

# Submission

to the

## Financial Markets Authority

on the

# Consultation: Proposed standard conditions for financial advice provider full licences and classes of financial advice service

7 August 2020

## About NZBA

1. The New Zealand Bankers' Association (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.
2. The following seventeen registered banks in New Zealand are members of NZBA:
  - ANZ Bank New Zealand Limited
  - ASB Bank Limited
  - Bank of China (NZ) Limited
  - Bank of New Zealand
  - China Construction Bank
  - Citibank N.A.
  - The Co-operative Bank Limited
  - Heartland Bank Limited
  - The Hongkong and Shanghai Banking Corporation Limited
  - Industrial and Commercial Bank of China (New Zealand) Limited
  - JPMorgan Chase Bank N.A.
  - Kiwibank Limited
  - MUFG Bank Ltd
  - Rabobank New Zealand Limited
  - SBS Bank
  - TSB Bank Limited
  - Westpac New Zealand Limited

## Introduction

3. NZBA welcomes the opportunity to provide feedback to the Financial Markets Authority (**FMA**) on its consultation: *Proposed standard conditions for financial advice provider full licences and classes of financial advice service (Consultation)*. NZBA commends the work that has gone into developing the Consultation.

## Summary

4. NZBA supports the proposal to impose standard conditions under the full licences for financial advice providers (**FAPs**).
5. Banks are already subject to numerous similar obligations under their RBNZ imposed Conditions of Registration and, for some banks, other licensing regimes. This includes the market services licensing regime under Part 6 of the Financial Markets Conduct Act 2013 (**FMCA**), which provides for the licensing of Managed Investment Scheme managers and providers of Discretionary Investment Management Services (amongst others), and is the regime which FAP licensing will form part of.

6. NZBA would welcome an approach that ensures common licensing conditions which are applied to different licensees (whether within the same statutory licensing framework or under different regimes) are consistent where possible to avoid an unnecessary compliance burden.
7. This is particularly the case in respect of the proposed standard conditions of full FAP licences, which cover the same matters as certain of the standard conditions which are already imposed on existing FMCA market service licensees (for example, in respect of Outsourcing).

## Condition 1 – Record keeping

8. NZBA supports the proposal to impose a standard condition requiring the maintenance of financial advice service records. We note our [submission dated 26 July 2019 on the consultation paper: Proposed standard conditions for financial advice provider transitional licences](#).
9. We consider that the timelines outlined at (d) of the condition could be difficult to implement in practice. Instead, the requirement could be simplified to “must be kept for a period of at least 7 years from the date the record is made”. That change would provide clarity and aid implementation from a systems perspective.
10. Additionally, we consider that, where possible, this condition should be aligned with the requirements soon to be enacted under the Credit Contracts Legislation Amendment Act 2019 (**CCLAB**).
11. Condition 1(c) requires that your records ‘must be available for inspection by us at all reasonable times’. The requirement to ‘be available’ differs from the requirement in s 9CA of CCLAB which uses the language ‘must make available’. We submit this condition should be amended to align with CCLAB. This reflects the fact that it may take time to collate records from different systems in order to make them available to FMA.
12. Similarly, the explanatory note requires that ‘your records should be readily available to you, and in any event within 10 working days when requested by us’. This timeframe may be impractical for complex requests. It also differs from s 9CA(7) of CCLAB which requires that ‘the lender must provide the records within 20 working days of the date on which the request is received by the lender or, in the case of records being provided to the Commission, within any longer period of time specified by the Commission’. Our preference is that the timeframes set out in this condition align with the CCLAB requirements.

## Condition 2 – Internal complaints process

13. NZBA supports the proposal to impose a standard condition requiring a FAP to have an internal process for resolving client complaints. Again, we note our July 2019 submission.

14. Complaints data is a rich and valuable source of information which enables banks to improve customer outcomes. NZBA's members already have internal complaints processes that meet the requirements of the proposed standard condition.

### Condition 3 – Regulatory returns

15. In principle, NZBA supports the proposal to impose a standard condition requiring a FAP to provide regulatory returns.
16. We consider that any regulatory returns should be able to be completed and submitted to the FMA electronically (eg through an online portal).
17. We support an approach that ensures the regulatory returns requirements across different licencing regimes are consistent where possible to avoid an unnecessary compliance burden. In particular, we note that there is potential for overlap between this condition and the CCLAB requirement for annual returns. These requirements should align where possible, particularly regarding financial advice given in relation to consumer credit contracts.
18. Further clarity is required on the proposed content of the Regulatory Return, including how this would align with standard condition 7 and the statutory reporting obligations market service licensees must comply with under ss 411 (should additional reporting obligations be prescribed for licensed FAPs by regulations) and 412 of the FMCA. Guidance on the definition of 'material change of circumstances' in section 410 of the FMCA would also be welcomed.
19. We look forward to reviewing and providing feedback on the proposed Regulatory Return Framework and Methodology. Once consultation on that has been completed, we consider that this condition would require a lead in period for implementation.

