Response to the

Ministry of Business, Innovation and Employment

on the

Draft Financial Services Legislation Amendment Bill and Proposed Transitional Arrangements

31 March 2017

1.0 INTRODUCTION

1.1 This submission has been prepared by Bank of New Zealand ('BNZ') in response to the Ministry of Business, Innovation and Employment's ('MBIE') consultation paper titled "New Financial Advice Regime" ('Consultation Paper') regarding the draft Financial Services Legislation Amendment Bill ('Bill').

1.2 BNZ welcomes this opportunity to provide a response to the Consultation Paper and acknowledges the industry consultation undertaken to date on this matter.

1.3 For ease of reference, a summary of BNZ's key points is set out below, with BNZ's detailed submissions (in the form of responses to the specific questions in the Consultation Paper) in the Schedule.

1.4 Words used but not defined in these submissions are defined in the Consultation Paper.

2.0 EXECUTIVE SUMMARY

2.1 BNZ commends MBIE on its commitment to revising the existing financial adviser regime, and for taking a "ground-up" approach to ensuring that the new regime achieves the right outcomes for New Zealand consumers. BNZ acknowledges that the process of determining the right policy settings is complex, in parts challenging, and necessarily iterative.

2.2 For completeness, BNZ agrees entirely with the objectives of the Bill. In particular, BNZ considers it critical that the issues with the existing regime are remedied and that, as a result, consumers have increased access to good quality financial advice, without unnecessary complexity. Customer outcomes should be the "anchor" for the new regime.

2.3 In light of that overriding objective, BNZ makes the following key submissions, each of which are addressed in further detail below:

2.3.1 Adviser Labels: The focus of any new labels given to persons who provide financial advice should be, first and foremost, on how those labels will be understood (or if they will be understood) by customers.

In that regard, BNZ makes two key comments:

2.3.1.1 *Retain "AFA":* The existing title "authorised financial adviser" or AFA should be retained. That is a term with which customers are familiar, and it is a brand into which AFAs and their employers have invested significant time and effort. Accordingly, it should be preserved under the new regime.

2.3.1.2 *No title for "financial advice representative":* The title "financial advice representative" is unnecessary, and risks causing confusion (and increased complexity) for consumers. A better approach is to not designate "financial advice representatives" at all, and instead rely on the existing checks and balances of the Code, the duties proposed in the Bill and the disclosure regime, to ensure that the type of advice provided by those persons is adequately limited (without giving them a specific title).

2.3.2 New duties: BNZ is broadly in favour of the new duties proposed in the Bill. However, it is BNZ's view that, as currently drafted, some of the duties (in particular the "client first" duty, and the duty to agree nature and scope) require further refinement to ensure that they are practicably workable, and will serve the ultimate objectives of the Bill. It would be a highly undesirable outcome if the breadth of the new duties, and the practical realities of complying with them (particularly within large-scale financial advice providers), reintroduced the very complexities and barriers to access that the Bill is designed to address.

2.3.3 Licensing of retail services: BNZ submits that section 389(4) in Part 2 of the Bill should be deleted, so that financial advice providers are not required to structurally or operationally segregate retail from wholesale services, in order to create "artificial" service divides solely for regulatory purposes. In BNZ's view, the only requirement should be for a financial advice provider to demonstrate, as part of its licence application, that it has processes in

place to correctly identify retail clients in respect of any financial advice service offered. This will ensure that customer needs are met, while not imposing unnecessary administrative costs on financial advice providers.

2.3.4 Approach to wholesale clients: BNZ considers that the Bill's current approach to wholesale clients (in terms of the application of some of the new client duties to wholesale clients, potential disclosure obligations for wholesale clients, and the definition of a "wholesale client" itself) will not achieve the right outcomes for wholesale clients.

In practice, it is BNZ's experience that wholesale clients generally require a different type of service and engagement from their financial advisers than that sought by retail clients. This is a result of the broad information symmetry that exists between wholesale clients and their advisers, which is incommensurate with an "overlay" of statutory duties – particularly the duty to put a client's interest first – and disclosure requirements.

Accordingly, in BNZ's view, the retail-centric obligations in the Bill should not extend to wholesale clients. To the extent that there are some existing categories of wholesale client which do not, in practice, evidence a level of sophistication that warrants being treated as wholesale, BNZ considers that the better approach is to refine the breadth of the "wholesale" categories themselves.

2.3.5 Disclosure: BNZ acknowledges that there is a second phase of consultation which will address the detail of the new disclosure requirements. However, as an overriding comment, BNZ strongly submits that the disclosure requirements be brief, practical, flexible, intuitive, and focus on effective communication with the customer. In BNZ's view, a well-designed and practical disclosure regime is at the core of a successful, customer-focussed, regime. Accordingly, it is of critical importance that the disclosure regime is flexible enough to have relevance and real value for customers across all types of engagements – from new technologies, to a sole trader financial adviser, to a retail banking relationship.

2.3.6 Refinement of what constitutes a "financial advice product": BNZ considers that MBIE should take this opportunity to reconsider the scope of what constitutes a "financial advice product", with a view to excluding simple and commonplace products which do not warrant the application (or, at least, the full application) of the financial adviser regime.

As a particular example, BNZ submits that consumer credit contracts should be excluded from the definition of a "financial advice product", given those products are already subject to a bespoke and comprehensive customer-focussed compliance regime – namely the Credit Contracts and Consumer Finance Act 2003, the Lender Responsibility Principles and the Responsible Lending Code. Contrary to the key objectives of the Bill, overlaying the financial adviser regime on top of the existing consumer credit regulatory regime only adds further complexity from the customer's perspective.

2.3.7 Transitional arrangements: In general, BNZ agrees with the phased approach to licensing, and the proposed transitional arrangements. However, BNZ considers that:

2.3.7.1 *QFE licensing:* Given the existing processes and controls QFEs are required to have in place (in particular in respect of their QFE advisers), there should be minimal relicensing process required for QFEs to become fully-licensed financial advice providers under the new regime.

2.3.7.2 *AFA qualification requirements:* Similarly, AFAs should not be required to requalify in order to become fully-licensed "financial advisers" (or, preferably, to remain AFAs) under the new regime. AFAs have already undergone a rigorous assessment process, and are already required to undertake continued professional development. If the competency or educational standards for AFAs are made more onerous going forward, this may mean that AFAs choose to leave the industry, which could result in consumers having *less* access to good quality advice.

2.3.7.3 *Robo-advice:* BNZ welcomes the new regime's approach to robo-advice, and considers the ability to provide robo-advice a critically important

development for New Zealand's financial advice regime – particularly as a means of ensuring that all consumers can have access to immediate, tailored, and good quality financial advice.

In terms of the transitional arrangements for robo-advice, BNZ submits that there should be a way for financial advice providers to introduce robo-advice products in advance of obtaining a full licence, provided that:

(a) the process and conditions for doing so are transparent, to ensure that the same standards are applied across the industry; and

(b) the relevant provider can demonstrate that there are robust standards in place (e.g. independent testing of algorithms / models) to ensure that all robo-advice products (including "early entrants") are of a high quality, and set a strong precedent for robo-advice going forward.

3.0 GENERAL

3.1 BNZ is pleased to provide this submission and the information it contains. BNZ is available to discuss any issues raised. Should MBIE have any questions in relation to this submission, please contact:

Paul Hay
Head of Regulatory Affairs
REDACTED

SCHEDULE

SUBMISSIONS

1.0 PART 1

Q1: If an offer is made through a financial advice provider, should it be allowed to be made in the course of, or because of, an unsolicited meeting with a potential client? Why or why not?

1.1 Yes. The giving of financial advice (and the offer of any financial products as a result of that advice) is already a highly regulated activity - it is not something (particularly in light of the enhanced client duties proposed in the Bill, as well as the baseline competency requirement in the new Code of Conduct) that can be done in a reckless, predatory or opportunistic manner. As such, even in the unsolicited context, the usual checks and balances of financial advice duties, disclosure requirements and the Code of Conduct will continue to apply.

1.2 This means that recipients of financial advice are *already* protected from the mischief that is otherwise associated with unsolicited offers - and indeed, an offer of a product would not be able to be made through a financial advice provider (whether in an unsolicited or solicited context) if the relevant adviser was not confident that it was a suitable offer to make, in any event. As such, giving financial advice is distinct from other circumstances where consumer interests are not as adequately protected. As a result, there is no need to extend the prohibition on unsolicited offers to circumstances where the offer is made through a financial advice provider.

