionary investment management service**, replace “392” with “**432A**”.

6 Section 9 amended (Definitions of financial benefit and of managed investment scheme)

Replace section 9(2)(b) with:

- (b) a discretionary investment management service supplied by a DIMS licensee:

7 New section 14A and cross-heading inserted (Transitional, savings, and related provisions)

After section 14, insert:

Transitional, savings, and related provisions

14A Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in Schedule 4 have effect according to their terms.

8 Section 18 amended (Interpretation in this Part)

In section 18, definition of **financial product**, paragraph (b), replace “financial product (within the meaning of section 5 of the Financial Advisers Act 2008)” with “financial advice product”.

9 Section 28 amended (Certain conduct does not contravene various provisions)

In section 28(1) and (2), replace “or 427” with “427, **431M**, or **431T**”.

10 Section 34 amended (Prohibition of offers in course of unsolicited meetings with persons acting otherwise than in trade)

Replace section 34(2)(b) and (c) with:

- (b) the offer is through a financial advice provider that is acting in the ordinary course of business as a financial advice provider; or

Part 2

Amendments to subparts 1 to 5 of Part 6 of the FMC Act (Licensing and other regulation of market services)

11 Section 386 amended (Overview)

After section 386(1)(e), insert:

- (ea) **subpart 5A** regulates the giving of financial advice and the provision of financial advice services:
- (eb) **subpart 5B** provides disclosure and conduct obligations for brokers:

12 Section 387 amended (Territorial scope for licensing of certain market services)

Replace section 387(1) with:

- (1) This Part applies to the following services received by a client or an investor in New Zealand, regardless of where the person providing the service is resident, is incorporated, or carries on business:
 - (a) a financial advice service:
 - (b) a discretionary investment management service:
 - (c) a prescribed intermediary service:
 - (d) a broking service.

13 New section 387A inserted (Other provisions relating to financial advice services and broking services)

After section 387, insert:

387A Other provisions relating to financial advice services and broking services

The provisions set out in **Schedule 5** have effect according to their terms.

14 Section 388 amended (When provider of market services needs to be licensed)

After section 388(b), insert:

- (ba) acting as a provider of a financial advice service (*see* **section 431C**):

15 Section 389 amended (Exemptions from need for market services licence)

- (1) Before section 389(1), insert:

General exemptions

- (2) Replace section 389(2) with:

Exemptions for financial advice service

- (2) A person is exempt from the licensing requirement under **section 388(ba)** in respect of a service (unless a declaration applies under subpart 3 of Part 9) to the extent that—

- (a) the service is not a retail service (*see* clause 35 of Schedule 1); or

Example

A service provider may provide a financial advice service to a number of clients. As long as the service provider has no retail clients, the provider need not be a licensee.

- (b) the service is a prescribed exempt service.

Exemptions for DIMS

- (3) A person is exempt from the licensing requirement under section 388(c) in respect of a service (unless a declaration applies under subpart 3 of Part 9) to the extent that—

- (a) the service is not a retail service (*see* clause 35 of Schedule 1); or

Example

A service provider may provide a discretionary investment management service to a number of investors using a model portfolio. As long as no retail investor is within the relevant class of investors, the provider need not be a DIMS licensee.

- (b) the service is a prescribed exempt service.

- (4) Despite **subsection (2)(a)**, if a financial advice service is a retail service, the licensee's market services licensee obligations apply in respect of the service as a whole (whether the service is provided to a wholesale client or a retail client).

16 Section 392 repealed

Section 392 is repealed.

17 Section 393 amended (Principles guiding the exercise of FMA powers)

In section 393(a), after “section 4”, insert “or, in the case of financial advice services, **section 431A**”.

18 Section 397 amended (Procedural requirements)

- (1) In section 397(1)(b), delete “or a member of a QFE group”.
 (2) Repeal section 397(3).

19 Section 400 amended (Licence may cover related bodies corporate as authorised bodies)

- (1) In the heading to section 400, delete “related bodies corporate as”.
 (2) After section 400(1), insert:

- (1A) A licence may also, in its conditions, authorise 1 or more named entities to provide a financial advice service covered by the licence if the FMA is satisfied that—
- (a) arrangements are or will be in place to ensure that the licensee will maintain appropriate control or supervision over the provision of that service by the entity under the licence; and
 - (b) the entity is capable of effectively providing that service (having regard to the proposed conditions of licence); and
 - (c) there is no reason to believe that the entity is likely to contravene the market services licensee obligations; and
 - (d) the entity is, or will be, registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 on and from commencing to provide that service; and
 - (e) the entity meets the eligibility criteria and other requirements prescribed by the regulations for the purposes of this section (if any).
- (3) In section 400(2)(a) and (b), replace “subsection (1)” with “subsection (1) or **(1A)**”.

20 Section 403 amended (When FMA may impose permitted conditions)

- (1) In section 403(2), after “(3)”, insert “or **(4)**”.
- (2) After section 403(3)(c), insert:
 - (d) in the case of a provider of a financial advice service, state which types of financial advice may, or may not, be provided by a financial advice representative on behalf of the provider.
- (3) After section 403(3), insert:
- (4) If a licence will cover a financial advice service and regulated financial advice may be given to both retail clients and wholesale clients, a condition referred to in subsection (1) may identify when a retail service is provided (and that identification must be treated as correct).

21 Section 410 amended (Meaning of material change of circumstances)

Replace section 410(b) with:

- (b) a change that means that the requirements referred to in section 396(a) to (f) or 400(1)(a) to (e) or **(1A)(a) to (e)** are not, or are no longer, satisfied (where those provisions are applied with all necessary modifications as if references to the applicant or body corporate (or entity) were references to the licensee or authorised body respectively).

22 Section 414 amended (FMA’s powers in case of contravention of market services licensee obligation, material change, etc)

Replace section 414(3)(b) with:

- (b) the licensee or an authorised body does not meet, or no longer meets, the requirements referred to in section 396(a) to (f) or 400(1)(a) to (e) or **(1A)(a) to (e)** (where those provisions are applied with all necessary modifications as if references to the applicant or body corporate (or entity) were references to the licensee or authorised body respectively).

23 Section 426 amended (Disclosure statement)

In section 426(1), delete “, the Financial Advisers Act 2008,”.

Part 3

New subpart 5A of Part 6 of the FMC Act (Regulation of financial advice)

24 New subpart 5A of Part 6 inserted

After section 431, insert:

Subpart 5A—Additional regulation of financial advice and financial advice services

Additional purpose

431A Additional purpose of subpart

- (1) This subpart has the additional purpose (in addition to those set out in sections 3 and 4) of regulating the giving of financial advice and provision of financial advice services with a view to—
- (a) improving the availability of financial advice for persons seeking that advice; and
 - (b) improving the quality of financial advice and financial advice services.
- (2) This section does not limit section 3 or 4.

Interpretation

431B Meaning of financial advice and regulated financial advice

- (1) A person gives **financial advice** if the person—
- (a) makes a recommendation or gives an opinion about acquiring or disposing of (or not acquiring or disposing of) a financial advice product; or
 - (b) designs an investment plan for a person that—
 - (i) purports to be based on—
 - (A) an analysis of the person’s current and future overall financial situation (including investment needs); and
 - (B) the identification of the person’s investment goals; and

- (ii) includes 1 or more recommendations or opinions on how to realise 1 or more of those goals.
- (2) However, a person does not give financial advice merely by doing 1 or more of the things set out in **clause 6 of Schedule 5**.
- (3) Financial advice is **regulated financial advice** if—
 - (a) it is given in the ordinary course of a business; and
 - (b) it is not excluded under any of **clauses 7 to 14 of Schedule 5**.

431C When is financial advice service provided

A person (A) provides a financial advice service if, in the ordinary course of A's business,—

- (a) A engages 1 or more individuals to give regulated financial advice on A's behalf; or
- (b) A gives regulated financial advice on A's own account.

Example

ABC Limited (**ABC**) is a firm that gives a range of investment advice to its clients. Some of this advice is given through its employees. Some of this advice is given through its Internet site. ABC provides a financial advice service (and must be licensed under **section 388(ba)**).

As part of ABC's business, Susan is employed by ABC to give financial advice on its behalf to its clients. While Susan is giving advice, she is not giving it on her own account. She is not providing a financial advice service.

Holding out

431D Prohibitions on holding out in relation to giving financial advice

A person must not hold out that the person, or another person,—

- (a) is a financial advice provider, a financial adviser, or a financial advice representative if that is not the case; or
- (b) is lawfully able to do any of the following if that is not the case:
 - (i) provide a financial advice service:
 - (ii) provide a particular kind of financial advice service:
 - (iii) give regulated financial advice:
 - (iv) give a particular kind of regulated financial advice:
 - (v) give regulated financial advice about a particular financial advice product or a particular kind of financial advice product:
 - (vi) give regulated financial advice to retail clients, to wholesale clients, or to retail and wholesale clients:
 - (vii) provide a financial advice service, or give regulated financial advice, in particular circumstances.

*Duties on persons giving regulated financial advice***431E Liability for duties**

- (1) **Sections 431F to 431M** (the **duty provisions**) impose duties on financial advice providers, financial advisers, and financial advice representatives who give regulated financial advice.
- (2) **Sections 431N** and **431O** impose additional duties on financial advice providers that engage financial advisers or financial advice representatives.
- (3) If a financial advice provider contravenes a duty provision or **section 431N or 431O**, the provider—
 - (a) may be civilly liable for the contravention; but
 - (b) is not subject to disciplinary action.
- (4) If a financial adviser contravenes a duty provision,—
 - (a) the financial adviser—
 - (i) is not civilly liable for the contravention; but
 - (ii) may be subject to disciplinary action; and
 - (b) if the adviser was acting on behalf of a financial advice provider, the provider—
 - (i) may be civilly liable for the contravention as a result of the operation of sections 535 and 536 (which may attribute the adviser's conduct and state of mind to the provider); and
 - (ii) may contravene **section 431N**.
- (5) If a financial advice representative contravenes a duty provision—
 - (a) the financial advice representative—
 - (i) is not civilly liable for the contravention; and
 - (ii) is not subject to disciplinary action; and
 - (b) the financial advice provider on whose behalf the representative was acting—
 - (i) may be civilly liable for the contravention as a result of the operation of sections 535 and 536 (which may attribute the representative's conduct and state of mind to the provider); and
 - (ii) may contravene **section 431N**.
- (6) This section does not affect—
 - (a) any liability that a person may have for a contravention as a person who is involved in the contravention (*see* section 533); or
 - (b) any criminal liability that a person may have for a contravention (for example, under section 511 for contravening **section 431M**).
- (7) In this section—

civil liability, in relation to the contravention of a provision that is a Part 6 service provision (see section 449), means civil liability under subpart 3 of Part 8 for contravention of that section

disciplinary action, in relation to a contravention of a provision, means disciplinary action under Part 5 of Schedule 5 for the conduct constituting the contravention.

431F Duty to meet standards of competence

- (1) A person must not give regulated financial advice unless the person meets—
 - (a) the standards of competence provided in the code of conduct for giving the advice; and
 - (b) any prescribed eligibility criteria in relation to the giving of the advice.
- (2) This section applies only to a retail service.

