



FAQs about the draft Bill for the New Financial Advice Regime – March 2017

Following the release of the draft Financial Services Legislation Amendment Bill on 17 February 2017, we have received a number of drafting questions on the Bill together with queries about the policy decisions that underpin the new legislation.

We thought it would be helpful to summarise the key questions being asked and to set out the rationale for several key policy decisions to help industry prepare their written submissions and ensure the final drafting reflects the policy intent. We intend to keep this document updated as and when we become aware of more FAQs.

Submitters may also find it useful to refer to the [factsheet](#) published alongside the consultation document.

Can the term ‘financial advice representative’ or other terminology in the draft Bill be changed?

After receiving feedback that the term ‘agent’ wasn’t workable we changed it to ‘financial advice representative’. However, we have heard some concerns that ‘financial advice representative’ may also be problematic. We would like to understand this further and welcome suggestions for alternative designations that will be more suitable and why. (For example: ‘financial provider representative’).

More generally we welcome feedback on the drafting of the Bill. It is important we understand if any of the drafting or terminology could have unintended consequences or could be interpreted differently to its intent. For example, we have heard some concerns about potential unintended consequences from the current drafting of the client’s interests first duty.

We are seeking feedback on terminology, including ‘financial advice representative’, and other legislative drafting. We want to make sure the Bill does not have unintended consequences and is not interpreted differently to its intent.

Why has sales not been separated from advice?

Throughout the review of the Financial Advisers Act, the idea of separating sales from advice was hotly debated. Officials and Ministers have given considerable thought to the submissions made on this matter and the trade-offs of different options.

We consulted extensively on the option of applying fewer obligations to some people who would be labelled ‘salespeople’. However, this would have meant that these people would be able to give financial advice (that is, make a recommendation or give an opinion to acquire or dispose of a financial product) without being held to the same standards as others performing the same activity.

We were concerned this would not achieve the objectives of the review, further limit access to quality financial advice and ultimately lead to poor consumer outcomes. A key criticism of the



current regime is that different people performing similar activities are held to different standards.

Instead, in July 2016 Cabinet decided that all those who give financial advice, regardless of who they are or where they work, should be held to the same conduct, competence and disclosure duties. This has been translated into the draft legislation.

Crucially, however, we agree that consumers need to be made aware of the limitations of the advice they receive. Please see the following FAQ for an overview of how the new regime aims to achieve this.

All those who give financial advice regardless of who they are or where they work, should be held to the same conduct, competence and disclosure duties.

If sales and advice are not separated, how will consumers be able to tell whether they are receiving objective advice?

We are aware that those giving advice provide a range of different services. Some may be able to consider and give advice on many products from a wide range of providers, while others may be restricted to only giving advice on a small selection of products from just one provider.

It is important when a consumer receives advice that they know what has and hasn't been considered and what limitations may apply to that advice.

This is a fundamental part of the new regime. There is a new duty in the draft legislation to take reasonable steps to ensure that the client understands any limitations on the nature and scope of the advice. This may include, for example, limitations on the types of financial products and providers that have been considered.

Moreover, we will be engaging further with industry and consumers later this year to develop the detailed disclosure requirements that will apply to anyone who provides financial advice. We will be working with industry and consumers to ensure that important information, including these limitations, won't be hidden in fine print.

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What is the difference between 'financial advisers' and 'financial advice representatives'?

While financial advisers and financial advice representatives (formerly referred to as 'agents') will be held to the same duties (discussed above), financial advice representatives will have a limited ability to exercise discretion and will be bound by clear and effective processes, controls and limitations set by the financial advice provider which engages them. As a result, the financial advice provider will be liable for complying with the advice duties (please see FAQ below 'why are financial advice representatives not personally liable?').

Financial advice representatives will have a limited ability to exercise discretion and will be bound by processes, controls and limitations set by the financial advice provider which engages them.



Why would anyone be a financial adviser if they can have the lesser personal liability of a financial advice representative?

