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Financial Markets Policy
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Submission: Consultation Paper – New Financial Advice Regime: The draft Financial Services Legislation Amendment Bill and proposed transitional arrangements ('Consultation Paper')

- 1 This submission is made on behalf of the Code Committee established under the Financial Advisers Act 2008 ('**FAA**') to develop and maintain a code of professional conduct for authorised financial advisers ('**Code**').
- 2 Given its statutory functions, the Code Committee's focus in this submission is on:
 - The place of the new code of professional conduct for financial advice services ('**New Code**') in the new regime
 - Issues we have identified from the drafting of the Exposure Draft of the Financial Services Legislation Amendment Bill ('**Exposure Draft**') that may impede the optimal development of a New Code having regard to our experience in developing and maintaining the Code under the FAA
 - The scope of application of the New Code under the new regime, and
 - The transitional arrangements for appointing a Code Working Group to develop the New Code of conduct,having regard to the importance of the new Code in furthering the objectives of the new regime.
- 3 In making a formal submission, the Code Committee considers that it would be inappropriate for it to comment on other issues raised in the Consultation Paper, although Code Committee members have their own views on a number of those issues. The Code Committee would also like to acknowledge the consultative approach of the Ministry's team in endeavouring to shape a regime that will promote the confident and informed participation of business, investors and consumers in financial markets, with the primary goals of:
 - ensuring consumers have the information they need to find and choose a financial adviser
 - ensuring financial advice is accessible for consumers on reasonable terms, and
 - promoting public confidence in the professionalism of financial advisers.

The Ministry's work to date has been of considerable assistance to the Code Committee as we have considered adjustments to the Code in light of the above goals and issues identified by the Ministry in the course of its earlier review of the FAA.

- 4 The Code Committee is conscious of the fact that the Exposure Draft is a complex piece of law reform. Weaving the Legislative amendments into the even more complex new regime for regulatory financial markets conduct will be challenging for many in the financial advisory sector to come to grips with. To encourage the sector's participation in the reform process, it will be essential for the Ministry and the Financial Markets Authority to adopt a communication strategy that is clear, concise and effective. Otherwise, there is a risk that providers of financial adviser services and consumers alike will find the complexity a barrier to engagement. For an optimal outcome to be achieved, it is important that all involved work together to break down that barrier.
- 5 Further background to the thinking of the Code Committee in relation to the FAA review that concluded with the July 2016 report of the Ministry can be found in our submission on the Ministry's Options Paper, dated 11 February 2016 ('**Previous Submission**').

New scope of the Code

- 6 In our Previous Submission, we expressed our frustration at the effectiveness of the Code under the FAA being undermined by its lack of universal application. As stated in our Previous Submission, we believe that unless exceptions to the application of the Code were minimised, the New Code would inevitably deliver sub-optimal outcomes and opportunities for regulatory arbitrage created by the current regime's uneven playing field would be perpetuated. The Code Committee was accordingly very interested to see how the Exposure Draft would give effect to Cabinet's policy decision that the code of professional conduct to be developed for the new regime should apply to all financial advice. We believe this would be a significant development in improving the manner in which financial advice is regulated.
- 7 The Code Committee believes that extending the application of the Code to all financial advisers, and not just those involved in providing personalised services in relation to particular types of financial products and financial adviser services, is a significant improvement to the current regime. We are also pleased to see that licensed financial advice providers will be held accountable for financial advice delivered by them or on their behalf needing to comply with the New Code where it is delivered to retail clients. The obligation on a financial advice provider to ensure all of its financial advisers and financial advice representatives comply with the statutory advice duties (including compliance with the New Code) in dispensing regulated financial advice is particularly powerful. However, as noted in the body of our submission below, we are not convinced the Exposure Draft has achieved the desired outcome of minimising exceptions to the scope of the New Code, and concerns remain that retail clients will still be exposed to financial advice being delivered in the ordinary course of business of providers who are not subject to any of the standards prescribed by the New Code.
- 8 Regardless, the Code Committee is pleased to see that the obligation to comply with the standards of ethical behaviour, conduct, and client care required by the New Code will apply to any person who gives regulated financial advice, and not just 'Financial Advisers' as defined in the Exposure Draft. Irrespective of the individual accountability issue discussed below, we see this as an important element in ensuring a level playing field and improving consumer protection. It is a significant improvement on the approach taken in the FAA in respect of qualifying financial entities ('**QFE**'s) under section 66(2) of the FAA. That approach

was limited to considering whether clients will receive protection of a similar standard to that provided by advisers who are subject to the Code, which we see as being a lesser standard than that now proposed for financial advice.

