CONFIDENTIAL

Submission to the

Commerce Committee

FINANCIAL SERVICE PROVIDERS (PRE-IMPLEMENTATION ADJUSTMENTS) BILL

CONTENTS

SUBMISSION BY THE NEW ZEALAND BANKERS' ASSOCIATION TO THE COMMERCE COMMITTEE ON THE FINANCIAL SERVICE PROVIDERS (PRE-IMPLEMENTATION ADJUSTMENTS) BILL

This submission is the collective view of the New Zealand Bankers' Association (the "NZBA") being the following nine member banks:

- ANZ New Zealand Limited
- ASB Bank Limited
- Bank of New Zealand
- Citibank, N.A.
- The Hongkong and Shanghai Banking Corporation Limited
- Kiwibank Limited
- Rabobank New Zealand Limited.
- TSB Bank Limited
- Westpac New Zealand Limited

INTRODUCTION

The NZBA supports the purpose of the financial adviser regulatory regime, which is:

> *"to promote the sound and efficient delivery of financial advice, and to encourage public confidence in the professionalism and integrity of financial advisers."*

The NZBA also supports the intention of the Financial Service Providers (Pre-Implementation Adjustments) Bill (**"Bill"**). However, it is important to ensure the Financial Advisers Act 2008 (**"FAA"**) and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**"FSP"**) can be implemented effectively.

Overall, our submission is aligned with the recommendations of the Capital Markets Development Taskforce, which recommended that a comprehensive and simple regulatory regime should apply to retail investors that is rigorously enforced. It noted, in

particular, that regulating the wholesale market under the financial advisor regulatory regime is not justified and is inconsistent with existing law. There are a number of issues not addressed in the Bill, which require urgent attention so the effectiveness of the regime is not severely compromised. Many of these issues stem from the broad scope of the regime. The NZBA has submitted solutions to each of the problems it has identified.

We note that the NZBA will be submitting separately on the Supplementary Order Paper (**"SOP"**) dated 16 March 2010, which will amend sections of the FAA currently dealing with "investment transactions". This submission also intends to include further comment on the definition of financial advice which we see as too far reaching. intends to include further comment in our submission on the investment transactions SOP

We would also like to thank the Committee for allowing officials from MED and the Securities Commission, and the NZBA members to continue with a Working Group to look at solutions to the problems set out below. Much has been resolved, and our submission reflects the discussions of the Working Group.

REQUEST TO MAKE ORAL SUBMISSION

The NZBA is happy to provide further information on any matter. We wish to make an oral submission to the Committee.

SUBMISSION SUMMARY

FAA Changes

1. The NZBA submits that the successful implementation of the FAA regime requires the legislation to be amended as follows: (See suggested drafting/guidance in the attached Appendices.)

1.1 **Genuine transition period for industry**:- Provide a genuine transition period for operational implementation of the regime by the industry, which allows sufficient time for the industry to prepare adviser business statements (**"ABSs"**), disclosure statements, complete training needs analysis, complete staff assessment / reassessment where required, and change documents, processes, procedures and IT systems. The lack of a transition period threatens the integrity and purpose of the regime.

1.2 **Wholesale/sophisticated persons exemption**:- Focus the FAA's application on those who require the benefit of the protections offered by the regime by excluding those who do not require that benefit or rely on financial advice. This submission is aligned to the Recommendations of the Capital Markets Taskforce, which noted that regulating of the wholesale market under the financial advisor regulatory regime is not justified and is inconsistent with existing law ("Capital Markets Matter", Capital Markets Development Report, December 2009, at pages 66 and 67).

1.3 **Group QFE**:- Allow a group of related companies to apply to become a single qualifying financial entity ("QFE") to recognise that large organisations like banks typically provide financial services and issue products through several entities within a corporate group, each of which have separate legal identity, but with central governance and risk management framework spread across all the entities in the group.

1.4 **Reclassify Cash PIES**:- Reclassify Cash PIEs as category 2 products under the FAA as these are widely recognised as simple products that replicate the features of standard bank accounts and term deposits.

1.5 **Change treatment of online / brochure generic advice**:- Allow an entity registered under the FSP to give financial advice in relation to category 1 and category 2 products by automated means or in a brochure, provided they have had a financial adviser ("AFA") approve the content of the financial advice. Remove the unnecessary requirement for disclosure by the adviser. It is artificial in those situations, where the customer naturally considers the institution not the individual is responsible.

1.6 **Improve "promoter" definition**:- Amend the definition of "promoter" under the FAA so that it covers wholesale customers and all financial products under the FAA (rather than being limited to securities under the Securities Act 1978 and offers to the public).

1.7 **Improve "financial advice definition"**:- The current definition of "financial advice" is too far reaching. The NZBA will work through options to address this issue and intends to include further comment in our submission on the investment transactions SOP.