431G Duty to agree on nature and scope of advice

- (1) A person (A) must not give regulated financial advice to another person (B) unless A—
 - (a) has agreed with B on the nature and scope of the advice to be provided; and
 - (b) has taken reasonable steps to ensure that B understands any limitations on the nature and scope of the advice.
- (2) This section applies only to a retail service.

431H Duty to put client's interests first

- (1) This section applies if a person who gives regulated financial advice (A) knows, or ought reasonably to know, that there is a conflict between:
 - (a) the interests of the person to whom the advice is given (B); and
 - (b) A's own interests or the interests of any other person.
- (2) In giving the advice or doing anything in relation to the giving of the advice, A must give priority to B's interests, including by taking all reasonable steps to ensure that the A's own interests or the interests of any other person do not materially influence the advice.

431I Duty to exercise care, diligence, and skill

A person who gives regulated financial advice must exercise the care, diligence, and skill that a prudent person engaged in the business of giving regulated financial advice would exercise in the same circumstances.

431J Duty to comply with code of conduct

- (1) A person who gives regulated financial advice must comply with the standards of ethical behaviour, conduct, and client care required by the code of conduct.

- (2) This section applies only to a retail service.

431K Duty relating to offer that contravenes Act or regulations

A person who gives regulated financial advice (A) to another person (B) must not recommend that B acquire a financial product if A knows, or ought to know, that—

- (a) the offer of the product was or is a regulated offer; and
- (b) the offer contravened or contravenes this Act or the regulations; and
- (c) the contravention has not been remedied.

431L Duty to make available prescribed information

- (1) A person who gives regulated financial advice must, at the request of a prescribed person or at the prescribed times or on the occurrence of the prescribed events, make available to a prescribed person the information that is required to be made available under this section by the regulations.
- (2) The information must be made available in the prescribed manner.

Examples

ABC Limited (ABC) provides investment advice to a client (C).

ABC must (if required by the regulations) provide information to C when the service is first provided (for example, about fees, the type of advice, dispute resolution arrangements, and other matters relevant to the performance of the service).

ABC must also (if required by the regulations) provide on-going information to C.

431M False or misleading statements and omissions

- (1) A person must not make available information under **section 431L** if—
 - (a) there is—
 - (i) a statement in the information that is false or misleading or is likely to mislead; or
 - (ii) an omission from the information that is required by the regulations; and
 - (b) the statement or omission is materially adverse from the point of view of the client.
- (2) For the purposes of this section, information about a future matter (including the doing, or not doing, of an act) is misleading if the person making the statement does not have reasonable grounds for making it.
- (3) **Subsection (2)** does not limit the meaning of a reference to a misleading statement.
- (4) This section does not limit **section 431L**.
- (5) *See* section 511 (offence to knowingly or recklessly contravene this section).

Additional duties on financial advice providers that engage financial advisers or financial advice representatives

431N Financial advice provider must ensure compliance with duties

A financial advice provider that engages 1 or more financial advisers or financial advice representatives to give regulated financial advice must ensure that each of its advisers and representatives complies with **sections 431F to 431M**.

431O Duties of financial advice providers in relation to financial advice representatives

- (1) A financial advice provider that engages 1 or more financial advice representatives to give regulated financial advice—
 - (a) must have in place clear and effective processes, controls, and limitations relating to the financial advice that may be given by its representatives; and
 - (b) must not give, or offer to give, (whether conditionally or unconditionally) to any of its representative any kind of inappropriate payment or other incentive.
- (2) In this section, a payment or other incentive is **inappropriate** if it is intended to encourage, or is likely to have the effect of encouraging, the financial advice representative to whom it is given or offered to engage in conduct that contravenes any duty under **sections 431F to 431M**.

Miscellaneous provisions

431P Protection of financial adviser or financial advice representative reporting breach

- (1) This section applies if a financial adviser or financial advice representative (A)—
 - (a) reasonably believes that a person has breached a provision of this Act that relates to the giving of financial advice or the provision of a financial advice service; and
 - (b) reports that belief to the FMA.
- (2) If A made the report in good faith—
 - (a) no civil, criminal, or disciplinary proceedings may be brought against A by reason of A having made the report; and
 - (b) no person may terminate A's employment or appointment by reason of A having made the report; and
 - (c) no tribunal, body, or authority that has jurisdiction in respect of A's professional conduct may make an order against, or do any act in relation to, A by reason of A having made the report.

Part 4

New subpart 5B of Part 6 of the FMC Act (Regulation of brokers)

25 New subpart 5B inserted

After **subpart 5A** of Part 6 (as inserted by **section 24**), insert:

Subpart 5B—Brokers' disclosure and conduct obligations

Interpretation

431Q Meaning of broker

- (1) A **broker** is a person who carries on a business of providing a broking service to a client (whether or not the business is the provider's only business or the provider's principal business).
- (2) *See* **section 431ZD** for how the subpart applies in the case of a person who provides a broking service on behalf of another person's business.

Compare: 2008 No 91 s 77A

431R Meaning of broking service, regulated broking service, and certain other terms

- (1) A **broking service**—
 - (a) is the receipt of client money or client property by a person and the holding, payment, or transfer of that client money or client property; and
 - (b) includes the holding of client money or client property by a person (A) in trust for, or on behalf of, a client (C), or another person nominated by C, under an agreement between A and C or between A and another person with whom C has an agreement (whether or not there are also other parties to the agreement).
- (2) The mere transmission of a non-transferable instrument payable to another person is not a broking service.
- (3) A broking service is a **regulated broking service** if it is not excluded under any of **clauses 15 to 19 of Schedule 5**.
- (4) In this subpart,—

client money means money—

 - (a) received in connection with acquiring, holding, or disposing of a financial advice product or otherwise in connection with a financial advice product; and
 - (b) received from, or on account of, a client by a person (A) (and not on A's own account)

client property means property (other than money) to which the following applies:

- (a) the property is a financial advice product, is a beneficial interest in a financial advice product, or is received in connection with a financial advice product; and
- (b) the property is received from, or on account of, the client by a person (A) (and not on A's own account)

custodial service means the type of broking service referred to in **subsection (1)(b)**.

Compare: 2008 No 91 s 77B

Disclosure obligations for services for retail clients

431S Broker must make disclosure before receiving client money or client property from retail client

A broker who provides a regulated broking service to a retail client must, in the prescribed manner, disclose the prescribed information to the retail client—

- (a) before receiving client money or client property from or on behalf of the client; or
- (b) if not practicable before, as soon as practicable after receiving client money or client property from or on behalf of the client.

Compare: 2008 No 91 s 77E

431T False or misleading statements and omissions

- (1) A person must not provide information under **section 431S** if—
 - (a) there is—
 - (i) a statement in the information that is false or misleading or is likely to mislead; or
 - (ii) an omission from the information that is required by the regulations; and
 - (b) the statement or omission is materially adverse from the point of view of a client.
- (2) For the purposes of this section, information about a future matter (including the doing, or not doing, of an act) is misleading if the person making the statement does not have reasonable grounds for making it.
- (3) **Subsection (2)** does not limit the meaning of a reference to a misleading statement.
- (4) This section does not limit **section 431S**.
- (5) *See section 511 (offence to knowingly or recklessly contravene this section).*

*Brokers' conduct obligations***431U Application of conduct obligations**

- (1) **Sections 431V and 431W** apply to all regulated broking services.
- (2) **Sections 431X to 431ZB**—
 - (a) apply to regulated broking services provided to a retail client; and
 - (b) apply to custodial and other regulated broking services provided to every investor under a retail service of a DIMS licensee (as provided by section 446); and
 - (c) otherwise apply to broking services provided to a wholesale client only if provided by the regulations; and
 - (d) do not apply to a broker within the meaning of the Insurance Intermediaries Act 1994 in relation to any money to which section 14 or 15 of that Act applies.

Compare: 2008 No 91 s 77J

431V Broker must exercise care, diligence, and skill

A broker must, when providing a regulated broking service, exercise the care, diligence, and skill that a prudent person engaged in the business of acting as a broker would exercise in the same circumstances.

Compare: 2008 No 91 s 77K

431W Broker must not receive client money if offer contravenes Act or regulations

A broker (**A**) must not receive client money or client property from a person for the acquisition of financial products if,—

- (a) when the financial products were or are offered under a regulated offer, the offer contravened or contravenes this Act or the regulations; and
- (b) the contravention has not been remedied; and
- (c) **A** knows or ought to know that, when the financial products were or are offered, the offer contravened or contravenes this Act or the regulations.

Compare: 2008 No 91 s 77O

*Obligations for handling client money and client property***431X Broker must pay client money into separate trust account and hold client property on trust**

- (1) A broker who receives client money or client property, in the broker's capacity as a broker for a client,—
 - (a) must hold the client money or client property, or ensure the client money or client property is held, on trust for the client; and

- (b) must ensure that the client money is paid promptly into a bank in New Zealand (or into any other prescribed entity) to—
- (i) a trust account of the broker or of a related body corporate specified in the regulations; or
 - (ii) if section 445 applies, a trust account of a person permitted to hold the money under that section.
- (2) A broker must ensure that the client money and client property are held separate from money or property held by or for the broker, or other person referred to in **subsection (1)(b)(i) or (ii)**, on its own account.
- (3) A broker must comply with any prescribed duties and other requirements in relation to the client money and client property held on trust under this section.

Compare: 2008 No 91 s 77P

431Y Broker must account for client money and client property

A broker who receives or holds client money and client property on trust for a client must account properly, or ensure that account is properly made, to the client for that client money or client property.

Compare: 2008 No 91 s 77Q

431Z Broker must keep records of client money and client property

- (1) A broker who receives or holds client money on trust for a client must keep, or ensure that there are kept, trust account records that disclose clearly the position of the client money in the trust account.
- (2) A broker who receives or holds client property on trust for a client must keep, or ensure that there are kept, records that—
 - (a) identify the client property; and
 - (b) show the date when the client property was received; and
 - (c) if the client property has been disposed of, show when the client property was disposed of and to whom.
- (3) The broker must also keep all other prescribed records.
- (4) The broker must—
 - (a) keep the records required by this section, or ensure that they are kept, in a manner that enables those records to be conveniently and properly audited, reviewed, or inspected; and
 - (b) comply with the prescribed requirements (if any) relating to those records and their audit, review, or inspection.

Compare: 2008 No 91 s 77R

431ZA Broker must report on client money and client property

- (1) A broker must, in the prescribed circumstances, provide confirmation information to a client or other prescribed persons in respect of client money or client property received or held on behalf of the client.
- (2) The confirmation information must be provided in the prescribed manner.
- (3) In this section, **confirmation information** means the information relating to the client money or client property, or transactions relating to it, that is prescribed.

Compare: 2008 No 91 s 77RA

431ZB Restrictions on use of client money and client property

A person must not use or apply client money or client property received or held on trust for a client by a broker in any way except—

- (a) as expressly directed by the client (either generally or specifically); or
- (b) in accordance with **section 431X**.