1.3 This is particularly relevant in the context of "simple" consumer products. For example, if the unsolicited meeting provisions meant that a financial advice representative was unable to direct a customer towards a term deposit in the context of a meeting about another topic when that may be a suitable product for the customer, then that would be an unfortunate outcome - and not one which BNZ believes the unsolicited meeting provisions should cause.

1.4 Moreover, from a consumer perspective, if a customer has made an effort to engage with a bank representative, that customer will likely expect the bank (and its employees) to be able to give appropriate assistance regarding suitable products, whether or not the customer has specifically requested "financial advice". Put another way, it is BNZ's experience that customers expect to be provided with meaningful assistance as to what BNZ can offer, even where they have not approached their engagement with BNZ with a specific query in mind. Accordingly, at least in the retail banking context, it would be contrary to a customer's expectations (and, ultimately, to their detriment) to prohibit offers being made through a financial advice provider in the course of, or because of, an unsolicited meeting.

Q2: If the exception allowing financial advice providers to use unsolicited meetings to make offers is retained, should there be further restrictions placed upon it? If so, what should they be?

1.5 No. See above - the overlay of the Code, the finance advice duties in the Bill and disclosure requirements already provide sufficient protection for consumers.

Q3: Do you have any other feedback on the drafting of Part 1 of the Bill?

1.6 BNZ shares some of industry's concerns regarding the potential for confusion with the term "financial advice representative". The key focus should be to ensure that customers can readily differentiate between financial advisers (who have specialised expertise) and persons who distribute the financial advice of the financial advice provider itself (i.e. financial advice representatives).

"Authorised financial adviser" vs "financial adviser"

1.7 As an initial comment, BNZ queries the benefit of discontinuing the term "authorised financial adviser", or "AFA". Those are terms that are now (after five years under the current legislation) well understood in the market, and AFAs and their employees have invested time, effort and expense in building the "AFA brand". It is BNZ's submission that, if possible, that title should be retained, and carried over into the new regime instead of the term "financial adviser".

1.8 One challenge with this approach may be the treatment of RFAs, and how they should be "transitioned" into the new regime. For obvious reasons, it would not be appropriate for a RFA, upon transition, to be known as an AFA. As a solution, RFAs may be better "transitioned" at the level of financial advice representatives (albeit ones who may be at the "higher end" of the nature of scope of financial advice that representatives can provide). This approach would:

1.8.1 provide immediate clarity as to the distinction between an AFA and a RFA (which, even under the current regime with different titles, is a cause of confusion for customers, and can result in customers perceiving that a RFA is in fact *more* qualified than an AFA); and

1.8.2 allow the AFA brand, and the distinct "credibility" of that brand, to be preserved under the new regime.

1.9 As an overriding observation, it would be unfortunate if, due to a new singular concept of a "financial adviser", customers were lead to believe that persons who were previously RFAs were, under the new regime, the functional equivalent of AFAs. As such, a better approach may be to transition RFAs as financial advice representatives, which would incentivise those persons to re-qualify at the earliest practicable time if they wanted to in fact be known as "financial advisers" - or, as BNZ's preference, "authorised financial advisers".

"Financial advice representative"

1.10 The concern with the title "financial advice representative" is that it may too easily be confused for a "financial adviser", given the similarity of the terminology (particularly when shortened to "FA" and "FAR"). This may in turn conflate the two terms, which then could compromise access to high quality financial advice - if it is not clear to customers from whom they should be seeking advice they may not seek advice at all. In addition, similar to BNZ's submissions above, for persons who are currently AFAs (and wish to become FAs), it will be important that the "credibility" of that role is preserved under the new regime, in order to incentivise people to retain the qualifications necessary to provide customers with sophisticated financial advice.

1.11 It may be that there is no term that:

1.11.1 universally captures this class of adviser;
1.11.2 does not risk confusion with the concept of a "financial adviser"; and
1.11.3 could be readily understood by customers,

in which case, one option is to remove the title altogether.

1.12 Absent a specific title, financial advice providers could continue to call those persons who distribute their advice what they are currently called in the relevant organisation - e.g. "banking advisers" or "insurance advisers" or "mortgage advisers" - and simply rely on the existing checks and balances of the Code of Conduct, the duties proposed in the Bill and the disclosure regime to ensure that the type of advice provided by these persons is adequately limited, and that customers are aware of that limitation. The approach here would be to take the focus off the title, and instead ensure that customers have ready access to financial advice from appropriate persons.

1.13 As an additional check and balance, the prohibition on "holding out" in section 431D of the Bill will ensure that a person cannot hold themselves out as:

1.13.1 being a particular type of adviser if they are in fact not; or

1.13.2 being permitted to provide certain services if they can in fact not,

which will mean consumers have confidence that only persons who are permitted by the legislation will be providing relevant services to them.

If there were further concerns as to the titles given to "financial advice representatives" by a particular financial advice provider, the FMA could address this specifically in the relevant licensing requirements for that financial advice provider (e.g. to ensure that no title was misleading or confusing for customers).

1.14 For completeness, BNZ acknowledges that, for the purposes of drafting the Bill, the class of persons who are currently "financial advice representatives" will need a designation (e.g. in order to draft appropriate liability settings). Consistent with BNZ's comments above, BNZ proposes that, for the

purposes of the legislation, those persons simply be identified as "FAP representatives" or "representatives", so as to better distinguish from the concept of a "financial adviser", even within the context of the legislation itself.

Approach to concept of a "financial advice product"

1.15 As a general policy proposition, BNZ considers that there is merit in refining the concept of a "financial advice product" to exclude "simple" banking products, such as term/call deposits, cash/term PIEs, residential mortgages and credit cards. This is on the basis that the provision of those products is largely regulated by, or subject to, other regimes or industry codes (including banking-specific regimes, such as the Code of Banking Practice and the broad oversight of the Banking Ombudsmen), and that those products are, by their nature, simple enough and sufficiently commonplace not to warrant the oversight of the financial adviser regime.

1.16 However, BNZ recognises that excluding all of these products entirely from the ambit of the financial adviser regime may have unintended consequences - particularly where non-banking advisers are advising on those products (who would not themselves be subject to the oversight of the Banking Ombudsman). Instead, as noted elsewhere in this submission, the better way to acknowledge the "simpler" nature of these products is (subject to the comments regarding consumer credit below) to ensure that the disclosure regime is adequately calibrated to, or flexible enough to accommodate, the relative complexity of the underlying product. This will ensure that, in respect of more straightforward products, customers are not exposed to disproportionate and confusing disclosure. Put another way, the "full force" of the financial adviser regime should be focussed on more complex products and circumstances.

1.17 Notwithstanding the above, BNZ submits that a "consumer credit contract" should be excluded from the definition of a "financial advice product". The reason for this is, primarily, clarity. Unlike other "simple" products, consumer credit contracts are already the subject of the Credit Contracts and Consumer Finance Act 2003, in particular the Lender Responsibility Principles and the Responsible Lending Code (together, 'CCCFA Regime'). With the further overlay (for banks at least) of lending restrictions imposed by the Reserve Bank of New Zealand, there is already a comprehensive regime in place which regulates the provision of consumer credit, and the interactions with (and advice to) bank customers that go with it.

1.18 In BNZ's view, adding the additional overlay of the financial advice regime will only create further complexity for advice in relation to these types of products, which is not in line with a key objective of the Bill. Further, given the existence of the CCCFA Regime (which is a bespoke regime specifically tailored to credit products, in particular consumer credit products) consumers are already adequately protected by the existing rules and principles when seeking advice regarding consumer credit contracts.

1.19 Accordingly, BNZ considers that the definition of a "financial advice product" in the Bill should exclude consumer credit contracts. If that is not going to be an achievable outcome, at the very least the Code must be consistent with the CCCFA Regime, such that it is possible for persons who both provide, and provide advice on, consumer credit contracts are able to practically comply with the dual regimes, with minimal duplication (for example, by allowing combined disclosures).

2.0 PART 2

Q4: Do you have any feedback on the drafting of Part 2 of the Bill?

Licensing of services

2.1 Yes. Section 389(4) in Part 2 of the Bill should be deleted. This section effectively means that, unless a financial advice provider has effectively structurally or operationally segregated all retail services from any wholesale services, the full ambit of retail obligations will apply to all customers (irrespective of their designation).