- 9 We believe the extension of this key conduct obligation to cover all regulated financial advice, regardless of how it is delivered and by whom, is not just a case of creating regulatory consistency. It is critical to improving both consumer outcomes and the professionalism and quality of the delivery of financial advice. The one reservation we have in relation to the formulation of the obligation in the Exposure Draft is that it is restricted to retail services. This reservation is discussed further in our discussion of Consultation Paper Question 7 below.

Part 3 of the Exposure Draft - New statutory duties

- 10 **Consultation Paper Question 5:** The Code Committee agrees that the duty to put the client's interests first should apply both in giving the advice and in doing anything in relation to the giving of the advice. With the duty expressed on this basis, it is clear that the duty does not only apply in the moment of giving advice. However, as noted below we have reservations about the way the client first obligation has been expressed in the Exposure Draft, with our response to Question 5 becoming largely academic in light of the narrow scope of application of the client first principle as drafted.
- 11 **Consultation Paper Question 6:** The Code Committee agrees that there should be a legislative prohibition on licensed financial advice providers giving financial advice representatives any kind of inappropriate payment or incentive. This should align with likely conduct obligations in the New Code without constraining the ability of the Code Working Group to provide further principles for financial advice providers to follow in this regard. Given the subjective nature of the concept of what is or is not inappropriate, we agree with specifying what is meant by 'inappropriate'. We also agree with the focus of the draft wording on payments or incentives that are intended to encourage, or are likely to have the effect of encouraging, the financial advice representative to whom it is given or offered to engage in conduct that contravenes the statutory duties (including the duty to abide by the New Code). As such, incentive payments are not arbitrarily banned. Rather, only those that promote unlawful behaviour. We believe this is an approach the Code Working Group is likely to find helpful.
- 12 **Consultation Paper Question 7:** The Code Committee supports extending the client-first duty to all providers of financial advice, not just those who advise retail clients. This is consistent with the position under the current Code. As a professional ethical behaviour obligation, it would be inappropriate for financial advisers and financial advice providers to be able to turn the duty on or off, depending on the characteristics of the client they are dealing with. Doing so would undermine the new regime's stated objective of improving the quality of financial advice and financial advice services.
- 13 The Code Committee is, however, concerned that the Exposure Draft takes an inconsistent approach in this regard. In particular, the obligation to comply with the standards of ethical behaviour, conduct, and client care is expressly limited to retail services. This means that the New Code will be precluded from including standards of ethical behaviour, conduct, and client care in relation to the provision of regulated financial advice to wholesale clients unless that occurs in the course of a retail service. This may impose an undesirable constraint on the work of the Code Working Group, who will be unable to create a consistent set of standards for those providing financial advice to follow. This is particularly odd in relation to ethical

behaviour standards, where there seems good reason to impose a uniform set of standards that apply regardless of whether or not the client is retail.

