How to have your say

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***.
- 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***.

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. 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.

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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?
   The Financial Dispute Resolution Service (FDRS) has no specific feedback on this and we have not received any feedback from our members on this point. However, it is worth noting that retaining this exception would seem to be in conflict with the overall proposal to streamline how financial services and advice are provided in New Zealand and by whom.

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?
   FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

3. Do you have any other feedback on the drafting of Part 1 of the Bill?
   FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

Part 2 of the Bill sets out licensing requirements

4. Do you have any feedback on the drafting of Part 2 of the Bill?
   FDRS has no specific feedback on this. Our members have expressed concern about how licensing will occur and how the FMA will make determinations on the kinds of advice that can be given (assuming that this becomes as aspect of the licensing requirements). The general feeling from our members who provided feedback on this is that the FMA is currently under-resourced and that the level of discretion inherent in determining what kind of advice could be given (as an example) would require itself a substantial array of processes and policies for making and reviewing these determinations.

   Further feedback on the licensing requirements generally is around licencing for business groups. We understand that this would likely work with the parent organisation holding the license and operating through subsidiaries and associated entities (as set out in the current FMC Act, s6 and s12). However, where the arrangement doesn't involve this kind of ownership & control structure but a looser grouping through operating agreements and IP sharing etc, the legislation as currently drafted doesn't address the issue.

   Finally, please see our response to question 19 for concerns raised about managed investment schemes and existing property syndicates.

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?
   FDRS has no specific feedback on this point. The FDRS members who have provided feedback on this point have expressed that this is already a feature of their business practice and do not feel that codification of this requirement would change how they interact with or advise their clients and customers.

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?
   FDRS has no specific feedback on this point and our members have not provided any feedback on this point.

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?
   FDRS has no specific feedback on this point and our members have not provided any feedback on this point. However, please see our response to question 24, in terms of our submissions on the definition of a wholesale client.

8. Do you have any other feedback on the drafting in Part 3 of the Bill?
   FDRS has no specific feedback on this point and our members have not provided any feedback on this point. However, please see our response to question 19 for concerns raised about managed investment schemes and existing property syndicates.

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?
   FDRS has no specific feedback on this point and our members have not provided any feedback

on this point.

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?
FDRS has no specific feedback on this point and our members have not provided any feedback on this point.

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?
FDRS has no specific feedback on this point. Some of FDRS's members have expressed concern over the criteria and process for how this would work.

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?
FDRS has no specific feedback on this point. Of the FDRS members who provided feedback on this point, they believe that financial advice providers should be allowed to show, as a mitigating factor for limiting liability, that they have met their obligations. No feedback was provided about whether this should be an absolute defence and FDRS does not make submissions on that point.

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?
FDRS believes that this is an appropriate power. In a related topic on financial service providers generally, some of FDRS's members have expressed concern that they are incidental financial service providers, which then subjects them to further compliance. For examples of concerns raised by our members on this point, please see our response to question 19.

14. Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?
FDRS has no specific feedback on this point and our members have not provided any feedback on this point.

15. Do you have any other feedback on the drafting of Part 5 of the Bill?
FDRS has no specific feedback on this point and our members have not provided any feedback on this point.

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?
FDRS has a number of submissions to make on this point. FDRS does not believe that the current or the proposed territorial application of the Act will adequately assist with addressing misuse of the FSPR. Specifically, in terms of business activities, the "promotion" test is not enough to accurate determine a financial service provider's presence in New Zealand. We believe that the following criteria as a whole should be considered when determining whether a financial service provider is providing a service in New Zealand: (1) the nature of the service

provided; (2) business activity within New Zealand (which includes active promotional activities and products and services available in New Zealand); (3) personal connection/presence in New Zealand (i.e., employees, offices, registered agents in New Zealand); and (4) whether the entity has New Zealand-based retail clients/customers. Proposed subsection 2 of section 6A addresses this on some level, but only as it relates to promotion.

Further, FDRS does not feel that there should be a threshold requirement. If there is at least one New Zealand-based customer or client, that client should have access to redress through one of the four approved dispute resolution schemes. Therefore, we think that a requirement for a volume threshold undermines the purpose of the dispute resolution provides and is an unintended consequence of the proposed changes.

Note that our members who provide financial services incidentally (i.e., hotels who provide currency exchange) believe that there should be some sort of threshold requirement for the overall determination about whether they are providing financial services. For further information, please see our response to question 19.

Another unintended consequence of the territorial scope provision (both currently and as proposed) is that a financial service provider with minimal contacts to New Zealand and no New Zealand customers or clients may legitimately be registered as a financial service provider in New Zealand. Further, they may have many overseas customers who then lodge complaints with the designated New Zealand dispute resolution scheme. The effect is that the dispute resolution scheme is required to address numerous complaints about issues that occurred offshore and do not include New Zealand residents or citizens. While this can be dealt with in terms of the scheme's jurisdiction, the administrative work required to get to that point can be onerous.

