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Discussion document on treatment of intermediaries under the new regime for the conduct of financial institutions – ASB Bank Limited submission

ASB Bank Limited (**ASB**) welcomes the opportunity to provide feedback to Ministry of Business, Innovation & Employment (**MBIE**) on its discussion document on treatment of intermediaries under the new regime for the conduct of financial institutions.

The discussion document provides helpful consideration of the requirements that apply in respect to intermediaries and we welcome MBIE's efforts to address the concerns that stakeholders have raised in relation to intermediary obligations.

We support a clear and focussed definition of intermediary and MBIE's proposal to amend intermediary obligations to remove duplication with other legislation. We highlight in our submission the need for legislation to recognise that financial institutions can also act in the capacity of an intermediary, and the need for different obligations to apply given these firms will have their own fair conduct programmes.

Our key feedback and recommendations are outlined in Section A, with further detail provided in Section B.

We acknowledge that ASB's submission may be published by MBIE. ASB does not seek confidentiality for any aspect of this submission, other than the personal contact details below.

If you require any further information in relation to this submission, please do not hesitate to contact Jennifer Bourne, Senior Manager, Government Relations and Regulatory Affairs (jennifer.bourne@asb.co.nz).

Yours sincerely

Privacy of natural persons

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Section A: ASB's key feedback and recommendations

A summary of our key feedback and recommendations is provided here, with detail provided in our responses to the consultation questions in section B.

Key points:

- We respond to this consultation as both as a financial institution and as an intermediary. We support **the definition of intermediary being more clearly defined** and **agree that the scope should be narrowed to cover those involved in sale and distribution only.** We also think 'agent' should be more narrowly defined. We support excluding lawyers, accountants and other professionals from the scope of 'agent' under the legislation.

- We support reducing the **range of requirements for financial institutions to oversee intermediaries** in relation to their compliance with financial institutions' fair conduct programmes. This will reduce unnecessary duplication of regulatory obligations for both financial institutions and intermediaries and ensure a better balance with existing obligations under the financial advice regime to support good customer outcomes.

Our recommendation:

1. There should be explicit recognition in the Financial Markets (Conduct of Institutions) (COFI) Bill that financial institutions who are also acting in the capacity of an intermediary, should already comply with the regime via their own fair conduct programme - they will therefore not need the same level of oversight, to avoid unnecessary compliance burden.

Section B: Responses to the Consultation Questions

Option 1: 'Amend definition of intermediary to focus on sales and distribution'

Do you have any comments on Option 1: 'Amend definition of intermediary to focus on sales and distribution'?

1 We support the narrowing of the definition to capture sales and distribution activities only. We also note that paragraph 31 of the consultation specifies that people involved in 'administration or performance of a service' would no longer be considered intermediaries. This would more clearly exclude the likes of investment schemes trustees/supervisors who would otherwise be caught by the current definition in the Bill.

2 Do you think the scope of the proposed definition of an intermediary is comprehensive enough to capture the variety of sales and distribution methods and to avoid gaps and risks of arbitrage?

We have provided input into the response of the Financial Services Council (FSC) and note that they have identified some potential gaps of coverage in their response to this question, in relation to whether investment platforms are considered intermediaries. Clarification in this area would be helpful.

Option 2: Refine scope of who is covered as an agent

Do you have any comments on Option 2?

3 We agree with the proposal to carve out of scope those involved in preparatory or advisory services only. We support the New Zealand Bankers Association (NZBA)'s submission points in relation to capturing those who are acting on behalf of the financial institution and with actual authority; and that the scope should be further refined to exclude those agents who would not have an impact on the treatment of customers.

4 Do you think Option 2 would adequately exclude advisory services (e.g. lawyers, accountants) and other service providers to the financial institution who are not involved, directly or indirectly, in providing any part of the financial institution's relevant service or associated products to consumers?

This will depend on the revised definition of agent (if provided for in the Bill) and/or regulations as drafted. We refer MBIE to the NZBA and FSC submissions on this point.

Do you think any explicit exclusions are needed for particular occupations or activities? If so, which ones, and why?

5 We support the NZBA submission made on this point, which suggests an approach to treat the concept of agent narrowly, and if exclusions are preferred, to make these principles-based rather than specifying particular occupations.

Objectives

Do you have any comments on the objectives regarding the treatment of intermediaries?