FSP Change

2. The NZBA submits that the successful implementation of the FSP regime requires the legislation be amended as follows.

2.2 **Correctly target the dispute resolution schemes**:- The dispute resolution scheme provisions under the FSP are currently focussed on services provided to the public. The NZBA supports this focus but submits that the definition of those who must be able to access dispute resolution is not appropriate. It is neither consistent with other legislation nor with business practice. The definition needs to be better targeted by adding further bright line tests, such as the business has a turnover or annual balance sheet that does not exceed $1 million.

DISCUSSION

FAA Changes

A genuine transition period for industry is required

Issue

3. For legislation of this type and scale, there needs to be a genuine transition period for industry to put the regime into operation following the completion of the rules. Here industry is being required to operationalise the legislation before the rules are finalised. In addition, the FAA itself is still undergoing significant change as envisaged by the Bill.

4. To date, critical delays in information release dates have caused planning uncertainty and truncated the time for industry to understand, adapt and become fully compliant. Examples of this include:

- Timing of the Code of Conduct – originally December 2009, now July 2010.
- Inadequate information to prepare the Qualifying Financial Entity (**QFE**) application because it is not yet known whether group QFEs will be able to submit an application.
- Timing of the QFE application.
- Timing of competence.
- Timing of dispute resolution.
- Timing of compliance.

5. Once the regime is in place and there is certainty around what constitutes "financial advice" member banks need a realistic timeframe to, for example:
   - Reassess AFA and financial adviser ("FA") numbers.
   - Plan, train and assess AFAs
   - Re-train and reassesss AFAs who do not meet the required standards on first assessment.
   - Identify product options.

- Prepare policies and process documents required in ABS guidelines.
- Obtain legal reviews and Board approvals.
- Submit draft ABSs.

6. In addition, the Securities Commission has indicated it will require up to 6 months to vet and approve all QFE applications prior to the implementation date.

7. Both the United Kingdom and Australian adviser regimes had the benefit of a transition period as part of their implementation. In Australia, the period for transition was two years. In the United Kingdom, new qualification and fee charging rules upon investment advisers will not come until effect until the end of 2012 - effectively a three year transitional period. In New Zealand it is also usual to include a transition period in legislation. For example, both the anti-money laundering legislation and the Companies Act 1993 allowed at least two years for implementation.

Impact on customers and public confidence

8. Examples of negative consequences that will arise in 2011 unless a relevant industry operational transition period is allowed are:

- There will be significantly fewer qualified advisers able to advise on category 1 products.
- QFEs will not have rolled out compliance programmes in full.
- Disclosure statements will not be ready.

9. These will likely attract significant public attention and result in a loss of public confidence in the financial advisory sector regulatory regime.

Timing and information concerns

10. Member banks have no incentive to delay implementation having already engaged additional resource such as project managers, IT specialists and other (usually on contract).

Proposed solution

11. Time is required to transition AFAs to meet competence requirements and to adjust for compliance with the QFE model and other new documents, structures and processes. A “pathway to compliance” is required.

12. The NZBA’s solution is a two stage implementation process:

- **Regime Launch 1 December 2010** - The regime completion launch would occur as planned on 1 December 2010.
  (By then AFAs and FAs could be registered, QFE applications would have been submitted to the Securities Commission and customers should have access to dispute resolution schemes. The regime will be in place).

- **Industry operational transition period to 30 June 2011** - The compliance programmes for individual AFAs and QFEs, and the additional training for AFAs, and new documents, structures and processes would be required in full by 30 June 2011, assuming that all current assurances about the implementation of key aspects of the regime are met, including finalising the legislation, regulation and the Code by September 2010 and the availability of accredited educational providers.

  Additional training for AFAs would be completed over a longer timeframe as indicated by the Securities Commission and the Code Committee as the “pathway to compliance”.

  During the transition period, it should be a defence against prosecution for non-compliance that the relevant individuals and institutions are working in good faith towards compliance on 1 July 2011.

Submission

13. The NZBA submits that an industry operational transition period be included in the FAA allowing compliance programmes for individual AFAs and QFEs, and the additional training for AFAs, to be required by 30 June 2011, with additional training for AFAs to be completed over a longer timeframe as indicated by the Securities Commission and the Code Committee as the “pathway to compliance”.

Wholesale and sophisticated customers excluded from FAA's scope

Issue

14. Wholesale customers and sophisticated customers (referred to in this submission as "eligible" customers) should be excluded from the scope of the financial adviser regime, by virtue of their capability and financial literacy relative to the typical 'mum and dad' investor.