Licensing expectations will be higher for providers who engage financial advice representatives since the FMA will need to be satisfied that a provider has clear and effective processes, controls, and limitations relating to the financial advice that may be given by its representatives.

Moreover, as financial advice representatives will be bound by processes, controls and limitations, it will only be feasible to provide financial advice through representatives in some situations. Some scenarios in which a consumer seeks financial advice will involve a level of complexity or uncertainty that cannot be adequately addressed using a financial advice provider's predetermined processes, controls and limitations.

In these cases only financial advisers (whose advice will not be strictly bound by processes, controls, and limitations) will be able to give advice. We think that will be a compelling reason for many individuals to become financial advisers and for many providers to want to engage financial advisers.

In addition, the broader remit of financial advisers will likely be an additional selling point. Some consumers may prefer to receive all their financial advice from a financial adviser who is less constrained and can exercise discretion and potentially deal with a wider range of questions or unforeseen issues.

Financial advisers will have a much greater ability to exercise individual discretion which will be necessary for advice scenarios which involve a level of complexity or uncertainty.

Why are financial advice representatives not personally liable?

Advice provided by financial advice representatives will be bound by the processes, controls, and limitations set by the financial advice provider which engages them (discussed above). The processes, controls, and limitations in effect mean that the provider is controlling the advice outcomes for consumers, and a financial advice representative is essentially acting as a conduit between the financial advice provider and the client. This is what makes it appropriate for financial advice providers to be accountable for their financial advice representatives.

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What competence standards will financial advice representatives need to meet?

Financial advice representatives will need to meet the common standards of competence, knowledge and skill set out in the Code of Conduct (a common standard could be to have knowledge of the FMC Act, the Code of Conduct and other relevant legal obligations). These common standards will apply equally to financial advice representatives, financial advisers, and financial advice providers.

Financial advice representatives will also need to meet any additional competence standards specified by the Code of Conduct for the particular types of advice they provide. For example, the Code of Conduct may provide different standards of competence for mortgage advice compared to investment advice, recognising that different knowledge and skills are required for each. Again, any additional standards will apply equally to financial advice representatives, financial advisers, and financial advice providers.



The competence, knowledge and skill standards will be developed by a Code Working Group in consultation with industry in 2017–2018.

Financial advice representatives will have to meet the competence standards relevant to the types of advice they provide. These standards will apply equally to financial advice representatives, financial advisers and financial advice providers.

What is the new inappropriate incentives duty? Will it be possible for financial advice providers to offer volume-based incentives to financial advice representatives under this duty?

The Bill places a duty on financial advice providers to not give financial advice representatives any kind of inappropriate payment or other incentive. An incentive is defined as inappropriate if it is intended to encourage, or likely to have the effect of encouraging, the representative to engage in conduct that contravenes any duties.

The onus will be on financial advice providers to take a close look at their incentive arrangements (both payments and other kinds of incentives) and ensure that they do not encourage financial advice representatives to contravene other legislative duties (e.g. the duty to put the client's interests first).

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When operating under the transitional licence safe harbour provision will I be permitted to provide any different services to those that I currently provide?

Under the transitional licence safe harbour provision, existing industry participants will be able to provide *any* services that they are currently legally permitted to provide under the Financial Advisers Act, even if they are not currently providing that service.

For example: a QFE will be able to provide personalised advice on all of its own Category 1 products. This means that if a QFE introduces a new Category 1 product to its range while operating under a transitional licence, the QFE will be able to provide personalised advice on it.

As another example: an RFA will continue being able to provide personalised advice on Category 2 products only. If an RFA wants to start providing personalised advice on insurance products while operating under a transitional licence that will be permitted. However, an RFA will not be able to start providing personalised advice on KiwiSaver while operating under a transitional licence, as KiwiSaver is a Category 1 product and not something RFAs can provide personalised advice on under the Financial Advisers Act.

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If you have any comments on the drafting please make a submission or contact the team at faareview@mbie.govt.nz.