CRAIGS
INVESTMENT PARTNERS

Head Office
Craigs Investment Partners Limited
Craigs Investment Partners House
158 Cameron Road
PO Box 13155, Tauranga 3141
New Zealand
P. +64 7 577 6049
0800 272 442
F. +64 7 578 3463
headoffice@craigsip.com
craigsip.com

20 March 2017

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

By email: faareview@mbie.govt.nz

To whom it may concern,

Review of the Financial Advisers Act 2008

Please find attached our submission to the exposure draft of the Bill, due by 5pm on 31 March 2017.

We summarise our key comments in the executive summary, and provide short submission comments under each question listed in the submission template.

Any questions regarding our submission can be directed to Cameron Watson or David Sawtell. Their contact details are provided below.

Yours faithfully
Craigs Investment Partners Limited

David Sawtell
Head of Advisory
REDACTED

Cameron Watson
Quality of Advice Manager
REDACTED

CRAIGS
INVESTMENT PARTNERS

Craigs Investment Partners: Submission, Consultation Paper: Draft Financial Services Legislation Amendment Bill

Executive Summary - Key submission points

1. **MBIE policy team** - We commend the MBIE policy team, both for their high level of industry engagement and for the content and principles contained in the draft Bill. We believe the revised Act will provide a regulatory framework that enhances accessibility to advice yet recognises the need for professional standards in conduct, service and competence. It also provides enough flexibility to allow advisers and advice firms to personalise service and develop innovative solutions for clients. It is a good platform for the future professional development of the financial advice sector.

2. **Level playing field a step forward** – The new Act requires all who provide regulated financial advice to put the interests of the client first and to only provide advice where competent to do so. All financial advice will also be subject to the Code of Conduct. This removes the current situation where AFAs face a higher standard of regulation than other advisers. We welcome these changes.

3. **Enabling Robo and simplifying advice** – Allowing advice to be delivered by a firm, which enables 'robo' advice, is a positive step, as is the decision to remove the class and personalised distinction.

4. **Merging the FAA and FMCA** – We believe it is sensible decision to merge the FAA into the FMCA. However, we note the FMCA is a long and complex statute and the proposed amendment legislation could be difficult for the industry to navigate. It would be helpful if all definitions were standardised and key information on particular services, such as DIMS were in one place. The complexity of the FMCA underscores the importance of the Code of Conduct as a primary regulatory guideline for advisers.

5. **Adviser naming conventions** – To distinguish between registered advisers and those who do not have personal responsibility under the Act, it is proposed to use the terms 'Financial Adviser' and 'Financial Advice Representative'. We believe these terms could cause confusion with consumers as they do not clearly elucidate the difference between the two. To solve this, we suggest the new Act continue to use the term Authorised Financial Adviser (AFA) to describe registered advisers. This would provide an extra step of credibility and differentiation between advisers and representatives, which we believe is warranted. It would also mean one less change, and help solidify the term AFA, which industry has grown accustomed to, and is increasingly recognised by consumers.

6. **Civil liability for financial advisers** – The draft Bill provides dual accountability for advice, against both a financial adviser and their financial advise provider. We understand the form of any liability is a disciplinary process for financial advisers and civil liability for a financial advice provider. We believe this is appropriate. We understand imposing civil liability on financial advisers is being considered. A possible unintended consequence of this could be a decline in the number of advisers. Many may decide, out of concern about this liability, to become representatives, who will not face civil liability.

7. **Duty to put client's interests first, Section 431H (1)** – This is a foundation principle of the Code and one which advisers are expected to uphold at all times. The very wording of this duty, whether in the Act or Code, infers that an adviser must put a client's interests before their own. Indeed, rule 9.1.1(d) of the NZX Participant Rules (CIP is an NZX Firm) states exactly that; "Each firm and adviser must at all times place the interests of its clients above its own interests". We note the Code Committee's concerns in respect to the wording of Section 431H, and agree that it would be unfortunate if the Act narrowed the Code Committee's scope. However, we agree with the underlying principle of Section 431H.

8. **Duty to put client's interests first when giving advice or 'doing anything in relation to giving of the advice', Section 431H (2)** – We presume including the wording 'doing anything in relation to giving of the advice' is intended to protect consumers against the situation where a consumer believes they are receiving advice, but the firm argues they are only providing information. If so, this is an important protection for consumers. We do also note that the scope of "doing anything in relation to the giving of advice" is unclear and potentially far reaching and may lead to uncertainty and unintended consequences. (Submission template question 5)

9. **Wholesale client's disclosure statement** – We agree with the proposal that wholesale clients must be provided with a disclosure statement. This will be an important protection against clients being classified as wholesale when they should more appropriately be classified as retail. As long as the disclosure process is simple, we do not see it being a problem from an administrative perspective, for 'genuinely' wholesale clients.

10. **Wholesale clients, new duty** – Those providing advice to wholesale clients have a new obligation to place client's interests first. We recommend continued engagement with wholesale specialists to ensure this is appropriate and no unintended problems arise from this new obligation.

