Consultation: New financial advice regime exemptions

About this consultation

The Financial Services Legislation Amendment Act 2019 (FSLAA) will introduce a new regulatory regime for financial advice. The Government has agreed the start date for the new regime will be June 2020.

The requirements in the new regime will apply to every person (including an entity) who gives regulated financial advice. There may be some areas where we need to use our legislative tools (exemptions, designations, and frameworks or methodologies) to modify the standard requirements to support the effective operation of the new regime.

We invite your comments on the matters discussed in this paper. Please use the feedback form provided. Your feedback will be considered in the development of our proposals. In addition to general feedback, we have included specific questions on exemption support for Australian licensees. We also want to hear about any additional matters that you believe should receive support from our legislative tools.

If you have questions, please email questions@fma.govt.nz or call us on 0800 434 567 (or +64 3 962 2698 if calling from outside New Zealand).

Submissions close at 5pm on Friday, 13 September 2019

This consultation is for any person giving regulated financial advice or providing client money or property services, and their advisers and interested parties.

It seeks feedback on proposed exemption support for the new financial advice regime.

Document history

This version was issued in August 2019 and is based on legislation and regulations as at the date of issue.

Overview – new financial advice regime

The FSLAA will amend the Financial Markets Conduct Act 2013 (FMC Act) to introduce a new regulatory regime for financial advice. The Government has agreed the start date for the new regime will be June 2020, with the precise date to be set by Order in Council in the coming months. The Financial Advisers Act 2008 (FA Act), its regulations and any exemptions we granted under the FA Act will be revoked.

Cabinet has agreed further details of the new regime including disclosure requirements, licensing fees and levies, registration requirements, and client money and property requirements. We are working with the Ministry of Business, Innovation and Employment (MBIE) on the development of the regulations relating to these requirements. More details on the regulations can be found on MBIE's website.

New licensing requirement

Once the new regime comes into force, a person[1] who gives regulated financial advice to retail clients will need to operate under a financial advice provider licence. They can either operate under their own licence, or work on behalf of someone else who holds a licence.

New Code of Conduct

A person who gives regulated financial advice to retail clients will be subject to a new Code of Professional Conduct for Financial Advice Services (the new Code). This contains minimum standards of ethical behaviour, conduct, client care, competence, knowledge and skill.

New disclosure requirements

A person who gives regulated financial advice will need to disclose specific information to their clients, to ensure those clients are making informed decisions. MBIE will consult on draft regulations shortly.

Registration requirements

Changes have been made to the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act) to address misuse of the Financial Service Providers Register (FSPR) and to implement the new financial advice regime. Regulations are being developed to support these changes.

Client money and property services

Client money and property services (formerly broking services) will be regulated under the FMC Act. The Government has decided that the Financial Advisers (Custodians of FMCA Financial Products) Regulations 2014 should largely be carried over to the new regulatory regime with minor changes that will:

- address workability issues that have emerged since the regulations have been in effect

[1] In this paper 'person' includes an entity.

- reflect a change in FSLAA designed to allow providers to deposit their own money into client accounts in certain circumstances, including to reduce the risk of the client account being overdrawn due to delays processing payments.

Regulations are being developed on client money and property service requirements.

Further information

You can find more information on the new regime on our website.

Exemption support for new regime

We are considering where FMC Act exemptions may be useful to support effective operation of the new regime. Before we grant an exemption we are required be satisfied that the exemption is:

- necessary or desirable to promote the purposes of the FMC Act; and
- not broader than reasonably necessary to address the matters that gave rise to it.

See Schedule 1 of this paper for more details.

Generally, it is likely to be appropriate for the standard requirements in the new regime apply to every person who gives financial advice. However, there may be a few areas where we need to use our exemption powers.

Part 1 of this paper discusses three matters where we think it may be useful to continue existing FA Act exemption relief to support effective operation of the new financial advice regime:

- Australian licensees
- Overseas custodians – assurance engagements
- Australian qualified advisers.

