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

To whom it may concern

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

We thank you for the opportunity to submit on these draft regulations.

We support the aim of the regulations - to give retail clients better access to information about financial advice providers, helping them to:

- find a financial advice provider that meets their needs
- make an informed decision about whether to seek advice from a particular person or provider
- make a decision about whether to act on advice they have been given, and
- access complaints information and dispute resolution services where an issue arises.

We consider stronger regulations around disclosure will improve confidence and trust in the financial advice industry.

Our submissions are informed by our role as an independent dispute resolution scheme, which investigates complaints across a broad spectrum of financial advice, services, and products (except banking). In the year ended 30 June 2019, we formally investigated 112 complaints and handled approximately 360 initial complaints and enquiries about insurers and insurance advisers. If the Ministry seeks any further information about our complaint statistics or trends, please contact us.

Yours sincerely

**Susan Taylor**
**Chief Executive Officer**

**Nicholas Flaws**
**Case Manager**

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

## Your name and organisation

| | |
|---|---|
| **Name** | Susan Taylor and Nicholas Flaws |
| **Organisation** | Financial Services Complaints Ltd (FSCL) |

## Responses to discussion document questions

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| 1 | Will the proposed record-keeping requirement be workable in practice? |

We think the record-keeping requirement will be workable in practice.

We believe these record-keeping obligations will help ensure financial advice providers (FAPs) provide proper disclosure, and will help dispute resolution schemes (DRSs) achieve better outcomes for consumers where disclosure has not been provided.

We often deal with complaints where a financial adviser says they have given disclosure verbally, but the complainant says no disclosure was provided. Placing an obligation on FAPs to retain proof of disclosure will help achieve better outcomes for consumers in these cases.

We attach, as appendix one to this submission, a relevant FSCL case note. FSCL investigated this complaint, but declined to uphold it due to a lack of evidence that the consumer had approached their broker for advice.

**FAPs should be required to retain evidence that disclosure was provided**

We consider regulation 192A(2) should be amended to require a FAP to retain evidence disclosure was provided to the consumer:

> "(c) a record of the information that was disclosed**; and**
>
> **(d) evidence the disclosure was given**."

This evidence could include:

- a copy of the email sent to the consumer with disclosure information
- a statement signed by the adviser or the consumer confirming the disclosure was provided in person, or
- a copy of a letter sent to the consumer enclosing the disclosure information.

In our view, this obligation would help achieve better outcomes for consumers where an adviser has recorded that disclosure was given, but the consumer says the FAP only created that record after the consumer raised their complaint.

This is an issue we see frequently, particularly concerning advisers' file notes of phone calls. If a consumer claims a phone call did not occur, they will often say that a file note recording the contents phone call could easily have been prepared after the complaint arose. Requiring a FAP to retain evidence that disclosure was given could avoid similar arguments with regards to disclosure.

We attach, as appendix two to this submission, a relevant FSCL case note. In this case, the consumers were adamant they had not received any phone calls from an insurance broker, despite the broker retaining detailed file notes. The consumers argued that the broker's file notes might have been falsified after the complaint arose.

We do not consider this obligation particularly onerous or impractical. Given the current draft requires the FAP to record the information provided and the person to whom the disclosure was made, the evidence that the disclosure was provided could easily be wrapped into a single document with the other information. For example, if disclosure is provided by email, retaining a copy of the email will satisfy each of the requirements, including our proposed sub-regulation (d).

**Obligation to provide information should be extended to Dispute Resolution Schemes (DRSs)**

We consider that regulation 192A(3)(b) should be amended to read:

> "(b) must be available for inspection by the FMA **and P's approved dispute resolution scheme** at all reasonable times; and"

FAPs are required to provide information to their DRS under their participation agreement with the DRS. We consider this obligation should be mirrored in the regulations. This would make a FAP's obligation to provide information to a DRS transparent, clear, and unambiguous.

We note that ss 9CA(4) and 41A(4) of the Credit Contracts Legislation Amendment Bill require lenders to provide records to the Commerce Commission and to the lender's DRS. In our view, the requirement for FAPs should mirror the requirement for lenders, so FAPs should be required to provide records to the Financial Markets Authority or the FAP's DRS.