Compare: 2008 No 91 s 77S

431ZC Protection of client money and client property held on trust

- (1) The client money or client property that is received or held by a broker on trust for a client—
 - (a) is not available for the payment of the debts of any other creditor of the broker; and
 - (b) is not liable to be attached or taken in execution under the order or process of any court at the instance of another creditor of the broker.
- (2) Nothing in **section 431ZB** or this section takes away or affects any lawful lien or claim that a broker who holds client money or client property has against the client money or client property.

Compare: 2008 No 91 s 77T

Persons acting in course of business of employers or principals

431ZD Who is responsible for broker obligations

- (1) If a broking service is provided by a person (**A**) on behalf of the business of another person (**B**), B (and not A) is treated as the broker having the broker obligations under this Act.
- (2) If B has a broker obligation under **subsection (1)**—
 - (a) any act or omission by A is also treated as being done by B; and
 - (b) if it is necessary to show the state of mind of B, it is sufficient to show that A had that state of mind.

- (3) **Subsections (1) and (2)** do not affect the liability of A or B under any other Act or rule of law for A's actions.

Compare: 2008 No 91 s 77U

Part 5

Other amendments to FMC Act

- 26 New section 432A inserted (Meaning of discretionary investment management service and related terms)**

After section 432, insert:

432A Meaning of discretionary investment management service and related terms

- (1) In this Act, a person (A) provides a **discretionary investment management service** if—
- (a) A—
- (i) decides which financial products to acquire or dispose of on behalf of an investor (B); and
- (ii) in doing so is acting under an authority granted to A to manage some or all of B's holdings of financial products; or
- (b) A gives financial advice in the ordinary course of, and incidentally to, providing a discretionary investment management service under **paragraph (a)** (for example, as to the appropriate scope of an investment authority).
- (2) In determining whether A has an authority under **subsection (1)(a)(ii)**, it does not matter if B has the right to be consulted on, or to countermand, A's decisions.
- (3) In this Act,—

DIMS licensee means a person that acts as a provider of a discretionary investment management service under a licence under this Part

investment authority means, in relation to a discretionary investment management service, the authority granted by an investor to manage some or all of an investor's holdings of financial products under the service

provider of a discretionary investment management service means a person who is in the business of providing a discretionary investment management service.

- 27 Section 446 replaced (Certain broker obligations of Financial Advisers Act 2008 may be enforced also under this Act)**

Replace section 446 with:

446 Certain broker obligations under subpart 5B apply

- (1) A DIMS licensee, and a custodian of investor money or investor property under the service, must provide the custodial and other broking services under the service to every investor in accordance with **sections 431X to 431ZC**.
- (2) Those sections apply as if every reference to a client were to the investor and every reference to client money or client property were to investor money or investor property.
- (3) This section does not limit the application of those sections to a DIMS licensee or a custodian as brokers under that subpart.

28 Section 449 amended (Part 6 services provisions)

- (1) After section 449(3)(e), insert:
 - (ea) **section 431M**, to the extent that a financial advice provider may be civilly liable for a contravention of the provision under **section 431E** (false or misleading statements and omissions):
 - (eb) **section 431T** (false or misleading statements and omissions):
- (2) Replace section 449(3)(g) with:
 - (g) **section 446** (application of certain broker obligations under **subpart 5B**).
- (3) After section 449(4)(g), insert:
 - (ga) **section 431D** (prohibitions on holding out in relation to giving financial advice):
 - (gb) **sections 431F to 431L**, to the extent that a financial advice provider may be civilly liable for a contravention of the provision under **section 431E** (duties on persons giving regulated financial advice):
 - (gc) **sections 431N and 430** (additional duties on financial advice providers that engage financial advisers or financial advice representatives):
 - (gd) **section 431S** (brokers' disclosure obligations):
 - (ge) **sections 431V and 431W** (brokers' conduct obligations):
 - (gf) **sections 431X to 431ZB** (brokers' obligations for handling client money and client property):

29 Section 451 amended (Meaning of FMC reporting entity)

- (1) In section 451(b), after "scheme", insert "or a person referred to in **subsection (2)**".
- (2) In section 451, insert as subsection (2):
 - (2) Despite **subsection (1)(b)**, a person who holds a licence under Part 6 that covers only a financial advice service is not an FMC reporting entity if the person would, but for this subsection, be an FMC reporting entity by reason only of holding that licence.

30 Section 462 amended (When FMA may make stop orders)

Replace section 462(1)(g) with:

- (g) disclosure relating to financial products under subpart 4 of Part 3, or a disclosure document under subpart 4, **5A, or 5B** of Part 6,—
 - (i) is false or misleading, or is likely to mislead or confuse, in a material particular; or
 - (ii) contains any material misdescription or material error or any material matter that is not clearly legible; or
 - (iii) does not comply with this Act or the regulations; or

31 Section 469 amended (Terms of direction orders)

In section 469, insert as subsection (2):

- (2) If the FMA is satisfied that the relevant person (**A**) is a financial adviser who, by engaging in any conduct, has contravened, or is likely to contravene, any of **sections 431E to 431M**, a direction order may do 1 or more of the following (whether or not in addition to an order under **subsection (1)**):
 - (a) direct the Registrar to deregister A under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the **FSP Act**);
 - (b) direct the Registrar to—
 - (i) deregister A under the FSP Act; and
 - (ii) prevent A for a specified period from being re-registered for a financial advice service under the FSP Act;
 - (c) direct the Registrar to suspend A's registration under the FSP Act for a period of no more than 12 months or until A meets specified conditions relating to the registration (but, in any case, not for a period of more than 12 months).

32 Section 475 amended (FMA must follow steps before making orders)

After section 475(2), insert:

- (3) In the case of a direction order under **section 469(2)**, the financial adviser that is the subject of the order is the person referred to in subsection (1)(a) and (d) and 477(1)(a).

33 Section 499 amended (General defences for person in contravention)

In section 499(3), replace “or 427” with “427, **431M**, or **431T**”.

34 Section 500 amended (Disclosure defences for person in contravention)

In section 500(1) and (2), replace “or 427” with “427, **431M**, or **431T**”.

35 Section 501 amended (Additional disclosure or financial reporting defence for directors who are treated as contravening)

In section 501(1)(a), after “427,”, insert “**431M, 431T**.”

36 Section 503 amended (General defences for person involved in contravention)

In section 503(4), replace “and 427” with “427, **431M**, and **431T**”.

37 Section 507 amended (No pecuniary penalty and fine for same conduct)

In section 507, replace “Financial Advisers Act 2008” with “Financial Service Providers (Registration and Dispute Resolution) Act 2008”.

38 Section 511 amended (Offence of knowingly or recklessly contravening other provisions relating to defective disclosure)

(1) In section 511(1) and (2), replace “section 99 or 427 or clause 27 of Schedule 1” with “a relevant provision”.

(2) In section 511(1)(a) and (2)(b)(i), replace “section 99(1)(a)(i) or 427(1)(a)(i) or clause 27(1)(a)(i) of Schedule 1 (as the case may be)” with “subsection (1)(a)(i) of the relevant provision”.

(3) In section 511(1)(b) and (2)(b)(ii), replace “section 99(1)(a)(ii) or 427(1)(a)(ii) or clause 27(1)(a)(ii) of Schedule 1 (as the case may be)” with “subsection (1)(a)(ii) of the relevant provision”.

(4) Replace section 511(4) with:

(4) In this section—

relevant act means,—

- (a) in relation to section 99, the act of providing or making available the on-going disclosure:
- (b) in relation to section 427, the act of providing the disclosure statement to a person or supplying the service to a person who was required to be provided, or has been provided, with the disclosure statement:
- (c) in relation to **section 431M or 431T**, the act of making the information available to a person:
- (d) in relation to clause 27 of Schedule 1, the act of providing the disclosure document to a person

relevant provision means section 99, 427, **431M**, or **431T** or clause 27 of Schedule 1.

39 Section 518 amended (Terms of banning orders)

Replace section 518(1)(b) with:

- (b) providing financial advice services or broking services, or contributing, as employee or agent, to the provision of those services.

40 New section 532A inserted

After section 532, insert:

532A Appeals against decisions of disciplinary committee

A person may appeal to the District Court against a decision of the disciplinary committee to take any action referred to in **clause 42 of Schedule 5** against the person.

41 Section 534 amended (Directors treated as having contravened in case of defective disclosure or financial reporting contravention)

(1) After section 534(1)(c), insert:

(caa) an entity has contravened **section 431M or 431T** (false or misleading information to client); or

(2) In section 534(3), after “(c),”, insert “**(caa)**”.

42 Section 543 amended (Regulations for purposes of Part 3 (Disclosure of offers of financial products))

Replace section 543(1)(l) with:

(l) prescribing kinds of financial products or currency forwards for the purposes of **clause 21(a)**, (c), or (d) or **38(4)(a)** of Schedule 1:

43 Section 546 amended (Regulations for purposes of Part 6 (market services))

(1) In section 546(1)(a)(i), after “related body corporate”, insert “or an entity referred to in **section 400(1A)**”.

(2) Replace section 546(1)(c) with:

(c) exempting (on terms and conditions, if any) services from the licensing requirement for providers of financial advice services for the purposes of **section 389(2)(b)**:

(ca) exempting (on terms and conditions, if any) services from the licensing requirement for providers of discretionary investment management services for the purposes of **section 389(3)(b)**:

(3) After section 546(1)(d)(iii), insert:

(iv) in the case of a provider of financial advice services, a condition limiting the types of financial advice that a financial advice representative may provide on behalf of the provider:

(4) After section 546(1)(m), insert:

Financial advice services and broking services

(ma) prescribing eligibility criteria for the purposes of **section 431F**:

(mb) prescribing the information that must be made available under **section 431L or 431S**, the times or events referred to in **section 431L**, the

persons who may make a request under that section, the persons to whom information must be made available under that section, and the manner of making the information available (including prescribing the manner in which the information is to be presented, calculated, or prepared):

- (md) prescribing activities for the purposes of **clause 6(g) of Schedule 5** (activities that are not giving financial advice):
 - (mf) providing for any or all of **sections 431X to 431ZC** to apply to wholesale clients and the extent to which and the circumstances in which they so apply:
 - (mg) prescribing the duties and obligations of brokers in relation to client money and client property:
 - (mh) prescribing entities for the purposes of **section 431X**:
 - (mi) specifying who may be a related body corporate for the purposes of **section 431X**:
 - (mj) regulating the establishment and operation of the trust account and the receipt, handling, and application of client money and client property by a broker (including prescribing requirements relating to the investment of money that is held in trust and providing for how interest or other income from that investment is to be paid, retained, or otherwise dealt with):
 - (mk) regulating the keeping, retention, reconciliation, inspection, and audit or review of trust account records and other records and procedures of brokers:
 - (ml) prescribing any other requirements necessary or desirable to ensure that trust accounts are duly kept and that persons on whose behalf client money and client property are held by brokers are informed of the client money and client property held and of the transactions made in connection with it (including prescribing what confirmation information must be made available and any other matters for the purposes of **section 431ZA**):
 - (mm) prescribing matters to regulate the delivery of client money or client property to the person on whose behalf they are held, and other steps to be taken or provisions to apply, in connection with the termination of any broking service:
- (5) Before section 546(1)(p), insert:
- (oa) prescribing the procedure of the code committee:
 - (ob) prescribing the procedure of the disciplinary committee:
- (6) In section 546(2), after “(c),”, insert “**(ca), (md)**”.