11. **Definition of wholesale, FMCA and FAA** – We believe it would be helpful to bring together the FMCA and FAA definitions of wholesale clients, as long as the key attributes of each are maintained.

12. **Exclusions from regulated financial advice** – The draft Bill continues to provide a carve out for a number of professionals providing financial advice, when this advice is given as an ancillary part of their business. We continue to see a number of professionals increasingly providing, in our view, financial advice and, in some instances, products as a key service. This raises issues of competence and accountability.

13. **Duty to meet standards of competence (Section 431F)** - We believe this is a critical issue to protect the interests of consumers. In our view, the success of these reforms will arguably largely hang on how well this duty is defined and enforced, especially in respect to Representatives. Even when providing advice which may initially be straightforward, perhaps on KiwiSaver, these staff will need enough competence to be able to recognise when KiwiSaver would be inappropriate for a consumer, and to identify other issues that need considering, and when in fact a consumer needs more comprehensive advice from an AFA. They should also be able to recognise when they and their firm cannot provide the advice or service a consumer needs or wants; and they must be compelled under the Act to advise the client as such (which they are under section 431H).

14. **Competence requirements for AFAs** – We look forward to gaining more clarity on the specific competence requirements for AFAs through the Code redrafting process. Having this available as soon as possible would remove an area of uncertainty, and allow us to address any additional training requirements with our advisers as needed.

15. **Disclosure statements** – We understand the form and delivery process for the new disclosure statements will be undertaken through another consultation process as part of developing the regulations. We see this as another key area and look forward to engaging in this process. While standardisation is desirable, there needs to be consideration of the different types of advice being provided, from insurance to investment, and to allow enough flexibility to ensure the most appropriate information for each is provided to consumers.

16. **The term broker** – We note the term 'broker' is used through the draft Bill and FMCA when we believe the industry would use the term 'custodian' (i.e.to describe a firm that holds funds on behalf of a consumer). The term broker is widely used in the finance sector to describe those who buy and sell a financial product, e.g. insurance broker and share broker. We understand the term is used in the FMCA to describe those who receipt client monies on behalf of others. Perhaps the term 'custodian' could be a better term to use in the FMCA than 'broker'.

17. **Co-mingling of client and firm money** – As merging the FAA into the FMA requires changes to the FMCA, it is an opportune time to address the existing problem with the co-mingling rules in the FMCA. At present, NZX Firms are operating on a five-year exemption provided by the FMA. The FMA recognises it will be impossible for NZX firms to ever meet these requirements. To avoid the reliance on rolling five-year exemptions, and remove the uncertainty that these exemptions be discontinued at some point, we believe the Act should be re-worded now.

18. **Transition timetable** – We are comfortable with the transition timetable. Some timeframes are clearly ambitious, but we presume any issues can be managed as they arise. The re-write of the Code is a first priority.

CRAIGS INVESTMENT PARTNERS

Part 1 of the Bill amends the definitions in the FMC Act

1. If an offer is 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?
   No submission comment.

2. 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?
   Bo submission comment.

3. Do you have any other feedback on the drafting of Part 1 of the Bill?
   No

Part 2 of the Bill sets out licensing requirements

4. Do you have any feedback on the drafting of Part 2 of the Bill?
   We agree with the structure of the licencing requirements.

Part 3 of the Bill sets out additional regulation of financial advice

5. 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?
   See executive summary point 8
   We presume including the wording 'doing anything in relation to giving of the advice' is intended to protect consumers against the situation where a consumer believes they are receiving advice, but the firm argues they are only providing information. If so, this is an important protection for consumers.
   We do also note that the scope of 'doing anything in relation to the giving of advice' is unclear and potentially far reaching and may lead to uncertainty and unintended consequences.
6. 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?
   We believe this is a positive step which ensures remuneration is two-dimensional in that it takes into account both commercial performance and the quality of advice provided to customers. We agree with the proposed definition of 'inappropriate', as being anything that leads to behaviour that contravenes the conduct obligations outlined in the key advice sections.

7. 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?

See executive summary point 10.
We recommend continued engagement with wholesale specialists to ensure no unintended problems. We do not think it is appropriate to extend section 431H to investment banking divisions as there are accepted conflict management practices in place to manage conflicts in this sector. We are happy to discuss this further.

8. Do you have any other feedback on the drafting in Part 3 of the Bill?
   We believe it would be appropriate for providers to have a defence to section 431N if they took reasonable and proper to steps to ensure its financial advisers complied with section 431F to 431M.

Part 4 of the Bill sets out brokers' disclosure and conduct obligations

9. What would be the implications of removing the 'offering' concept from the definition of a broker?
   No submission comment.