2.2 If retained, this will force providers to implement artificial distinctions between essentially identical services, to ensure that wholesale and retail demarcations can be effectively maintained for licensing purposes. This would create significant inefficiencies, and unnecessarily duplicate processes for no ultimate customer benefit.

2.3 Section 389(4) appears to be based on an assumption that services within financial advice providers are in fact always segregated or operated in a "compartmentalised" manner - for example, that there is a distinct institutional side of a relevant provider, which would never intersect with its retail

side. In fact, this is not always the case. For many businesses (including BNZ), in some instances the same service is provided to both wholesale and retail clients – and there are robust controls in place to ensure that clients are correctly identified and appropriate processes applied accordingly, within those shared service streams. This is a model that works, is efficient, and still protects customer interests.

2.4 As such, the only requirement should be for a financial advice provider to demonstrate, as part of its licence application, that it has processes in place to correctly identify retail clients in respect of any financial advice service offered – rather than require financial advice providers to artificially segregate common services to avoid the overreach of the licensing regime.

Limitation on who can provide regulated financial advice

2.5 Similar to sections 17 to 20 of the FA Act, the Bill should include a clear statement that only a financial advice provider, or a person engaged by a financial advice provider to provide advice on its behalf, is permitted to provide regulated financial advice to a person in New Zealand. Absent such a statement, there may be confusion as to who is in fact entitled to provide regulated financial advice to persons in New Zealand (particularly in circumstances where there is no discrete licensing requirement, i.e. the wholesale-only scenario).

3.0 PART 3

As an opening comment, BNZ submits that all of the new duties in the Bill need to be calibrated in a way that ensures positive customer experiences, but also allows for financial advice providers to measure compliance with duties in a straightforward manner. What this means in practice is that the new duties (and the associated disclosure requirements) must not be so onerous as to undermine the customer experience, nor so complex that it is not practically possible for financial advice providers to implement systems that can track and record compliance, without adversely compromising the customer experience. BNZ expands on this on its specific submissions below.

Q5: Do you agree that the duty to put the client's interest first should apply both in giving the advice and doing anything in relation to the giving of advice? Does this make it clear that the duty does not only apply in the moment of giving advice?

3.1 As a starting point, BNZ supports the principle that, at least in the retail client context, the duty to put the client's interest first in a conflict scenario should capture more than simply the actual giving of advice. However, the current proposal is very broad, the drafting is not clear and, without clear guidance (or a narrowing of the duty itself), may cause industry confusion and misalignment.

Scope of duty, and interaction with clause 431(G) (duty to agree nature and scope of advice)

3.2 At the outset, BNZ assumes that the intention of the language "*or doing anything in relation to the giving of the advice*" is to capture matters that are clearly and directly connected to the giving of advice and the relevant conflict (while not being the actual giving of advice itself) – but not to capture *all* related matters, and should not extend to every aspect of the provider/customer relationship. In particular, the concept of "*anything in relation to*" should be inherently limited to things directly within the nature and scope of the relevant advice sought (and there is clearly some significant overlap here with the new duty to agree the nature and scope of the advice with a client).

3.3 Put another way, the duty:

3.3.1 should apply to matters relating to the consideration of the client's circumstances within the agreed (or inherent) nature and scope, the steps taken as a result of that consideration, and the relevant conflict which is known or ought reasonably to be known – e.g. as that may relate to whether an adviser gives information only or gives advice, and (as applicable) the nature of the information or advice given; but

3.3.2 should not apply to matters which are, while related to the giving of the advice and potentially conflicting in nature, outside of the agreed (or inherent) nature and scope and/or are unrelated to the actual consideration of the client and his/her/its circumstances – e.g. the fees charged by the relevant adviser or their employer (which are the subject of their own disclosure regime).

3.4 Absent that distinction, the language in section 431H of the Bill would potentially inherently capture:

3.4.1 the charging of fees for advice or the earning of fees or profit from a product recommended, even if those fees are fair and reasonable;

3.4.2 the allocation of products between clients, where multiple clients may be suited for a product which has limited supply (which can be managed in a reasonable and fair manner – but not where the adviser is obliged to put a particular client's interests first where there is a potential for conflict between clients);

3.4.3 the recommendation of suitable products to a customer – for example, a customer may be better suited putting the money in a term deposit, but if that happens to earn a higher return for the product provider than leaving the money on call there may be a question as to whether the duty is being met;

3.4.4 if the duty were applied too expansively, the mere making of a profit in relation to a client's assets; and

3.4.5 more generally, if the duty is not limited to the parameters of the agreed (or inherent) nature and scope of the advice, in circumstances where a customer has only sought advice on a particular type of product, the relevant adviser / provider may nevertheless be compelled to go outside that scope, in order to put the customer's interests first. For example, if a customer was seeking advice regarding BNZ term deposit products only (which will naturally benefit BNZ over another provider's term deposit product), should BNZ have an obligation, in light of the agreed (or inherent) nature and scope of the advice BNZ is providing, to nevertheless point out the benefits of other term deposits? BNZ submits that it should not.

3.5 BNZ is aware that this is not the intention of the duty, but there is a risk that, on a literal interpretation at least, it could be read that way.

Obligation to prioritise a customer's interests

3.6 Further, it is difficult to understand the actual extent of the obligation to prioritise a customer's interests. This is because, in clause 431H(2) of the Bill, it is unclear how the obligation that a person "*must give priority to B's interests*" aligns with the follow-on obligation to take "*all reasonable* steps to ensure that A's own interests of the interests of any other person do not *materially influence* the advice" (emphasis added).

3.7 The latter language seems to suggest that the obligation is one of reasonableness and materiality, while the headline obligation is simply to prioritise B's interests, which is an "absolute" obligation. As such, this language needs to be clarified so that it is clear how exactly an adviser / provider is expected to go about prioritising client interests and, crucially, what standard of behaviour is required.

3.8 Further, it needs to be clear that this duty only applies in the context of a conflict (which is known, or reasonably ought to be known, by the relevant adviser) – it is not a general "best interests" duty. BNZ perceives that, even currently, there is widespread confusion as to how this duty is in fact meant to operate in practice, including its limitation to conflict circumstances – this may be more of a general awareness matter, rather than a drafting issue per se. But in any event, given the importance and potential scope of this duty, guidance from the FMA will be critical.

Possible solution

3.9 Taking into account the above, one solution may be to re-draft the client-first duty along the lines of the following (BNZ puts this forward as a possible formulation only and would expect further refinement to be necessary to ensure all relevant factors are balanced):

(1) This section applies if a person who gives regulated financial advice (A) knows, or ought reasonably to know, that there is a material 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 an associated person of A.

(2) In giving the advice, A must, in light of (and taking into account) the nature and scope of the advice to be given (determined in accordance with section 431G), take all reasonable steps to ensure that A's own interests or the interests of any associated person of A do not materially influence the advice.

(3) For the purposes of this section, "giving the advice" means:

(a) giving the advice to B by whatever means; and
(b) any other action (or omission) by A which is directly related to the nature or subject matter of the advice.

(4) For the purposes of this section, A's own interests, or the interest of any associated person of A, shall be deemed not to have materially influenced the advice, if the advice would have been the same had those interests not existed.

Q6: Do you have any comments on the proposed wording of the duty that a provider must not give a representative any kind of inappropriate payment or incentive? What impacts (both positive and negative) could this duty have?

3.10 BNZ recognises the importance of limiting inappropriate payments or other incentives to sell and agrees entirely with the fundamental principle of clause 431O(1)(b) of the Bill. Accordingly, as an outright policy position, BNZ considers that this duty should also apply in respect of financial advisers, not only financial advice representatives. From a consumer perspective, BNZ sees no reason to prohibit inappropriate payments or incentives in respect of one group of advisers only. Rather, the same duty should apply in respect of *all* advisers.

3.11 In terms of incentives generally, BNZ itself focusses on broader measures (e.g. the overall customer experience and satisfaction, complaint rates, etc.) to incentivise staff and provide meaningful (and measurable) performance indicators, and strongly believes that this is the better approach from a customer perspective.

3.12 Notwithstanding that, the wording in section 431O(1)(b) and (2) of the Bill is broad, and there is a risk that it could effectively amount to (or be argued to amount to) an outright ban on all/any sales-based performance measures (which, as a policy position, was explicitly abandoned by MBIE). As a general rule, BNZ does not pay advisers or representatives a sales-based commission. It may however factor sales performance into broader performance recognition. While excessive sales-based performance measures may be "inappropriate", there are circumstances where some measures are appropriate and could serve a useful purpose. For example, where the relevant financial advice provider is looking to rebalance its overall product portfolio and incentivises staff to align with the desired model accordingly, and particularly when used in conjunction with other performance measures.