15. The Capital Markets Development Taskforce noted in its report:

> *"The regulation of advice outside the retail market is not justified, as non-retail investors are able to obtain information from their advisors, judge the competency of their advisors, judge the competency of their advisors without inflexible, mandated disclosure, codes of practice and competency standards. ("Capital Markets Matter", at pages 66 and 67)"*

Impact on customers

16. Advisers to wholesale and eligible customers should not be required to be individually authorised by the Securities Commission, nor required to be registered under the FSP. There is no value in them doing so because their customers do not either seek or require the protection of the state in relation to their dealings and it is inconsistent with international practice (for example, Australian and United Kingdom). It is also common place for New Zealand legislation to restrict financial sector compliance regulation to protect retail and SME customers only (for example, the Credit Contracts and Consumer Finance Act 2003).

17. Narrowing the scope allows the FAA regime to be focussed on those who rely on the advice, avoiding resources of both the private sector and the Securities Commission being needlessly dispersed.

18. The main reasons for the wholesale and eligible customer exemptions are:
    - They are experienced in financial markets and do not require or need the protections of the FAA.
    - They are likely to seek and / or can afford independent legal and financial advice or have in-house advisers or treasury departments.
    - They are sophisticated enough to be able to choose an adviser with qualifications which are most suited to their needs.
    - They include market counterparties such as banks, insurance companies, fund managers and investment companies who are experienced in financial markets and will assess their own risks.

19. Requiring the FAA to apply to wholesale and sophisticated customers will place additional barriers to the ability of these customers to do business in the financial markets and may mean these customers will pay more.

20. To illustrate further, the following bank / customer interactions are currently caught by the FAA and if unchanged, would require relevant staff either to attain AFA equivalent status (assuming they are employed by a QFE) or refer them to suitably qualified staff:

    - Where Treasury Unit / Market dealers talk to corporate customers about buying or selling products such as bonds or commercial paper issued by third parties.
    - Likewise in relation to derivatives, where the bank is not in a position to offer a certain product to a corporate customer, it may suggest or recommend a product offered by an offshore affiliate and introduce the customer to that affiliate to provide that product.
    - Commercial relationship managers often discuss land transactions with their business owners or land developer customers
    - Some banks' phone numbers, which wholesale customers call, are diverted after hours to offices offshore so as to provide 24 hour services.
    - Where overseas parties are participating on a conference call with New Zealand wholesale customers.

- Bank economists or senior employees who provide general presentations on financial advice to wholesale clients may be captured by the financial advisers regime.
- Research teams providing general market commentaries that are sent to a pre-defined list of customers may be covered by the financial advisers regime, even though the advice provided is general.

Proposed solution

21. The NZBA submits that wholesale and eligible customers need to be clearly and easily defined to prevent confusion in the market.

22. The two parts to the sections that would achieve this exemption are: the automatic exemption and the self-certifying opt-out (see Appendix ONE).

- PART ONE: An automatic exemption for wholesale customers - The 'automatic wholesale person exemption' would be a combination of a bright line approach and a principle-based approach. This allows certainty plus flexibility for different situations and alternative preferred approaches to the exemption – some parts of the industry require the certainty of a prescriptive approach, some prefer the flexibility of a principle-based approach.

- PART TWO: A self-certification opt-out for eligible customers - The opt-out mechanism would be a certificate provided by the customer stating that they wish to opt-out of the regime because they meet certain criteria, do not require the protections of the FAA and understand their adviser is not covered by the FAA. The onus would be on the adviser to satisfy themselves on reasonable grounds that the investor does have the required investing and / or business experience.

Rationale for solution

23. As well as looking at other jurisdictions' approaches in determining the solution, we looked at the Securities Act 1978 provisions. We found a number of problems

with the Securities Act approach; largely to do with its purpose – which is for the provision of securities, not the provision of financial advice like the FAA.

Principles-based approach

24. Particularly, the section 3 (2) (a) (ii) definition in the Securities Act 1978 does not necessarily exclude all large corporate entities (which would fall within one of the categories of ‘wholesale person’ in Appendix ONE) from outside the financial sector.

25. While the interpretation by the Courts of the "habitual investor" phrase in the Securities Act 1978 has shifted over time, the position now appears to be settled. It is now confined to core professional investors and does not include those entities who do not invest on a regular basis but who for the reasons discussed above do not want or need the protection of the regime. The investment activity carried out by the habitual investor must actually be "business" activity. In this regard there is useful precedent here, but again it may not be wide enough to cover other entities not requiring, and not wanting, the protection of the FAA regime.

26. Some member banks do not currently make use of the section 5 (2CE) exemption in the Securities Act 1978 because of the difficulties with satisfying themselves with the assessment of the customer. It is a qualitative definition rather than ‘bright line’, and hence requires the application of judgment in each case, with a residual risk that a Court will later disagree with the assessments made.