10. 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?
    See executive summary point 16.
    We note the term 'broker' is used through the draft Bill and FMCA when we believe the industry would use the term 'custodian' (i.e.to describe a firm that holds funds on behalf of a consumer). The term broker is widely used in the finance sector to describe those who buy and sell a financial product, e.g. insurance broker and share broker. We understand the term is used in the FMCA to describe those who receipt client monies on behalf of others. Perhaps the term 'custodian' could be a better term to use in the FMCA than 'broker'.

Part 5 of the Bill makes miscellaneous amendments to the FMC Act

11. 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?
    See executive summary point 6.
    The draft Bill provides dual accountability for advice, against both a financial adviser and their financial advise provider. We understand the form of any liability is a disciplinary process for financial advisers and civil liability for a financial advice provider. We believe this is appropriate. We understand imposing civil liability on financial advisers is being considered. A possible unintended consequence of this could be a decline in the number of advisers. Many may decide, out of concern about this liability, to become representatives, who will not face civil liability.

12. 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?
    Yes we think this is appropriate and reasonable.

13. 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?
    Yes. Allowing the FMA the power to respond if they discover a provider is purposely avoiding the Act by allowing them to deem a service financial advice when it is advice in substance if not form.

14. Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?
    Yes. We believe it should be workable.

15. Do you have any other feedback on the drafting of Part 5 of the Bill?
    No.

Part 6 of the Bill amends the FSP Act

16. 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?
    Yes this helps to address misuse.

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

18. Do you consider that other measures are required to promote access to redress against registered providers?
    No submission comment.

19. 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?
    We support the amendment to the list of financial services. We would welcome guidelines (like the example given at the end of page 29) to help ensure consistent application across the sector.

20. 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?
    Yes.

21. Do you have any other feedback on the drafting of Part 6 of the Bill?
    No.

Schedule 1 of the Bill sets out transitional provisions relating to DIMS and the code of conduct

22. 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?
    No submission comment.

23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?
    No submission comment.

Schedule 2 of the Bill creates a new schedule to the FMC Act with detail about the regulation of financial advice

24. 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?
    This would simplify this process for consumers. See executive summary point 11. We believe it would be helpful to bring together the FMCA and FAA definitions of wholesale clients, as long as the key attributes of each are maintained.
25. 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?
    No submission comment.

26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?
    No submission comment.

27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?
    No. Appear appropriate in our view.

28. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?
    Yes.

29. 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?
    Yes it is clear, in our view.

30. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?
    Yes, it would be an important step to protect dual accountability. Providers essentially become advisers as they can deliver advice (via Robo), and

therefore must be held to account for this advice. The interaction with other regulatory entities should be considered, such as the NZX.

31. 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?
    The level of fines should be meaningful. Section 9 of the NZX Discipline Rules may provide a useful reference point.

32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?
    No submission comment.

About transitional arrangements

33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?
    No. We support the transitional objectives.

Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?
    Yes.

35. Is six months from the approval of the Code of Conduct sufficient time to enable existing industry participants to shift to a transitional licence?
    It will depend on potential system, process changes required to obtain a full licence. We hope more time will be offered if required.

36. Do you perceive any issues or risks with the safe harbour proposal?
    No.

37. 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?
    No.

38. 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?
    It is difficult to provide feedback on this question without knowing what the new competency standards will be. See executive summary point 14.
    We look forward to gaining more clarity on the specific competence requirements for AFAs through the Code redrafting process. Having this available as soon as possible would remove an area of uncertainty, and allow us to address any additional training requirements with our advisers as needed.

Possible complementary options

39. 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?
    See our answer to Q38. It is difficult to provide feedback on any complementary options without knowing what the competency standards will be.

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
    This will depend on the level of any new proposed qualification.

41. 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?
    Yes. Avoiding the need for an exemption would be preferable, which could be achieved if the qualification requirements are outlined as soon as possible, allowing adequate time for advisers to obtain these qualifications before any exemption or 'grandfathering' is required.

42. 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?
    We believe it best sits with the Code Working Group.

43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
    No. This would impose additional costs and raises the prospect of inconsistencies in standards. AFAs and RFAs should be required to obtain the minimum qualifications.

44. 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?
    No submission comment.

45. 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?
    No submission comment.

NZX Firm

Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?
    A phased approach would appear the most workable approach to manage volumes.

47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?
    No submission comment.

48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?
    No submission comment.

Demographics

49. Name:
    Craigs Investment Partners

50. Contact details:
    Cameron Watson
    REDACTED

51. Are you providing this submission:
    ☐As an individual
    ☒On behalf of an organisation

    Craigs Investment Partners is one of New Zealand's largest investment advisory and management firms, offering bespoke investment solutions to private, corporate and institutional clients. We have 17 offices across New Zealand, 140 advisers (all AFAs, or studying towards this), 430 staff, 50,000 clients and over $12 billion of client funds under management.

52. Please select if your submission contains confidential information:

☐I would like my submission (or specified parts of my submission) to be kept confidential, and attach my reasons for this for consideration by MBIE.

Reason: Enter text here.