

Submission

to the

Financial Markets Authority

on the

Guidance Note: Sale and Distribution of KiwiSaver

30 July 2012

Submission by the New Zealand Bankers Association to Financial Markets Authority on the Guidance Note: Sale and Distribution of KiwiSaver

About NZBA

1. The New Zealand Bankers Association (**NZBA**) works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes which contribute to a safe and successful banking system that benefits New Zealanders and the New Zealand economy.
2. The following thirteen registered banks in New Zealand are members of NZBA:
 - ANZ National Bank Limited
 - ASB Bank Limited
 - Bank of New Zealand
 - Bank of Tokyo-Mitsubishi, UFJ
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited.
3. If you have any questions about this submission, or would like to discuss any aspect of it further, please contact me:

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General comments

4. NZBA appreciates this opportunity to submit on the draft guidance note. We believe in the importance of the KiwiSaver regime both to the market and to the long term prosperity of New Zealand.
5. The KiwiSaver initiative sets out to encourage retirement savings for the long term benefit of New Zealanders. Fundamental to achieving this objective is ensuring that KiwiSaver products are easy to access. In addition, the ability to switch between funds was intended to drive competition in the market, resulting in better investment outcomes for KiwiSaver members.
6. Since the inception of KiwiSaver, banks have played an important part in the sale and distribution of KiwiSaver products. The wide spread of bank networks across New Zealand has enabled easy uptake, and has provided people with an accessible and affordable way to access information and advice regarding KiwiSaver products.
7. On the whole KiwiSaver products have been well accepted with member numbers inching close to two million. In addition, NZBA understands that complaints and issues around KiwiSaver have been fairly minimal. Anecdotal evidence from the Banking Ombudsman has been that complaint volumes have been very low, with all complaints to date being about the features of KiwiSaver rather than the product itself. This has mirrored the experience of NZBA member banks.
8. NZBA believes banks will continue to play a major role in the future of the KiwiSaver market, particularly as committed and competent providers of information and class advice services. In order to do this, it is essential that guidance about financial advice in the context of KiwiSaver is clear and allows banks to design and work within an appropriate service model.
9. NZBA supports the intention of the guidance to bring greater consistency to practices regarding the sale and distribution of KiwiSaver products. We believe that this will help increase confidence in KiwiSaver, which will have positive impacts both for consumers and the industry as a whole.
10. NZBA further notes that the structure of the guidance, especially the use of examples, is very user friendly. We commend the FMA for designing the guidance in such a user-focused manner.
11. NZBA does, however, have some concerns about certain aspects of the draft guidance. These are discussed in detail below.

Scope of the guidance

12. NZBA understands that the note is intended to be guidance, and as such is not intended to impose new legal requirements, but rather to simply clarify existing obligations that arise under the Financial Advisers Act 2008 (**FAA**). In particular, the note concerns the boundaries set out in sections 10 and 15 of the FAA.

13. NZBA believes that the guidance note should be clarified to consistently reflect that it is only intended to be guidance on FMA's views on interpretation of and compliance with the law, and that the language used in the individual sections needs to mirror this intent.
14. Section 10 of the FAA provides the tests for determining when financial advice is given. This first part essentially sets the parameters for determining when an interaction falls within the regime (i.e. when it is financial advice), and when an interaction falls short of advice (often referred to as a 'no-advice' or 'information-only' service). The key test outlined in that section is whether the advisor made or gave either a 'recommendation' or an 'opinion'. NZBA appreciates that financial advice can be given in situations where statements made to a customer do not use the words 'recommend' or 'opinion', but do contain, for example, a statement using the words 'good' or 'bad'. However, as confirmed in the appended legal opinion, the test is still focused on the content of the advice, not the context in which it was given.
15. The framing of section 10 clearly anticipates that some interactions in relation to financial products would not constitute financial advice, and this is reflected in the express exemptions. These would include, for example, providing information or helping with the completion of a form, as these types of interaction do not include opinions or advice. The legitimate existence of such no-advice services was contemplated by Parliament and the Select Committee during deliberations on the FAA.
16. Once the section 10 threshold has been met, section 15 provides the tests for determining whether the advice given constitutes class or personalised advice. This determination then impacts on the requirements around the interaction. The essence of the test under section 15 is either whether the individual's needs were taken into account in the advice, or whether they would reasonably have believed, under the circumstances, that their individual needs were taken into account.
17. As stated above, the tests and considerations under sections 10 and 15 are different, and as such in interpreting the law, the guidance needs to be framed in light of these differences in order to avoid confusion.
18. The guidance note also sets out a number of further recommendations regarding what FMA believes best practice in the sale and distribution of KiwiSaver to be. In many areas this is extremely useful. One area where we believe further guidance would also help would be in relation to the practice of pre-populating forms for customers.
19. NZBA firmly believes, however, that in areas where the guidance is purely as to best practice, care needs to be taken to ensure that the guidance does not imply legal obligations where there are none.