- 14 The current Code deals with the above issue by specifying Code Standards that only apply where a retail client is involved (as is the case with most of the Code's client care standards¹), but rendering most of the ethical behaviour standards applicable irrespective of the nature of the client. The Code Committee would like to see the obligation at the proposed new section 431J changed so that rather than stating the section only applies to a retail service, state that the Code may impose different standards for a financial advice service that is not a retail service, or impose standards that only apply when dealing with a retail client. That way the Code Working Group will be able to consult on the issue and have a greater chance of being able to devise code standards that are fit for purpose.
- 15 **Consultation Paper Question 8:** The Code Committee has a number of comments in relation to the drafting in Part 3 of the Exposure Draft. The drafting of Part 3 will be key to the ability of the Code Working Group to develop a New Code that delivers on Cabinet's intentions and stated objectives of the regime. Our overarching concern is that the formulation of the new statutory advice duties in the Exposure Draft, as identified below, has strayed from the principles-based approach that has been the foundation of the success of the Code. We believe that the more prescriptive approach that has been documented will negatively impact on the ability of the new regime to deliver on its stated objectives, and will serve as a hindrance to the work of the Code Working Group.
- 16 **Section 431A – additional purposes:** The Code Committee supports the inclusion of the additional purposes of the Financial Markets Conduct Act 2013 ('**FMCA**') regime for the regulation of financial advice as drafted. Those purposes – improving the availability of financial advice for persons seeking that advice and improving the quality of financial advice and financial advice services – provide the Code Working Group with a useful point of reference for its work, without unduly constricting its work. The Code Working Group will be ideally placed to devise appropriate conduct rules that strike an appropriate working balance between these two potentially conflicting objectives.
- 17 However, the Code Committee notes that one of the purposes of the FAA, to encourage public confidence in the professionalism and integrity of financial advisers, has been omitted from the Exposure Draft. This purpose is not implicit in sections 3 and 4 of the FMCA, and the new purpose of improving the quality of financial advice and financial advice services falls short of the FAA purposes. The Code references the purpose of encouraging confidence in the professionalism and integrity of financial advisers as providing the spirit underpinning the Code. When considering their conduct and disclosure obligations under the FAA and the Code, the Code asks Authorised Financial Advisers to have that spirit in mind.²
- 18 The Code Committee is accordingly concerned that removal of the concepts of professionalism and integrity of financial advisers from the purposes of the new regime is a backward step. Our preference is for the purpose of improving professionalism and integrity in the provision of financial advice to be incorporated as an additional limb of the proposed new section 431A(1)(b). This would have the effect of reinstating these concepts from the purposes of the FAA, but without the current focus on encouraging public confidence in these attributes of financial advice – confident and informed participation of consumers in financial

¹ See, for example, the reference to 'retail client' in the Code of Professional Conduct for Authorised Financial Advisers, Code Standard 9 (Suitability of personalised services for retail clients).

² See Code of Professional Conduct for Authorised Financial Advisers, Section A – Background.

markets is already included as a purpose of the FMCA³, and we feel the focus of the new regime for providing financial advice should be on the delivery of financial advice itself, as opposed to public confidence in the way it is delivered. It would also be helpful for development of the New Code if the Exposure Draft could specify that the additional purposes stated at section 431A (or just section 431A(1)(b), expanded as proposed) provide the spirit underpinning the Code, to which all persons providing regulated financial advice must adhere when applying the Code.

- 19 **Section 431E – liability for breach of duties:** One reservation that the Code Committee does have with the formulation of the new section 431E of the FMCA is the fact that there is no regulatory mechanism to hold financial advice representatives personally accountable for their personal failure to comply with the New Code. We appreciate the logic behind not requiring financial advice representatives to separately register, and recognise that breaches by financial advice representatives are just as likely to be attributable to the financial advice provider as the representative, consistent with the current approach for QFE advisers. However, we are concerned that this may undermine public confidence in the regime, as there is no mechanism for preventing a financial advice representative who personally acts in breach of the New Code from moving from one financial advice provider to another with no public record of past misdemeanours.
- 20 We accept the above issue is mitigated in part by the fact that licenced financial advice providers will need to ensure that they have processes in place to ensure that their financial advice representatives operate in accordance with the new Code, and will themselves be held accountable for the failings of their financial advice representatives. We also accept that part of the licensing process will no doubt include an assessment of staff on-boarding processes of would-be licenced financial advice providers. However, we encourage the Ministry to consider this issue further to see if there are any feasible options available (such as the industry-created claims register used by insurers, and vetting systems employed within the real estate industry) to further mitigate this risk.
- 21 One option to consider that would mitigate this risk, and also protect the reputations of financial advisers who are directly accountable for their actions under the New Code, would be to change the name of ‘financial advice representative’ to ‘financial advice provider representative’ or just ‘provider representative’. Doing so would overcome the representation implied by the currently proposed term that representatives are personally delivering financial advice, instead emphasising who it is they represent. This would enhance the integrity of the New Code and reduce possible public confusion over who is directly accountable for breaches of the New Code.
- 22 **Section 431F – duty to meet standards of competence:** The Code Committee is comfortable with the way the duty to meet standards of competence has been expressed at the new section 431F of the FMCA. This leaves the Code Working Group free to adopt appropriate standards of competence within the New Code, coupled with the regulatory flexibility of enabling eligibility criteria in relation to the giving of advice to be prescribed where necessary. We also support this obligation only applying where there is a retail service involved.
- 23 **Section 431G – duty to agree on nature and scope of advice:** The Code Committee does not support the formulation of the proposed duty to agree on the nature and scope of advice provided at the new section 431G. The wording used expands on Cabinet’s decision of July

