Submission on discussion document: *Exposure draft: Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2019*

Name and organisation

Name	Katrina Shanks, Chief Executive
Organisation	Financial Advice New Zealand

Responses to discussion document questions

1	Will the proposed record-keeping requirement be workable in practice?
	The structure of 'staged disclosure' by way of Schedule 21A clauses 4, 5 & 6, with the initial disclosure of generic Publicly Available Information, moving to more specific and relevant information at the point of client engagement regarding the nature and scope of the advice, then moving to even more specific & additional disclosure when the regulated financial advice is provided, has the real potential to improve on the current disclosure regime and ensure greater client understanding. However, there are a number of inconsistencies and ambiguities in the proposed regulations that hinder the 'workability' of 'staged disclosure' that is addressed in further questions and in the points below: a) Clarification is required in the regulation as to when a consumer is considered a client, as this impacts on what record keeping is required and for whom. The regulation is currently silent on this. The current regulations could lead to unworkable requirements. For example, a disclosure could be given under regulation 229D schedule 21A clause 5 to a consumer, in regard to the nature and scope of the advice. But in fact, that consumer may never decide to become a client, nor proceed to seek regulated financial advice from the FAP and adviser. In such a case, the consumer would not meet the definition of a client, therefore, we recommend there be no obligation to hold these disclosure records. b) Clarification is required of the requirements under S229A(5) and also S229D(7) and 229E(5) - so there is clearly no expectation of disclosure every 12 months on an ongoing basis. We recommend these clauses be written so there is no obligation on the adviser and FAP to continually provide disclosure information unless; • there was a material change in information previously disclosed • the client requested information • the disclosure requirements are triggered by the client and adviser re-entering the advice process e.g. an advice review c) Financial Advisers provide disclosures to clients as a part of the six step advice process. For example a 'Scope of Service' document is presented to a client with all the information required under Schedule 21A- clause 5. However, under regulation 192(A) it is ambiguous whether if these disclosures, embedded in an advice document, (dated and with the name of the client) meets this regulation requirement. Is there an

	expectation of separate and discrete 'Disclosure Documents' to be provided to the consumer/client? It would be much more workable for the client if disclosure was expressly allowed within advice documentation and processes rather than have prescribed separate templates. f) As written, Regulation 192A limits the licensed FAP's requirement to keep disclosure records to the FAPs clients ("P's clients"). However, the legislation allows a licensed FAP with no clients. Such a licenced FAP may have authorised bodies (unlicensed FAPs). The transitional licensing requirements are a FAP is to have record keeping. Alignment and clarification needs to be obtained between these two processes.
2	Do you have any comments on the drafting of the Regulations that will require information to be made publicly available?
	We hold that Schedule 21A Clause 4 ought to have all generic information. 'Duties Information' - the description of duties in the FMAC Act that the person giving the advice, is generic information and better removed from clause 6 and placed into disclosure that is publicly available that is, Schedule 21A Clause 4. S229(C) references limitations and restrictions on the nature and scope of advice – should be changed to material limitations. There are ultimately endless limitations which will be confusing and add no value for the consumer to be disclosed.
3	Do you have any comments on the draft Regulations that will require the disclosure of information when the nature and scope of the advice is known?
	Clause 5 and 6 both should omit any information previously disclosed to avoid document clutter and consumer confusion. With regard to sections 'Fees and Expenses' and 'Conflicts of Interest & Incentives' we hold that only information not previously disclosed under clause 4 (publicly available) needs disclosure in clause 5. The repetition of this information does not add value to the consumer. See recommendation regarding clause 229D(7) (see Q1)
4	Do you have any comments on the draft Regulations that will require the disclosure of information when the financial advice is given?
	Clause 5 and 6 both should omit any information previously disclosed to avoid document clutter and consumer confusion. Schedule 21A(6)(J) - The purpose of this final disclosure at time advice is given is to have clear, concise and relevant information pertinent to the decision of the consumer, we have a number of recommendations regarding the proposed disclosures at this point in the advice process. Placing 'Duties Information' at this point adds a level of general information which only adds noise to the documentation. It is not pertinent to the decision required of the client. With regard to section 'Duties Information' we hold that this generic information removed entirely from clause 6 and be required under clause 4 (Publicly Available Information). With regard to section' Complaints Handling and Disputes Resolution' we recommend this be removed entirely from clause 6, as it is included in clause 4 (Publicly Available Information) and the repetition of this information does not add value to the client at this