3.13 As such, section 431O needs to be able to accommodate the position that there are *some* forms of incentives that, while still being "incentives", are nevertheless not "inappropriate" – i.e. there must be a balance – and requiring those incentives to be disclosed may be a key feature in preserving that balance.

3.14 Clause 431O also needs to dovetail with the duty in clause 431(H) of the Bill (the "client-first" duty). In particular:

3.14.1 If not all incentives are "inappropriate" (which BNZ understands to be MBIE's policy position), then some incentives must be appropriate.

3.14.2 An appropriate incentive is still an incentive – i.e. it is still something which may compel a financial advice representative to favour one product over another, while not causing (or encouraging) that representative to breach any of the duties in clauses 431F to 431M of the Bill.

3.14.3 However, an incentive by its very nature may evidence a form of conflict of interest. This means that, either:

3.14.3.1 on the proposed regulatory settings, it is actually not possible to have an "appropriate" incentive, as an incentive would always be caught (and negated) by clause 431H of the Bill – in which case the Bill should be clear that there is an outright ban on all incentives; or

3.14.3.2 more appropriately, the duty in clause 431H of the Bill should be made subject to any incentive which is not an "inappropriate" incentive in accordance with clause 431O(2) of the Bill, so that the two duties can work together.

3.15 BNZ acknowledges that this is a very forensic, technical analysis of the relevant duties. However, when considering how these duties will apply in practice, their scope and interaction with other duties must be clear. Otherwise, it will be too challenging for financial advice providers to configure clear and effective rules which can be implemented by frontline staff. This in turn may result in providers being overly cautious and thus limiting the amount and quality of financial advice available to consumers – which is exactly the opposite of what the Bill is trying to achieve.

3.16 Accordingly, while BNZ is largely comfortable with the current drafting, it suggests that there be industry guidance as to how the FMA intends to approach the "inappropriate" concept in practice.

3.17 Further, given the potential for this duty to have a wide reach, BNZ submits that there should be a defence available to providers who can demonstrate that they have put in place appropriate incentive policies, procedures and controls to manage the risk of any "impropriety". This defence could essentially create a form of "safe harbour" if the provider is available to demonstrate that it had the relevant controls in place, even if in a particular instance a payment or incentive available to a representative may otherwise have been "inappropriate" in context. Of course, this defence would not apply if the relevant controls failed – as it would not be possible in those circumstances to demonstrate that the controls were "in place". For these reasons, BNZ considers that this would be a fair balance between the objectives of the duty and not penalising providers who act in good faith and have relevant controls in place.

Keeping pace with market developments

3.18 While BNZ's submission is that a sales-related component can be a part of an incentive arrangement without that arrangement being "inappropriate", over time BNZ can see the market moving more towards a "fees for service" model, and away from traditional commission based remuneration. This may particularly be the case for robo-advice platforms, especially if they are "product agnostic" and do not align themselves with any particular providers.

3.19 If this paradigm shift was to occur, then it would be important for regulation to move with it. For example, if commission based structures were to become the exception, it would be necessary to ensure that the existence of those structures is given appropriate transparency through disclosure (and that would potentially need to be heightened, if they were the exception rather than the norm). Further, there could be a case for prohibiting some types of commissions, if their continued existence means that the duty to place the client interest first becomes impossible to fulfil, which could be a real risk if there is a behavioural shift in the market resulting from a rise in a fees for service model.

Q7: Do you support extending the client-first duty to providers who do not provide a retail service (i.e. those who only advise wholesale clients)? Why or why not?

3.20 No. BNZ submits that the client-first duty should *only* apply in respect of retail clients.

3.21 For completeness, and reiterating the submissions in paragraphs 2.1 to 2.4 above, for providers who provide a retail *and* wholesale service, the client-first duty should still only apply in respect of the retail clients who receive that service.

Impact of clause 13(3) of Schedule 5

3.22 BNZ notes that clause 13(3) of Schedule 5 is relevant in this context. That clause provides that financial advice given by a person is not "regulated" financial advice if it is given in connection with an offer of a financial product by or on behalf of the offeror, and the offer does not require disclosure because of any of clauses 3 to 5 of Schedule 1 (with clause 3 being "wholesale investors" under the FMCA). Simply put, advice would not be "regulated" if it is given by BNZ in connection with its own product to a person who is already wholesale under clause 3 of Schedule 1 of the FMCA.

3.23 While the existence of this provision as an exclusion from advice being regulated financial advice does alleviate the concerns with this duty somewhat, advice would still be regulated in this context:

3.23.1 if BNZ was giving advice on a third party product which is not "on behalf of" the offeror; or

3.23.2 in circumstances where the client is wholesale but, for example as a result of an FMA "call in", disclosure is required (so the clause 13(3) exclusion falls away).

3.24 In any event, BNZ would prefer to engage on this point on a "generic" basis, rather than on the basis that clause 13(3) will essentially render the debate somewhat academic in circumstances where BNZ is providing advice to wholesale clients on products which BNZ itself issues. Rather, for the purposes of this aspect of BNZ's submission, BNZ has considered the scope of this duty as if it could apply in all circumstances – i.e. as though clause 13(3) did not exist – as BNZ feels strongly that the duty should not apply to wholesale clients in any circumstances.

Client first duty will not achieve the right outcome for wholesale clients

3.25 BNZ acknowledges the attraction of having one service standard for all clients. However, in BNZ's view, wholesale clients will not uniformly benefit from a statutory "client-first" duty, and in some cases, it may do them a disservice. This is because, in most instances, wholesale clients approach advisers on a relatively even playing field – they are seeking expert advice from persons who are suitably qualified to give them robust advice which is direct, straightforward and sophisticated.

3.26 If those wholesale clients are owed an overriding statutory duty to prioritise their interests in a conflict scenario, that could have two immediate and negative outcomes:

3.26.1 Difficultly in determining contractual rights: In many cases, wholesale clients will determine appropriate controls with the provider themselves (e.g. in relation to product allocation where client demand outstrips product supply), and negotiate the position that they want with the relevant provider or adviser.

If a statutory client-first duty then overlays those contractual arrangements, that would cause more confusion and potentially impact the provider's ability to comply with similar arrangements with other parties – e.g. if a provider has a mix of local and international clients, and makes standard arrangements in relation to, for example, product allocation across all those clients, it would be in the difficult position of owing different duties to different clients (based on their jurisdictions), despite having uniform contractual terms. This may in turn compromise the effectiveness of the contractual relationships which some wholesale clients have in place with their providers, which is not an optimal regulatory outcome.

3.26.2 Risk of conservatism: If the "client-first" duty is extended to wholesale clients, providers and advisers may well err on the side of caution and, given the potential for issues to arise as a result of the new statutory duty, provide more conservative or constrained advice (in an attempt to observe the boundary of the statutory duty, which will, inevitably, not always be clear). This means that, converse to the intention of the duty, wholesale clients (who are paying for robust, direct, straightforward and sophisticated discussions) may in fact receive a lesser standard of service, which does not accord with the key objectives of the Bill.

3.27 In addition, protections will still apply to wholesale clients, such as:

3.27.1 the general duty for an adviser / provider to exercise care, diligence and skill;

3.27.2 the overlay of various consumer protection regimes (such as the Fair Trading Act 1986 and the fair dealing provisions of the FMC Act);

3.27.3 internal policies and procedures which, in BNZ's case, are informed by relevant international codes of conduct and best practice; and

3.27.4 more generally, a financial advice provider's natural desire to protect its brand and standing in the market,

which are sufficient to protect the interests of wholesale clients, without compromising the quality of advice those clients may receive.

3.28 Set out below are some examples of how extending a client-first duty to wholesale clients may cause confusion:

3.28.1 In the wholesale derivatives context (and this is unlikely to be specific to BNZ only), BNZ is required to manage a number of conflicts with wholesale clients, in relation to BNZ's role as (in cases) adviser, market maker, own-account trader, calculation agent or hedge provider – and BNZ discloses these conflicts to its wholesale clients. In this circumstance, it would be almost impossible for a provider to meaningfully navigate, let alone comply with, a client-first duty amongst a client base which may be in constant and natural "conflict" with each other.