44 Section 548 amended (Other regulations)

- (1) In section 548(1)(a), replace “financial products (within the meaning of section 5 of the Financial Advisers Act 2008)” with “financial advice products”.
- (2) After section 548(1)(d)(i), insert:
 - (ia) declaring products to be financial advice products:
- (3) After section 548(1)(d)(iv), insert:
 - (iva) prescribing documents or information the giving of which does not constitute the giving of financial advice under **clause 6(f) of Schedule 5**:
 - (ivb) prescribing occupations, offices, and positions for the purposes of **clause 7(3) or 15(1) of Schedule 5**:
 - (ivc) prescribing circumstances in which financial advice is not regulated financial advice for the purposes of **clause 14 of Schedule 5**:
 - (ivd) prescribing circumstances in which a broking service is not a regulated broking service for the purposes of **clause 18 of Schedule 5**:
- (4) In section 548(2), after “(iii),”, insert “**(iva) to (ivd),**”.

45 Section 550 amended (Procedural requirements for regulations relating to exemptions, exclusions, and definitions)

- (1) In section 550(1)(c), after “(d),”, insert “**(da),**”.
- (2) In section 550(2)(d), replace “and (c)” with “, (c), and **(ca)**”.
- (3) After section 550(2)(d), insert:
 - (da) **section 546(1)(md)** (activities that are not financial advice):
- (4) In section 550(2)(f), after “(ii),”, insert “**(iva) to (ivd),**”.

46 Section 562 amended (FMA’s designation power)

- (1) After section 562(1)(g), insert:
 - (ga) declare that a service that would not otherwise be a financial advice service is a financial advice service:
- (2) Replace section 562(1)(h) with:
 - (h) declare a person, service, or conduct to be not exempt under any exemption that would otherwise apply under any of the following provisions (and accordingly the licensing requirement under this Act applies):
 - (i) **section 389(2)**:
 - (ii) **section 389(3)**:

47 Section 563 amended (Procedural requirements)

After section 563(1)(c), insert:

- (ca) in the case of **section 562(1)(ga) or (h)(i)**, it is satisfied that the declaration is necessary or desirable in order to promote the additional purposes specified in **section 431A**; and

48 Heading to subpart 8 of Part 9

In the heading to subpart 8 of Part 9, replace “Transitional and miscellaneous” with “Miscellaneous”.

49 Section 597 repealed (Transitional provisions)

Repeal section 597.

50 Schedule 1 amended

- (1) In Schedule 1, replace clause 21(a) with:
 - (a) financial products of a kind prescribed for the purposes of this paragraph that are issued by a registered bank; or
- (2) In Schedule 1, clause 21(c), replace “category 2” with “financial”.
- (3) In Schedule 1, clause 35(2), after “A service”, insert “(other than a financial advice service)”.
- (4) In Schedule 1, after clause 35(2), insert:
 - (3) A financial advice service is a **retail service** if that service is supplied—
 - (a) to a retail client (*see clause 2 of Schedule 5*); or
 - (b) to a number of clients and at least 1 of those clients is a retail client.
 - (4) **Subclause (3)** is subject to **section 403(4)**.
- (5) In Schedule 1, replace clause 37(1)(a)(iii) and (iv) with:
 - (iii) providing a financial advice service; or
 - (iv) providing a broking service; or
- (6) In Schedule 1, replace clause 37(1)(g) with:
 - (g) a financial adviser.
- (7) In Schedule 1, replace clause 38(4)(a) with:
 - (a) financial products of a kind prescribed for the purposes of this paragraph:
- (8) In Schedule 1, clause 41(1)(a)(i), after “subclause (2)”, insert “or **(2A)**”.
- (9) In Schedule 1, clause 41(1)(c), replace “an authorised financial adviser” with “a financial adviser”.
- (10) In Schedule 1, after clause 41(2), insert:

- (2A) In relation to the supply of a financial advice service or broking service (or a class of those services), A must certify that A has previous experience in acquiring or disposing of financial advice products that allows A to assess—
- (a) the merits of the service or services to be provided (including assessing its value and the risks involved); and
 - (b) A’s own information needs in relation to the service or services; and
 - (c) the adequacy of the information provided by any person involved in the service or services.
- (11) In Schedule 1, after clause 41(5), insert:
- (6) In relation to the supply of a financial advice service or broking service (or a class of those services), the certification under subclause (1)(a)(ii) must include a certificate that A understands that the competency standards and requirements of the code of conduct will not be applicable (if relevant) and that the financial adviser or broker may not be a member of an approved dispute resolution scheme).
- (12) In Schedule 1, clause 42(1), after “(2),”, insert “**(2A)**,”.
- (13) In Schedule 1, clause 42(2)(a) and (b), replace “authorised financial adviser” with “financial adviser”.
- (14) In Schedule 1, clause 43(1), replace “An authorised financial adviser” with “A financial adviser”.
- (15) In Schedule 1, clause 49(1), definition of **relevant person**, after paragraph (a), insert:
- (ab) the supply of a financial advice service or broking service to a person in any other case, means the provider of the service:
- (16) In Schedule 1, clause 49(1), definition of **relevant time**, after paragraph (b), insert:
- (ba) the supply of a financial advice service or broking service to a person in any other case, means immediately before the service is supplied:
- (17) In Schedule 1, clause 49(1), definition of **relevant transaction**, after paragraph (a), insert:
- (ab) the supply of a financial advice service or broking service:

51 Schedule 2 amended

In Schedule 2, clause 2(d), replace “perform a financial adviser service (within the meaning of the Financial Advisers Act 2008)” with “give financial advice”.

52 Schedule 4 amended

- (1) In the heading to Schedule 4, replace “s 597” with “**s 14A**”.
- (2) In Schedule 4, after clause 62, insert the Part set out in **Schedule 1** of this Act.

53 New Schedule 5 inserted

After Schedule 4, insert the **Schedule 5** set out in **Schedule 2** of this Act.

Part 6**Amendments to Financial Service Providers (Registration and Dispute Resolution) Act 2008****54 Principal Act**

This Part amends the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the **principal Act**).

55 Section 4 amended (Interpretation)

(1) In section 4, repeal the definitions of **broker**, **broking service**, and **financial adviser service**.

(2) In section 4, insert in their appropriate alphabetical order:

broker has the same meaning as in **section 431Q** of the Financial Markets Conduct Act 2013

broking service has the same meaning as in **section 431R** of the Financial Markets Conduct Act 2013

financial advice has the same meaning as in **section 431B** of the Financial Markets Conduct Act 2013

financial advice provider has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2013

financial advice service has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2013

56 Section 5 amended (Meaning of financial service)

Replace section 5(1)(a) with:

(a) financial advice service:

57 New section 6A inserted (Application of Act)

After section 6, insert:

6A Application of Act

(1) This Act applies to every person (**A**) who is in the business of providing a financial service if—

(a) A's financial services are promoted to persons in New Zealand by or on behalf of A or an associated person of A; or

(b) A is, or is required to be, a licensed provider under a licensing enactment; or

- (c) A is required to be registered under this Act by any other enactment; or
 - (d) A provides the service in the prescribed circumstances.
- (2) The following apply for the purposes of **subsection (1)(a)**:
- (a) financial services must be treated as being promoted to persons in New Zealand if an offer to provide the service is received by a person in New Zealand, unless A demonstrates that it has taken all reasonable steps to ensure that persons in New Zealand may not accept the offer:
 - (b) the paragraph does not apply merely because A's financial services are accessible by persons in New Zealand:
 - (c) the paragraph does not apply if A—
 - (i) does not have a place of business in New Zealand; and
 - (ii) does not provide the service to any retail client in New Zealand:
 - (d) the paragraph does not apply if the extent to which the financial service is provided to person in New Zealand is less than any prescribed threshold:
 - (e) the paragraph applies regardless of where the financial service is provided.
- (3) This Act may also apply to a person who registers for financial advice services under **section 22C** (even though the person is not in the business of providing a financial service).

58 Section 7 amended (Application of Act)

- (1) Replace the heading to section 7 with: “**Persons who are not in business of providing financial service**”.
- (2) Repeal section 7(1).
- (3) Repeal section 7(2)(i).

59 Section 8A repealed

Repeal section 8A.

60 Section 10 amended (Registration and deregistration)

After section 10(3), insert:

- (4) This section is subject to **section 22B** (suspension of registration).

61 Section 15 amended (Application to be registered as financial service provider)

After section 15(1)(a), insert:

- (ab) if the applicant is applying to be registered under **section 22C**, state whether the applicant is engaged by a financial advice provider (**B**) to

give financial advice on B's behalf and, if so, B's name and business address; and

62 Section 16 amended (Registration of financial service provider)

After section 16(1)(a)(iii), insert:

(iiia) if the provider (A) is registered under **section 22C**, a statement as to whether A is engaged by a financial advice provider (B) to give financial advice on B's behalf and, if so, B's name and business address; and

63 Section 17 amended (Duty to notify changes relating to financial service provider)

(1) After section 17(1)(c), insert:

(d) a financial advice provider that knows that it is recorded on the register as having engaged a financial adviser, if the financial adviser is no longer engaged by the provider.

(2) In section 17(4), replace "(1)(c)" with "(1)(c) or (d)".

64 Section 18 amended (Deregistration of financial service provider)

(1) After section 18(1)(c), insert:

(ca) has failed to comply with a duty provided for under regulations made under **section 44(1)(ba) and (bb)**; or

(2) Replace section 18(1B) with:

(1B) The Registrar must deregister a financial service provider if—

(a) the FMA gives a direction under section 18B(3)(c)(i); or

(b) the FMA gives a direction under **section 469(2)(a) or (b)** of the Financial Markets Conduct Act 2013; or

(c) the disciplinary committee gives a direction under **clause 42(3)(a) or (b) of Schedule 5** of the Financial Markets Conduct Act 2013.

65 Section 21 (Notification of deregistration of financial service provider)

In section 21, insert as subsection (2):

(2) In the case of a deregistration in accordance with a direction referred to in **section 18(1B)(b) or (c)**, the notice under subsection (1)(a) must refer to an appeal under **subpart 9 of Part 8** of the Financial Markets Conduct Act 2013 (rather than an appeal under section 42).

66 New sections 22A to 22C and cross-headings inserted

After section 22, insert:

22A Registrar must not re-register financial adviser if direction has been made

The Registrar must not re-register a person (A) during a period if the Registrar has received a direction under **section 469(2)(b)(ii)** or **clause 42(3)(b)(ii) of Schedule 5** of the Financial Markets Conduct Act 2013 to prevent A from being re-registered during that period.