FDRS finds that this particular issue sits almost exclusively with foreign currency/exchange trading platforms. FDRS believes that there should either be a higher level of scrutiny placed on these kinds of financial service providers (in terms of their registration in New Zealand) or that financial service providers of this type who are registered in New Zealand are required to communicate with their clients/customers that complaints not arising in New Zealand and/or about New Zealand residents/citizens cannot be considered by the New Zealand dispute resolution scheme.

Finally, FDRS believes that the new territorial application should take effect as soon as practicable following enactment.

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?

FDRS believes that a top priority is ensuring that financial service providers on the FSPR are legitimately and actively offering financial services to New Zealand residents and citizens and/or participating in the provision of financial services in New Zealand. While including the AML/CFT supervisor (where applicable) on the FSPR is one way of illustrating regulation and supervision, there is a chance that this could be confusing to the public. For example, entities that would be included as financial service providers under the legislation (as amended) may be excluded under the Anti-Money Laundering legislation exemptions because of the nature of their business. Additionally, this could create confusion about which entity should receive a complaint about the provision of a financial service/advice (i.e., the dispute resolution scheme or the supervising agency/body).

Overall, FDRS believes that there should be more in-depth and multi-faceted vetting of financial service providers before they become listed on the FSPR. Please see our response to question 16 for more information on this topic.

18. Do you consider that other measures are required to promote access to redress

against registered providers?

The Consultation Paper provides a number of examples on this point, including the Act explicitly stating that a financial service provider's membership in a dispute resolution scheme can be terminated if they fail to engage with the scheme as required, or if the scheme is not satisfied that the provider will comply. The dispute resolution schemes generally have rules that scheme members must comply with the requirements of the scheme or face termination. Therefore, codification of this requirement would have a neutral effect.

Once the regulations are in place, there may be other ways to promote access to redress. However, at this point FDRS has no other submissions on this point.

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?

FDRS does not have submissions to make on this point. However, some of our Scheme Members have expressed concern about the breadth of the legislation generally, in terms of who is providing financial services. This includes tourism, hotel, and rebate card scheme members who provide exchange services, pre-paid debit cards and rebate schemes. These members would like to see the scope of sections 20, 21, 22 and 23 under row C of the table of proposed list of financial services considered further.

One other proposal from our members is that, where the entity's primary business is not financial services (i.e., a hotel) the legislation should consider a threshold requirement for the value of transfers/money exchanges and/or number of transfers/money exchanges before having to comply with all requirements of the legislation. However, see FDRS's response to question 16, in terms of concerns about the applicability of thresholds.

In a related matter, FDRS has also received the following feedback as it relates to exemption of existing property syndicates:

We thank you for the opportunity to comment on the Financial Services Legislation Amendment Bill ("FSLA") – The concern is what is considered to be overly onerous obligations on advisors with respect to property syndicates particularly those that are already in existence. This is clearly interrelated with the Financial Markets Conduct Act 2013 ("FMCA") and what constitutes a "managed investment scheme" and we wish to submit a request that: the definition of managed investment scheme, and in particular the exclusions set out in section 9(2) of the FMCA be clarified to clearly provide that property syndicates can fall within the exclusion set out in section 9(2) such that it is not a managed investment scheme; or provide an avenue for investors to opt out (by majority vote) from the disclosure requirements and licensing obligations, to reduce the compliance costs which will be passed on to the investor and which we consider, far outweigh any benefits gained by the investors in respect of investor protection.

We are aware of the Financial Markets Conduct (Property Schemes - Custody of Assets) Exemption Notice 2016 (the "Exemption") which relieves existing closed schemes from the independent custodianship requirements for real property if certain conditions are met. We do not feel however that the Exemption goes far enough in balancing compliance costs (which will ultimately be passed on to the investor) with investor protection.

Purpose of FSLA and FMCA

The explanatory note to the FSLA states that the new regime seeks to address problems relating to the old regime without imposing any undue compliance costs. Section 4 of the FMCA states that one of the purposes of the Act is to avoid unnecessary compliance costs and to provide for timely, accurate and understandable information to be provided to persons to

assist those persons to make decisions relating to financial products.

It is therefore necessary to consider the importance of investors receiving sufficient information against compliance costs for investors in respect of property syndicates. With respect to the property syndicates which our client is managing, we understand that investors are required to pay an initial upfront purchase price which covers both administrative costs relating to the syndicate and the purchase price for the property. Our client has advised that investors are not generally required to pay any further costs during the term of the syndicates.

The FMA has advised that property syndicates should be considered to be managed investment schemes and the exclusion set out in section 9(2) of the Act relates to schemes such as unit titles and not property syndicates generally. Under the new scheme therefore, we understand that our client will be required to register his various syndicates which were in existence prior to the new regime and comply with the disclosure requirements for product disclosure statements and the licensing obligations.