	stage of the advice process. With regard to sections 'Identifying Information' and 'Availability of Information' we hold that only information not previously disclosed or materially changed from that provided under clause 5 (nature and scope) needs further disclosure in clause 6. The repetition of this information does not add value to the client at this stage of the advice process. See recommendation regarding clause 229E(5) (see Q1)
5	Do you have any comments on the draft Regulations that will require the disclosure of a provider's complaints handling and dispute resolution processes when a complaint is received?
	A standard condition of a FAP licence is that they have an internal complaints process – so the Regulation 229F (1) (a) shouldn't say **"IF** P has one" as this is in contradiction of the FMA licensing requirements. There are significant challenges for a client to understand the internal and external complaint processes. The client understanding of such processes could be significantly improved if regulation 229F required the FAP to provide a diagram (e.g. process flow diagram) of both the complaints handling process and external disputes resolution process. We note that the ADRS websites already provide helpful process diagrams.
6	Do you have any comments on the draft Regulations that set the manner in which information must be disclosed?
	Clarification needs to be provided as to whether disclosure information can be provided to a client verbally only. Regulation 229G states the hard & electronic copies are required if requested. Verbal (non-recorded) disclosure could be very confusing for the client. We doubt whether a consumer could absorb disclosure information provided verbally in a manner which would allow them to make informed decisions in the future without receiving any written information. Disclosure information is technical by nature and receiving this via an automated process with no ability to ask questions we believe does not improve outcomes for consumers. It is unclear if the regulation allows this or not. Regulation 229G does not specifically refer to recorded audio files or video formats. Unlike mere verbal disclosures they can be replayed and reviewed by the client. Such formats can be of significant consumer benefit and understanding especially in the case where there is an issue of client numeracy and literacy. A recent ASIC-AFM report noted that with regard to disclosure requirements they are "'often 'one size fits all' interventions – yet people and contexts differ and shift"[1] Regulation 229G(3) specifies format, font and font size of disclosure but we would strongly recommend that disclosure regulation 229G(4) specifically allow recorded audio or video formats as acceptable. These disclosures can be kept and retrieved and if required, transcribed into a written format.
7	Are there instances in your business when regulation 229D might apply to someone who is not the one to give advice to the client? Please give examples and provide any comments on how the draft Regulations apply in such scenarios.
	Not applicable to the Association

[1] Source: ASIC-AFM joint report *Disclosure: Why it shouldn't be the default October 2019*

8	Do you have any further comments on new regulation 229A to 229H of the draft Regulations?
	If the summary of information is to be made publicly available and does not change through the advice process due to its general nature then we believe it does not have to be disclosed separately at each advice stage but referred to where it can be located.

9	Do you have any further comments on new Schedule 21A in the draft Regulations?
	Disclosure of Publicly Available Information We recommend that disclosure by means of Publicly Available Information will have the ability to seriously simplify the personalised documentation that the client receives. This documentation will then become more relevant and meaningful to the client, which is the intent of the legislation and regulation. **Record Keeping for persons who are not clients** If a person does not proceed from the disclosure on scope of advice, are they considered a client? If a person does not agree to action advice given are they still considered a client? How long, if at all, would these disclosure records for these 'clients' have to be held? There is considerable cost and effort to hold records for persons not on a client base. Our recommendation is that the regulations need to clarify if these persons are defined as clients, or not, so as to determine which disclosure records need to be held. We believe when advice is implemented then the person is considered a client. Further to this clarification should be provided on when adviser relationships are with companies where both companies and individual employees are beneficiaries of the advice. E.g. Group Life Insurance and Group Health Insurance. **Format of Information** The table format of the regulations Schedule 21A clause 4-6 may not encourage effective new formats of information presentation. The FMA's 2013 report, *Clear, Concise and Effective Disclosure?* provides the sector relevant observations about best practice in the layout and presentation, length and complexity of text, and notes the "effective use of diagrams and charts to illustrate complex business"[2] The regulations ought specifically encourage the use of diagrams and charts in disclosure. The FMA states in the same report; (of) " the need to keep sentences short and remove (or explain) legal terms and industry jargon" (Source as above page 2) **Disclosure of Fees, Expenses and Conflicts of Interest** It is important that disclosure of fees & expenses, conflict of interest including commissions or other incentives remains flexible to allow a variety of pricing mechanisms and remuneration models across the sector to be reported, such as calculated actual commissions, and % commissions reporting etc. We will be providing a supplementary submission on the disclosure of fees, expenses and conflicts of interest. **Definition of Conflict of Interest** The definition of conflict of interest (2(2)(a) refers to a 'reasonable client' test in terms of identifying conflicts of interest. The new adviser duties under the FMC Act refer to the 'prudent adviser' in the 'same circumstances'. We hold that the reasonable client would not expect to have a good grasp of identifying conflicts of interest in the sector. The regulation could be strengthened by having a higher standard, such as – "any interest of A, P, or any other person connected with the giving of the advice that has the potential to influence the advice given by A"

