

Submission on discussion document: *Exposure draft: Financial Markets Conduct (Regulated Financial Advice Disclosure) Amendment Regulations 2019*

Name and organisation

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Responses to discussion document questions

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| 1 | <p>Will the proposed record-keeping requirement be workable in practice?</p> <p>The structure of ‘staged disclosure’ by way of Schedule 21A clauses 4, 5 & 6, with the initial disclosure of generic Publicly Available Information, moving to more specific and relevant information at the point of client engagement regarding the nature and scope of the advice, then moving to even <u>more specific</u> & additional disclosure when the regulated financial advice is provided, has the real potential to improve on the current disclosure regime and ensure greater client understanding.</p> <p>However, there are a number of inconsistencies and ambiguities in the proposed regulations that hinder the ‘workability’ of ‘staged disclosure’ that is addressed in further questions and in the points below:</p> <p>a) Clarification is required in the regulation as to <u>when</u> a consumer is considered a client, as this impacts on what record keeping is required and for whom. The regulation is currently silent on this. The current regulations could lead to unworkable requirements.</p> <p>For example, a disclosure could be given under regulation 229D schedule 21A clause 5 to a consumer, in regard to the nature and scope of the advice. But in fact, that consumer may never decide to become a client, nor proceed to seek regulated financial advice from the FAP and adviser. In such a case, the consumer would not meet the definition of a client, therefore, we recommend there be no obligation to hold these disclosure records.</p> <p>b) Clarification is required of the requirements under S229A(5) and also S229D(7) and 229E(5) - so there is clearly no expectation of disclosure every 12 months on an ongoing basis. We recommend these clauses be written so there is no obligation on the adviser and FAP to continually provide disclosure information unless;</p> <ul style="list-style-type: none">• there was a <u>material</u> change in information previously disclosed• the client requested information• the disclosure requirements are triggered by the client and adviser re-entering the advice process e.g. an advice review <p>c) Financial Advisers provide disclosures to clients as a part of the six step advice process.</p> <p>For example a ‘Scope of Service’ document is presented to a client with all the information required under Schedule 21A- clause 5. However, under regulation 192(A) it is ambiguous whether if these disclosures, embedded in an advice document, (dated and with the name of the client) meets this regulation requirement. Is there an</p> |
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expectation of separate and discrete 'Disclosure Documents' to be provided to the consumer/client?

It would be much more workable for the client if disclosure was expressly allowed within advice documentation and processes rather than have prescribed separate templates.

f) As written, Regulation 192A limits the licensed FAP's requirement to keep disclosure records to the FAPs clients ("P's clients"). However, the legislation allows a licensed FAP with no clients. Such a licenced FAP may have authorised bodies (unlicensed FAPs).

The transitional licensing requirements are a FAP is to have record keeping. Alignment and clarification needs to be obtained between these two processes.

2

Do you have any comments on the drafting of the Regulations that will require information to be made publicly available?

We hold that Schedule 21A Clause 4 ought to have all generic information.

'Duties Information' - the description of duties in the FMAC Act that the person giving the advice, is generic information and better removed from clause 6 and placed into disclosure that is publicly available that is, Schedule 21A Clause 4.

S229(C) references limitations and restrictions on the nature and scope of advice – should be changed to material limitations. There are ultimately endless limitations which will be confusing and add no value for the consumer to be disclosed.

3

Do you have any comments on the draft Regulations that will require the disclosure of information when the nature and scope of the advice is known?

Clause 5 and 6 both should omit any information previously disclosed to avoid document clutter and consumer confusion.

With regard to sections 'Fees and Expenses' and 'Conflicts of Interest & Incentives' we hold that only information not previously disclosed under clause 4 (publicly available) needs disclosure in clause 5. The repetition of this information does not add value to the consumer.

See recommendation regarding clause 229D(7) (see Q1)

4

Do you have any comments on the draft Regulations that will require the disclosure of information when the financial advice is given?

Clause 5 and 6 both should omit any information previously disclosed to avoid document clutter and consumer confusion.

Schedule 21A(6)(J) - The purpose of this final disclosure at time advice is given is to have clear, concise and relevant information pertinent to the decision of the consumer, we have a number of recommendations regarding the proposed disclosures at this point in the advice process.

Placing 'Duties Information' at this point adds a level of general information which only adds noise to the documentation. It is not pertinent to the decision required of the client. With regard to section 'Duties Information' we hold that this generic information removed entirely from clause 6 and be required under clause 4 (Publicly Available Information).

With regard to section 'Complaints Handling and Disputes Resolution' we recommend this be removed entirely from clause 6, as it is included in clause 4 (Publicly Available Information) and the repetition of this information does not add value to the client at this

stage of the advice process.

With regard to sections 'Identifying Information' and 'Availability of Information' we hold that only information not previously disclosed or materially changed from that provided under clause 5 (nature and scope) needs further disclosure in clause 6. The repetition of this information does not add value to the client at this stage of the advice process.

See recommendation regarding clause 229E(5) (see Q1)

5

Do you have any comments on the draft Regulations that will require the disclosure of a provider's complaints handling and dispute resolution processes when a complaint is received?