Part 2 of this paper discusses four matters where we think existing FA Act exemption support will no longer be required given expected changes in the law:

- Recognition of alternative qualifications
- NZX and non-NZX brokers – client money and client property
- Personalised digital advice
- Offers of financial products through AFAs supplying personalised DIMS.

Part 1 – Matters where continued exemption support may be needed

Australian licensees

The Australian Licensees notice provides exemption support to allow Australian-regulated licensed financial services firms to provide financial adviser services into New Zealand in limited circumstances.

Australian licensees, and their representatives, are exempted from the certain FA Act requirements where they provide services to New Zealand retail clients and have no place of business in New Zealand:

- the requirement that a registered entity acts through a registered or authorised financial adviser (AFA)
- restrictions on holding out as a financial planner or investment planner
- the requirement to make disclosure to retail clients
- the requirement for representatives to register on the FSPR.

The notice applies in limited circumstances for unsolicited, offshore services to New Zealand clients. This allows Australian licensees to:

- continue to provide advice to Australian clients that move to New Zealand
- provide advice to New Zealand clients who became clients before the FA Act came into effect
- provide advice sought by New Zealand clients without any solicitation by the Australian licensee.

The notice recognises the protections offered under Australian law. It allows very limited services to be given to New Zealand clients. Key protections remain, including that:

- Australian licensees are licensed and regulated by the Australian Securities and Investments Commission (ASIC) under Australian law
- Australian licensees must register on the FSPR and be members of a New Zealand dispute resolution scheme
- Australian licensees must provide information to New Zealand clients, so that they are aware of the nature of the exemption
- disclosure must be made to New Zealand retail clients as if they were Australian retail clients
- Australian licensees remain subject to the general statutory care, diligence and skill obligations under the FA Act.

We consider that the policy grounds for providing relief under this notice remain relevant under the new financial advice regime. Therefore, continued exemption support is likely to be appropriate. The notice facilitates Trans-Tasman provision of financial services where compliance with the New Zealand licensing regime would result in dual regulation and be disproportionate to the limited services being provided from Australia. We will signal our solution for this matter before the opening of transitional licensing on 4 November 2019, and will have any notice in place well before the new regime comes into effect in June 2020.

Further discussion and questions relating to the Australian Licensees notice is in Schedule 2.

Overseas custodians – assurance engagements

Currently the Overseas Custodians—Assurance Engagement notice provides exemptions for overseas custodians who hold client money or client property relating to an FMC Act financial product under the Financial Advisers (Custodians of FMCA Products) Regulations (FA custodian regulations). The notice exempts overseas custodians from the requirement to get an assurance engagement with a New Zealand auditor. Assurance engagements can instead be obtained with auditors in certain overseas jurisdictions and comply with overseas requirements.

The exemptions only apply where assurance engagements are prepared by overseas auditors who are subject to auditing standards and oversight that are broadly equivalent to those that exist in New Zealand. This means we can have confidence in the comparability and quality of their assurance engagements.

Where an overseas custodian has already obtained an assurance engagement prepared by an overseas auditor subject to auditing standards and oversight that is broadly equivalent to those that exist in New Zealand, the compliance costs of having an additional assurance engagement undertaken by a New Zealand qualified auditor would outweigh the benefits to investors.

The Government has decided that the FA custodian regulations should largely be carried over to the new regulatory regime, subject to some minor changes discussed above on page 3.

While we will need to review the new regulations, our view is that it is likely to be appropriate for exemption relief to be continued on the same basis. This will promote the purposes of the FMC Act by ensuring appropriate governance arrangements that allow for effective monitoring, avoid unnecessary compliance costs and promote flexibility in the financial markets. Our aim is to have a solution for this matter in place well before the new regime comes into effect in June 2020.

Australian qualified advisers

Under the Australian Qualified Advisers notice, Australian advisers who meet the qualification requirements under ASIC's regulatory guides to provide personal financial product advice to retail clients in Australia are given recognition when applying to be an AFA in New Zealand. This is in relation to products they are qualified to advise on in Australia, where New Zealand has an equivalent licence (authorisation). ASIC provides reciprocal recognition for New Zealand qualified advisers who wish to provide advice in Australia with New Zealand qualifications.