27. However, the decision to not use the section 5 (2CE) may also be due to risk management decisions. For instance, where a bank has determined that (notwithstanding the increased cost and compliance obligations) the more appropriate approach for the bank to take from a risk perspective is to provide the product disclosure documents required by registered bank exemptions under the Securities Act, than seek to rely on section 5 (2CE). Compliance with the FAA is not quite that simple so an exemption may be more widely used.

Bright line approach

28. Experience of bright line approaches in New Zealand, Australia and the United Kingdom, show that bright line tests can work where the tests are clearly defined and no subjective judgment is required to be employed. However, they also present problems with distorting incentives, requiring continual monitoring and can result in inadvertent gaps where a customer does not obviously fit into a category threshold.

29. Also, the Australian regime requires an accountant to certify compliance with the thresholds (as does one exemption in the Securities Act). This requirement for independent certification should not apply here as both in New Zealand and overseas, accountants are reluctant to provide such certificates due to potential liability issues or charging excessive fees for doing so, raising an additional barrier to doing business in the New Zealand market. A mechanism should not be put in place that cannot be used because the market will not provide it.

Self-certifying opt-out certificate

30. The opt-out approach deals with the grey area between wholesale customers and members of the public. It gives this class of customer the ability to choose to use an adviser covered by the FAA or not, depending on whether the customer is able to judge the position for themselves, and a non-FAA adviser agrees.

31. If an adviser is unsure whether the person fits into the automatic exemption then they can use the opt-out certificate provided “they are satisfied on reasonable grounds that” the person meets the suggested eligible person criteria in Appendix ONE.

Submission

32. The NZBA submits that the FAA has an automatic exemption for wholesale customers and a self-certificate opt-out mechanism for eligible customers, along the lines set out in Appendix ONE.

Banking groups to apply for group QFE status

Issue

33. The way the FAA treats QFEs is entirely inconsistent with industry operating models. For instance, banks' financial services are usually provided by several entities within a corporate group, each with its own separate legal identity, but with a central governance and risk management framework across all the entities in the group. Further, in banking groups, the majority of employees are often employed by one entity and some of the products are issued by another within the group.

34. Currently under the FAA (as proposed to be modified by the Bill), employees or nominated representatives of a QFE are not required to be AFAs if they only advise on category 1 products of which the QFE is an issuer or promoter. However, this is not the case where the employees or nominated representatives of the QFE advise in relation to category 1 products which are issued by related entities in the same corporate group as the QFE.

35. Allowing a group QFE application would improve efficiencies in the regime by reducing procedural requirements and duplication of assessments for entities that rely on group-wide policies and risk management practices to ensure ongoing compliance with the regime.

Impact on customers

36. Allowing banking groups to apply for QFE status as a group will have a positive impact on customers, who will be able to continue to have access to certain freely-available products.

Proposed solution

37. The legislation be amended to allow a QFE applicant the discretion to apply for group status, as follows:

- All of the employees and nominated representatives within the QFE group will be able to provide advice on the products issued or promoted by all of the QFE group companies.

- The QFE would be responsible (and be supervised accordingly) for the related companies within the QFE group.

- The QFE application can specify either a lead company or umbrella arrangement where two or more companies in the group are the lead.

- The QFE would agree with the Commission on how to record and store the names of its nominated representatives. This would require amending clause 17(2) of the Bill by deleting the words "(ca)… with an up-to-date list of the QFE's nominated representatives".

- The QFE (either one company or a number of the companies in the group) would need to demonstrate to the Commission that it has sufficient control over the advisers and the products in the companies within the QFE group.

- The Commission would have the right to reject or amend a group QFE application, in part or in full, if the QFEs control over products and advice is not demonstrable. (The Commission does not need specific powers in relation to limiting type or development of products).

Submission

38. The NZBA submits that the legislation be changed to allow group QFE structures along the lines of the drafting in Appendix TWO.

Definition of “promoter” requires amendment

Issue

39. A solution to the problem of employees and nominated representatives being able to advise on QFE’s category 1 products, which has been proposed under the Bill, is that employees and nominated representatives of a QFE will be able to advise on category 1 products of which the QFE is the issuer or a promoter.

40. At first blush this appears to resolve the matter, but in practice, it will be only a partial solution for two reasons:
    - Being a promoter has implications under this Securities Act 1978 which would mean that the QFE will need to become deeply involved in the preparation of the prospectus.
    - The Securities Act 1978 definition is limited to securities offered to the public, so misses out wholesale customers and financial products that are not securities which the Act captures leading to the odd result that the FAA is in this aspect more restrictive in relation to securities offered only to wholesale market participants.

Submission

41. To partially address this issue, the NZBA submits the definition of “promoter” in the FAA be changed to cover wholesale persons and other products in the FAA where the person is instrumental in the formulation of a plan or programme pursuant to which the financial product is offered to any person – see the drafting suggested / guidance in Appendix TWO.