Treatment of 'no advice'

20. NZBA notes, and agrees with, FMA's position that steps need to be taken to ensure that interactions that are intended to be a 'no-advice' service do comply with the limits set out in section 10 of the FAA in order to help protect against unscrupulous selling of products under the guise of no-advice services.
21. NZBA believes, however, that care needs to be taken to ensure that the guidance does not purport to apply limits to the provision of no-advice services beyond the controls contained in section 10. As an example, we note the statement that face to face or phone-based interactions with someone who only sells one scheme's product would seldom constitute a no-advice service.
22. While we understand that this statement, and other similar statements, are intended to remind providers to be careful not to overstep the boundaries, we note that the current wording implies that these are legal limits, rather than best practice guidelines. NZBA believes, as discussed above, that the use of no-advice services is anticipated under the FAA. The guidance as it currently stands does not reflect this, and NZBA believes that a reference to this effect should be included. In addition, where the guidance goes further, suggesting best practice, these recommendations should be clearly identified as such.

Reasonable expectation standard

23. NZBA notes that in a number of instances the guidance refers to the expectation of the client or their interpretation of the situation. A key area where this is relevant is in determining whether the advice provided was class advice or personalised advice.
24. We note that section 15(1)(b)(ii) provides that where the circumstances would lead the customer to reasonably expect that the adviser took their particular position or goals into account, advice is deemed to be personalised advice.
25. The current drafting does not make consistent reference to this 'reasonable' requirement, both in the guidance on the interpretation of the section and in the subsequent examples. As per our discussion on 17 June, we note that this is an oversight that you have indicated you can easily rectify.

Contextual elements and implied advice

26. NZBA notes and agrees with the key theme of the guidance that the circumstances in which advice is given can greatly impact how the customer perceives the interaction. We further agree that this is something for distributors to be mindful of when designing and monitoring their service model.
27. As stated above, however, for an interaction to be caught under the FAA, financial advice in the form of an opinion or recommendation must be positively provided during the interaction with the client. As a result, we believe that the mere provision of information can never constitute advice, regardless of the context.

28. NZBA believes care needs to be taken to ensure that a clear demarcation is maintained between the legal tests outlined in sections 10 and 15 and other best practice guidelines contained in this guidance note. NZBA believes that the two elements have been confused in some of the discussion around determining if advice was given.
29. Most of the potential uncertainty relates to the repeated use of the phrase “express or implied” and the frequent assertion to the importance of “context” in determining if advice was given. The repeated use of this terminology has the potential to be interpreted as the guidance both introducing a contextual element into the requirements for determining if an interaction is caught under section 10, and introducing a more general concept of implied advice.
30. Both these aspects are of concern to our members. If a distributor has taken care to provide the proper warnings to a client and to limit the service to the provision of information, they need to be able to rely on those warnings as a control. Contextual elements will not deem that advice was given but are part of the wider considerations as to the type of service model that is applied.
31. We note that the original draft of the FAA made reference to situations where a client was ‘influenced’ by the situation. This is a much closer standard to ‘imply’ but as it was deleted from the final version of the FAA. NZBA believes it would be unfortunate if the wording of the guidance implied the reintroduction of this concept. We strongly believe that this confusion needs to be clarified in the final version of the guidance.