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| 2 | Do you have any comments on the drafting of the Regulations that will require information to be made publicly available? |

No. We consider this requirement is appropriate. In particular, we are pleased to see that the regulations consider the possibility that a financial advice provider will not maintain a website.

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| 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? |

**FAP should be required to give initial information each time a client seeks new advice**

We consider an adviser should be required to provide initial information each time a client seeks new advice. We consider subclause 229D(7) should be removed.

Regulation 229D(7) introduces a complex and vague test as to whether there have been any 'material' changes to an adviser's initial information in the past 12 months. It is unclear what will be considered material under this regulation, and it appears to be an assessment left up to each adviser to apply on a case-by-case basis. It could lead to inconsistencies between advisers, and arguments about whether a change is ''material''.

Under reg 229D(7), FAPs will also be required to keep track of when they last provided each of their clients with disclosure information, as they will need to provide new copies of the disclosure information if advice is sought more than 12 months after the last disclosure was made.

We consider it will be simpler and less onerous for an adviser to provide a fresh copy of their disclosure information whenever they are approached for new advice.

**Initial information and additional information should be the same (except additional information should have more detailed information about fees)**

In our view, a FAP should provide the same information to a client both when the scope of the advice is known, and when the advice is given. This would simplify the disclosure process for FAPs, and would ensure clients have all the relevant information when deciding whether to proceed with advice from a FAP.

We submit that a FAP should be required to provide the following information when it knows the scope of the advice to be provided:

- Complaints handling and dispute resolution information, and
- Duties information.

Similarly, we think it would be useful for a FAP to provide the following information when it gives advice:

- Licensing information
- Nature and scope of the advice, and
- Reliability history.

This would mean the only difference between the initial information and the additional information would be the information about the FAP's fees. The FAP would be required to provide a more detailed description of the FAP's fees when it provides the advice. This seems sensible, as a FAP will usually be in a much better position to estimate its fees when it gives advice to a client.

We consider combining the initial and additional information would simplify disclosure for FAPs, and would ensure clients have all relevant information when they decide whether to proceed with advice from a FAP.

We acknowledge that this is a significant amount of information for a client to receive twice. We accept that many clients will not read through the disclosure information, or at least will not read through it in any detail. However, we consider it beneficial to provide this information to the client as soon as possible, to ensure they have received the information, should they need to refer to it later. We think this benefit outweighs the risk that clients will be presented with more information than they can digest.

This benefit is particularly relevant with respect to complaints. A client may skim over a FAP's complaints process when they first seek advice. However, there is still a great deal of value to a client having complaints information to refer to if, later in the advice process, an issue arises and the client wishes to lodge a complaint.

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| 4 | Do you have any comments on the draft Regulations that will require the disclosure of information when the financial advice is given? |

**Advisers should be required to give additional information again when advice is given, regardless of time since last disclosure was given**

In our view, advisers should simply be required to supply the additional information to a client each time advice is given, rather than being required to keep track of:

- whether there have been any material changes to the information, and
- how long ago the initial information was given.

This submission, in effect, mirrors our answer to question 4, above. We consider the test for

whether a change is 'material' is vague and undefined, and that it will be onerous for advisers to assess whether initial disclosure was given to a client more than 12 months ago.

Instead, advisers should simply be required to give the same disclosure each time they provide advice to a client.

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| 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? |

**Regulations should include definition of complaint**

We strongly submit that a definition of **complaint** should be added to regulation 229F.

We submit that this definition should be the definition of complaint given by Australian New Zealand Standard AS/NZS 10002:2014 Guidelines for Complaint Management in Organizations at <www.standards.com.au>.

> **complaint** means: "an expression of dissatisfaction made to or about an organisation, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required."

This is the same definition of complaint used in the terms of reference for FSCL, the Insurance and Financial Services Ombudsman Scheme, and the Financial Dispute Resolution Service (3 of the 4 DRSs). Without a definition of complaint:

- a FAP may not recognise an issue as a complaint, and
- it will be up to a FAP to determine when an expression of dissatisfaction requires the FAP to give disclosure.