3.28.2 In addition, in some cases, BNZ enters into derivatives transactions as principal (albeit in respect of a client). As such, BNZ deals with those clients as counterparties, which is a necessary feature of the relevant transaction. To the extent that entry into those transactions is also in "in relation to" the giving of any advice, then that would create significant difficultly if a client-first duty then applied, as (viewed at its most expansive) the duty could in theory restrict BNZ from insisting on its contractual rights where to do so would conflict with the client-first duty.

While the exclusion in clause 13(3) of Schedule 5 could potentially ameliorate this issue for BNZ in contexts where BNZ is itself the derivatives issuer, in circumstances where that exclusion will not apply, any outcome which would comprise BNZ's ability to enforce contractual rights against a sophisticated counterparty would be inappropriate – and not, in BNZ's view, a desirable regulatory setting.

3.29 Lastly, from a policy perspective, if the categories of "wholesale" are configured appropriately, there should be no concern that wholesale clients nevertheless need the statutory overlay of a client-first duty. If the concern is that there is, even within the current wholesale settings, a subcategory of clients who *do* require a higher level of consideration, then the better place to address that concern is within the definition of "wholesale" itself, rather than extend retail-centric obligations to all wholesale clients. In this regard, see further paragraph 8.1 below.

Q8: Do you have any other feedback on the drafting in Part 3 of the Bill?

Duties and robo-advice

3.30 BNZ submits that, in respect of all the financial advice duties, there needs to be a specific consideration of how they will apply in the context of robo-advice. It is inevitable that technology will rapidly play a significant (perhaps predominant) role in the way that financial advice is sought, determined, and received – and the duties need to be able to accommodate that.

3.31 For example:

3.31.1 There needs to be a straightforward way for persons to agree "nature and scope" with a provider through (and in respect of) an online platform – or, more appropriately, there should be an ability for online platforms to simply state the scope of their abilities, and for that to constitute the requisite agreement.

3.31.2 How will the client-first duty play out in the robo-advice context? Depending on the nature of the robo-advice, if this duty became relevant – e.g. if the provider had a theoretical conflict between two clients who were independently seeking robo-advice – it may not be possible for the advice platform to prioritise a particular client's interest when providing that advice.

3.32 It may be that MBIE has already undertaken this exercise, and is comfortable that the duties are "future proofed" in terms of financial technology innovation (including in respect of the scenarios noted above), and that guidance will be provided specifically in relation to robo-advice, to clarify the FMA's expectations in this regard. BNZ's prime concern is to ensure that the Bill is drafted in a way which contemplates that financial technology will become a key feature of the advisory landscape going forward – and adequate time for consideration on that issue is required (whether that is at the time of regulations or when the FMA determines its approach to licensing providers who want to offer robo-advice platforms).

Robo-advice vs online delivery channels

3.33 BNZ welcomes the Bill's approach to robo-advice and other financial technology solutions, and agrees that it not necessary (or desirable) to define "robo-advice" at this stage. However, it will be important to ensure that, when talking about "robo-advice", that term does not inadvertently

capture *all* forms of technological development, some which may be permissible under the existing FA Act.

3.34 For example, where the focus is on a *delivery channel*, and the provider of the advice is still an identifiable individual, that should not be considered "robo-advice", and should be permitted under the FA Act, including during the transitional period (even if the relevant financial advice provider is not using that particular means of delivering an existing service prior to transition – as if it is simply a new way of delivering an existing service, that should be within the parameters of the transitional licence).

3.35 In this regard, BNZ sees a difference between developing the *nature of delivery* of advice where that advice is still provided by a natural person, and developing "robo-advice" solutions (e.g. algorithmic or other automated means of determining advice), and electronic delivery of advice *of the financial advice provider* itself (rather than of an identifiable individual acting on behalf of that financial advice provider). For example, an online chat portal which links a customer with a "real life" and named person (albeit through the medium of an instant message platform, and assuming it otherwise complies with the requirements of the FA Act) should not be considered "robo-advice".

3.36 Similarly, an online calculator which, without giving advice, can show customers how their retirement savings would be impacted by additional contributions should not, despite being an online resource, fall into the category of "robo-advice", and be considered part of that regime.

3.37 In summary, the danger BNZ is cautioning against is the new concept of "robo-advice" inadvertently being applied to *everything* that has a technological or innovative flavour, rather than being limited to the development of technologies which allow a non-natural person to provide regulated financial advice. Importantly, the concept of "robo-advice", and the transitional arrangements relevant to that specific type of advice, should not stifle technological innovation which is still within the ambit of the FA Act.

Duty to agree nature and scope

Duty should "fit" circumstances

3.38 BNZ urges a sensible and "customer-friendly" approach to the nature and scope duty in section 431G of the Bill. There is a real risk that this duty could inadvertently re-introduce burdensome disclosure requirements necessitating pro-forma disclosures which compromise the effectiveness of the overall customer experience (and the likelihood of those customers seeking advice more regularly). Crucially, the duty needs to be aligned with the reality of the underlying circumstances, and the dynamics of customer engagement in a "mass consumer" banking business.

3.39 For example, a customer seeking a simple lending product from a lender (be it a bank or other financer) should not need to first agree the "nature and scope" of advice to be provided. In that scenario, the nature and scope are self-evident – the lender is only going to advise on its own products, the scope is to obtain advice regarding loan options.

3.40 By contrast, where there are a range of products that may be advised on by the adviser (including by different product providers – i.e. more akin to an investment planning service), and/or the scope of the advice is less clear (e.g. a customer wanting to discuss a "wealth strategy", "investment options" or "what to do with spare cash") – there is good reason for the relevant provider or adviser to first clarify the nature and scope of the advice sought. A specific example of where there should be more "formality" required for agreeing nature and scope would be where a customer moves from a "simple" service offering (e.g. seeking advice on term deposits) to a more sophisticated service where the financial advice provider is making third party products available, or advising on entry into a discretionary investment management service (DIMs).

3.41 Put another way, *the requirement to agree the nature and scope needs to be proportionate to, and reflect the reality of, the client engagement*, and providers and advisers should be entitled to assume a base level of common sense (in this regard, it is BNZ's observation that, when consumers approach an entity such as a bank, about a finance need, they are aware that they will be provided with information and advice only about the products available from that entity).

3.42 As such, in circumstances where there is no reasonable likelihood of ambiguity, no agreement as to nature and scope should be required – in fact it would be entirely artificial (and potentially intimidating) to first require the customer to agree the scope and nature of their engagement with the relevant provider or adviser, before being able to "access" a product.

3.43 This is particularly so given that, in many circumstances (particularly where consumer interests are paramount, e.g. in the consumer credit context) there are a number of existing controls in place in any event, e.g. the Responsible Lending Code, various fee disclosure requirements, other protections under the Credit Contracts and Consumer Finance Act 2003 and the Fair Trading Act 1986, underpinned by the Code of Banking Practice.

Flexibility essential

3.44 Lastly, similar to BNZ's submissions in paragraphs 3.46 to 3.50 below, BNZ is strongly of the view that the manner in which this duty is discharged must be flexible. For example, it would do a disservice to the purpose of the Bill if the only way to demonstrably comply with section 431G was to hand each customer a pre-printed outline of the nature and scope of advice sought (e.g. "advice regarding the appropriate BNZ mortgage product for first home buyer with fixed income") have that customer read, sign and return that scope, and then proceed.

3.45 Instead, the obligation to comply with this duty should form part of the overall competency requirement for advisers, and they should be charged with complying with that duty in the manner they deem most effective - which may be through a meaningful conversation with the customer, by use of "new" technology (e.g. tablets), or otherwise.

Disclosure

Manner of disclosure

3.46 BNZ acknowledges that there is a second phase of consultation which will address the detail of the new disclosure requirements. It is paramount that the disclosure regime balances the need for timely and meaningful disclosure while not distracting the customer's attention from the advice that is given.

3.47 However, as an overriding and initial comment, BNZ strongly submits that the disclosure requirements be brief, practical, flexible, intuitive, and focus on effective communication with the customer. Further, they should be technology neutral (i.e. disclosure should be achievable across all forms of technology).

3.48 In this regard, the obligation to disclose should be seen as a feature of the competency standard - i.e. advisers and providers should be charged with ensuring clients receive the substance of the disclosures required, in a meaningful manner, rather than relying on an overly prescriptive or rigid model.