*Suspension of registration***22B Suspension of registration**

- (1) The Registrar must suspend the registration of a person (A) if the Registrar has received a direction under **section 469(2)(c)** or **clause 42(3)(c) of Schedule 5** of the Financial Markets Conduct Act 2013.
- (2) The suspension is in effect—
 - (a) for the period specified in the direction; or
 - (b) until A meets the conditions specified in the direction (but, in any case, not for a period of more than 12 months).
- (3) A person whose registration is suspended is taken not to have that registration while it is suspended.
- (4) However, the FMA or the disciplinary committee may specify in the direction that **subsection (3)** does not apply for specified purposes.

*Registration of financial advisers***22C Registration of financial advisers**

- (1) An individual (A) who is not disqualified under section 14 may be registered as a financial service provider for financial advice services even though A is not in the business of providing that service.

Example

Susan is employed by ABC Limited (ABC) to give financial advice to ABC's clients. ABC Limited is required to be licensed under **section 388(ba)** of the Financial Markets Conduct Act 2013. Under **section 431C** of that Act, ABC is the entity that is providing the financial advice service. Susan is not providing the service because she is not in business and is only giving the advice on behalf of ABC to ABC's clients.

However, under the conditions of ABC's market service licence, the type of service that Susan gives can only be given by a person who is registered under this Act. **Subsection (1)** allows Susan to register even though, as a mere employee, she is not in the business of providing financial advice services.

- (2) If A becomes registered, this Act (and the rules of an approved dispute resolution scheme) apply with all necessary modifications to A as if A were in the business of providing financial advice services.

- (3) However, after the expiry of 3 months after registration, A must not be treated as being in the business of providing a financial service (and, accordingly, may be deregistered under section 18(1)(b)) if—
- (a) A is not engaged by a financial advice provider to give financial advice on the provider’s behalf; and
 - (b) A is not in the business of providing financial advice to wholesale clients.
- (4) For the purposes of Part 3, A must be treated as providing a financial advice service to a client (C) if—
- (a) A is engaged by a financial advice provider to give financial advice on the provider’s behalf; and
 - (b) C is a client of that provider; and
 - (c) A gives financial advice to C.

67 Section 27 amended (Contents of register)

After section 27(1)(c), insert:

- (ca) if the provider (A) is registered under **section 22C**, a statement as to whether A is engaged by a financial advice provider (B) to give financial advice on B’s behalf and, if so, B’s name and business address:

68 Section 29 amended (Registrar must amend register in certain circumstances)

After section 29(c), insert:

- (ca) a financial advice provider notifies the Registrar of a change under **section 17(1)(d)**; or

69 Section 34 amended (Sharing information with other persons or bodies)

After section 34(4)(d), insert:

- (da) the disciplinary committee established under **Part 5 of Schedule 5** of the Financial Markets Conduct Act 2013:

70 Section 37 (Registrar’s inspection powers)

- (1) Before section 37(1)(a), insert:

- (aaa) promotes a financial service to persons in New Zealand as referred to in **section 6A(1)(a)**; or

- (2) After section 37(2), insert:

- (2A) The Registrar, or a person authorised by the Registrar, may require a person to produce a relevant document relating to another person (for example, a director may be required to produce a document relating to the business of a company).

- (3) Replace section 37(6) with:

- (6) If a registered financial service provider, or a director of such a provider, does not comply with a requirement made under subsection (2)(a) to (ab) in relation to the provider (including compliance with the specifications in subsection (2)(ac)) within 20 working days from the date the requirement was notified to the provider or director, the Registrar may assume that the provider is no longer in the business of providing a financial service and sections 18 to 20 apply.
- (4) Before section 37(9)(a), insert:
- (aaa) promotes a financial service to persons in New Zealand as referred to in **section 6A(1)(a)**; or

71 Section 44 amended (Regulations under Part 1 and this Part)

- (1) After section 44(1)(a), insert:
- (aaa) prescribing circumstances for the purposes of **section 6A(1)(d)**;
- (aab) prescribing a threshold or thresholds for the purposes of **section 6A(2)(c)**;
- (2) After section 44(1)(b), insert:
- (ba) specifying warnings or other information about, or in connection with, the registration of a financial service provider that must be included in advertising for the service or in information or documents provided to persons who receive or may receive the service (for example, a warning that registration does not mean that the provider is subject to active regulation or oversight);
- (bb) prescribing the circumstances in which the duty referred to in **paragraph (ba)** applies and the manner in which the duty must be carried out;
- (3) After section 44(1), insert:
- (1AA) The Minister must, before making a recommendation under **subsection (1)(aaa)**, be satisfied that the regulations are necessary or desirable—
- (a) in order to promote 1 or more of the purposes of this Act as specified in sections 2A, 9, or 47; and
- (b) to protect, or prevent damage to, the integrity or reputation of—
- (i) New Zealand's financial markets; or
- (ii) New Zealand's law or regulatory arrangements for regulating those markets.

72 Section 49 amended (Who are retail clients)

Replace section 49(2)(h) with:

- (h) if the financial service is a financial advice service or a broking service, a person who is a wholesale client in respect of that service under **clause 3 of Schedule 5** of the Financial Markets Conduct Act 2013.

73 Schedule 2 amended

In Schedule 2, delete the item relating to the Financial Advisers Act 2008.

Part 7**Repeals and amendments to other Acts****74 Repeals and revocations**

- (1) The Financial Advisers Act 2008 (2008 No 91) is repealed.
- (2) The following regulations are revoked:
 - (a) Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014 (SR 2014/48):
 - (b) Financial Advisers (Definitions, Voluntary Authorisation, Prescribed Entities, and Exemptions) Regulations 2011 (SR 2011/50):
 - (c) Financial Advisers (Disclosure) Regulations 2010 (SR 2010/378):
 - (d) Financial Advisers (Fees) Regulations 2010 (SR 2010/234):
 - (e) Financial Advisers (Personalised DIMS) Regulations 2014 (LI 2014/333).
- (3) The following notices are revoked:
 - (a) Financial Advisers (Australian Licensees) Exemption Notice 2011 (SR 2011/238):
 - (b) Financial Advisers (NZX Brokers—Client Money and Client Property) Exemption Notice 2015 (SR 2015/298):
 - (c) Financial Markets Conduct (Offers of Financial Products Through Authorised Financial Advisers Supplying Personalised DIMS) Exemption Notice 2015 (LI 2015/254).

75 Consequential amendments

Amend the enactments specified in **Schedule 3** as set out in that schedule.

Schedule 1
New Part 4 inserted into Schedule 4 of Financial Markets Conduct Act 2013

s 00

Part 4
Transitional provisions relating to Financial Markets Conduct Amendment Act 2017

63 Financial advisers treated as holding DIMS licence

- (1) This clause applies to a person (A) who, immediately before the commencement of this clause,—
- (a) is permitted to provide a discretionary investment management service under section 18(1)(d) of the Financial Advisers Act 2008; and
 - (b) provides that service to 1 or more retail clients.
- (2) A must, on and after the commencement of this clause, be treated as holding a market services licence that—
- (a) covers the service of acting as a provider of a discretionary investment management service; and
 - (b) is subject to a condition that the service that A can provide under the licence is limited to the service that A could provide immediately before the commencement of this clause; and
 - (c) has an expiry date that is the earliest of the following:
 - (i) the date that the person is issued with another licence that covers the service; or
 - (ii) the date that the licence is cancelled.
- (3) However, **subclause (2)** does not apply if, before the commencement of this clause, A has given written notification to the FMA that A does not want **subclause (2)** to apply.
- (4) Nothing in this clause prevents the FMA from exercising any power in relation to the licence.

64 Code may be prepared before commencement

- (1) Any action taken by or on behalf of the body of persons known as the Code Working Group before the commencement of this clause in preparing the code of conduct must be treated as having been validly taken by the code committee under, and for the purposes of, **clauses 28 to 35 of Schedule 5**.

- (2) For the purposes of **subclause (1)**, a reference in **clauses 28 to 35 of Schedule 5** to the code committee includes a reference to the Code Working Group.
- (3) The Minister may exercise or perform a power or duty under **Schedule 5** before that schedule comes into force.
- (4) The Minister must ensure that the code comes into force no later than the date on which **subpart 5A of Part 6** comes into force.

65 Certification for eligible investors under Financial Advisers Act 2008 continues under this Act

- (1) A certification given under section 5D(1) of the Financial Advisers Act 2008 that is in effect immediately before the repeal of that Act remains in effect after the repeal as if it were a certificate given under clause 41(1) and **(2A)** of Schedule 1 of this Act.
- (2) Subclause (1) is subject to clause 42 of Schedule 1.

66 Code Working Group continues as code committee

- (1) The body of persons known as the Code Working Group, its chairperson, and its other members immediately before the commencement of this clause must be treated as being the code committee, its chairperson, and its members under **clauses 20 and 22 to 24 of Schedule 5** (with the chairperson and other members having the same period of appointment).
- (2) This clause does not limit **clause 22(1)(b), (2), and (4) and 24(2) and (3) of Schedule 5**.

67 Disciplinary committee continues

- (1) The disciplinary committee established under section 103 of the Financial Advisers Act 2008 must be treated as being the disciplinary committee established under **clause 45 of Schedule 5**.
- (2) A person who, immediately before the commencement of this clause, is the chairperson or another member of the disciplinary committee established under section 103 of the Financial Advisers Act 2008 must be treated as being the chairperson or another member of the disciplinary committee established under **clause 45 of Schedule 5** (for the same period as specified under section 105(2) of the Financial Advisers Act 2008).
- (3) **Subclause (2)** does not limit **clause 47(6) of Schedule 5**.

68 Continuation of pending investigations and disciplinary proceedings

All investigations and disciplinary proceedings under subpart 2 of Part 4 of the Financial Advisers Act 2008 that have been commenced before the commencement of this clause and that have not been completed before that commencement are to be continued and completed as if the Financial Services Legislation Amendment Act **2017** had not been enacted (with the disciplinary committee

established under **clause 45 of Schedule 5** acting as the disciplinary committee).

Schedule 2
New Schedule 5 inserted into Financial Markets Conduct Act 2013

s 49

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Part 1

Retail and wholesale financial advice or broking service clients

1 Who are clients

In this Act, a **client**,—

- (a) in relation to a financial advice service, means a person who receives the service (whether or not on payment of a charge); and
- (b) in relation to a broking service, means the person on whose behalf the client money or client property is received, held, paid, or transferred under the service (but excludes the product provider); but
- (c) does not include a person who receives the financial advice or broking service from another person if the service is both provided and received in the course of, and for the purposes of,—
 - (i) the same business; or
 - (ii) the businesses of related bodies corporate; or
 - (iii) the businesses of a group of entities that consists of a licensee and its authorised bodies.

Example

If a company employee (**A**) gives financial advice to the board of directors on investments to be made by the company, the directors are not clients of A. However, if A, in the course of business, gives that same financial advice to another employee (**B**) in relation to B's own investments, B would be a client of A for the purposes of this Act.

Compare: 2008 No 91 s 5A

2 Who are retail clients

A **retail client**, in respect of a financial advice service or a broking service, is a client of a financial advice provider or broker who is not a wholesale client.