Precedent and the unique nature of KiwiSaver products

32. NZBA notes the statement in the introduction to the guidance that many of the general principles contained in the guidance would apply to financial products beyond KiwiSaver. It further states, however, that given the unique nature of KiwiSaver, some factors contained in the guidance would not apply to other products.
33. NZBA strongly supports the notion that the unique nature of KiwiSaver means that the requirements around the sale and distribution need to be different from, for example, basic simple savings and loan products.
34. NZBA believes, however, that in spite of the general statement at the front of the guidance, the note will still be looked at for guidance as to how FMA views how other products need to be sold or distributed. As a result we believe it is important that the guidance is amended to more clearly indicate which parts contain principles that FMA believes should be generally applied in all cases where financial advice is given, and which are intended to be KiwiSaver specific.

Entering and switching KiwiSaver schemes

35. NZBA notes that the guidance does not distinguish in any way between guidance around interactions aimed at signing individuals up to KiwiSaver and those aimed at enabling switching between schemes.
36. NZBA notes that much of the negative publicity around the selling of KiwiSaver products has related to switching, and acknowledges that as the growth in number of new members declines these issues will only become more prevalent.
37. NZBA believes that the guidance should reflect the differences in practice that may apply when joining up a member as opposed to switching an existing member. This could be done, for example, by noting that initial discussions may take longer, and may be initiated by a bank employee, while still constituting either an information only service or class advice.

Switching within a KiwiSaver scheme

38. NZBA notes that the guidance applies the same standard to advice relating to switching between funds in the same scheme as it does to switching schemes, under the presumption that switching funds is a "renewal or variation of the terms of an existing category 1 product".
39. NZBA does not support this interpretation. As noted in the guidance, such a switch is excluded from the requirements in the Securities Act 1978. We do not see any justification for treating scheme switching differently under the FAA than under the Securities Act. We suggest that given the precedent under the Securities Act, in the absence of express inclusion under the FAA, it would be inappropriate for guidance to reverse this standing precedent. This position is supported by Chapman Tripp in the appended legal opinion.
40. We agree, however, that switching between funds within a scheme can be as important a decision as switching between schemes, and thus for many investors this would be a time where they may be seeking advice. Where advice is given or a need to provide personalised advice is identified, NZBA agrees that as best practice the content of such advice should be held to the same standard as advice. However, guidance to this effect should only be couched as best practice guidance.

Conduct guidance

41. NZBA notes that the document includes a lot of guidance around the conduct associated with the provision of financial advice about KiwiSaver products. A key example is the section entitled "What type of advice is needed?" which suggests that certain levels of advice needs to be given under certain circumstances.
42. From our discussions with you we note that the intention of these sections is to provide some indication of the factors that FMA believes should be taken into

account when designing a service model for the sale and distribution of KiwiSaver products.

43. NZBA agrees with a number of these recommendations as to best practice in the industry. We note, however, that as mentioned above the current structure does not clearly distinguish between legal requirements under the FAA and best practice guidelines. As a result, there is the potential for confusion as to what the actual legal requirements are.
44. The FAA seeks to regulate the content of advice when it is provided, but does not seek to dictate when or in what manner advice is provided. Such matters are for the individual provider to determine, taking into account their circumstances and industry practice.
45. NZBA believes that to lessen the chance of confusion sections such as the one mentioned above, which are pure guidance, should be clearly identified as such, and potentially presented separately to the sections that focus primarily on interpreting the legal requirements.
46. We further note that section 36 of the FAA does allow for the making of regulations specifying specific conduct obligations for class advice services to retail clients. NZBA believes that if there was a desire to make the conduct guidance mandatory, this should be done through regulation instead.

Accessibility of KiwiSaver

47. As mentioned above, the NZBA has some concerns about the guidance's current expression of the boundaries between no-advice, class advice, and personalised advice due to the impact that may have on the accessibility of KiwiSaver products.
48. Some investors do choose to enter/switch KiwiSaver schemes based simply of the provision of information. Currently, many bank employees only provide information-only or class advice services, not personalised advice. This is partially due to the fact that from a training and monitoring perspective it is fairly simple to explain the distinction between personalised advice and a simple information service. The same cannot be said for the distinction between class and personalised advice.
49. A push towards a personalised advice model would certainly lead to delays in receiving information, particularly when the scale of KiwiSaver membership is compared to the number of Authorised Financial Advisers in New Zealand. In addition, it would likely impose additional adviser costs on investors. For certain groups of individuals, such as those with small balances, conservative risk profiles or those that were initially defaulted into a KiwiSaver scheme, the added delay and cost may inhibit their ability to enter/switch in cases where that is likely to be in their best interests.