This notice provides an exemption from the educational competency requirements under the current Code of Professional Conduct for Authorised Financial Advisers (the current code) in Code Standard 15 (to the extent that it requires Unit 26360) and Code Standard 16.

The new financial advice regime under the FSLAA will significantly change regulation of financial advice, with a new licensing regime and a new Code. New qualifications and other requirements for advice on relevant financial products (i.e. investments, superannuation and life insurance) have also been introduced in Australia. Furthermore, a new organisation called the Financial Adviser Standards and Ethics Authority Limited (or FASEA) has been established in Australia to set the education, training and ethical standards for financial advisers providing advice on 'relevant financial products'.

We intend to explore whether continued recognition of Australian adviser qualifications is appropriate under the new financial advice regime. If it is then this could be put into effect by way of an exemption from certain competency requirements under the new Code.

However, given the significant changes to the financial advice regime on both sides of the Tasman, we intend to review the arrangements under this exemption and discuss continued Trans-Tasman recognition with ASIC and FASEA. Following this, we will consult on any continued exemption support to recognise Australian qualified advisers. We will aim to consult on this matter in the first half of 2020.

We note that Australian qualified advisers who have already become authorised in reliance on the Australian Qualified Advisers notice will be treated as any other AFA for the purposes of reliance on the competency exception in clause 81 of Schedule 4 of the FMC Act and compliance with the competency requirements in the new Code.

Part 2 – Exemption support not required due to regulatory change

Recognition of alternative qualifications

The Certified Investment Management Analyst (CIMA) notice recognises the CIMA certification program as an alternative to certain competency requirements under the current Code. The program is an international postgraduate-level specialist qualification designed for investment and wealth professionals. The notice exempts AFA applicants with this designation from Code Standard 16 to the extent that it requires applicants to have the Core Component and the Investment Strand of the New Zealand Certificate in Financial Services (Level 5).

The exemption is subject to conditions that the AFA applicant has a professional development plan to address specified matters relating to any gaps or deficiencies in their competence, knowledge and skills, and that the AFA then completes structured professional development within 12 months of authorisation to address those gaps or deficiencies.

We don't think continued exemption support will be required under the new regime to recognise the CIMA designation or other alternative qualifications or designations.[2] Standards 6 to 8 of the new Code set competency at the learning outcomes for Level 5 of the New Zealand Certificate in Financial Services (NZ Certificate).[3] Different strands apply for different types of advice. Everyone who gives advice must have general competence and for this they will need to meet the learning outcomes for the core module of the NZ Certificate (Level 5). They will also need to meet the learning outcomes for one or more of the specialist strands of the Level 5 NZ Certificate (i.e. investment, life, disability and health insurance, general insurance, residential property lending, personal lending or banking) depending on the advice they will provide.

The new Code does not have an alternatives schedule like the current code. However, it does have built-in flexibility. A person may demonstrate that they meet the required learning outcomes through an alternative qualification or experience if they can do this in an objective, measurable and independently verifiable manner. In addition, a person can demonstrate the required learning outcomes by referring to a financial advice provider's procedures, systems and expertise.

A person who intends to rely on an alternative qualification or experience will need to get their qualification or experience assessed to see if they meet the relevant Code standard. In general we do not expect we will consider that alternative qualifications or experience are equivalent to the requirements set out in the new Code unless independently verified by an NZQA-approved qualification developer.

We are working through the process for assessment of alternative qualifications through discussions with the New Zealand Qualifications Authority (NZQA) and NZQA-approved qualification developers. We are keen to see a process that keeps compliance costs to a minimum, and for any process developed to allow the single assessment of a qualification for the benefit of all persons with that qualification. We expect that the process (and costs) for

[2] One exception might be to recognise qualifications of Australian-trained advisers where Australia provides reciprocal recognition for New Zealand qualifications on a Trans-Tasman basis.
[3] Version 2 approved in January 2019

recognising qualifications that have already been found to be equivalent for the purposes of the current code is likely to be straightforward.