3.49 This means that the:

3.49.1 nature of delivery;

3.49.2 timing of delivery (within set parameters); and

3.49.3 actual content,

of the disclosure should, in places, be at the reasonable discretion of the relevant provider or adviser. BNZ submits that, while this will mean that there are different approaches to disclosure in different circumstances, this is the only model which will serve the purpose of the Bill, and ensure that customers receive relevant and useful disclosure, in the form and at the time most relevant to them. Importantly, there is no single "financial advice industry" in New Zealand. Rather, there are a number of different industries which participate in the giving of financial advice - on different scales and in respect of different financial products and client bases. It is therefore crucial that the disclosure regime is flexible enough to accommodate, and have practical relevance in, each of those different industries.

3.50 Further, the manner of disclosure needs to be flexible enough to accommodate rapidly developing technology, which is going to become an increasingly common (and welcome) feature of financial advice - with it being very likely that, within a short space of time, the majority of financial advice may be sought and provided online. Again, the best way to ensure this is to charge providers and advisers with the obligation to ensure that the *substance* of any disclosure requirement is communicated effectively to customers - rather than overly prescribe wording, timing and format. This might mean that, in practice, the same disclosure obligation may, in different contexts, take the form of a brief conversation, a message on a tablet which is shared by an adviser with the customer, an in-app "pop-up", a pre-recorded video, a text message, or a pamphlet.

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Wholesale customers

3.51 The duty of disclosure in section 431L of the Bill should apply to retail clients only. Wholesale clients are sophisticated enough not to require any prescribed form of disclosure.

Instead, for wholesale customers, financial advice providers should be free to choose when and how they should make any disclosures to those customers, as long as they do so in accordance with:

3.51.1 the general duty for an adviser / provider to exercise care, diligence and skill;

3.51.2 the overlay of various consumer protection regimes (such as the Fair Trading Act 1986 and the fair dealing provisions of the FMC Act);

3.51.3 their internal policies and procedures which, in BNZ's case, are informed by relevant international codes of conduct and best practice; and

3.51.4 more generally, a financial advice provider's natural desire to protect its brand and standing in the market.

3.52 BNZ is not submitting that there are no circumstances where disclosure is warranted to wholesale customers (and BNZ itself makes various voluntary disclosures to its wholesale customers, as a result of the above factors). However, the circumstances should be *at the discretion of the relevant provider*. Unlike the retail sphere, where the potential vulnerability of the customer base does warrant more baseline prescription, wholesale customers are sophisticated enough to receive tailored disclosure, as and when determined to be appropriate by the relevant product provider.

3.53 Lastly, it is not necessary to inform wholesale customers that they are in fact treated as wholesale. This is largely for two reasons:

3.53.1 The safe harbour and eligible investor certification processes already require customers to acknowledge the consequences of their being treated as wholesale. As such, for those customers, any such notification would be entirely duplicative and unnecessary.

3.53.2 The remaining categories of "wholesale" should mean that, by definition, the relevant person is sophisticated enough to know that they are in fact a wholesale client (and be aware of the lesser protections that go with that status).

3.54 Against that background, BNZ disagrees that there is a risk that a material proportion of wholesale clients will not in fact appreciate that they are treated as wholesale (and therefore not be in a position to opt out of that designation). Again, as per the comment in paragraph 3.29 above, if MBIE does consider that there is a real risk that certain wholesale clients will not appreciate that they are in fact wholesale, that is a matter of *categorisation*, not disclosure. The better approach in that circumstance is to revisit the scope of the wholesale client categories themselves, rather than require blanket disclosure to all wholesale clients.

4.0 PART 4

Q9: What would be the implications of removing the 'offering' concept from the definition of a broker?

4.1 BNZ supports removing the "offering" concept from the definition of a broker, and believes it will provide more clarity as to when a person is in fact a "broker".

Q10: Do you have any other feedback on the drafting of Part 4 of the Bill, for example any suggestions on how the drafting of broker provisions could be simplified or clarified?

4.2 BNZ makes no comment on this aspect.

5.0 PART 5

Q11: Should financial advisers have direct civil liability for breaches of their obligations, if the financial advice provider has met its obligations to support its advisers? Why or why not?

5.1 Yes. Irrespective as to whether a financial advice provider has met its obligations to support its financial advisers, if a financial adviser acts outside of the relevant provider's authority, it is appropriate for that financial adviser to have direct civil liability. However, if an adviser has acted within the employer's authority but has nevertheless breached a duty, disciplinary action is a sufficient response.

Q12: Should the regime allow financial advice providers to run a defence that they met their obligations to have in place processes, and provide resources to enable their advisers to comply with their duties?

5.2 Yes. BNZ submits that this is a reasonable defence, which will better incentivise providers to in fact have and maintain proper processes, and provide sufficient resources, to create a strong compliance environment. This is a similar defence to that found elsewhere in the FMC Act, e.g. section 503(2)(b), and should be replicated in the financial advice context.

Q13: Is the designation power for what constitutes financial advice appropriate? Are there any additional/different procedural requirements you would suggest for the exercise of this power?

5.3 BNZ is supportive of a designation power for consistency with other aspects of the FMC Act. This is necessary to future proof the legislation, given that the industry is constantly evolving and financial advice providers will continually create novel and unique ways to offer a service and/or financial product.

Q14: Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?

5.4 No – see BNZ's submissions in paragraphs 2.1 to 2.4 above. It is not workable in practice and would require providers to artificially separate parts of their business into separate "retail services" and "wholesale services", which would be an inefficient and unnecessary exercise. Rather, the focus should be on ensuring that there are robust and effective processes in place so that financial advice providers can correctly identify retail clients in any part of their business, and treat those retail clients accordingly.

Q15: Do you have any other feedback on the drafting of Part 5 of the Bill?

5.5 BNZ has some concern with the concept that financial advice representatives may be civilly and criminally liable where they commit a section 511 offence, or are involved in a section 533 contravention. While BNZ absolutely understands the necessity and policy function of these sections in a broader FMC Act context, financial advice representatives are, by their nature, a much more constrained type of financial market participant – e.g. they are in no way comparable to, say, a director or senior manager of an issuer.

5.6 Conversely, the prospect of a financial adviser or financial advice representative being "involved" in a contravention is potentially higher than a director or senior manager. This is because, inherently, a financial adviser or financial advice representative is an individual who interfaces more *directly and personally* with an individual customer – making it more likely (for example) that such an individual could be "knowingly concerned in, or party to," a contravention than, say, a senior manager who participates in the due diligence process for producing a product disclosure statement.

5.7 Moreover, while the financial advice duties and Code will (and should still) apply to financial advice representatives, they are not (at least in BNZ's understanding) persons who are meant to be afforded a material amount of discretion in the advice they provide.

5.8 As such, BNZ queries the effect of subjecting those persons to a potentially extremely intimidating liability regime, where the onus should in fact be on BNZ to have effective processes in place to manage and supervise representatives, and the primary liability should rest solely with BNZ. One way to mitigate this may be to provide a defence for financial advice representatives where they have acted in accordance with the processes, controls and limitations (including as set out or covered in any training sessions, internal procedures manuals or policies) of the relevant financial advice provider.

5.9 BNZ acknowledges that the standard for sections 511 and 533 of the FMC Act are high, are require (broadly) knowledge, recklessness, or intent. However, it will need to be a feature of training for financial advice representatives that if, for example, they are reckless as to whether or not a particular disclosure contained a false or misleading statement, they could be criminally liable. Similarly, if they are knowingly involved in a contravention by BNZ (as the financial advice provider) – e.g. if they contributed to BNZ not meeting the standards required by the Code, for example a training obligation – they could have civil liability.

5.10 These are significant consequences, and BNZ has concerns that the nature of the potential liability regime could make certain representatives ultra-cautious, and reluctant to give advice (similar to the existing issue regarding advice on KiwiSaver) which would undermine a key objective of the Bill.

6.0 PART 6

Q16: Does the proposed territorial application of the Act set out above help address misuse of the FSPR? Are there any unintended consequences? How soon after the passing of the Bill should the new territorial application take effect?

6.1 BNZ is in favour of addressing the misuse of the FSPR, and agrees with the proposed territorial amendments. A key focus of the reform should be to ensure that, in respect of services provided into New Zealand, no matter where the relevant service is provided, persons receiving those financial services in New Zealand have some form of protection (or at least access to local dispute resolution schemes). Further, BNZ agrees that financial advisers should be required to register on the FSPR.

Q17: Do you support requiring further information (such as a provider's AML/CFT supervisor) to be contained on the FSPR to help address misuse?

6.2 To the extent that the requirement for further information would in fact address misuse of the FSPR (noting that there is already some misalignment between the FSPR and the AML/CFT Act), BNZ supports this approach.

