

11 December 2017

Financial Markets Authority
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Draft exemption to enable personalised digital advice

The Institute of Directors (IoD) appreciates the opportunity to comment on the [draft exemption to enable personalised digital advice](#) (the exemption).

Personalised digital advice (also known as robo-advice) is currently restricted in New Zealand under the Financial Advisors Act 2008 which requires personalised financial advice to be given by a *natural person*.

The proposed exemption is a temporary measure and will permit financial advisor entities to provide personalised digital services to retail clients. It is intended to improve consumer access to financial advice and promote innovation while providing consumer protection safeguards. When the new financial advice regime comes into effect (expected to be in 2019), the exemption will be revoked.

Financial advisor entities must apply to the FMA to be eligible for the exemption. As part of the application process, these entities will need to include good character declarations from their directors and senior managers. Our submission focuses on this aspect of the exemption process.

About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to driving excellence in governance. We represent a diverse membership of over 8,500 members drawn from listed issuers, large private organisations, small and medium enterprises, public sector organisations, not-for-profits and charities.

Our Chartered Membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

Chartered Members and Chartered Fellows of the IoD are required to confirm annually that they are of good character and are a fit and proper person. There is a [list](#) of criteria they need to consider in making this confirmation. Where a member is unable to agree/confirm any matters in the list, they must contact the IoD Registrar. This process has been in place since 2014.

Good character assessment

The exemption application guide states that the FMA's assessment of good character is important for preserving public confidence in the professionalism and integrity of financial advisor entities providing digital services. The assessment is based on (but not limited to):

- information in the directors and senior managers declarations
- feedback from third parties checks such as the Ministry of Justice
- conduct indicating past non-compliance
- convictions or involvement in dishonesty, deceit, theft or fraud
- failure to manage business or personal financial affairs
- dismissal from a position of trust
- adverse information from other government agencies and regulators.

We support the requirement for a good character assessment and recognise the importance of having directors and senior managers of good character responsible for entities that provide digital advice services.

We understand from the exemption application guide that directors and senior managers who have already provided good character declarations to the FMA for the purposes of the Financial Markets Conduct Act 2013 do not need to provide new declarations.

We make specific comments below on aspects of the good character declaration form (DA1.1 Declaration).

Good character declaration form

The declaration form must be completed by all directors and senior managers of the entity seeking to apply for the exemption. The draft exemption notice defines *senior manager* as “in relation to a person (A), means a person who is not a director but occupies a position that allows that person to exercise significant influence over the management or administration of the financial adviser service provided by A through the digital advice facility”. *Director* is defined in the Companies Act 1993.

The declaration form has 11 questions and applicants must select yes or no for each question. If they answer yes to any question, they must provide full details in appendix 1 of the form.

Clean slate scheme

The form asks applicants to disclose certain convictions. We note that the Criminal Records (Clean Slate) Act 2004 allows people not to disclose some criminal convictions when certain requirements are met. The FMA may wish to consider alerting applicants on the declaration form of their rights under the Act.

Enforceable undertakings

Enforceable undertakings are an increasingly common tool used by regulators as an alternative to prosecution. The IoD’s annual confirmation requires Chartered Members and Chartered Fellows to declare if they have “been party to or the subject of any enforceable undertaking or other arrangement with any regulatory body under which [they] may not be a director of any entity or concerned or take part in the management of any entity”. Although question 5 may prompt applicants to disclose that they are or have been subject to enforceable undertakings, the FMA may wish to have a separate question on this so it is more explicit.

Solvent v insolvent liquidations

We understand that question 6 is essentially about whether an applicant has been involved (at a governance or executive level) in a business that has failed. The question refers to, among other things, where an entity that has been placed into liquidation in the last 15 years. This could give rise to disclosures relating to businesses that have not failed. We note that it is common for companies to be put into liquidation when a business has been sold, ceased trading or reorganised for commercial purposes. We suggest the FMA consider distinguishing the type of liquidation, for example between solvent and insolvent liquidations.

Other behaviour not covered

The FMA may also wish to include a *catch all* question asking if there are any other matters it should be aware of in assessing an applicant’s application.

Material change in circumstance

After an entity has been approved by the FMA to provide personalised digital services, they must notify the FMA of any *material change in circumstances* otherwise the exemption will cease to apply

(they have five working days to notify the FMA after becoming aware of the change). The meaning of the phrase includes where the entity or any of its directors or senior managers are subject to any of the following:

- a criminal conviction
- disciplinary proceedings under any enactment
- an adverse finding by a court or an approved dispute resolution scheme
- bankruptcy or any other insolvency proceedings.

Generally this appears to strike the right balance in protecting the public, while not unduly burdening the entity. However, the phrase “an adverse finding by a court...” is broad in scope and could be more pointed.

We appreciate the opportunity to comment on the exemption on behalf of our members and would be happy to discuss this submission with you.

Yours sincerely

A handwritten signature in cursive script that reads "Felicity Caird".

Felicity Caird

**General Manager, Governance Leadership Centre
Institute of Directors**