Entities to give generic brochure and internet advice

Issue

42. The FAA prevents the development in New Zealand of automated online advisory services and generic brochures. Currently, the FAA requires a natural person to perform all financial advice, even when that advice is generic and provided by mediums such as internet-based, automated systems or in printed brochures (including posters, flyers and statement inserts).

43. Automated services, including web pages and online calculators, are effective in delivering generic advice efficiently by systems in which customers' complete online questionnaires and the systems then generate generic recommendations as to risk tolerance and the likely classes of products which would satisfy that risk tolerance.

44. There have been suggestions that the solution is to provide the name and contacts details of a specific individual natural person who has qualified as an authorised financial adviser for all such publications. The requirement that one named individual should take responsibility for all the advice generated in a large corporate entity is unrealistic. Where automated services operate or brochures are generic, the customers understand that it is the corporate entity, and not an individual, who stands behind the content of the brochure or online information.

45. We do not want an individual having to be available to all customers and the disclosure will need to be changed every time that individual is unavailable or ends their employment. The accountability and liability for the advice should be allocated to the corporate entity.

Impact on customers

46. Without the change, many services may simply become too difficult to deliver. The current requirements will create significant compliance costs and have the

potential to reduce the services available for customers and innovation in the online environment for the financial sector.

Submission

47. The NZBA submits that an entity can give the online/brochure advice provided a financial adviser has approved the content of the financial advice given by automated means or in a brochure – see Appendix THREE.

Categorisation of cash PIES as category 2 products

Issue

48. Cash Portfolio Investment Entities whose only underlying investments are debt securities issued by a registered bank (“Cash PIEs”) are widely recognised as simple products that replicate the features of standard bank accounts and term deposits. They are currently provided by the same bank staff who deal with deposits.

49. However, because of their form (a unit trust), and the fact that technically the issuer is a different entity in the group, they will be category 1 products (unless it fits into the limited promoter definition under the Securities Act 1978), which will restrict their availability and unnecessarily limit access for customers. Further, the Securities Commission, in its exemption notices under the Securities Act 1978, has recognised that Cash PIES are simple products.

Impact on customers

50. This means that, in the future, bank staff will not be able to suggest to customers that they may wish to consider a Cash PIE as an alternative to a term deposit unless they are authorised financial advisers. This cannot be in customers' interests.

51. As a consequence banks estimate more than twice the number of authorised financial advisers (previous estimate was 5,000) would be required under the current act, or distribution models will significantly reduce customers’ access to Cash PIEs.

Submission

52. The NZBA submits that Cash PIEs be reclassified as a category 2 product along the lines of the drafting in Appendix FOUR.

FAA scope is too far reaching

53. The current definition of "financial advice" inadvertently captures conversations which neither the customer nor the adviser intend to be "financial advice", nor in fact rely on as being so. The NZBA will work through other options and intends to include further comment in our submission on the investment transactions SOP.

Other amendments

Exemption for company directors for advice to shareholders

Issue

54. A director of a company giving advice to shareholders of that company or other company group members would currently under the FAA need to be an AFA or a FA if the advice relates to their shares. This is unworkable, unnecessary, and would severely limit the pool of directors in New Zealand. This issue affects everyone not just banks.

Submission

55. The NZBA submits that FAA must include an exemption in section 12 for directors giving advice to shareholders of that company or other company group members that relates to their shares, as follows:

> *"Section 12*
>
> *(qa) a director of a company giving advice to a shareholder of that company, a holding company of that company or a subsidiary of that company in relation to its shares or other interest in that company."*

Documents issued in lieu of a prospectus

Issue

56. The NZBA supports the intent behind section 13 (1), which is essentially to confirm that statements in offering documents are not intended to constitute financial advice, but considers a new paragraph is required.

57. The rationale behind section 13 (1) is that the content of those documents are statements by the issuer of securities to potential investors, rather than statements by any third party adviser. However, the drafting of section 13 is focussed on circumstances when the recipient is a member of the public for the purposes of the Securities Act 1978.

58. In the case of section 13 (1) (a) to (e)) because the documents referred to are documents required for a public offer under that Act, and when the recipient is a consumer for the purposes of the Credit Contracts and Consumer Finance Act 2003 (in the case of section 13 (1) (f)).

59. As a result, documents used by an issuer to offer exclusively to the wholesale market will not, however, fall within the section 13 (1) as currently drafted. Specifically section 13 (1) (e) will not assist because offers not made to the public are not made under "an exemption" under the Securities Act. Instead they are simply outside the scope of the Securities Act.

Submission

60. The NZBA submits that a new section 13 (1) (ea) needs to be added. The section would mean that wholesale market information memoranda and offering circulars would have the same treatment as their equivalents in the retail market, along the following lines:

"Section 13

(ea) a document or documents issued in lieu of a prospectus or investment statement to persons who are not members of the public under the Securities Act 1978."