Compare: 2008 No 91 s 5B

3 Who are wholesale clients

- (1) The following clients of a financial advice provider, financial adviser, or broker are **wholesale clients** in respect of a financial advice service or a broking service (unless the person has opted out from being a wholesale client under **clause 4**):
- (a) any other financial advice provider, financial adviser, financial advice representative, or broker who receives the service in the course of business of providing a financial advice service or broking service:
 - (b) a person who is in the business of providing any other financial service and receives the financial advice service or broking service in the course of that business:
 - (c) an entity to which at least 1 of the following applied at the end of each of the last 2 completed accounting periods:
 - (i) at the balance date, the net assets of the entity exceeded \$1 million:
 - (ii) the turnover of the entity for the accounting period exceeded \$1 million:
 - (d) a related body corporate of an entity to which **paragraph (c)** applies:
 - (e) a person who is a wholesale investor within the meaning of clause 3(2) of Schedule 1 (*see subclause (3)*):
 - (f) a person who is, in relation to an offer of financial products, a wholesale investor within the meaning of clause 3 of Schedule 1 if the service relates to that offer or to financial products that have been acquired by that person under that offer:
 - (g) a person who is, in relation to an offer of financial products, a close business associate of the offeror, or a relative of the offeror or of a director of the offeror, within the meaning of clauses 4 and 5 of Schedule 1 if the service relates to that offer or to financial products that have been acquired by that person under that offer:
 - (h) a person who is, in relation to a DIMS facility provided by a DIMS licensee, a wholesale investor under clause 36(b) of Schedule 1 if the service relates to that DIMS facility:
 - (i) an eligible investor in relation to the service under clause 41 of Schedule 1.

- (2) If **subclause (1)** applies to a person (A), it applies equally to any controlling owner, director, employee, agent, or other person acting in the course of, and for the purposes of, A's business to the same extent as it applies to A.
- (3) The relevant time, for the purposes of applying Schedule 1 under **subclause (1)(e)**, must be treated as the time immediately before the service is received by the client.

Compare: 2008 No 91 s 5C

4 How to opt out of being wholesale client

- (1) A person may opt out of being a wholesale client, in relation to a financial advice provider, financial adviser, or broker, by giving the financial advice provider, financial adviser, or broker a signed notification to that effect.
- (2) A notification may be specific to a particular service, or class of services, or may be general for all services provided by the financial advice provider, financial adviser, or broker to whom it is given.
- (3) A person may vary or revoke a notification in the same way as the notification may be given.
- (4) A notification (or variation or revocation of a notification) under this clause is effective only in relation to services provided after it is given.
- (5) This clause does not apply if a person is a wholesale client by reason of being an eligible investor under clause 41 of Schedule 1.

Compare: 2008 No 91 s 5G

5 Giving notification of opt out

- (1) A notification under **clause 4** is sufficiently given to a financial advice provider, financial adviser, or broker if—
 - (a) provided to the financial advice provider, financial adviser, or broker; or
 - (b) delivered or posted to the financial advice provider, financial adviser, or broker at the person's business address stated on the register under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 or the person's last known place of business in New Zealand; or
 - (c) sent by email to the person's email address stated on the register under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.
- (2) The notification is treated as received by the person no later than 7 days after it is posted or 2 days after it is emailed, unless the person to whom it is posted or sent proves that it was not received (otherwise than through fault on the person's part).

Compare: 2008 No 91 s 5H

Part 2

Financial advice exclusions

6 Exclusions from definition of financial advice

A person does not give financial advice merely by doing 1 or more of the following:

- (a) providing factual information (for example, information about the cost or terms and conditions of a financial advice product, or about the procedure for acquiring or disposing of a financial advice product):
- (b) carrying out an instruction from a person to acquire or dispose of, or not to acquire or dispose of, a financial advice product for that person:
- (c) making a recommendation or giving an opinion about a kind of financial advice product in general rather than a particular financial advice product (for example, an opinion about shares generally rather than shares of a particular company):
- (d) recommending that a person obtain financial advice:
- (e) passing on financial advice given by another person (unless the person holds out that the financial advice is the person's own advice):
- (f) giving or making available any of the following:
 - (i) a disclosure document:
 - (ii) information from a register entry:
 - (iii) an advertisement referred to in section 89:
 - (iv) any other document or information that the person is required by law to give or make available:
 - (v) a document or information prescribed by the regulations:
- (g) carrying out a prescribed activity.

Exclusions from regulated financial advice

7 Ancillary services and other occupations

- (1) Financial advice is not regulated financial advice if it is given only as an ancillary part of a business the principal activity of which is not the provision of a financial service.
- (2) Financial advice is not regulated financial advice if it is given by an incorporated law firm (as defined in section 6 of the Lawyers and Conveyancers Act 2006) in the ordinary course of its business.
- (3) Financial advice is not regulated financial advice if the person giving the advice—
 - (a) is one of the following:

- (i) a conveyancing practitioner (as defined in section 6 of the Lawyers and Conveyancers Act 2006):
 - (ii) a journalist:
 - (iii) a lawyer:
 - (iv) a lecturer (being a person employed by an institution (as defined in section 159 of the Education Act 1989) to teach or instruct students of the institution):
 - (v) a qualified statutory accountant:
 - (vi) a real estate agent (being an agent as defined in section 4(1) of the Real Estate Agents Act 2008):
 - (vii) a registered legal executive (being a member of the New Zealand Institute of Legal Executives Incorporated who holds a current annual registration certificate issued by that body):
 - (viii) a registered valuer (as defined in section 2 of the Valuers Act 1948):
 - (ix) a tax agent (as defined in section 3(1) of the Tax Administration Act 1994):
 - (x) a teacher (being a person who holds a teaching position as defined in section 348 of the Education Act 1989):
 - (xi) a person carrying on an occupation prescribed by the regulations; and
- (b) gives the advice in the ordinary course of carrying on that occupation.

8 Crown related entities

- (1) Financial advice is not regulated financial advice if it is given in the ordinary course of the business of 1 of the following:
- (a) a Crown entity under section 7 of the Crown Entities Act 2004, other than the Public Trust:
 - (b) a government department named in Schedule 1 of the State Sector Act 1988:
 - (c) a government-related organisation as defined in section 4 of the Crown Organisations (Criminal Liability) Act 2002:
 - (d) the Reserve Bank:
 - (e) the New Zealand Security Intelligence Service.
- (2) Financial advice is not regulated financial advice if the person giving the advice—
- (a) is one of the following—
 - (i) a Minister of the Crown:
 - (ii) a member of Parliament:

- (iii) an employee or a chief executive (both as defined in section 2 of the State Sector Act 1988):
 - (iv) the holder of, or a person performing the duties of, an office established by an enactment (other than the Māori Trustee):
 - (v) a person performing duties that are expressly conferred on him or her by virtue of his or her office by an enactment; and
- (b) gives the advice in the ordinary course of carrying on that occupation, or exercising the powers or performing the functions of that office or position.

9 Trustee corporations

- (1) Financial advice is not regulated financial advice if it is given in the ordinary course of the business of a trustee corporation providing—
- (a) legal or financial services in relation to the preparation of a will; or
 - (b) estate management and administration services (and associated legal, financial, and other services carried out under the Act governing the corporation).
- (2) In this clause, **trustee corporation** means 1 of the following:
- (a) the Public Trust;
 - (b) the Māori Trustee;
 - (c) a corporation that is authorised by an Act to administer the estates of deceased persons and other trust estates;
 - (d) a wholly owned subsidiary of a corporation referred to in **paragraph (c)** that is guaranteed by the corporation.

10 Non-profit organisation

- (1) Financial advice is not regulated financial advice if it is given—
- (a) in the ordinary course of the business of a non-profit organisation; and
 - (b) for no charge.
- (2) In this clause, **non-profit organisation**, means an organisation that is carried on other than for the purposes of profit or gain to an owner, a member, or a shareholder.

11 Workplace financial products

Financial advice is not regulated financial advice if it is given—

- (a) by or for an employer; and
- (b) to an employee of the employer; and
- (c) in relation to a financial advice product that is made available through the employee's workplace.

12 Advice to product provider

Financial advice is not regulated financial advice if it is given—

- (a) in connection with a financial advice product; and
- (b) to the provider of the financial advice product; and
- (c) by a person engaged by the provider to give the advice.

13 Activities governed by other regulatory frameworks

(1) Financial advice is not regulated financial advice if—

- (a) the advice is given as part of a discretionary investment management service; and
- (b) the provision of that service is—
 - (i) covered by a market services licence; or
 - (ii) exempted from the licensing requirement under section 388(c).

(2) Financial advice is not regulated financial advice if it is given—

- (a) in the course of a business carried on by a rating agency approved under section 86 of the Non-bank Deposit Takers Act 2013 or section 62 of the Insurance (Prudential Supervision) Act 2010; and
- (b) in connection with a rating given or to be given by the agency.

(3) Financial advice given to a person (A) is not regulated financial advice if—

- (a) the advice is given—
 - (i) in connection with an offer of a financial product; and
 - (ii) by or on behalf of the offeror; and
- (b) the offer to A does not require disclosure under Part 3 because of any 1 or more of clauses 3 to 5 of Schedule 1.

(4) Financial advice is not regulated financial advice if it is given—

- (a) by an offeror or a target company in the course of a takeover offer under the Takeovers Code; or
- (b) by an independent adviser in the course of exercising his or her functions under the Takeovers Code.

14 Prescribed circumstances

Financial advice is not regulated financial advice if it is given in prescribed circumstances.

Part 3

Broker exclusions

15 Service given in course of carrying out other occupations

- (1) A broking service is not a regulated broking service if the person giving the service—
- (a) is one of the following:
 - (i) a conveyancing practitioner (as defined in section 6 of the Lawyers and Conveyancers Act 2006):
 - (ii) a lawyer:
 - (iii) a qualified statutory accountant:
 - (iv) a real estate agent (being an agent as defined in section 4(1) of the Real Estate Agents Act 2008):
 - (v) a registered legal executive (being a member of the New Zealand Institute of Legal Executives Incorporated who holds a current annual registration certificate issued by that body):
 - (vi) a tax agent (as defined in section 3(1) of the Tax Administration Act 1994):
 - (vii) a person carrying on an occupation prescribed by the regulations; and
 - (b) gives the service in the ordinary course of carrying on that occupation.
- (2) A broking service is not a regulated broking service if it is given by an incorporated law firm (as defined in section 6 of the Lawyers and Conveyancers Act 2006) in the ordinary course of its business.

16 Crown related entities

- (1) A broking service is not a regulated broking service if it is given in the ordinary course of the business of 1 of the following:
- (a) a Crown entity under section 7 of the Crown Entities Act 2004, other than the Public Trust:
 - (b) a government department named in Schedule 1 of the State Sector Act 1988:
 - (c) a government-related organisation as defined in section 4 of the Crown Organisations (Criminal Liability) Act 2002:
 - (d) the Reserve Bank:
 - (e) the New Zealand Security Intelligence Service.
- (2) A broking service is not a regulated broking service if the person giving the service—
- (a) is one of the following—

- (i) an employee or chief executive (both as defined in section 2 of the State Sector Act 1988):
 - (ii) the holder of, or a person performing the duties of, an office established by an enactment:
 - (iii) a person performing duties that are expressly conferred on him or her by virtue of his or her office by an enactment; and
- (b) gives the service in the ordinary course of carrying on that occupation, or exercising the powers or performing the functions of that office or position.