[2] Source (page 2) ***https://www.fma.govt.nz/assets/Reports/131030-clear-concise-and-effective-disclosure.pdf***

	Incentives and Disincentives There are various references to 'incentives'. We recommend including in the regulation a definition and reference to 'disincentives' as well. For example, a reduction of commission rates for low volumes could escape the disclosure regime. Disincentives is an area that is often overlooked and should be drawn attention to, so FAPs and advisers cannot avoid their disclosure obligations by saying "this disincentive is not technically an incentive"
10	What (if any) transitional provisions should be included in the regulations?
	The new regime starts from June 29 2020. It would be confusing for advisers and FAPs not to have clear disclosure regulations in place at least by early 2020 so that the disclosure documents and websites can be prepared and then incorporated into the advice processes that are compliant with the FMC Act.

Supplementary Submission on Conflicts of Interest

Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2019

Name and organisation

Name	Katrina Shanks, Chief Executive
Organisation	Financial Advice New Zealand

Response to request to submit on conflicts of interest

1	Principles
	In regard to disclosure of conflicts of interest, we outline some key principles: a) Ensure the FAP and financial adviser interests are explained concisely and simply to the client to ensure they easily understand the conflict described, and how it is managed and/or mitigated (see example over). b) Ensure the FMA oversight of disclosure is a key part of the licensing regime with alignment of the FAP licence conditions with Disclosure Regulations requirements. c) Financial Advice New Zealand believe the development of guidelines is fundamentally important to assist in the interruption of regulations and legislation. Financial Advice New Zealand would like to lead the development of practical guidelines and worked examples of disclosure of conflicts of interest and their management for the MBIE and FMA to consider. Financial Advice New Zealand is continuing talks with sector groups, and association practitioner members have working knowledge of effective disclosure to their clients in ways that add value.
2	Materiality of incentives – to be inserted
	Materiality is an important consideration with regards to disclosure. In the financial services sector vast amounts of information is disclosed to clients and it is important only material information is disclosed to ensure the consumer is not overwhelmed with information. The regulations, as written, may capture the inclusion of non-material incentives such as common hospitality like providing meetings with refreshments and coffee. These standard business courtesies could seriously clutter disclosure documents. Recommendation: define incentive materially in the regulations and/ or include the word “material” incentives in the regulations. Ref: Part 2 4 (1) (i) (j) information that must be publically available, Part 2 5 (2) (e) (f) information given when nature and scope of advice known Part 2 6 (1) (e) (f) information given at time of advice
3	Meaningful disclosure of interest to clients – not overly prescriptive or complicated – removal of “steps”

Where advisers are paid a commission, the client would be best served with a brief description of the conflict of interest and a statement that a client is obliged to put their client's interests first, rather than a description of the 'steps that have been or will be taken to manage each conflict'.

Recommendation: re-write clause from a "brief explanation of **the steps** that have or will be taken to manage each conflicts of interest" to read a "brief explanation of how each conflict of interest is managed". Ref:

Part 2 4 (1) (i) (j) information that must be publicly available,

Part 2 5 (2) (e) (f) information given when nature and scope of advice known

Part 2 6 (1) (e) (f) information given at time of advice

Furthermore, we believe the regulations should provide an example for clarification.

Example:

Disclosure of Interest - Commission

Our financial advisers usually receive commission on all insurance placed. The rates of commission received vary from each insurance provider and product. Advisers have an obligation to ensure client's interests are put first when determining the most suitable provider or product.

Management of this Conflict of Interest – Commission

Our advice processes and reviews ensure the selection of provider and product for the advice recommendations are based on the client's needs, circumstances and goals.

Provider and product selection are in no way related to the level or rates of commission paid.

4 Amounts and values – to maintain a wide scope

We strongly agree with the current wording in the regulations regarding the disclosure of the amount or value of commissions and incentives. Importantly, by allowing the important option of:

> "or how that would be determined"

provides the sector with a practical means to provide full disclosure to the client when it is impractical or not possible to determine the actual amount or value of the commission or incentive.

5 Defining 'incentives' – to include 'disincentives'

In addition to our commentary in Point 2 on materiality of incentives, we also would like to repeat a point in our earlier submission of 8 November 2019. viz

There are various references to 'incentives'. We recommend including in the regulation a definition and reference to 'disincentives' as well.

Disincentives is an area that is often overlooked and should be drawn attention to, so FAPs and advisers cannot avoid their disclosure obligations by saying "this disincentive is not technically an incentive"

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In developing this supplementary submission, we canvassed the sector widely to

understand the views of financial advisers. If you require additional information in a specific area, please do not hesitate to contact me.