Given the built-in flexibility in the new Code we don't think future support from the FMA's exemptions will be needed to recognise alternative qualifications.

NZX and non-NZX brokers – client money and client property

Currently there are two notices in place that permit the co-mingling of client money and property with broker money and property. This is permitted, to the extent that is reasonably necessary to either facilitate or arrange the settlement of clients' financial product transactions in a prudent and orderly fashion, or reduce the risk of a shortfall in a client money trust account. The notices are the NZX Brokers – Client Money and Client Property notice and the Non-NZX Brokers – Client Money notice.

There are strict controls on the co-mingling under these notices, including requirements that:

- brokers take all reasonable steps to ensure that client money and property remain separately identifiable, and to document, implement, and monitor processes consistent with good practice to manage the risks involved
- brokers must ensure that the amount of firm money held in a client money trust account is no more than is reasonably necessary to cover the risk of a shortfall arising
- NZX brokers are subject to the NZX Participant Rules and NZX supervision
- Non-NZX brokers report to FMA on a six-monthly basis and obtain an assurance engagement with a qualified auditor in accordance with applicable audit and assurance standards and provide the report to the FMA.

We don't think continued exemption support will be required for this matter. The FSLAA allows regulations to prescribe circumstances in which the requirement to keep client money and property separate from that held by or for the provider does not apply. In this instance the FSLAA provides that broker money or property that is not kept separate from client money must be treated as client money or client property if the regulations provide for this. This is intended to mitigate the risks for clients in the event the broker becomes insolvent.

As noted above, the Government has decided that client money regulations should largely be carried over to the new regulatory regime, subject to changes – including to reflect a change in FSLAA designed to allow providers to deposit their own money into client accounts in certain circumstances, such as to reduce the risk of the client account being overdrawn due to delays in processing payments.

We will support MBIE to consider whether it would be appropriate to provide continued relief from the segregation requirement through regulations and, if so, the terms on which this should be available. The segregation rule provides an important protection for clients and we expect that brokers relying on the current FA Act exemptions will have taken significant steps by now towards implementing changes to their systems, processes and business to eliminate (or reduce to the maximum extent possible) any shortfalls arising in client money. It is possible therefore that any relief provided may be limited in scope and/or the period for which it is available, and subject to tight controls.

Personalised digital advice

The Personalised Digital Advice notice enables entities named in a schedule to provide personalised digital advice services to retail clients under the FA Act, promoting innovation and improving consumer access. The exemption is

limited to personalised financial advice, personalised investment planning services, and services that relate to certain eligible financial products.

The exemptions do not apply if requirements to provide notifications to FMA on the occurrence of certain events are not met. The exemptions are also subject to conditions relating to disclosure, procedures to comply with the current code, and record-keeping. There is no exemption from the conduct obligations in the FA Act.

We don't think continued exemption support will be needed for digital advice services. The new financial advice regime is 'technology neutral'. Licensed providers can use a digital advice delivery channel if they wish, providing they comply with the new conduct obligations in the FMC Act (as introduced by the FSLAA), including the competence standards in the new Code.

The new regime will have a two-year transitional period. During this period, some licensed providers can take advantage of a competency 'safe harbour'. This allows them to continue to provide regulated financial advice that they would have been permitted to provide under the FA Act without needing to comply with the competence standards in the new Code. For personalised digital advice, this is only available to providers who are named in the schedule to the Personalised Digital Advice notice.

Offers of financial products through AFAs supplying personalised DIMS

Clause 7 of Schedule 1 of the FMC Act provides a statutory exclusion from the standard disclosure regime for offers of financial products made through a discretionary investment management services (DIMS) provider who holds a licence under the FMC Act (the Schedule 1 exclusion).