17 Other exclusions

A broking service is not a regulated broking service if—

- (a) the person giving the service is an operator of a designated settlement system under section 156N of the Reserve Bank of New Zealand Act 1989 and the service is provided by the receipt, holding, payment, or transfer of money or property in accordance with the rules of that settlement system:
- (b) the service is provided by a derivatives issuer in the course of acting as a derivatives issuer under a licence under Part 6; or
- (c) the service is provided by an employer to an employee in connection with a financial product made available through the person's workplace.

18 Prescribed circumstances

A broking service is not a regulated broking service if it is given in prescribed circumstances.

Part 4

Code of professional conduct and code committee

Code committee

20 Establishment of code committee

The code committee is established.

Compare: 2008 No 91 s 81

21 Functions of code committee

- (1) The functions of the code committee are—
- (a) first, to produce a draft code for approval by the Minister; and
 - (b) subsequently, to review the code from time to time; and
 - (c) to recommend to the Minister changes to the code as the code committee thinks fit.

- (2) See **clause 64 of Schedule 4** (which provides for the code to be prepared before the commencement of **clauses 28 to 35**).

Compare: 2008 No 91 s 82

22 Membership of code committee

- (1) The Minister may at any time—
- (a) appoint a member of the code committee; or
 - (b) discharge a member of the code committee.
- (2) The appointment of a member of the code committee must be for a specified period, but a member may be discharged under **subclause (1)(b)** before his or her period of appointment has expired.
- (3) The code committee must have not less than 7 members and not more than 11 members, and the Minister must ensure that the number of current members does not fall below 7.
- (4) A member of the code committee may resign by notice in writing to the Minister.

Compare: 2008 No 91 s 83(1)–(3), (5)

23 Who Minister must appoint

The Minister must appoint as members of the code committee—

- (a) 2 persons who, in the Minister’s opinion, are each qualified for appointment because of their knowledge of, and skills and experience in relation to, consumer affairs or dispute resolution; and
- (b) other persons who, in the Minister’s opinion, are each qualified for appointment because of—
 - (i) their individual knowledge of, and skills and experience in relation to, the provision of financial services; or
 - (ii) any other appropriate knowledge, skills, and experience that will assist the code committee to perform its functions.

Compare: 2008 No 91 s 83(4)

24 Chairperson

- (1) The Minister must appoint one of the members of the code committee as the chairperson of the code committee.
- (2) The Minister may at any time discharge the chairperson from that office (whether or not the Minister also discharges the chairperson as a member of the code committee).
- (3) The chairperson may, without resigning as a member of the code committee, resign from that office by notice in writing to the Minister.

Compare: 2008 No 91 s 84(2)

25 Proceedings of code committee

- (1) Meetings of the code committee must be held at the times and places as the code committee or the chairperson from time to time decides.
- (2) The quorum for a meeting of the code committee is 5 members.
- (3) Every question before the code committee must be determined by a majority of the votes of the members present or otherwise.
- (4) The chairperson of the code committee has a deliberative vote and, in the case of an equality of votes, a casting vote.
- (5) The code committee may regulate its own procedure.
- (6) **Subclause (5)** applies except as provided in this clause and in any regulations.

Compare: 2008 No 91 s 84

26 Certain provisions of Crown Entities Act 2004 apply to members of code committee

Clause 15 of Schedule 5 of the Crown Entities Act 2004 (**Schedule 5**) applies as if the code committee were a committee appointed by the Minister under clause 14 of Schedule 5 and with all other necessary modifications.

Compare: 2008 No 91 s 85

27 Funding of code committee

The FMA must fund the code committee.

Compare: 2008 No 91 s 85A

*Code of professional conduct for financial advice services***28 Content of code**

- (1) The code must provide for minimum standards of professional conduct that must be demonstrated when financial advice is given, including minimum standards—
 - (a) of general competence, knowledge, and skills that apply to all persons that give financial advice; and
 - (b) of particular competence, knowledge, and skills that apply in respect of different types of financial advice, financial advice products, or other circumstances; and
 - (c) of ethical behaviour; and
 - (d) of conduct and client care.
- (2) However, the code must not include limits on the types of financial advice that may be given by a financial advice representative.
- (3) The code—

- (a) must identify different types of financial advice, financial advice products, or other circumstances for the purposes of **subclause (1)(b)**; and
 - (b) may specify different standards, or matters under **subclause (3)**, in respect of those types.
- (4) The code must also provide for—
- (a) continuing professional training for persons that give financial advice, including specification of minimum requirements that a person must meet for the purpose of continuing professional training;
 - (b) the way in which a financial advice provider or financial adviser may demonstrate the provider's or adviser's competence, knowledge, and skill.
- (5) The code may limit or modify standards, or provide for separate standards, for the duration of 1 or more periods of transition.

Compare: 2008 No 91 s 86

29 Code committee must prepare code

- (1) The code committee must prepare a draft code.
- (2) In preparing the draft code, the code committee must—
- (a) have regard to—
 - (i) the main and additional purposes of this Act stated in sections 3 and 4 and the purpose set out in **section 431A**; and
 - (ii) New Zealand's international obligations that are relevant to financial markets or financial advice services; and
 - (b) prepare an impact analysis document that describes how the proposed standards may contribute to, or detract from, the matters referred to in **paragraph (a)** (including a description of any trade-offs between those impacts); and
 - (c) consult with the FMA; and
 - (d) consult any persons that it reasonably considers to be representative of the financial advice industry; and
 - (e) consult any persons that it reasonably considers to be representative of consumers of financial advice; and
 - (f) allow an opportunity for any person affected by the code to make submissions to the code committee.
- (3) The code committee must publish, on an Internet site maintained by or on behalf of the committee,—
- (a) the impact analysis document prepared under **subclause (2)(b)**; and
 - (b) a summary of the submissions made to the committee; and

(c) a brief response to those submissions.

Compare: 2008 No 91 s 87

30 Minister's approval of draft code

- (1) After receiving the draft code prepared by the code committee, the Minister must—
- (a) approve it; or
 - (b) decline to approve it.
- (2) The Minister must approve the draft code prepared by the code committee if the Minister is satisfied that—
- (a) a majority of the code committee has approved the draft code; and
 - (b) the code committee has complied with its obligations under **clause 29(2)**; and
 - (c) the draft code is consistent with this Act.
- (3) A failure by the code committee to comply with its obligations under **clause 29(2) or (3)** does not affect the validity of the code.
- (4) This clause is subject to **clause 31**.

Compare: 2008 No 91 s 88

31 Minister may require revision or consultation

- (1) If the Minister is not satisfied as to a matter specified in **clause 30(2)**,—
- (a) the Minister must direct the code committee to revise the draft code or undertake further consultation or receive submissions, as necessary; and
 - (b) the code committee must as soon as practicable comply with the Minister's direction.
- (2) If the Minister considers that the draft code is not consistent with this Act, the Minister must, in directing the code committee to revise the draft code, state in what respects the Minister considers that the draft code is not consistent.

Compare: 2008 No 91 s 89

32 Minister's approval of revised draft code

- (1) After receiving a revised draft code, the Minister must—
- (a) approve the revised draft code; or
 - (b) if the Minister considers that the draft code requires further amendment to be consistent with this Act,—
 - (i) make any amendments to the draft code that the Minister considers necessary; and
 - (ii) approve the draft code as amended.
- (2) Before making any amendment to the draft code under this clause, the Minister must—

- (a) advise the code committee of the Minister's intention to do so; and
- (b) give the code committee a reasonable opportunity to make submissions on the matter; and
- (c) consider those submissions.

Compare: 2008 No 91 s

33 Consultation with FMA

The Minister must consult the FMA before exercising a power under **clause 30 to 32**.

34 Deadline for Minister's approval of draft code

The Minister must approve the draft code within 90 days after receiving the draft code or, if **clause 31** applies, within 90 days after receiving the revised draft code.

Compare: 2008 No 91 s 91

35 Code comes into force by *Gazette* notice

- (1) After the Minister has approved the draft code or after the 90-day deadline for approval specified in **clause 34** has expired, the Minister must give notice in the *Gazette* of the date or dates on which the provisions of the code come into force.
- (2) The notice may state different dates for different provisions, but no date may be before the 28th day after the date on which the notice is published in the *Gazette*.
- (3) Each provision in the code comes into force on the date stated in the notice that applies to the provision.
- (4) The code and the notice are each disallowable instruments, but not legislative instruments, for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

Compare: 2008 No 91 s 94

Changes to code

36 Changes to code

- (1) A change to the code may be proposed by—
 - (a) the code committee; or
 - (b) the FMA; or
 - (c) the Minister.
- (2) The procedure for changing the code is the same as the procedure set out in **clause 28 to 35** for the preparation and approval of the draft code.
- (3) However, the code committee must, in relation to a proposed change,—

- (a) prepare an impact analysis document that describes how the proposed change may contribute to, or detract from, the matters referred to in **clause 29(2)(a)** (including a description of any trade-offs between those impacts); and
- (b) publish the document on an Internet site maintained by or on behalf of the code committee.

Compare: 2008 No 91 s 95

Part 5

Complaints and disciplinary proceedings

Who deals with complaints

37 Complaint about financial adviser

- (1) Any person may complain to the FMA about the conduct of another person (A) in A's capacity as a financial adviser.
- (2) The FMA may initiate a complaint.

Compare: 2008 No 91 s 96

38 Investigation by FMA

- (1) After receiving or initiating a complaint, the FMA must investigate the complaint if it is practicable to do so having regard to—
 - (a) the nature and number of complaints to be investigated; and
 - (b) the FMA's regulatory priorities as reflected in its statement of intent; and
 - (c) the FMA's available resources.
- (2) The FMA need not investigate a complaint if it is satisfied that—
 - (a) the complaint is vexatious; or
 - (b) the complaint is not sufficiently serious to warrant investigation.

Compare: 2008 No 91 s 97

Complaint about financial adviser

39 FMA may refer complaint to disciplinary committee

When the FMA has, under **clause 38**, investigated a complaint about a financial adviser, it may refer the complaint to the disciplinary committee if, in the FMA's opinion, the conduct complained of amounts to a contravention of a provision of **subpart 5A of Part 6** (for example, a contravention of the code).

Compare: 2008 No 91 s 98

40 Disciplinary committee must give notice of complaint

The disciplinary committee must serve a written notice of the complaint on a financial adviser if—

- (a) the FMA refers a complaint about the financial adviser to the disciplinary committee; and
- (b) the disciplinary committee considers that a hearing is necessary to deal with the complaint.