A standard condition of a FAP licence is that they have an internal complaints process – so the Regulation 229F (1) (a) shouldn't say "IF P has one" as this is in contradiction of the FMA licensing requirements.

There are significant challenges for a client to understand the internal and external complaint processes. The client understanding of such processes could be significantly improved if regulation 229F required the FAP to provide a diagram (e.g. process flow diagram) of both the complaints handling process and external disputes resolution process. We note that the ADRS websites already provide helpful process diagrams.

6

Do you have any comments on the draft Regulations that set the manner in which information must be disclosed?

Clarification needs to be provided as to whether disclosure information can be provided to a client verbally only. Regulation 229G states the hard & electronic copies are required if requested. Verbal (non-recorded) disclosure could be very confusing for the client. We doubt whether a consumer could absorb disclosure information provided verbally in a manner which would allow them to make informed decisions in the future without receiving any written information. Disclosure information is technical by nature and receiving this via an automated process with no ability to ask questions we believe does not improve outcomes for consumers. It is unclear if the regulation allows this or not.

Regulation 229G does not specifically refer to recorded audio files or video formats. Unlike mere verbal disclosures they can be replayed and reviewed by the client. Such formats can be of significant consumer benefit and understanding especially in the case where there is an issue of client numeracy and literacy. A recent ASIC-AFM report noted that with regard to disclosure requirements they are

""often 'one size fits all' interventions – yet people and contexts differ and shift"¹

Regulation 229G(3) specifies format, font and font size of disclosure but we would strongly recommend that disclosure regulation 229G(4) specifically allow recorded audio or video formats as acceptable. These disclosures can be kept and retrieved and if required, transcribed into a written format.

7

Are there instances in your business when regulation 229D might apply to someone who is not the one to give advice to the client? Please give examples and provide any comments on how the draft Regulations apply in such scenarios.

Not applicable to the Association

¹ Source: ASIC-AFM joint report *Disclosure: Why it shouldn't be the default October 2019*

Do you have any further comments on new regulation 229A to 229H of the draft Regulations?

If the summary of information is to be made publicly available and does not change through the advice process due to its general nature then we believe it does not have to be disclosed separately at each advice stage but referred to where it can be located.

Disclosure of Publicly Available Information

We recommend that disclosure by means of Publicly Available Information will have the ability to seriously simplify the personalised documentation that the client receives. This documentation will then become more relevant and meaningful to the client, which is the intent of the legislation and regulation.

Record Keeping for persons who are not clients

If a person does not proceed from the disclosure on scope of advice, are they considered a client? If a person does not agree to action advice given are they still considered a client? How long, if at all, would these disclosure records for these 'clients' have to be held? There is considerable cost and effort to hold records for persons not on a client base.

Our recommendation is that the regulations need to clarify if these persons are defined as clients, or not, so as to determine which disclosure records need to be held. We believe when advice is implemented then the person is considered a client.

Further to this clarification should be provided on when adviser relationships are with companies where both companies and individual employees are beneficiaries of the advice. E.g. Group Life Insurance and Group Health Insurance.

Format of Information

The table format of the regulations Schedule 21A clause 4-6 may not encourage effective new formats of information presentation. The FMA's 2013 report, *Clear, Concise and Effective Disclosure?* provides the sector relevant observations about best practice in the layout and presentation, length and complexity of text, and notes the

"effective use of diagrams and charts to illustrate complex business"²

The regulations ought specifically encourage the use of diagrams and charts in disclosure. The FMA states in the same report;

(of) "the need to keep sentences short and remove (or explain) legal terms and industry jargon" (Source as above page 2)

Disclosure of Fees, Expenses and Conflicts of Interest

It is important that disclosure of fees & expenses, conflict of interest including commissions or other incentives remains flexible to allow a variety of pricing mechanisms and remuneration models across the sector to be reported, such as calculated actual commissions, and % commissions reporting etc.

We will be providing a supplementary submission on the disclosure of fees, expenses and conflicts of interest.

Definition of Conflict of Interest

The definition of conflict of interest (2(2)(a)) refers to a 'reasonable client' test in terms of identifying conflicts of interest. The new adviser duties under the FMC Act refer to the 'prudent adviser' in the 'same circumstances'. We hold that the reasonable client would not expect to have a good grasp of identifying conflicts of interest in the sector.

The regulation could be strengthened by having a higher standard, such as – "any interest of A, P, or any other person connected with the giving of the advice that has the potential to influence the advice given by A"

² Source (page 2) <https://www.fma.govt.nz/assets/Reports/131030-clear-concise-and-effective-disclosure.pdf>

Incentives and Disincentives

There are various references to ‘incentives’. We recommend including in the regulation a definition and reference to ‘disincentives’ as well. For example, a reduction of commission rates for low volumes could escape the disclosure regime. Disincentives is an area that is often overlooked and should be drawn attention to, so FAPs and advisers cannot avoid their disclosure obligations by saying “this disincentive is not technically an incentive”

10 What (if any) transitional provisions should be included in the regulations?

The new regime starts from June 29 2020. It would be confusing for advisers and FAPs not to have clear disclosure regulations in place at least by early 2020 so that the disclosure documents and websites can be prepared and then incorporated into the advice processes that are compliant with the FMC Act.