There will clearly be significant compliance costs involved in complying with the above requirements. Several of the property syndicates managed by our client have a relatively small profit margin and the costs involved in the above could well eat into any such profit margin (noting that it is not possible at this stage to calculate the costs involved in compliance).

Investors in the property syndicates have already paid their purchase price and effectively assumed all risks associated with the property syndicate. Accordingly, what real benefit will there be for these investors by requiring the syndicates to register and comply with disclosure and licensing obligations? We consider any such benefits would be minimal and in any event would be far outweighed by the negatives - primarily being the compliance costs which will significantly reduce any profit recoverable from the syndicates.

We consider that it is unfair to require investors to pay such compliance costs in return for the minimal benefits that investors will receive.

How to address the above issues

There are various solutions that could help and we briefly list two of these below. We would be happy to consider these in further detail if required:

Amend the definition or exclusions of managed investment scheme under the FMCA to clearly provide that property syndicates are exempt or provide exemptions for existing property syndicates from the disclosure and licensing requirements;
Include property syndicates within the definition of managed investment schemes but allow investors to opt out of the disclosure and licensing requirements (by majority vote).

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?
FDRS is in favour of appropriate information sharing in order to assist in ensuring a well-functioning financial services industry. FDRS is not opposed to legislation that provides for greater scope of information sharing with the Financial Markets Authority. However, overly-prescriptive requirements could become too onerous and may have a chilling effect on financial service providers earnestly seeking assistance or advice. FDRS's endorsement of this provision will depend on the scope and mechanisms for reporting.

21. Do you have any other feedback on the drafting of Part 6 of the Bill?
FDRS has no other specific feedback on this and we have not received any feedback from our members on this point.

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?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

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?
    FDRS's concern with this provision provided is that it is not nuanced enough and is not close enough to the FMC definitions of a wholesale client. In terms of nuance, the provision as proposed is based on assets of 1 million dollars. That threshold may not enough to substantially and meaningfully identify wholesale investors. Examples of potentially unsophisticated and inexperienced investors include the owners of a family farm held in trust with equipment and land assets exceeding 1 million dollars, or a homeowner whose home is held in a family trust who sells the home and finds herself flush with cash to invest. Given current real estate prices, New Zealanders with little to no actual investment experience could be deemed a wholesale client because of (3)(c) of Schedule 2.

    We think some of the provisions in the FMC Act, with respect to investment activity, serve as a better framework for determining whether one is a wholesale investor, particularly the requirements of Section 38 of the FMC Act with respect to investment activity criteria.

    It is recognised that Clause 4 of Schedule 2 provides for an opt-in provision, it is not clear how easily this will be accomplished or whether there is any onus on the financial service provider to ascertain the level of investment experience/expertise and advise whether someone should opt-out of being a wholesale client.

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?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?
    FDRS has no specific feedback on this and we have not received any feedback from our

members on this point.

28. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

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?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

30. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

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?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?
    FDRS has no other specific feedback on this and we have not received any feedback from our members on this point.

About transitional arrangements

33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?
    FDRS believes that the objectives should be to make the transitional arrangements as straightforward as possible so that both financial advisors and their clients/customers understand how the process will work.

    One concern raised by some of our members is when new advisors and/or new products are introduced. While this would not necessarily create a problem where an investor is engaging with a single advisor on a single product, if they were to engage with an advisor on an existing product and a new product (or with multiple advisors at the firm), it could become confusing for both the customer/client and the firm. The feedback given was that more thought needed to be given to this.

    Further feedback on the licensing requirements generally is around licencing for business groups. We understand that this would likely work with the parent organisation holding the license and operating through subsidiaries and associated entities (as set out in the current FMC Act, s6 and s12). However, where the arrangement doesn't involve this kind of ownership & control structure but a looser grouping through operating agreements and IP sharing etc, the legislation as currently drafted doesn't address the issue.

Proposed transitional arrangements

34. Do you support the idea of a staged transition? Why or why not?
    Please see our response to question 33.

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?
    FDRS has no other specific feedback on this, other than what has generally been provided in response to question 33, and we have not received any feedback from our members on this point.

36. Do you perceive any issues or risks with the safe harbour proposal?
    FDRS has no other specific feedback on this, other than what has generally been provided in response to question 33, and we have not received any feedback from our members on this point.

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?
    FDRS has no other specific feedback on this, other than what has generally been provided in response to question 33, and we have not received any feedback from our members on this point.

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?
    FDRS has no other specific feedback on this, other than what has generally been provided in response to question 33, and we have not received any feedback from our members on this point.

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?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

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?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

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?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

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?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

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?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

Phased approach to licensing

46. What would be the costs and benefits of a phased approach to licensing?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?
    FDRS has no specific feedback on this and we have not received any feedback from our members on this point.

Demographics

49. Name:
    Jennifer Mahony, Scheme Director, Financial Dispute Resolution Service

50. Contact details:
    REDACTED

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

    FDRS is one of the four government approved dispute resolution schemes for financial disputes.

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.