Compare: 2008 No 91 s 99

41 Content of notice of complaint

The disciplinary committee's notice of complaint to the financial adviser concerned (**A**) must—

- (a) state that the disciplinary committee considers that there is reason to believe that **A** may have contravened a provision of **subpart 5A of Part 6**; and
- (b) contain the particulars that are reasonably necessary to clearly inform **A** of the nature of the contravention; and
- (c) specify a date, which must not be sooner than 20 working days after the date of service of the notice, on which the disciplinary committee intends to hear the matter.

Compare: 2008 No 91 s 100

42 Disciplinary committee may discipline financial adviser

- (1) In this clause,—

A is the person who is the subject of the complaint

FSP Act means the Financial Service Providers (Registration and Dispute Resolution) Act 2008

Registrar means the Registrar of Financial Service Providers.

- (2) The disciplinary committee may take any of the actions referred to in **sub-clause (3)** if it is satisfied that **A**—
- (a) has contravened a provision of **subpart 5A of Part 6**; or
 - (b) has failed to pay any amount payable to the FMA under section 67 or 68 of the Financial Markets Authority Act 2011 or regulations made under those sections.
- (3) The disciplinary committee may do 1 or more of the following:
- (a) direct the Registrar to deregister **A** under the FSP Act;
 - (b) direct the Registrar to—
 - (i) deregister **A** under the FSP Act; and
 - (ii) prevent **A** for a specified period from being re-registered for a financial advice service under the FSP Act;
 - (c) direct the Registrar to suspend **A**'s registration under the FSP Act for a period of no more than 12 months or until **A** meets specified conditions

relating to the registration (but, in any case, not for a period of more than 12 months):

- (d) censure A;
 - (e) order that A may, for a period not exceeding 3 years, give financial advice for the purposes of a financial advice service only subject to any conditions as to employment, engagement, supervision, or otherwise that the disciplinary committee may specify in the order;
 - (f) order that A undertake training specified in the order;
 - (g) order that A must pay a fine not exceeding \$10,000;
 - (h) take no action.
- (4) Deregistration or suspension of A's registration under the FSP Act under **sub-clause (3)** relates only to A's registration for a financial advice service.

Compare: 2008 No 91 s 101(1)–(3)

43 Other matters relating to discipline

- (1) No fine may be imposed under **clause 42(3)(g)** in relation to an act or omission that constitutes—
- (a) an offence for which A has been convicted by a court; or
 - (b) a contravention for which A has been found liable to pay a pecuniary penalty.
- (2) In any case to which **clause 42(2)** applies, the disciplinary committee may order that A must pay costs and expenses of, and incidental to, the investigation by the FMA and the disciplinary committee's proceeding.
- (3) The disciplinary committee may publicly notify the action in any way that it thinks fit.
- (4) **Clause 42** and this clause apply whether or not A is a financial adviser at the time of the complaint, the investigation, or the disciplinary proceeding.

Compare: 2008 No 91 s 101(4)–(7)

44 Reasonable opportunity to be heard

The disciplinary committee must not take any of the actions specified in **clause 42(3)** unless it has first—

- (a) informed the person concerned in writing as to why it may take any of those actions; and
- (b) given that person or his or her representative a reasonable opportunity to make written submissions and be heard on the question.

Compare: 2008 No 91 s 102

*Disciplinary committee***45 Minister must establish disciplinary committee**

The Minister must establish a disciplinary committee.

Compare: 2008 No 91 s 103

46 Functions of disciplinary committee

The functions of the disciplinary committee are to—

- (a) conduct disciplinary proceedings arising out of complaints regarding financial advisers referred to it by the FMA; and
- (b) take any of the actions referred to in **clause 42(3)** as a result of disciplinary proceedings.

Compare: 2008 No 91 s 104

47 Membership of disciplinary committee

- (1) The Minister may at any time appoint a member of the disciplinary committee.
- (2) The appointment of a member of the disciplinary committee must be for a specified period.
- (3) The Minister must appoint one of the members of the disciplinary committee as the chairperson of the disciplinary committee.
- (4) The disciplinary committee must have not less than 4 members and not more than 6 members including the chairperson, and the Minister must ensure that the number of current members does not fall below 4.
- (5) Apart from the chairperson, the Minister must appoint as members of the disciplinary committee—
 - (a) at least 1 member who works or has worked in the financial advice industry; and
 - (b) at least 1 member who is independent of the financial advice industry; and
 - (c) at least 1 member who is a lawyer with not less than 7 years' legal experience.

- (6) A member of the disciplinary committee may resign by notice in writing to the Minister.

Compare: 2008 No 91 s 105

48 Proceedings of disciplinary committee

- (1) Meetings of the disciplinary committee must be held at the times and places as the disciplinary committee or the chairperson from time to time decides.
- (2) The quorum for a meeting of the disciplinary committee is 3 members.
- (3) Every question before the disciplinary committee must be determined by a majority of the votes of the members present at the meeting.

- (4) The chairperson of the disciplinary committee has a deliberative vote and, in the case of an equality of votes, a casting vote.
- (5) The disciplinary committee may regulate its own procedure.
- (6) **Subclause (5)** applies except as provided in this clause and in any regulations.

Compare: 2008 No 91 s 106

49 Disciplinary committee may hear evidence in disciplinary proceeding

- (1) In a disciplinary proceeding, the disciplinary committee may—
 - (a) receive evidence on oath (and for that purpose a member of the disciplinary committee may administer an oath):
 - (b) permit a person appearing as a witness before it to give evidence by tendering a written statement and verifying that statement by oath, statutory declaration, or otherwise.

- (2) A hearing before the disciplinary committee in a disciplinary proceeding is a judicial proceeding for the purposes of sections 108 and 109 of the Crimes Act 1961.

Compare: 2008 No 91 s 107

50 District Court may authorise disciplinary committee to summon witnesses on disciplinary matters

- (1) A District Court Judge may, on the application of the disciplinary committee or the person to whom the proceedings relate, give a certificate authorising the disciplinary committee to issue a summons under **clause 51**.
- (2) A District Court Judge must not give a certificate unless satisfied that—
 - (a) the evidence of the witness is or may be material to the hearing of a disciplinary matter by the disciplinary committee; and
 - (b) it is necessary or desirable that the summons be issued to compel the attendance of the witness at the hearing.

Compare: 2008 No 91 s 108

51 Issuing of summons by disciplinary committee

- (1) The disciplinary committee must, on production of a certificate referred to in **clause 50**, issue a summons to a person requiring that person to attend a hearing before the disciplinary committee and to do all or any of the following:
 - (a) give evidence:
 - (b) give evidence under oath:
 - (c) produce documents, things, or information, or any specified documents, things, or information, in the possession or control of that person, that are relevant to the hearing.

- (2) The summons must be in writing, be signed by the chairperson of the disciplinary committee, and state—
- (a) the date and time when, and the place where, the person must attend; and
 - (b) the documents, things, or information that the person is required to bring and produce to the disciplinary committee; and
 - (c) the entitlement to be tendered or paid a sum in respect of witnesses' fees, allowances, and expenses; and
 - (d) the penalty for failing to attend.
- (3) The disciplinary committee may require that any documents, things, or information produced under this clause be verified by oath, statutory declaration, or otherwise.

Compare: 2008 No 91 s 109

52 Serving of summons

- (1) A summons may be served—
- (a) by delivering it personally to the person summoned; or
 - (b) by posting it to the person summoned at that person's usual place of residence.
- (2) A summons must,—
- (a) if it is to be served under **subclause (1)(a)**, be served at least 48 hours before the attendance of the witness is required;
 - (b) if it is to be served under **subclause (1)(b)**, be served at least 10 days before the attendance of the witness is required.
- (3) A summons that is posted is treated as having been served when it would have been delivered in the ordinary course of post.

Compare: 2008 No 91 s 110

53 Failure to comply with summons to attend disciplinary committee hearing

- (1) A person summoned under **clause 51** commits an offence if he or she, without sufficient cause,—
- (a) fails to attend in accordance with the summons; or
 - (b) does not give evidence when required to do so; or
 - (c) does not give evidence under oath when required to do so; or
 - (d) does not answer any question that is lawfully asked by the disciplinary committee; or
 - (e) does not provide any documents, things, or information that the summons requires the person to provide.
- (2) A person who commits an offence under this clause is liable on conviction to a fine not exceeding \$5,000.

- (3) A person must not be convicted of an offence under this clause if witnesses' fees, allowances, and expenses to which the person is entitled under **clause 54** have not been paid or tendered to him or her.

Compare: 2008 No 91 s 137

54 Witnesses' fees, allowances, and expenses

- (1) A witness appearing before the disciplinary committee under a summons is entitled to be paid witnesses' fees, allowances, and expenses in accordance with the scales prescribed by regulations under the Criminal Procedure Act 2011.
- (2) The person requiring attendance of the witness must pay or tender to the witness the fees, allowances, and expenses at the time the summons is served or at some other reasonable time before the hearing.

Compare: 2008 No 91 s 111

55 Protection for witnesses and counsel in disciplinary proceeding

- (1) Every person who does the following things has the same privileges as witnesses have in a court:
- (a) provides documents, things, or information to the disciplinary committee in relation to a disciplinary matter; or
 - (b) gives evidence or answers questions at a hearing of the disciplinary committee in relation to a disciplinary matter.
- (2) Every counsel appearing before the disciplinary committee in relation to a disciplinary matter has the same privileges and immunities as counsel in a court.

Compare: 2008 No 91 s 112

56 Certain provisions of Crown Entities Act 2004 apply to members of disciplinary committee

Clause 15 of Schedule 5 of the Crown Entities Act 2004 (**Schedule 5**) applies as if the disciplinary committee were a committee appointed by the FMA under clause 14 of Schedule 5 and with all other necessary modifications.

Compare: 2008 No 91 s 113

57 Funding of disciplinary committee

The FMA must fund the disciplinary committee.

Compare: 2008 No 91 s 113A

Schedule 3

Consequential amendments

s 00

Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (2009 No 35)

Repeal section 48(b)(ii).

In section 137(4) and (5), replace “, the Financial Markets Conduct Act 2013, and the Financial Advisers Act 2008” with “and the Financial Markets Conduct Act 2013”.

Repeal section 140(2)(d).

Credit Contracts and Consumer Finance Act 2003 (2003 No 52)

In section 9C(3)(f), replace “the Financial Advisers Act 2008” with “**subpart 5A** of Part 6 of the Financial Markets Conduct Act 2013”.

Financial Markets Authority Act 2011 (2011 No 5)

In Schedule 1, repeal the item relating to the Financial Advisers Act 2008.

KiwiSaver Act 2006 (2006 No 40)

In section 41(e), replace “professional financial adviser” with “financial advice provider”.

In the heading to section 162, replace “**adviser**” with “**advice**”.

In section 162, replace “financial adviser service for the purposes of the Financial Advisers Act 2008” with “financial advice service for the purposes of the Financial Markets Conduct Act 2013”.

In Schedule 1, clause 4A(3)(b), replace “a financial adviser, or for financial adviser services” with “a financial advice provider, or for financial advice services”.

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In section 157(2), replace “an authorised financial adviser under the Financial Advisers Act 2008” with “a financial advice provider under the Financial Markets Conduct Act 2013”.

In section 157(4), replace “an authorised financial adviser” with “a financial advice firm”.