³ See section 3 of the FMCA

2016 to require financial advisers to outline limitations on the nature and scope of advice provided, to extract additional requirements from Code Standard 8 of the current Code. Considerable thought was given by the Code Committee in devising the new Code Standard 8 to ensure that the obligation to agree on the nature and scope of advice would be workable in practice. In particular, the current Code includes a deeming mechanism⁴ where class advice is provided, with the client being deemed to have agreed to the nature and scope of the service. This recognises that the current concept of a class service will often be provided where there is no prospect of the advice provider being able to evidence client agreement to the nature and scope of what has been provided. For example, sharebroking firms may issue buy/hold/sell recommendations in relation to particular stock that are widely distributed. The Code Committee recommends that the section 431G advice duty be revised so as to replicate the more principles-based approach documented at section 431F. In other words, we think the duty is best expressed by stating the principle, with that principle to be addressed in accordance with relevant standards provided in the New Code.

- 24 **Section 431H – duty to put client’s interest first:** The Code Committee does not support the manner in which the duty to put clients’ interests first has been expressed in the new section 431H of the FMCA. Client first, as expressed in the current Code, is a paramount obligation. It is a philosophical statement as to how financial advisers subject to the Code are expected to behave in any scenario. It is aspirational in nature. Treating it as a black letter law concept is not appropriate. In practice, ‘client first’ could be translated into an obligation to always make the client’s interests the financial adviser’s primary consideration when performing any activity relating to the adviser’s financial adviser services. Even then, strict enforcement of the obligation would still be problematic. Treating ‘client first’ as a black letter law obligation that only applied when a conflict of interest was in play was not the Code Committee’s intention in formulating Code Standard 1, which never lent itself to being strictly enforced in a court of law. In the Code Committee’s view, it is an obligation that lends itself perfectly to being expressed in a code of conduct where a disciplinary committee might be expected to take a broader consideration of a financial adviser’s duties.
- 25 As expressed in the Exposure Draft, the duty to put clients’ interests first has been reduced so as to only apply where the person giving regulated financial advice knows, or ought reasonably to know, that there is a conflict between the interests of the client and the financial adviser’s own interests or the interests of any other person. The obligation is then expressed as needing to give priority to the clients’ interests, including by taking all reasonable steps to ensure that the financial adviser’s own interests or the interests of any other person do not materially influence the advice. This is very different from the client first concept as currently documented in the Code. In our view, it is inconsistent with the Cabinet decision made in July 2016 which we had interpreted as an endorsement of the current concept of client first as expressed in the Code. Paragraph 5 of our Previous Submission refers – we felt that a pivotal requirement to be satisfied, if the objectives of the regime are to be achieved, is for all financial advisers to be required to always put the consumer first. This was the basis on which the Code Committee previously supported the elevation of the Code Standard to the Legislation itself.
- 26 Given the above, the Code Committee disagrees with the discussion provided at page 19 of the Consultation Paper in relation to putting clients’ interests first, where the obligation is translated to mean prioritising the client’s interests where there is a conflict of interest. That puts an unduly restrictive take on the intent behind current Code Standard 1. The discussion

⁴ See the explanatory note for Code Standard 8

in the Consultation Paper notes that a useful question to ask is whether the advice would be the same in the absence of the conflict. We agree that this is a useful question to ask in situations where there is a conflict, but it is not the only question to ask.