(Note the proposed section 13 (1) (ea) above does not cover financial products which are not securities. This is because there is no wholesale market equivalent to a disclosure statement under the Credit Contracts and Consumer Finance Act).

"Supervised advisers in training" class of AFA

Issue

61. Section 86(3) of the Act allows the Code to specify different standards for different classes of AFAs. However, we understand there is some uncertainty as to whether the provision for "classes of AFAs" would allow the Code to specify different standards for "supervised advisers in training".

62. These "advisers in training" should be able to offer financial adviser services under conditions determined by the Code Committee, including under the supervision and control of an AFA. The AFA would take responsibility and liability for the service provided by the "supervised adviser in training".

63. A class of "supervised advisers in training" is required to cater for the following circumstances:

- During implementation of the regime, there will be significant time and resource pressures on training providers and assessors to cater for the large number of advisers needing training and/or assessment; and
- Post implementation, when new advisers to the market (from New Zealand or offshore) will want to practice but will be required to complete targeted training as well as assessment to become full AFAs.

Impact on customers

64. Not catering for a class "advisers in training" may affect customer accessibility to category 1 products and financial planning services and business continuity.

Submission

65. The NZBA submits section 86(3) of the Bill should be amended to allow the Code to cover "advisers in training", the conditions under which those advisers may provide a financial adviser service and the standards of conduct and competence those advisers must adhere to.

FSP Change

Better target the dispute resolution schemes

Issue

66. Section 48 of the FSP requires an approved dispute resolution scheme in respect of a financial service provided to the public. The NZBA supports that focus. But the definition of the public in section 49 and exclusions in section 63 are insufficiently focussed.

67. The definition of public needs to be better targeted by adding further bright line tests for exemption to section 49(2) of the FSP, such as where the business has a turnover or annual balance sheet that does not exceed $1 million, as is the case in other jurisdictions, for instance, the United Kingdom.

68. These concerns also arise under section 63 which relates to rules about approved dispute resolution schemes. While section 63(c) of the FSP requires dispute resolution schemes to allow complaints to be made by "businesses that have no more than 19 full-time equivalent employees", this does not accurately define small and medium enterprises. It will capture many entities that do not require access to the scheme, such as trusts, or merchant banks, and investment companies with less than 19 employees.

69. The consumer access to dispute resolution rationale which sits behind the Banking Ombudsman Scheme does not readily apply to wholesale customers, who are both well-informed and well-resourced. Dispute resolution schemes should be able to exclude those customers from their scheme's coverage.

Submission

70. The NZBA submits that the FSP be amended to change the definition of public by adding further bright line tests for exemption, such as where the business has a turnover or annual balance sheet that does not exceed $1 million.

Appendix ONE

NOTE: this is not fully resolved drafting, but suggestion/ guidance.

WHOLESALE EXEMPTION

10A What is not a financial adviser service

1. A person ("A") does not perform a financial adviser service when A gives financial advice, makes an investment transaction or provides a financial planning service if A is satisfied on reasonable grounds that the recipient ("B") is either –

   (a) a wholesale person; or

   (b) an eligible person who has, prior to the relevant service being performed, given A self-certification opt-out executed as required by subsection [(3)] below.

   wholesale person means:

   A. Professional Counterparty - A person who is registered [under the FSP Act], or a person whose principal business or activity is the investment of money or who, in the course of and for the purposes of their business or activity, habitually invests money; OR

   B. Professional Investor - A specific list of types of larger entities, including for instance, fund trustee/manager of more than $10m in net assets, person in control of at least $10m, crown entities/SOEs/local authorities, supra nationals/govt agencies, listed companies, all either located/incorporated here or overseas; OR

   C. Business Customer - In connection with a business, a customer that meets (or any of whose holding companies or subsidiaries meets, in aggregate) (or has met at any time during the previous two years) any two of the following conditions:

   - Balance sheet total of at least $1m (or its equivalent in any other currency at the relevant time); or
   - Net turnover of at least $1m (or its equivalent in any other currency at the relevant time); or

- Aggregate total business related exposure and financial instrument value of at least $500,000 (or its equivalent in any other currency at the relevant time); or
- Customers with an average number of employees or nominated representatives during the preceding 12 months in excess of $10m;OR

D. Foreign customer – the customer is a foreign entity which, if established or incorporated in New Zealand would fall within one of the above categories, OR

E. Product Notional Amount / Price – in relation to a product, where the price/value of that product is greater than $500,000.

eligible person means a person who, as a result of having experience in investing money or in the industry or business to which the relevant financial advice, investment transaction or financial planning service relates.