The lack of a definition of complaint might allow less diligent FAPs to withhold disclosure well past the point where disclosure would be useful for the client. If it is up to a FAP to interpret when an expression of dissatisfaction becomes a complaint, FAPs could receive a legitimate complaint, yet fail to properly respond because the complaint did not come through the FAPs formal complaints channel, or because the client did not use the word 'complaint'. This is something we see reasonably often: a client will express dissatisfaction and clearly ask their financial service provider to take a specific action to remedy the issue, but the financial service provider will fail to take any action or refer the client to its DRS, saying that they do not need to engage their complaints process because the client has not used the word 'complaint'.

In our view, the addition of a definition of complaint is a crucial amendment to the regulations. Without amendment, legitimate complaints may be missed, and there will be opportunities for less diligent FAPs to avoid addressing legitimate complaints.

**Disclosure should be made within three working days of a FAP receiving a complaint**

The regulations as drafted require a FAP to provide information about their complaints handling and DRS "as soon as practicable after the complaint is received". We submit that this requirement is too vague and uncertain. We are of the view that a FAP should be required to give disclosure within a fixed period after receiving a complaint. We note that FAPS will have to have an internal complaints process in order to obtain a transitional licence, so providing details about their complaints process within three working days should not be onerous.

We believe 3 working days would be appropriate. The information which needs to be disclosed under reg 229F will not change often, so we do not consider this short timeframe

too onerous.

Accordingly, we submit reg 229F(2) should be amended to read:

> "(2) The information must be given within 3 working days of receipt of the complaint."

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| 6 | Do you have any comments on the draft Regulations that set the manner in which information must be disclosed? |
| | No. We think the manner in which information can be disclosed is reasonable and appropriate. |
| 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. |
| | No comment. |
| 8 | Do you have any further comments on new regulation 229A to 229H of the draft Regulations? |

**Definitions of 'initial information' and 'additional information' should be removed to make Regulations clearer**

In our view, the definitions of 'initial information' and 'additional information' in reg 229B should be removed, to make regs 229B to 229H clearer and easier to understand. Instead, regs 229C-F should directly refer to Schedule 21A.

Reg 229C to 229F all, quite consistently, provide that advisers and FAPs need to provide the information in Schedule 21A to clients, at set times. However, each regulation refers an adviser to Schedule 21A in a different way:

- Regulation 229C states that a FAP must provide the information set out in clause 4 of Schedule 21A
- Regulation 229D states an adviser must provide all of the initial information that is applicable. 'Initial information' is defined in reg 229B as 'the information set out in clause 5 of Schedule 21A'
- Regulation 229E states that the adviser must provide all of the additional information that is applicable. 'Additional information' is defined in reg 229B as having the meaning set out in reg 229E. Reg 229E(6) states that 'additional information' means the information in Schedule 21A, clause 6, and any changes to the information in clause 5(1), if that information has materially changed since initial disclosure.
- Regulation 229F sets out the information which needs to be provided in the regulation itself, while also referring to Schedule 21A, clause 6(1)(i).

We consider the regulations should be amended, so they are all consistent with regulation 229C, and all directly refer the reader to Schedule 21A. This will involve:

- **Regulation 229D:**
  - Amending reg 229D(2) to read:

    "(2) A must give the client all of the information set out in **clause 5 of**

**Schedule 21A** that is applicable."

- **Regulation 229E:**
  - Amending reg 229E(1) to read:

    "(1) A person (**A**) who gives advice to a client must give the client all of the information set out in **clause 6 of Schedule 21A** that is applicable."
  - Moving reg 229E(6)(b) to be a new Schedule 21A, clause 6(1)(h).
  - Removing the rest of reg 229E(6).
- **Regulation 229F:**
  - Amending reg 229F(1) to read:

    (1) A financial advice provider (**P**), or a person engaged by P to give advice to P's clients on P's behalf, who receives a complaint about P's financial service must give the information set out in **clause 7 of Schedule 21A** to the person complaining.[1]

| 9 | Do you have any further comments on new Schedule 21A in the draft Regulations? |
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**An additional clause 7 should be added, clearly setting out the information which must be given at the time a complaint is received**

Regulation 229A very clearly sets out that there are 4 sets of information which advisers (or FAPs) need to provide their clients, at 4 separate points in the advice process. Regulations 229C, 229D, 229E and 229F very clearly set out the four points of the advice process at which an adviser or FAP needs to provide disclosure information.