Offers may alternatively be made through an AFA who is authorised to provide personalised DIMS under the FA Act. The Offers of Financial Products Through Authorised Financial Advisers Supplying Personalised DIMS notice provides relief for these offers, making them exempt from the disclosure requirements in Part 3 of the FMC Act, and providing they are not regulated offers. Similarly to the Schedule 1 exclusion, the notice recognises that, when investment decisions are made by an AFA through a personalised DIMS service, the DIMS client does not need to receive the usual disclosures under the FMC Act.

We do not consider any continued support will be required under the new regime. From June 2020 all persons providing DIMS will be required to operate under an FMC Act licence. AFAs who are currently authorised to provide DIMS will be automatically treated as holding an FMC Act DIMS licence (subject to certain limits and conditions). From June 2020, therefore, the Schedule 1 exclusion will cover offers made through AFAs who become licensed DIMS providers under the FMC Act.

Schedule 1- Requirements for FMC Act exemptions

The FMC Act grants FMA the power, on the terms and conditions we think fit (if any), to exempt any person or class of persons from compliance with any provisions of the FMC Act or any regulations.

Before we grant an exemption, we must be satisfied that the exemption:

- is necessary or desirable to promote the purposes of the FMC Act (see below)
- is not broader than reasonably necessary to address the matters that gave rise to the exemption.

The main purposes of the FMC Act are to:

- promote confident and informed participation of businesses, investors and consumers in the financial markets
- promote and facilitate the development of fair, efficient and transparent financial markets.

The FMC Act's additional purposes are to:

- help investors make informed decisions with timely, accurate, understandable information of financial products and services
- allow effective monitoring and reduced governance risks with appropriate governance arrangements for financial products, and certain financial services
- avoid unnecessary compliance costs
- promote innovation and flexibility in the financial markets.

Additional purposes applicable to regulation of financial advice and financial advice services are:

- ensuring the availability of financial advice for people seeking that advice; and
- ensuring the quality of financial advice and financial advice services.

Schedule 2 – Further discussion and questions relating to Australian licensees

Specific exemptions required

As noted above, the Australian Licensees notice facilitates Trans-Tasman provision of financial services where compliance with the New Zealand licensing regime would result in dual regulation and be disproportionate to the limited services being provided from Australia.

We think exemptions for Australian licensees and their representatives are likely to be required from the following new regime requirements:

- the requirement in s 388(ba) of the FMC Act[4] to be licensed to act as a provider of a financial advice service
- the limitation in s 431F of the FMC Act on who can give regulated advice to retail clients on behalf of a financial advice provider to allow an Australian licensee's representatives to give that advice; and
- the prohibition in s 431G of the FMC Act on holding out certain matters in relation to giving financial advice.

We also think it would be appropriate to grant exemptions for Australian licensees and their representatives from the statutory duties in s 431I to s 431P of the FMC Act (except perhaps the duty in s 431L to exercise care, diligence and skill) and from the additional duties on financial advice providers who engage others to give advice in s 431Q. The Australian financial service providers regulatory regime has similar objectives to New Zealand's new regime and Australian licensees will be licensed by ASIC and regulated under Australian law. We think this will provide appropriate protections for New Zealand clients where alternative requirements apply (see page 13). In particular, we propose that Australian licensees will be required to join a New Zealand dispute resolution scheme. This will ensure New Zealand clients have access to an independent process in New Zealand for resolving any disputes. In addition, we have information and co-operation arrangements in place with ASIC. They will allow us to seek assistance from ASIC if compliance issues arise. Another requirement, if any exemption is granted, will be that Australian licensees provide certain information to New Zealand clients so they are aware of the exemption and that disclosure is made as if the clients were based in Australia.

We doubt whether any exemptions are required from the requirements for representatives of an Australian licensee to register on the FSPR under s 11(1) of the FSP Act (as amended by the FSLAA). An Australian licensee will have an exemption from the requirement in s 431F of the FMC Act only to provide advice through individuals who are engaged as financial advisers or nominated representatives. This means its representatives will not need to be registered on the FSPR by reason of being financial advisers. Nor will they need to be registered by reason of being 'in the business of providing a financial service' for the purposes of s 11(1) of the FSP Act (as amended by the FSLAA).