2. To be an eligible person the relative or close business associate in (a) or person in (b) needs to be able to assess:

(i) the merits of the financial advice, investment transaction or financial planning service; and
(ii) the value and characteristics of any financial products that might reasonably be the subject of the financial advice, investment transaction or financial planning service; and
(iii) the risks associated with the financial advice, investment transaction or financial planning service; and
(iv) that person's own financial needs; and
(v) the adequacy of the financial advice, investment transaction or financial planning service being provided by A.

self certification opt-out means providing a certificate substantially in the form in [schedule 1] or such other form as may be prescribed.

3. Self-certification opt-out certificate must be signed by the eligible person.

ELIGIBLE PERSON CERTIFICATE

To: _____

("A")

name of service provider

I _____

("B")

name of eligible person

confirm that:

1. I understand that the effect of this certificate is **to release A from the obligation to comply with the Financial Advisers Act 2008**.
2. As a result, A will **not** be bound by the Financial Advisers Code of Professional Conduct in relation to any:
   - financial advice A gives me;
   - investment transaction A makes for me; or
   - financial planning services A provides for me.
3. As a result of my own experience in the investment of money or in the industry or business to which they relate, I am able to assess:
   (a) the merits of the financial advice, investment transaction or financial planning service provided by A; and
   (b) the value and characteristics of any financial products the subject of the financial advice, investment transaction or financial planning service; and
   (c) the risks involved in accepting the financial advice, investment transaction or financial planning service provided by A; and
   (d) my own financial needs; and
   (e) the adequacy of the financial advice, investment transaction or financial planning service provided by A.

signed by the person named as B above[1]

[1] This requirement can be met under the Electronic Transactions Act 2002.

Appendix TWO

NOTE: this is not fully resolved drafting, but suggestion / guidance.

GROUP QFE

In section 5, insert the following definitions in the correct alphabetical order:

"**promoter** means, in relation to a financial product, a person which is instrumental in the formulation of a plan or programme pursuant to which the financial product is offered to any person.

QFE group company means, in relation to a QFE, a body corporate or more than one body corporate, which singularly or together -

(a) form part of a group of companies as each is a related company; and

(b) has been designated by the QFE as a QFE group company or companies by notice to the Securities Commission".

In the definition of **related company** insert after the reference to "1993" the words "as if a reference in that definition to a company included a body corporate wherever incorporated".

In section 9(c) insert at the end of the paragraph the words "or a QFE group company"

In section 17, in the heading, insert after the reference to "a QFE" the words "or a QFE group company".

In section 17(1) insert after the reference to "a QFE" the words "or a QFE group company".

In section 17(1) insert after the reference to "the QFE's" the words "or a QFE group company's".

In section 17(2) insert after the reference to "a QFE" the words "or a QFE group company".

In section 17(2) insert after the reference to “the QFE’s” the words “or a QFE group company’s”.

In section 17(2)(a) insert after the reference to “the QFE” the words “or a QFE group company”.

In section 17(2)(a) insert after the reference to “the issuer” the words “or a promoter”.

In section 17(2)(b) insert after the reference to “the QFE” the words “or a QFE group company”.

In section 17(2)(b) insert after the reference to “the issuer” the words “or a promoter”.

In section 26(1)(a) insert after the reference to “a QFE” the words “or a QFE group company”, and after the reference to “the QFE’s” the words “or a QFE group company’s”.

In section 26(1)(b) insert after the reference to “a QFE” the words “or a QFE group company”, insert after the reference to “the QFE” the words “or a QFE group company” and insert after the reference to “the QFE’s” the words “or a QFE group company’s”.

In section 26(1)(b)(iii) insert after the reference to “issuer”, the words “or a promoter”

In section 26(2)(a) insert after the reference to “disclose” the words “or procure disclosure of”.

In section 26(3)(a) insert after the reference to “the QFE’s” the words “or a QFE group company’s”.

In section 26(3)(c) insert after the reference to “the QFE” the words “or a QFE group company”.

In section 47(1) insert after the reference to “must not” the words “, and must ensure that any QFE group company does not,”.

In section 48(1) insert after the reference to “must not” the words “, and must ensure that any QFE group company does not,”.

In section 75, in the heading, insert after the reference to ”QFE” the words “or a QFE group company”.

In section 75(1)(a) insert after the reference to “a QFE” the words “or a QFE group company”, and after the reference to “the QFE’s” the words “or a QFE group company’s”.

In section 75(1)(b) insert after the reference to “a QFE” the words “or a QFE group company”, insert after the reference to “the QFE” the words “or a QFE group company”, insert after the reference to “issuer” the words “or promoter”, and insert after the reference to “the QFE’s” the words “or a QFE group company’s”.

In section 76(1)(a) insert after the reference to “nominated representatives” the words “and the employees and nominated representatives of a QFE group company” .

In section 76(1)(b) replace the reference to “as its” with the words “the QFE’s or a QFE group company’s” .