However, the information which needs to be provided at each point is not so clearly laid out. As currently drafted, the clauses 4, 5 and 6 operate as effective templates for the information which must be provided under regs 229C, 229D and 229E respectively. However, there is no template for reg 229F. To find out what information a FAP needs to provide under reg 229F, it needs to refer to a subclause of clause 6. This is unnecessarily confusing.

For the sake of clarity, we consider an additional clause 7 should be added to Schedule 21A, setting out:

**"7 Information to be given at time complaint received**

(1) A financial advice provider (**P**), or a person engaged by P to give advice to P's clients on P's behalf, who receives a complaint about P's financial service, must give the following information to the person complaining, in accordance with **regulation 229F** (which provides that information must be given to a client at the time a complaint is received):

(a) an overview of P's complaints handling process; and

(b) in relation to P's disputes resolution scheme –

(i) a statement that P is a member of the scheme, including the scheme's name; and

(ii) a statement that the scheme provides an independent dispute resolution service; and

[1] We suggest a new clause 7 is added to schedule 21A, clearly setting out the information which must be given at the time a complaint is received. We discuss this suggestion in more depth in our answer to question 9.

(iii) a statement that the scheme will not charge a fee to any complainant to investigate or resolve a complaint; and

(iv) the scheme's contact details to make a complaint."

| 10 | What (if any) transitional provisions should be included in the regulations? |
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| | We do not consider any transitional provisions are necessary.<br>However, we acknowledge we are not well-placed to comment on the difficulties FAPs may have adapting their processes to comply with the regulations. |

# Appendix One

## Case note: When an instruction to your broker falls between the cracks

### An instruction that falls between the cracks

Bertie contacted her insurance broker, Jermaine, to ask about extending her insurance policy to include cover for landlord's loss of rental. Bertie was still living in her house at the time, but was looking to rent the house in the near future.

After an earthquake in September 2010 Bertie moved out of her house and rented it to tenants. Bertie emailed Jermaine to include loss of rent cover on her policy. A second earthquake in February 2011 left Bertie's house untenantable. Bertie tried to claim for her lost rental income, but was told that she did not have the appropriate cover in place.

Bertie contacted Jermaine to ask why her policy had not been updated to include cover for lost rent.

Jermaine said that he remembered having a general discussion about loss of rent cover before September 2010, but did not believe that he had received a specific instruction from Bertie to arrange the extension of cover. Jermaine could not find any record of the email which Bertie sent that requested the additional cover. Bertie did not have a copy of this crucial email either: she had deleted it, having been told that the loss of rent cover "would be taken care of" at the time.

Bertie complained to FSCL.

### FSCL's review

FSCL investigated and took the view, on the balance of the evidence, that Jermaine had not received Bertie's email. Bertie could not provide evidence of the email correspondence, Jermaine had meticulous records of his dealings with clients, and there was no evidence to suggest that any of Jermaine's records had been lost, removed or destroyed.

FSCL did not question Bertie's recollection of sending the email but noted that due to the unstable nature of infrastructure in the Canterbury region immediately after the September earthquake it was not uncommon for emails to be sent but not received.

Importantly, Bertie's current insurance company would not have agreed to the policy change even if Jermaine had received Bertie's instruction. The insurance company's regional manager and underwriter both provided evidence to FSCL confirming this. There was also no evidence that any other insurance company would have issued a new policy to Bertie for loss of rent.

So, even if FSCL found that Jermaine negligently failed to carry out Bertie's instruction, Bertie would most likely have been in the same position anyway. In other words, Jermaine would not have been the cause of Bertie's loss.

Bertie withdrew her complaint.

### A practice note on evidence

FSCL must consider and weigh the evidence provided by both parties to a complaint.

