

# How to have your say

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## Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by **5pm on Friday 31 March 2017**.

Your submission may respond to any or all of these questions. We also encourage your input on any other relevant work. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please include your name, or the name of your organisation, and contact details. You can make your submission:

- By attaching your submission as a Microsoft Word attachment and sending to [faareview@mbie.govt.nz](mailto:faareview@mbie.govt.nz).
- By mailing your submission to:  
Financial Markets Policy  
Building, Resources and Markets  
Ministry of Business, Innovation & Employment  
PO Box 1473  
Wellington 6140  
New Zealand

Please direct any questions that you have in relation to the submissions process to:  
[faareview@mbie.govt.nz](mailto:faareview@mbie.govt.nz).

## Use of information

The information provided in submissions will be used to inform the development of the Financial Services Legislation Amendment Bill, decisions in relation to the outstanding policy matters, and advice to Ministers.

We may contact submitters directly if we require clarification of any matters in submissions.

Except for material that may be defamatory, MBIE intends to upload PDF copies of submissions received to MBIE's website at [www.mbie.govt.nz](http://www.mbie.govt.nz). MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

## Release of information

Submissions are also subject to the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

If your submission contains any confidential information, please indicate this on the front of the submission. Any confidential information should be clearly marked within the text. If you wish to provide a submission containing confidential information, please provide a separate version excluding the relevant information for publication on our website.

## Private information

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### 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?

Enter text here.

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?

Enter text here.

3. Do you have any other feedback on the drafting of Part 1 of the Bill?

We submit that the terms "financial advice provider", "financial advice representative" and "financial adviser" be reconsidered. We find the terminology confusing and unlikely to reflect the true nature of the service that the individuals/entity provide (depending on how regulations seek to limit the type of service each of those persons can provide). In this regard we submit that MBIE should take into account the feedback and suggestions on the terminology provided by advice providers in the market. The definition of financial advice

provider implies that a natural person could be licensed as a financial advice provider, however it is clear from the commentary and consultation document that licensing is to occur at firm level rather than by individuals. The fact that a financial advice provider can be (by way of example) a bank or a sole trader under a limited liability company creates confusion. While potentially a large corporate entity should be responsible for its group of advisers, the same cannot be said for a sole trader where the financial advice provider is a limited liability company.

Clarity is required now as to how the service provided by a financial adviser or financial advice representatives may be restricted to enable adviser and financial advice providers to consider the appropriate structure of their business moving forward.

There is also a need to ensure the definition of financial advice provider does not include a company engaging a person to distribute their product only (and not give advice on their behalf). Will detail be included in regulation or will it be left up to the financial advice provider?

## Part 2 of the Bill sets out licensing requirements

### 4. Do you have any feedback on the drafting of Part 2 of the Bill?

Part 2 provides that if a service is provided to any retail client then the service is a retail service and a financial advice provider would need to be licensed. Licensee obligations and duties under the Bill would then apply to the service as a whole (whether provided to a wholesale or retail client).

The consequence is that as soon as a firm provides advice to one retail client, that firm must be licensed and all licence conditions will apply to its wholesale clients as well as its retail clients. This approach differs from all other licensing under the FMC regime where the wholesale service is not required to be licensed e.g. fund managers are not required to be licensed in respect of their wholesale offerings and their wholesale business is not factored into any conditions of licensing, levies etc. We consider there should be a consistent approach taken within the legislation, with entities able to operate a wholesale advisory service separately from any retail service they provide.

## 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?

We support the broader duty but there needs to be a clear scope of when that duty begins and when it ends. The example provided in the consultation paper of putting client's interests first by determining whether to provide information only or advice might not work in situations where information only is being provided on purpose and therefore the duty under the Bill is not covered. Clear guidance is required as to exactly what this duty means.

We also submit that limb (b) of the duty which refers to "the interests of any other person" is too broad. This should be limited to related parties.

Clarity is required as to how tied advisers will deal with this duty. Will appropriate disclosure be sufficient? In our view an adviser obligation to consider the client's best interests is more appropriate.

We do not think this duty should be applied to wholesale clients who are not individuals.

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?

Enter text here.

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?

Enter text here.