We also consider that an exemption from the duties of persons who engage nominated representatives in s 431R may not be required. The Australian licensee's representatives will not be nominated representatives given the exemption from s 431F and therefore the Australian licensee will not need to comply with the duties of persons who engage nominated representatives.

[4] In this schedule, references to provisions or subparts of the FMC Act are to provisions that will be inserted in the FMC Act by the FSLAA.

Conditions that may be required

We think most conditions under the existing Australian Licensees notice remain necessary and appropriate. However we are considering whether the following requirements are still necessary.

Currently, an Australian licensee must provide a list to the FMA of its representatives who give advice to New Zealand retail clients (and update that list). We note that there is a register of Australian financial advisers. Individuals who are authorised to provide personal advice to retail clients on investments, superannuation and life insurance (i.e. 'relevant financial products') are required under Australian law to be on this register. There is also a register of authorised representatives. We are considering whether this will provide sufficient information on Australian licensees' representatives. We note, however, that these registers will not provide information about individuals who provide information on basic banking products, general insurance and consumer credit insurance, which are not relevant financial products.

Currently, Australian licensees and their representatives must also submit to the non-exclusive jurisdiction of the New Zealand courts and appoint a local agent for service of process. Requiring an agent for service and submission to jurisdiction may impose an unnecessary compliance burden. Trans-Tasman mutual recognition of judgments and proceedings is straightforward between New Zealand and Australia under the Trans-Tasman Proceedings Act 2010 (TTPA). Subpart 1 of Part 2 of the TTPA allows defendants to be served with the initiating document in Australia and this has the same effect as if that document was served in New Zealand.

Questions

1. Do you support exemption relief under the new financial advice regime for Australian licensees and their representatives? What are the reasons for your view?
2. Do you consider that the exemptions discussed on page 12 are required and appropriate? What are the reasons for your view?
3. Do you think any additional exemptions are required? If so, why do you think those exemptions would be appropriate, taking into account the purposes of the FMC Act (see Schedule 1 of this paper).
4. Do you consider any exemption is required for Australian licensees' representatives from the requirement to register on the FSPR? What are the reasons for your view?
5. Do you think the conditions under the existing Australian Licensee notice remain appropriate? What are the reasons for your view?
6. Do you think any additional conditions required? What are the reasons for your view?
7. Do you consider any existing conditions are unnecessary given regulatory changes or impose an unreasonable compliance burden? What are the reasons for your view?
8. Do you think the requirement for Australian licensees to provide a list to FMA of its representatives who give advice to New Zealand retail clients (and update that list) is necessary? What are the reasons for your views?
9. Do you think the requirements to submit to the non-exclusive jurisdiction of the New Zealand courts and appoint a local agent for service impose an unnecessary compliance burden? What are the reasons for your view?
10. Please tell us if you currently rely on the existing Australian Licensees notice. If so, please provide an up-to-date list of your New Zealand clients and details of the type of financial adviser services provided to them, including the financial products involved. Please tell us how many of your clients became clients after you notified FMA that you intended to rely on the exemptions under the existing notice.

Feedback form: New financial advice regime exemptions

Please submit this feedback form electronically in both PDF and MS Word formats via email to consultation@fma.govt.nz with 'Feedback: New financial advice regime exemptions' in the subject line. Thank you.
Submissions close at 5pm on Friday, 13 September 2019.

Date: Number of pages:

Name of submitter:

Company or entity:

Organisation type:

Contact name (if different):

Contact email and phone:

Question number	Comment	Recommendation
You don't need to quote from the consultation document if you use page numbers. *You may insert additional lines or pages - please label each additional page with your name & organisation.*		

Feedback summary – *if you wish to highlight anything in particular.*

Please note: Feedback received is subject to the Official Information Act 1982. We may make submissions available on our website, compile a summary of submissions, or draw attention to individual submissions in internal or external reports. If you want us to withhold any commercially sensitive or proprietary information in your submission, please clearly state this and note the specific section. We will consider your request in line with our obligations under the Official Information Act.

Thank you for your feedback – we appreciate your time and input.