- 27 As expressed, section 431H is simply a conflict of interest management obligation. As such, the heading to the statutory provision would more properly be rephrased to say 'duty to manage conflicts of interest'. A key concern that the Code Committee has with the formulation now proposed is that it may constrain the future Code Committee from including provisions in the New Code to elaborate on what is meant by placing the interests of the client first, and on how financial advisers are expected to go about managing conflicts of interest. That is because the New Code will be required to be consistent with the Act, requiring the future Code Committee to walk something of a tight rope when devising Code Standards for matters that are already covered in the Legislation.
- 28 For the above reasons, the Code Committee strongly recommends that the formulation of the client first duty be rephrased to a similar form as has been used for section 431F. That would involve simply imposing a duty on those giving regulated financial advice to always place clients' interests first in accordance with relevant standards of the code of conduct. The provision could possibly go on to include conflict of interest wording as an example of where the interests of the clients must be put first and how that might occur, although again we recommend that this is done in such a way that the future Code Committee has flexibility to document relevant Code Standards that take into account consultation with stakeholders as to the practicalities involved in transparently managing or avoiding conflicts of interest.
- 29 In addition to the above concern, the Code Committee believes that the manner in which conflicts of interest have been expressed in the proposed section 431H is unworkably broad. Code Standard 5 currently deals with an Authorised Financial Adviser's obligation to effectively manage any conflicts of interest that may arise when providing a financial adviser service. This is restricted to interests of the AFA 'or a related person' that might influence the services provided. The wording formulation used in the Exposure Draft refers to conflicts with the interests of 'any other person'. The Code Committee believes this is unhelpfully broad, and will be problematic for those giving regulated financial advice to apply in practice. As noted above, with this wording formula used in the Legislation, it may not be open to the future Code Committee to alter conflict of interest obligations in the Code to render it more workable.

Schedule 2 of the Exposure Draft - Exclusions from the concept of regulated financial advice

- 30 **Consultation Paper Question 26:** As noted above and in our Previous Submission, the main constraint on the effectiveness of the Code under the FAA is its lack of universal application. While the Exposure Draft provides for the Code to apply to all regulated financial advice, there are still very broad carve outs from its application by virtue of the exclusions from what will count as regulated financial advice and Part 2 of the proposed new Schedule 5 to the FMCA. The reason this is a concern for the Code Committee is that it undermines the credibility of the regime and raises concerns over the tilting of the playing field against financial advisers who are required to abide by the Code and other statutory obligations.
- 31 The Code Committee's primary concern in this regard is in relation to clause 7 of Part 2 of Schedule 5, dealing with ancillary services and other occupations. A critical concern, that has repeatedly been raised by financial advisers over the period in which the FAA has been in

force, is the ability of the likes of lawyers and accountants⁵ to dispense what would otherwise be regulated financial advice without needing to abide by any of the standards of conduct under the FAA. That is the case even where the financial advice provided has no real connection with the relevant occupational functions. The concerns are particularly extreme where the practitioner in question has no relevant competency training or qualifications, yet is in a trusted adviser position and able to unduly influence clients with their views without being held to the same standards of professionalism as a financial adviser.

- 32 The Code Committee recognises the practicalities involved, and does not submit that the specified occupations be brought under the full force of the regime, or be required to obtain a licence as a financial advice provider. Rather, the Code Committee submits that the exclusion from regulated financial advice that the relevant occupations enjoy should be rendered subject to the condition that the practitioners in question still be subject to specific conduct obligations. As a bare minimum, a condition of their relief should be that they be required to comply with the proposed new section 431i (duty to exercise care, diligence, and skill).
- 33 The Code Committee also recommends that the extent of any occupational relief be restricted⁶ to the provision of financial advice that is a necessary incident of the occupation in question, as opposed to the much broader current requirement of the advice being given in the ordinary course of carrying out the relevant occupation. Otherwise, the effectiveness of the regime is compromised – the ability of a significant section of the professional community to dispense financial advice without needing to have any regard to the FAA is currently seen by financial advisers as a significant loophole. It is disappointing to see that loophole continued in the Exposure Draft.