In section 76(1)(c) insert after the reference to “in relation to” the words “the QFE’s or a QFE group company’s”.

In section 77(1)(a) insert after the reference to “its” the words “or a QFE group company’s”.

In section 77(1)(b) insert after the reference to “its” the words “or a QFE group company’s”.

In section 77(1), add a new subparagraph (ba) as follows:

“(ba) stating the name of each QFE group company; and”

In section 77(1)(e) insert after the reference to “nominated representatives” the words “of the QFE or a QFE group company”.

Change to the Bill

In clause 17(2)(ca) of the Bill delete the words “(ca) …with an up-to-date list of the names of the QFEs nominated representative”.

Appendix THREE

NOTE: this is not fully resolved drafting, but suggestion/ guidance.

ONLINE AND BROCHURE FINANCIAL ADVICE

Insert a new section 17A.

"**17B Automated and brochure financial advice**

1. An entity which is registered may give financial advice in relation to a category 1 product or a category 2 product by automated means or in a brochure if:

   (a) a financial adviser approved the content of financial advice given by automated means or in a brochure; and

   (b) the entity complies with the conduct and disclosure obligations which would apply to a financial adviser giving that financial advice, except that the disclosure in section 23 and 25 do not apply.

2. An entity to which this section 17A applies has the same liability under this Act for giving the financial advice as if it was an individual who is a financial adviser.

3. In this section 17A:

   (a) **automated**, in relation to the giving of financial advice, includes web pages, online calculators and processing in whole or in part through an electronic or mechanical processing system; and

   (b) **brochure** means a written document (including posters, flyers and statement inserts) that provides financial advice in relation to a class of persons or a class of financial products.

4. The financial adviser's approval continues to apply if the current financial adviser ceases to be an employee or agent of the entity, or ceases to be authorised or registered.

This section is purely enabling. If the entity is the issuer or promoter, we assume s13 will adequately cover the position. That is, that 13(1) (e) will be amended to cover documents in lieu when the offer is not to the public (rather than under an exemption) and include authorised advertisements.

Appendix FOUR

NOTE: this is not fully resolved drafting, but suggestion/ guidance.

CASH AND TERM PIES

In section 5 insert in the definition of "**category 2 product**" in section 5 the following:

"(e) a specified unit in a specified PIE; or" (renumber (e) to (g))

Insert in the correct alphabetical order in section 5 the following definitions:

"**registered bank parent** means a registered bank within the meaning of section 2(1) of the Reserve Bank of New Zealand Act 1989 that is the parent or holding company, as defined in section 5 of the Companies Act 1993, of a specified issuer

specified bank means:

(a) the specified issuer's registered bank parent; or

(b) a related company of the specified issuer's registered bank parent that is also a registered bank within the meaning of section 2(1) of the Reserve Bank of New Zealand Act 1989

specified issuer means an issuer, in respect of 1 or more specified PIEs, that:

(a) is a wholly owned subsidiary of its registered bank parent; and

(b) is controlled by its registered bank parent within the meaning of section 7 of the Companies Act 1993 (which for the purposes of this paragraph is to be read with the necessary modifications); and

(c) in the ordinary course of its business continuously offers specified units to the public for subscription

specified PIE means a unit trust or group investment fund:

(a) that is a [portfolio tax rate entity] as defined in section YA 1 of the Income Tax Act 2007; and

(b) in respect of which all of the money received from the public by way of subscriptions for specified units is invested in debt securities issued by a specified issuer

specified unit means a unit in a specified PIE that has either:

(a) a fixed principal amount [unit price], fixed term, and a potential penalty if the unit [is redeemed or purchased by the specified issuer] withdrawn before a maturity date; or

(b) a fixed principal amount [unit price], and a right to [is redeemed or purchased by the specified issuer] withdraw in full at any time,

and in each case may be subject to any or all of the following rights and requirements:

(i) the right of the specified issuer to suspend withdrawals if the withdrawal would prejudice the interests of unit holders in the specified PIE as a whole or would threaten the specified PIE's eligibility as a [portfolio tax rate entity] as defined in section YA 1 of the Income Tax Act 2007;

(ii) the right of the specified issuer to use some or all of the unit price to meet any amounts that are owing by the unit holder to the specified bank;

(iii) the right of the specified issuer, on a demand for withdrawal of the unit price, to pay less than the unit price in full because of any default or impairment of debt securities of the specified bank in which the specified PIE invests;

(iv) a requirement to maintain a minimum account balance;

(v) the right of the specified issuer to withhold payment if the consideration for the units has not been received or cleared; and

(vi) a requirement to withdraw a minimum amount"

(NOTE: This wording is based on the exemption notice under the Securities Act 1978. The wording could still be improved and we welcome a discussion on further changes. The words in square brackets are some examples of these changes.)