6 We agree with and support the objectives for the obligations on treatment of intermediaries by financial institutions to ensure that consumers are being treated fairly, and that in doing so, compliance costs and duplication of regulation is minimised.

Do you have any comments on Option 3: 'Minimal changes to intermediaries obligations'

7 We do not prefer this option as we do not think it goes far enough to minimise the unnecessary duplication of regulatory obligations for financial institutions or intermediaries.

If Option 3 were pursued, do you think any other obligations in section 446M(1)(bb), (bc), (bd) or (bf) would need clarifying or amending? Why/why not?

8 While we do not prefer this option, we note that s446M(1)(bb)(ii) may need to be amended or removed, given the link to s446M(1)(b).

Option 4: More significant changes to intermediaries obligations

Do you have any comments on Option 4: 'More significant changes to intermediaries obligations'?

We are supportive of this option and agree that it will help address the concerns that 'managing or supervising' will involve a significant amount of oversight and unnecessary compliance burden which would not recognise the reality that many intermediaries that financial institutions work with are already regulated closely and subject to a degree of oversight by financial institutions.

9 We do think that there should be explicit recognition that financial institutions who are also acting in the capacity of an intermediary, should already comply with the regime via their own fair conduct programme - they will therefore not need the same level of oversight, to avoid unnecessary compliance burden. We note the removal of 446J from the Bill, which had clarified that a Financial Institution acting as an intermediary was not required to comply with another Financial Institution's fair conduct programme and would instead need to ensure that their own fair conduct programme should cover their role as an intermediary. The rationale for the removal of this clause is not clear, and we would support this clause being reinstated.

What do you think the level of responsibility should be for financial institutions' oversight of intermediaries? For example, "*managing or supervising* the intermediary to ensure they

10 **support the financial institutions compliance with the fair conduct principle", or "*monitoring* whether the intermediary is supporting the financial institution's compliance with the fair conduct principle", or something else?**

We think the level of responsibility should be set at 'monitoring' the intermediary. This feels more proportionate and workable in practice, than 'managing or supervising'. However, we think it would be beneficial for there to be guidance to industry in the form of either industry best practice, or regulatory guidance, to ensure that there is a broadly consistent approach to monitoring, which will help minimise the compliance burden on intermediaries.

What standard do you think financial institutions should have to oversee their intermediaries to?

11 We think the standard should be set at 'reasonable' and we support the NZBA submission which suggests mirroring the equivalent standard that is set out in the Responsible Lending Code about oversight of agents.

Option 5: Distinguish between FSLAA and non-FSLAA intermediaries

Do you have any comments on Option 5: 'Distinguish between FSLAA and non-FSLAA intermediaries'?

We prefer Option 4 over Option 5. Making a distinction between FSLAA and non-FSLAA
12 intermediaries has the potential to be more operationally complex, and lead to a higher compliance burden. However, as we note in our response to Q 9 above, we do feel that there should be explicit recognition in the Bill that those financial institutions, who are also intermediaries, should already be complying with the requirements of the fair conduct regime and therefore require limited oversight.

How far do you think financial institutions' oversight of FSLAA intermediaries under Option 5 should extend? For example, should it cover the general conduct of the intermediaries, or more narrowly on product performance and related consumer outcomes (or something else)?

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We think this should cover oversight in relation to the general conduct of intermediaries, as it relates to the financial institution's services and products, as this would best evidence compliance with the requirements of the fair conduct programme.

Obligations in relation to employees and agents

Do you have any comments on the proposals regarding obligations in relation to employees and agents?

We agree that the obligations do not need major change for employees, given that financial
14 institutions are able to manage and supervise them. For agents, subject to the clarification of the definition of agent, the requirement to 'manage or supervise' will be practically constrained by the contractual relationships in place. A monitoring obligation would be more workable and better reflect the nature of the relationship.

15	**Do you think there should be a distinction drawn between employees and agents? Why/why not?**	
	Yes, for the reasons set out in our response to question 14 above.	
16	**Do you think any amendments should be made to the obligations in 446M(1) that would apply to employees and agents?**	
	We propose an amendment to s446M(1)(bd) to change the obligation to monitoring, rather than 'managing or supervising' agents.	
17	**Do you have any other comments or viable proposals?**	
	We referred above to the removal of s446J of the Bill. The rationale for the removal of this clause is unclear and we would support its reinstatement, as this will help to reduce compliance burden and the potential for a financial institution may have to comply with another fair conduct programme which puts it in conflict with its own.	