Schedule 2 of the Exposure Draft - The mechanics of the Code Committee

- 34 **Consultation Paper Question 27:** The Code Committee is comfortable with the proposed membership criteria and proceedings for the new Code Committee. In our Previous Submission we had expressed the view that having wide flexibility in the criteria to be applied in appointing Code Committee members was important, without locking in specific representation requirements. While there will now be a requirement for two members to be appointed by virtue of their knowledge, skills, and experience in consumer affairs and dispute resolution, we don't believe this will unduly constrain the ability to appoint a Code Working Group/Code Committee that contains a sufficiently broad knowledge, skills, and experience set to be able to devise a Code that takes into account the legitimate interests of all stakeholders.
- 35 **Consultation Paper Question 28:** The Code Committee notes the change in the appointment basis for the Code Committee, requiring the Code Working Group (and the future Code Committee) to be appointed by the Minister, and therefore be held accountable as a public body. The Code Committee also notes the added requirements for transparency and rigour in the processes the future Code Committee will need to follow. This means that there will now be more paperwork and formalities involved in developing and reviewing the New Code. In particular, the drafting of a Regulatory Impact Statement in support of the New Code and any changes to it will add to the extent of the work involved, and may increase the amount of time required to develop the New Code.

⁵ Same exemption is currently enjoyed by other occupations listed under s14(1)(d) of the FAA.

⁶ Compare with s7 of the Real Estate Agents Act 2008.

- 36 While the Code Committee has no issue with the increased level of transparency and rigour that comes from the requirement to produce a Regulatory Impact Statement, this new requirement counters some of the efficiency gains of removing the existing two-step process that requires prior approval of the Code by the FMA, and will require the Code Working Group to have greater need of secretarial and Ministry resource than would otherwise be the case. As a consequence, we query the appropriateness of placing funding of the work of the Code Working Group and the new Code Committee with the FMA, when every other aspect of the appointment and operation of the Committee falls directly under the Minister, with FMA's role being reduced to one of consultation.
- 37 In response to the specific question raised in the Consultation Paper, the Code Committee believes that the requirement to produce a Regulatory Impact Statement provides ample direction to the Code Working Group's and future Code Committee's work. The requirement is unlikely to prove overly prescriptive, although it will require additional devotion of expert resource.
- 38 Irrespective of whether the Code Working Group and the new Code Committee is funded by the Minister or the FMA, the Code Committee submits that it will be essential for the Committee to be well resourced, in particular over the next two years as the New Code is developed. There was a significant body of work undertaken by the current Code Committee when the FAA regime was introduced in 2009-2010. The Code Committee envisages a similar level of work being required for the introduction of the new regime, with the Code Working Group likely to be playing a pivotal role in developing the substance of the new regime's requirements. The Code Committee believes that it will be important for the Code Working Group to have its own dedicated secretarial resource over that initial consultation and Code development period, with that secretariat solely accountable to the Code Working Group.
- 39 The Code Committee is disappointed that opportunity has not been taken in the Exposure Draft to extend the functions of the new Code Committee. Currently, the statutory functions of the Code Committee are to review the Code from time to time and recommend changes to the Code as the Code Committee sees fit. This is a very limited function, with the only option available to the Code Committee if they see the Code not being applied or interpreted as intended being to instigate a full review of the Code. This is not efficient. The Exposure Draft would continue this limited functionality and inefficiency. We see clause 21 to the proposed new Schedule 5 of the FMCA as a missed opportunity to address this limitation.
- 40 What the Code Committee would like to see would be for the new Code Committee to be given an additional function of liaising with the FMA, the Minister, and stakeholders in the financial advice sector in relation to the New Code and its application and enforcement, where considered necessary or desirable in light of the purposes of the Act. The Code Committee believes that adding a function along these lines would greatly enhance the ability of the Code Committee to better promote the achievement of the objectives of the new regime, without needing to dance on the head of a pin to do so, or stepping outside its statutory mandate.
- 41 **Consultation Paper Question 29:** The Code Committee is comfortable that the proposed wording of the requirement that the Code address minimum standards of competence, knowledge, and skills which apply in respect of different types of advice, financial advice products, or other circumstances, is adequate to capture the circumstances in which additional and different standards might be required. We believe the work of the Code Working Group will be sufficiently empowered by this wording formulation, without being unduly constrained.