6.3 As a more general comment, BNZ considers it a worthwhile objective to make the FSPR a more "consumer-focussed" tool, which could allow consumers to make informed decisions about which financial advisers they choose to engage, before approaching those advisers. This could require, for example, more information regarding the nature of services the relevant adviser can provide, any constraints or incentives it has in providing his or her advice and, possibly, notification of any material disciplinary procedures relevant to that adviser. However, BNZ acknowledges that this would be a fundamental shift in approach for the FSPR and, presently, those aspects may be more appropriately addressed through the disclosure regime.

Q18: Do you consider that other measures are required to promote access to redress against registered providers?

6.4 BNZ makes no comment on this matter.

Q19: Do you have any comments on the proposed categories of financial services? If you're a financial service provider, is it clear to you which categories you should register in under the proposed list?

6.5 BNZ is in favour of rationalising the categories so that, for financial service providers, it is more straightforward to register. This will also mean that the register provides more clarity as to the substance of the services that a provider in is fact providing, which is a better outcome for persons using the register. As such, BNZ supports the proposed categories – and is strongly in favour of aligning the services on the FSPR with those in the FSP Act itself, and allowing a provider to register in only the category most relevant to the services it in fact provides (where there are multiple categories for the same service).

Q20: Do you support clarifying that schemes must provide information to the FMA if they believe that a provider may be involved in conduct that constitutes breach of relevant financial markets legislation?

6.6 BNZ does not support this approach. There is a real risk that this would create a default position that any matter referred to a scheme could constitute a breach of the relevant legislation, necessitating notification to the FMA. BNZ does not view this as an appropriate outcome, and believes the current regulatory settings strike the right balance.

Q21: Do you have any other feedback on the drafting of Part 6 of the Bill?

6.7 BNZ makes no comment on this matter.

7.0 SCHEDULE 1

Q22: When should an FMC Act DIMS licence granted to AFAs who provide personalised DIMS expire? For example, should it expire on the date on which the AFA's current authorisation to provide DIMS expires?

7.1 Not applicable to BNZ.

Q23: Do you have any other feedback on the drafting of Schedule 1 of the Bill?

7.2 BNZ makes no comment on this matter, other than that it supports the approach taken in Schedule 1 of the Bill.

8.0 SCHEDULE 2

Q24: Should the FMC Act definition of 'wholesale' be adopted as the definition of wholesale client for the purposes of financial advice? Why or why not?

8.1 Yes. BNZ views it as necessary and desirable to align the categories – meaning that the definition of a "wholesale client" for the purposes of the Bill should be the same as that currently in clause 3(2) of the FMC Act, or the person is an eligible investor. This is for the following principal reasons:

8.1.1 Consistency: From a compliance perspective, it is much more straightforward for providers who also operate in other spheres of the financial services industry to have alignment across the various regulatory regimes.

8.1.2 Policy: This links in with the comments BNZ has made above. BNZ considers that, in particular, the category in clause 3(1)(c) of Schedule 2 of the Bill (that an entity is a wholesale client if it has net assets or turnover over $1 million at the end of its last two accounting periods) is, in today's environment, an unsuitable measure of "wholesale". That category that does not necessarily demonstrate a person (or persons) who are, as a result of meeting the relevant criteria, sufficiently sophisticated to warrant being treated as a wholesale client.

8.1.3 Clarity: Alignment will also produce clarity between the regimes governing product issue and product advice. At the moment, there is significant overlap between the two approaches and this produces uncertainty and confusion. For example:

8.1.3.1 the categories in clause 3(1)(f) and (g) are linked to a product offer by the use of the words "in relation to an offer of financial products" whereas the category in clause 3(1)(e) is not linked to a particular offer of financial products;

8.1.3.2 the specific category in clause 3(1)(h) for persons in relation to a DIMS facility is unnecessary if the person is otherwise qualified as wholesale for all purposes;

as a result, BNZ sees much more logic in a wholesale client being wholesale for all purposes, as long as that client is wholesale under the existing tests in Schedule 1.

8.1.4 For certification: At present, wholesale investor certificates have to cater for the dual product offering and product advice regimes, as described above. This results in lengthy and potentially confusing certificates, which are also difficult to understand and implement for a customer. Alignment would resolve this issue.

Q25: We understand that some lenders consider that they may be subject to the financial adviser regime because their interactions with customers during execution-only transactions could be seen to include financial advice. Does the proposed clarification in relation to execution-only services help to address this issue?

8.2 BNZ is in favour of clarification but otherwise makes no comment on this matter.

Q26: Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?

8.3 BNZ makes no comment on this matter.

Q27: Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?

8.4 MBIE should give consideration to requiring at least two members of the code committee to be experienced in retail banking (and the appropriate persons could be recommended by the Chief Executive Officer of the New Zealand Bankers' Association). This is because the retail banking sector is well-positioned to give useful feedback on how the new regime will affect customers in practice in light of the banking industry's key product distribution role in New Zealand, and acknowledging that a substantial proportion of financial advice will likely continue to be given within the retail banking context.

Q28: Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?

8.5 BNZ supports the impact analysis requirement, but submits that an aspect of that analysis should specifically consider the "client experience" to ensure that, from a practical perspective, the Code is achieving the desired outcome (and will not detract from the key objectives of the Bill).

Q29: Does the wording of the required minimum standards of competence knowledge and skill which 'apply in respect of different types of advice, financial advice products or other circumstances' adequately capture the circumstances in which additional and different standards may be required?

8.6 Yes. And BNZ agrees with an approach which will prescribe differing levels of competency according to the relevant circumstances. However, as an overriding comment, the Code should not alter the education and competency requirements for AFAs. As BNZ notes elsewhere in these submissions, if the educational standards for AFAs are raised further, this may mean that experienced AFAs choose to leave the industry, which could result in consumers having *less* access to good quality advice. Such an outcome would compromise a key objective of the Bill.

8.7 More generally, while a focus of the Bill has been to move away from the category 1 and category 2 classifications (and BNZ supports that proposal), BNZ agrees that there will need to be differing competency levels prescribed within the Code, in order to ensure that advisers can qualify up to the level required in order to perform their role, rather than require all advisers to meet the same competency level.

8.8 There are three key reasons for this:

8.8.1 Access to advice: Customers need to be able to access good quality advice easily. The corollary of this is that there needs to be a large amount of people who have met the quality standards necessary to provide that advice. However, not everyone needs expert advice, and it would be counterproductive if all advisers were required to meet the highest (or higher) standards of competency (as the likelihood is that people simply would not want or be able to meet those standards, nor would employers require (or be prepared to fund) a disproportionately large group of highly qualified advisers, thus limiting the pool of available advisers).

As such, it is important that, for more straightforward products, or in more straightforward circumstances, the competency standards are adjusted accordingly. This will then allow a

greater range of people to in fact provide financial advice, which will result in more customers having access to that advice.

8.8.2 Primacy of financial advisers: Similarly, there should be a clear demarcation between a financial adviser (who, BNZ understands, will be akin (in competency requirements at least) to an AFA) and financial advice representatives.

This will only be achieved by preserving the "brand" of AFAs (and, going forward, "financial advisers") which is important to AFAs and is important to providers who employ AFAs. As such, tailoring the competency standards to clearly differentiate between classes of advisers, and to effectively maintain those different classes, is important.

8.9 In addition, the Code should recognise that the vast majority of financial advice will be provided to bank retail customers and that, as a highly regulated industry, banks already have considerable expertise in training staff to the required levels of competency. As such, in respect of the banking industry in particular, the Code should recognise the existing expertise of bank financial advice providers.

8.10 Lastly, if consumer credit contracts will not be excluded from the definition of a "financial advice product" (and it is BNZ's submission that they should be), at the very least the Code must be consistent with the CCCFA Regime, such that it is possible for persons who both provide, and provide advice on, consumer credit contracts are able to practically comply with the dual regimes.

Q30: Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?

8.11 No. In BNZ's view, the existing dispute resolution regime already provides a sufficient regime for addressing breaches, outside a formal court or disciplinary process. Banks are already subject to the Banking Ombudsman dispute resolution regime, which has been working very well for many years. Adding another tier of disciplinary action will only create additional and unnecessary complexity.

8.12 In addition, importantly in this context financial advice providers have "primary" civil liability for any breaches - which exposes providers to investor and/or FMA enforced civil and potentially criminal liability for contravention. BNZ considers that this liability regime, together with the (more accessible) dispute resolution mechanism, is an adequate enforcement model against financial advice providers.