### Condition 4 – Outsourcing

20. NZBA supports the proposal to impose a standard condition requiring a FAP to ensure that they meet their licensee obligations where they have outsourcing arrangements in place. This condition should not conflict with banks' existing obligations under other licensing regimes and (where applicable) the Reserve Bank of New Zealand's outsourcing policy (**BS11**). That will ensure consistency of regulatory approach to outsourcing arrangements and avoid operational complexity and inefficiency.
21. The outsourcing standard conditions applicable to other FMCA market service licensees use 'necessary to the effective and proper running of the market service' as the criterion for the application of the outsourcing standard condition. It is not clear to us why this criterion is not also used in the outsourcing standard condition for FAP licensees. We suggest the FMA considers using this test to ensure consistency across common standard conditions.

22. If the FMA does not accept our submission in paragraph 21 above, we would welcome further guidance in the explanatory note to this standard condition on what types of outsourcing arrangements are considered 'material to the provision of the financial advice service' (as opposed to 'necessary to the proper running of the market service'), as this is a critical definition for determining the scope of this condition, and the outsource arrangements to which it applies.
23. We do not believe that 'the review of compliance processes to a professional services company' is an arrangement that should be captured by the condition.
24. Regarding the matters that should be considered in respect of outsourcing arrangements (explanatory note, bullet point 2) – 'having contractual arrangements with each provider that enable you to effectively monitor their performance and take appropriate action for non-performance, ~~and having suitable termination provisions to enable you to continue to meet your licensee obligations at all times~~' – we do not think the struck-out text is necessary as it is covered by the ability to take appropriate action for non-performance.

## Condition 5 – Professional indemnity insurance

25. NZBA supports the proposal to impose a standard condition requiring a FAP to maintain professional indemnity insurance, subject to the ability for the FMA to waive the standard condition (via a specific condition) where the applicant demonstrates that it is unable to obtain appropriate cover, or has another valid reason for not having cover.
26. As the detail of the standard condition and the commentary outline, any cover should be 'adequate and appropriate for the provision of your financial advice service to retail clients in New Zealand.' There are valid circumstances in which it would be appropriate for a FAP to elect to self-insure (via its balance sheet), rather than maintain professional indemnity cover in respect of its financial advice service. This would particularly be the case where, under the new financial advice regime:
  - (a) the scope of regulated financial advice provided to retail customers is limited. For example, in response to retail customer questions only in respect of simple debt securities (eg call accounts and term deposits) issued by a registered bank;
  - (b) regulated financial advice is able to be provided only by a very limited number of financial advisers;
  - (c) the FAP is itself an entity of significant scale and substance; and/or
  - (d) the aggregate amount of any claim or claims for any loss a retail customer may suffer as result of relying on the regulated financial advice provided by or on behalf of the FAP would be unlikely to exceed the excesses typically applied to a professional indemnity policy where the insured is a financial institution of scale.

27. We consider the application of a specific condition waiving this standard condition where a FAP has valid reasons for not having professional indemnity cover (or is unable to obtain appropriate cover) is appropriate.
28. However, we submit that the requirement for disclosure to retail clients that an entity does not have professional indemnity cover should not automatically attach to this specific condition. Rather, it should be at the FMA's discretion whether this additional disclosure obligation is imposed. This is particularly in circumstances where:
  - (a) it is a considered (and reasonable) decision for the FAP not to maintain professional indemnity cover in respect of its financial advice service; and
  - (b) the absence of such cover would not adversely affect retail customers (ie there is not a real risk of the FAP being unable to respond to a claim/remediate the customer in the absence of professional indemnity cover).

## **Condition 6 – Business continuity and technology systems**

29. NZBA supports the proposal to impose a standard condition requiring a FAP to maintain a business continuity plan. Again, we would welcome an approach that ensures consistency across different licensing regimes and common standard conditions to avoid an unnecessary compliance burden.
30. We consider that the term 'cybersecurity' should be replaced with 'information security' which is wider in scope and concerned with making sure data in any form is kept secure, as opposed to cybersecurity which is about protecting data that is in electronic form, and the requirement to report material events in five days is removed. The new Privacy Act ensures reporting is in place for at risk customer information.

## **Condition 7 – Ongoing eligibility**

31. NZBA supports the proposal to impose a standard condition requiring a FAP to meet eligibility requirements on an ongoing basis.
32. We look forward to reviewing and providing feedback on the Licensing Application Guide.

## **Condition 8 – Notification of material changes**

33. In principle, NZBA supports the proposal to impose a standard condition requiring a FAP to notify FMA of material changes.

34. We recommend that further guidance is provided in the explanatory note around what is considered 'material', and how this condition will be aligned with standard condition 3.
35. We also consider that the requirement to provide notification within 10 working days of 'commencing to implement' should be amended to state within 10 working days of 'implementation'. 'Commencing to implement' could be interpreted to mean an early stage in the change process, when the change to the nature or manner in which the financial advice service is provided is only beginning to be considered. This amendment will provide more certainty as to when the 10 working day time period should run from, and ensure the FMA is receiving reporting in respect of changes which have actually taken place (rather than early stage reporting resulting from an abundance of caution to ensure compliance with the standard condition).
36. Where possible, reporting timelines should be aligned with requirements to report similar matters to other regulators to avoid inconsistency.

## **Financial advice provider full licence classes**

37. NZBA agrees with the division of financial advice services into three distinct licence classes.
38. We note that these naming conventions may be open to some consumer confusion – A, B and C could be understood to infer differing levels of quality. Instead, the class names could reflect what the licence is about.

## **Contact details**

39. If you would like to discuss any aspect of this submission, please contact:

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