Proposed transitional arrangements

- 42 **Consultation paper Questions 34-37:** The Code Committee supports the approach that has been outlined in the Consultation Paper, of allowing 6 months' from finalisation of the New Code for the new regime to come into effect, with existing financial advisers being given transitional relief for up to two years to continue offering their current form of financial advice without needing to satisfy any new competency requirements.
- 43 In the Code Committee's experience, anticipating the New Code will only take a year to develop and finalise from the time of appointment of the Code Working Group is an ambitious target, especially with the potential vagaries of the progression of the proposed Legislation through the House of Representatives happening at the same time. There is a significant body of work to be undertaken by the Code Working Group to ensure the New Code appropriately deals with the far broader scope of its application, even if it were to start with the current Code as the base. Determining appropriate competency standards and devising standards to deal with a far greater range of financial advice services than currently covered by the Code – including robo-advice – will require extensive consultation with a range of stakeholders.
- 44 Accordingly, we believe a time period of 15-18 months from the time of appointment to finalisation of the New Code is likely to be a more realistic timeframe. However, the Code Committee is concerned about the length of time it will take to bed in the new regime and the negative impact the resulting uncertainty has on current providers of financial advice. In the interests of accelerating the process and limiting the current period of uncertainty, we hope that adequate resources will be made available to the Code Working Group to enable it to expedite the process as far as possible to meet the ambitious timeframe contemplated.
- 45 Allowing a 6 month period from finalisation of the New Code should be sufficient time to enable financial advice providers to decide whether or not they want to seek a transitional licence to continue operating, and for existing financial advisers to link up with a transitional licensee so as to be able to continue providing financial advice services. On that basis, the proposed grandparenting approach for existing individual financial advisers is supported. The possibility of needing to satisfy new, as yet unknown, competency requirements will be a key concern for the existing cohort of Authorised Financial Advisers and Registered Financial Advisers. Providing safe harbour relief from competency requirements for up to two years, with all other aspects of the New Code being in full force and effect, strikes a good balance.
- 46 The Code Working Group will need to be cognizant of transitional issues when devising continuing professional training obligations, and in imposing any additional or different ethical behaviour, conduct or client care obligations that financial advisers will need to satisfy from day one. We do not see this as being a significant burden for the Code Working Group to overcome. We also anticipate any changes in this area are unlikely to have a substantive impact on the practices of existing Authorised Financial Advisers, with the obligation for the Code Working Group to go through the formality of a regulatory impact statement in devising the New Code providing comfort for those concerned about the prospect of extensive change.
- 47 For persons providing what will become regulated financial advice immediately before the Act comes into effect, it may relieve some concerns if a further 6 month period of grace were to be allowed following the new regime coming into effect, to enable them to bring their systems and documentation up to speed to meet any new or different requirements not already provided for in the Code. This may just be a matter of the Financial Markets Authority

exercising its powers⁷ to state that it will not take any action in relation to non-compliance with new obligations imposed under the New Code for the first six months of the new regime.⁸

Conclusion

48 We would be happy to work with the Ministry over the months ahead to explore the various issues we have raised, and assist with producing a set of workable criteria for a future professional standards setting body that we believe would best support the regulatory objectives.

Yours faithfully



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⁷ See section 9 of the Financial Markets Authority Act 2011

⁸ See, for example, the Commerce Commission's Enforcement Guidelines released in August 2013 utilising the Commission's no-enforcement compliance tools such as education and advocacy. With the new unfair contract terms provisions, in addition to the 15 months' transition period, the Commission issued Guidelines in February 2015 noting its intention to exercise enforcement discretion.