Q31: If the jurisdiction of the Financial Advisers Disciplinary Committee is extended to cover financial advice providers, what should be the maximum fine it can impose on financial advice providers?

8.13 Not applicable, see paragraphs 8.11 and 8.12 above.

Q32: Do you have any other feedback on the drafting of Schedule 2 of the Bill?

8.14 BNZ has no further comments on the drafting of Schedule 2 of the Bill.

9.0 TRANSITIONAL ARRANGEMENTS

Q33: Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?

Robo-advice

9.1 An overriding theme of this submission is that financial technology, such as robo-advice, will inevitably become a key feature of the financial advisory landscape going forward - and that that is a good thing and should happen as soon as possible (subject to BNZ's comments below). It is one of the key ways in which a fundamental purpose of the Bill can be achieved: making it easier for consumers to access good quality financial advice. It will enable anywhere, anytime access to quality financial advice at considerably reduced risk and cost. As consumers increasingly look toward online platforms and distribution channels for information, it is paramount that the financial advisory industry can also adapt to that model.

9.2 Against that background, BNZ is in favour of ensuring that the quality of robo-advice available in the market, particularly in the early stages, is robust, reliable and up-to-date. As such, it is paramount

that a precedent of high-quality and effective advice is set for robo-advice from the outset. Otherwise, there is a risk that the reputation of, and opportunities for, robo-advice could be compromised. This would be a highly undesirable outcome, as it could create mistrust in what should be a critically important development for New Zealand's financial advisory industry.

9.3 To the extent that a financial advice provider can demonstrate to the FMA that it has adequate processes, controls and testing in place to ensure that it can deliver a robust, compliant and accurate robo-advice platform to the market which complies with the Code, there should be some flexibility in order to allow those providers to introduce robo-advice at an earlier stage (prior to obtaining a full licence). This could be through an amendment to the relevant provider's transitional licence (to allow for this additional service), or take the form of an interim amendment to the FA Act, or a discrete exemption from the FMA (which may also require an interim amendment to the FA Act).

9.4 However, in every case, the primary focus must be on ensuring that:

9.4.1 relevant providers have a satisfactory framework for delivering effective, accurate and consumer-focussed robo-advice platforms to the market (which may include ensuring that, for example, there is independent "proofs" of models and algorithms, and the provider has processes in place for continued assurance testing); and

9.4.2 the process for and conditions to allowing robo-advice products to come to market earlier must be transparent, so that all industry participants are aware of, and held subject to, the same standards.

10.0 PROPOSED TRANSITIONAL ARRANGEMENTS

Q34: Do you support the idea of a staged transition? Why or why not?

10.1 Yes, given the experience with the FA Act and the compressed timeline that was available to comply with that, BNZ is strongly in support of a staged transition which affords enough time for financial advice providers and representatives, and financial advisers, to become compliant with the new regime. However, the transitional regime needs to be designed and implemented in a way that does not impede innovation (i.e. applicants with novel or innovative ideas should be encouraged and not distinguished from other applicants simply because what they are doing is "new").

Q35: Is six months from the approval of the Code of Conduct sufficient time to enable existing industry participants to shift to a transitional licence?

10.2 Yes, on the understanding that the process for obtaining a transitional licence will be very straightforward and that the aspects of the Code which will apply to transitional licence holders will not be onerous to comply with in practice (although it is difficult to submit on this point without visibility of the Code). In BNZ's view, for an entity which is already a QFE, if the QFE can confirm that it is not in material non-compliance with the terms of its registration, that should be sufficient to obtain a transitional licence.

Q36: Do you perceive any issues or risks with the safe harbour proposal?

10.3 BNZ is in favour of the safe harbour proposals and considers it necessary that existing advisers have adequate time to become compliant with the new regime (while still being able to perform their roles in the meantime).

Q37: Do you think there are any elements of the new regime that should or shouldn't take effect with transitional licences? What are these and why?

10.4 See BNZ's submissions in paragraphs 3.33 to 3.37 and 9.1 and 9.2 above.

Q38: Is two and a half years from approval of the Code of Conduct sufficient time to enable industry participants to become fully licensed and to meet any new competency standards?

10.5 It is difficult to submit on this fully without understanding the scope of the new licensing / qualification and Code requirements. However, based on BNZ's understanding of the requirements, two and a half years sounds sufficient in principle. One aspect it will be important to ensure in the context of transition timing is that the Code does not require existing AFAs to re-qualify in order to

become financial advisers. This would be unfortunate from a timing perspective, but more relevantly it would be unfair to materially "shift the goalposts" for a group of people who have already invested a significant amount of time and effort into meeting the required qualifications to be experts in their area.

11.0 POSSIBLE COMPLEMENTARY OPTIONS

Q39: Do you support the option of AFAs being exempt from complying with the competence, knowledge and skill standards for a limited period of time? Why or why not?

11.1 Yes. Further, BNZ queries the extent of any additional qualifications that will be required for AFAs. Similar to BNZ's comments in paragraph 10.5 above, AFAs should not be required to re-qualify, given the standards to which they are already held. As such, the "safe harbour" for AFAs should be more of a procedural than a substantive concept.

11.2 AFAs were required to undergo a rigorous authorisation process six years ago, and recently were required to comply with updated Code Standards which were issued in December 2016. To change the standard again would be undesirable and unnecessary. Further, there does not seem to be a pressing concern regarding AFA qualifications – rather, the concern appears primarily to be with a lack of consumers having access to good quality advice in general. BNZ is strongly in favour of a permanent exemption from requiring AFAs to undertake further studies, with the requirement simply being for existing AFAs to continue to complete annual continuous professional development hours.

Q40: Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?

11.3 As above, BNZ is in support of AFAs not being subjected to a materially increased compliance requirement. As such, the length of any "exemption" is less relevant than the underlying requirements for re-qualification.

Q41: Is there a risk that this exemption could create confusion amongst industry and for consumers about what standards of competence, knowledge and skill are required?

11.4 On the basis that the "new" standards will be materially similar to the existing standards, then no. However, if MBIE is proposing that AFAs will need to materially re-qualify, BNZ submits that that is an undesirable approach and that there inevitably will be confusion amongst consumers, as one "financial adviser" may be operating to an entirely different level of competency than another "financial adviser", and there will be no meaningful way for consumers to differentiate between the two.

Q42: If you support this option do you think it should be set in legislation or something for the Code Working Group to consider as an option as it prepares the Code of Conduct?

11.5 As a starting point, BNZ strongly submits that AFAs should not be required to re-qualify under the new regime – see in particular paragraph 11.2 above. However, to the extent there are technical and procedural matters which require grandfathering, those should be considered by the Code Working Group, for inclusion in the Code (rather than legislation).

Q43: Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?

11.6 No. The process should be transparent. At the outset, AFAs should not be required to substantially re-qualify. If there are technical differences between the qualifications necessary under the existing and new Codes, there should be either a cross-accreditation process, or the new requirements should be easy to achieve (in light of the AFA's existing qualifications). BNZ submits that manual assessment processes will only cause more confusion for the industry and consumers.

11.7 However, while AFAs have already undergone a rigorous assessment process, this is not the case for RFAs. Accordingly, RFAs should be required to complete a competency assessment if they are to be exempted from complying with the competency standard – and see more generally BNZ's submissions in paragraphs 1.8 and 1.9 regarding the transition of RFAs specifically.

Q44: Is it appropriate for the competency assessment process to be limited to existing AFAs and RFAs with 10 or more years' experience? If not, what do you suggest?

11.8 See comments above, in particular paragraphs 11.1 and 11.2. Existing AFAs should have their AFA status fully recognised under the new regime, irrespective of how long the relevant AFA has been in practice.

Q45: If you support this option do you think it should be set in legislation or something for the Code Working Group to consider as an option as it prepares the Code of Conduct?

11.9 See comments above.

12.0 PHASED APPROACH TO LICENSING

Q46: What would be the costs and benefits of a phased approach to licensing?

12.1 BNZ has no particular comment on the costs and benefits of a phased approach to licensing, but sees significant benefits in grandfathering existing QFE licences into the new regime, with little additional licensing processes or procedures required. Further, as mentioned above, it is important that a phased approach does not hamper innovation.

Q47: Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?

12.2 BNZ makes no comment on this matter.

Q48: Do you have any other comments or suggestions regarding the proposed transitional arrangements?

12.3 BNZ's submissions on the proposed transitional arrangements are set out above.