Unfortunately for Bertie, there was no evidence to support her claim because she could not find the email she thought she had sent. If Bertie could provide the email, Jermaine would have trouble proving that he had not acted negligently. Whether you are providing or receiving a financial service, it is very important to keep records of your correspondence (including email correspondence) with the other side to support your arguments should a dispute arise.

# Appendix Two

## Case note: Communication breakdown

Ian and Jeanette live in a remote part of New Zealand, running a building business as well as a bed and breakfast. They arranged liability insurance for their business, as well as material damage insurance for their buildings and contents through a broker. When a fire destroyed a storage shed, containing building tools, Jeanette contacted their broker to lodge a claim for loss of about $160,000 . The broker advised that the insurance had been cancelled about three years earlier because Ian and Jeanette had not paid the premium.

Ian and Jeanette were shocked, how could their broker allow the insurance to lapse? Surely, he should have contacted them to tell them they had not paid the premium?

The broker replied that he had sent their invoice, as usual, to their PO Box. When he did not hear back, he emailed and wrote to them. When the insurance was finally cancelled, he again wrote to the PO Box. When Jeanette asked if he had tried to call, he said he had not. The broker said he was sorry, but he did not think he was liable for their loss.

Ian and Jeanette did not agree, and complained to FSCL.

**Dispute**

Ian and Jeanette considered their broker had been negligent by failing to take all possible steps to contact them before the policy was cancelled. Ian and Jeanette acknowledged that mail to their PO Box occasionally goes missing, but said they had checked their email inbox, as well as their email junk folder, and could find no record of receiving the email from the broker. Ian and Jeanette also contacted their email provider who confirmed that no emails failed to be delivered during the relevant period. Ian and Jeanette said that part of running a successful bed and breakfast business is communication and they were adamant they had received no letters, emails or telephone calls.

The broker checked his records again and advised he had:

- posted a renewal letter to the PO Box on 13 February
- posted statements to the PO Box in April, May and June
- posted an overdue notice to the PO Box on 3 June
- telephoned Ian and Jeanette on 3 July, and left a message
- sent an email to their email address on 3 July
- posted a letter advising the policy was cancelled to the PO Box on 15 July.

With respect to the 3 July telephone call, the broker said that when he first spoke to Jeanette, he overlooked the note on his file, but is sure he made the call because the email of the same day refers to a message he left on their voicemail.

## Review

We considered the broker had taken all reasonable steps to tell Ian and Jeanette about their insurance renewal. It was reasonable for him to assume that letters sent to the PO Box, that were not returned as undeliverable, had been received. The broker had also sent an email, and provided confirmation that it had been delivered. Further we were satisfied, given the reference in the email, that the broker tried to contact Ian and Jeanette by telephone.

We also commented that in the three and a half years since the policy was cancelled, Ian and Jeanette had not noticed they were not paying insurance premiums of $5,000. This was surprising.

While we sympathised with the significant loss Ian and Jeanette had suffered, there was sufficient evidence to show that the broker took reasonable steps to advise them of the renewal and he impending cancellation of cover. In the circumstances, we could not find the broker liable for Ian and Jeanette's loss.

## Resolution

Ian and Jeanette did not accept our view, continuing to maintain they did not receive any information about the cancellation. When they discovered they had no insurance, Jeanette said the broker offered to arrange new cover and undertook to speak to them if there was any risk their insurance might be cancelled for non-payment of premium. Ian and Jeanette said that this proved that the broker would not, as a matter of course, telephone a client in these circumstances. In Ian and Jeanette's view, it should be mandatory for a broker to speak to a client before insurance can be cancelled.

Ian and Jeanette also said they changed accountants shortly after the policy was cancelled, so the new accountant did not notice the insurance had not been paid.

We took Ian and Jeanette's further submissions into consideration, but were not persuaded to reach a different decision. On the evidence available to us, we were satisfied that the broker did not cause or contribute to their loss and we did not uphold the complaint.

## Insights for consumers

While your broker will let you know that your premiums are due, and try to contact you using different means, ultimately the responsibility for renewing your insurance rests with you.