8. Do you have any other feedback on the drafting in Part 3 of the Bill?

The difficulty we are having with the overall treatment of wholesale and retail under the Bill is that financial advice to a wholesale client is 'regulated' under the proposed new provisions and most conduct obligations and duties apply to both retail and wholesale (with the exception of a few which only apply to a retail service). It is unclear as to what obligations will apply and what obligations will not in different circumstances. The layout of the duties in the Bill needs to be clearer.

The concept of 'regulated offer' and 'regulated product' in part 3 of the Financial Markets Conduct Act 2013 (FMC Act) differ from the concept of 'regulated advice' in that it specifically carves out wholesale investors who are excluded under Schedule 1 of the FMC Act.

We submit that there should be alignment of the 'regulated advice' and 'regulated offer' concepts to avoid confusion particularly with respect to providing advice to wholesale clients. In our view it would be more appropriate for wholesale services not to be regulated on the condition that certain duties, specifically tailored for advice to wholesale clients, are complied with.

Another related but separate issue is that once a service is provided to a retail client, the service is a retail service. Applying this to a financial advice firm that provides advice to wholesale and retail clients, we understand the intention is that unless the wholesale and retail services are clearly delineated, then the retail service duties will apply to wholesale clients also. What exactly this will mean will not be known until the Code and Regulations are drafted. However, if the implications are significant, it is also not clear how the services can be delineated in a small one person business where the same person deals with both wholesale and retail clients. In larger institutions such as banks, there are teams and business units that only deal with wholesale, so the separate offerings are far more apparent.

It is our view that the treatment of wholesale clients should be consistently applied across the FMC Act.

It is also unclear in the Bill who can provide regulated advice. There is no specific section setting this out. We can deduce from the definitions and commentary that only financial advice providers, financial advice representatives and financial advisers will be able to, but we suggest that this be clarified in the legislation.

#### **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?

Enter text here.

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?

### **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?  
Enter text here.
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?  
Enter text here.
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?  
Enter text here.
14. Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?  
Enter text here.
15. Do you have any other feedback on the drafting of Part 5 of the Bill?  
Enter text here.

### **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?  
Enter text here.
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?  
Enter text here.
18. Do you consider that other measures are required to promote access to redress against registered providers?  
Enter text here.
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?  
Enter text here.
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?

Enter text here.

21. Do you have any other feedback on the drafting of Part 6 of the Bill?

Enter text here.

### **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?

Enter text here.

23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?

Enter text here.

### **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?

Regardless of whether the FMC Act definition of 'wholesale' is adopted or not, we submit having wholesale concepts in different parts of the FMC Act will be confusing. We suggest the definition should be in one place (including the definition for DIMS), and if some parts of the definition do not apply for either the FMC Act, the financial adviser provisions or DIMS, this can be expressly stated in a subsection.

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?

Enter text here.

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

Enter text here.

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

Enter text here.

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

Enter text here.

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?

Enter text here.

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

Enter text here.

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?

Enter text here.

32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?

Enter text here.

### About transitional arrangements

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

Enter text here.

### Proposed transitional arrangements

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

Enter text here.

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?

Enter text here.

36. Do you perceive any issues or risks with the safe harbour proposal?

Enter text here.

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?

Enter text here.

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?

Enter text here.

### 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?

Enter text here.

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?  
Enter text here.
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?  
Enter text here.
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?  
Enter text here.
43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?  
Enter text here.
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?  
Enter text here.
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?  
Enter text here.

### Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?  
Enter text here.
47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?  
Enter text here.
48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?  
The proposed timing means that robo-advice will not be able to be provided until the Bill is passed into legislation and a relevant financial advice provider has obtained their full licence. We submit that FMA, MBIE and PCO should work together to enable the FMA to use its existing class exemption powers under the FAA to facilitate the earlier provision of personalised automated investment advice. One consideration while we wait for legislation could be to allow those who are licensed and monitored in another jurisdiction (such as Australia) to provide robo advice in New Zealand subject to complying with Australian requirements.

### Demographics

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51. Are you providing this submission:

- As an individual
- On behalf of an organisation

DLA Piper New Zealand is a global law firm with a national financial services practice in New Zealand. The Financial Services team advises clients on compliance with financial services legislation including the Financial Advisers Act 2008 and the Financial Markets Conduct Act 2013.

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.