25 November 2019

Stephen Glenfield
Chief Executive Officer
Financial Adviser Standards and Ethics Authority
Level 21, 133 Castlereagh Street
Sydney NSW 2000

Email: consultation@fasea.gov.au

RE: FASEA Code of Ethics Guidance

Dear Stephen

The Financial Planning Association of Australia[1] (FPA) welcomes the opportunity to provide feedback in response to the Financial Adviser Standards and Ethics Authority's (FASEA) Code of Ethics guidance.

The FPA supports the introduction of a compulsory code of ethics for the financial advice profession. Our association has its own Code of Professional Practice, including a Code of Ethics, which has applied to our members for many years. We recognise the importance of codes in driving higher standards of behaviour. It is appropriate that the higher standards represented by existing voluntary codes are extended to apply to all financial advisers and that meeting these higher standards is a prerequisite for continuing to practice as a financial adviser.

The FPA has long been supportive of principles-based professional standards for financial advisers. However, the introduction of a principles-based Code of Ethics that gives individual financial advisers the permission to use their professional judgement, contradicts in many ways with the tick-a-box compliance regime of the Corporations Act under which financial advisers are authorised by their licensee. Businesses will require an appropriate transition to address this dichotomy and ensure the intended consumer benefits of the Code are realised.

There remains good support for the Code of Ethics and what it is trying to achieve among advisers and licensees. However, advisers are confused about what is required of them under the Code of Ethics and what they need to do to comply from 1 January 2020. FASEA's Guidance document FG002 has not

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[1] The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:
• Our first "policy pillar" is to act in the public interest at all times.
• In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
• We have an independent conduct review panel, Chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
• The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
• We have built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
• CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
• We are recognised as a professional body by the Tax Practitioners Board.

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resolved many of the issues that we first raised in 2018 and again when the Code of Ethics was published in February 2019. This submission follows on from the Joint Submission we made with the AFA, SMSFA, FINSIA, SAFAA to the Minister (and provided to FASEA) on 7 November 2019.

Yours sincerely

Ben Marshan
Head of Policy and Standards
Financial Planning Association of Australia

FASEA intent and inconsistency

There is great consensus that the discussions made during the FASEA roundtable were amicable and provided clarity on FASEA's intentions with the Code of Ethics Guidance. However, the plethora of member feedback the FPA have received illustrates that the language used in the legislative instrument, explanatory statement and the guidance have failed to communicate these intentions.

Legal parameters

Section 921U(2) of the *Corporations Act 2001* (Cth) limits FASEA's legal powers and requires FASEA to make its new standards, including the Code of Ethics ('the Code'), by Legislative Instruments. The Act does not provide FASEA with the legal power to use any other means to set its standards.

FASEA Code of Ethics Guidance FG002 sits outside the legal powers bestowed on FASEA for setting the standards of the Code of Ethics. It is therefore inappropriate for FASEA to introduce new requirements into the Code via its Guidance. Under s921U(2)(b) all the Code standards that financial advisers must comply with should be included in the Legislative Instrument.

Like the Explanatory Statement, the Guidance is not part of the Legislative Instrument and, therefore, not part of the Code. Its role includes to provide a plain English explanation of the Code, offer additional context and describe its likely impacts and effects. Though it is not itself part of the Code, the purpose of the Guidance should be to assist readers in interpreting the Code. Specifically, it should broaden out real world examples and demonstrate in FASEA's view how a financial adviser can comply, or will breach the code of ethics, particularly as FASEA is not the Regulator of the code. That is, what was FASEA's intent in setting the standard (the Code of Ethics) and how the standard should operate in the real world.

However, FG002 goes further than this. While it does not form part of the Code, FASEA understands that practitioners, licensees, the disciplinary body with oversight of the Code, and AFCA, are likely to look to the Guidance to determine how to comply with, and judge compliance with the Code. FASEA has used this Guidance, in some cases, in an attempt to change or override the provisions in the law.

This is a significant concern given the lack of consultation on the Guidance prior to its release, the issues with the workability of the Guidance, and the timing of the release of the

Guidance. It is simply too late for advisers to be able to make meaningful changes to their businesses by 1 January 2020.

The FPA is of the view that:

- If the wording in the Code, as set in the Legislative Instrument, is not clear or will not work in practice or fails to clearly state FASEA's intent, the Determination should be amended, and
- The Guidance should not be used to introduce new requirements into the Code or override laws that have been approved through the Parliamentary process.

This submission highlights our key concerns with the Guidance based on this premise.

Timing of the code

Section 921W requires that the Code does not commence earlier than 30 days after the Code (or amendments to the Code) is registered. There is now just 25 business days until the Code of Ethics is due to commence on 1 January 2020. The fact that issues with the FASEA Guidance, a key FASEA document in relation to explaining FASEA's intent of the Code, remain unresolved 25 business days prior to when relevant providers are required to meet the new standards, is inconsistent with the intent of s921W.

The FPA considers that there are significant concerns with the Legislative Instrument, Explanatory Statement, and FASEA Code of Ethics Guidance that must be addressed for the Code to operate effectively.

As stated above, the FPA has long been supportive of principles-based professional standards for financial advisers. However, the introduction of a principles-based Code of Ethics that gives individual financial advisers the legal permission to use their professional judgement when providing services to clients, contradicts in many ways with the tick-a-box compliance regime of the Corporations Act under which financial advisers are authorised and currently regulated. Businesses will require an appropriate transition to address this dichotomy and ensure the intended consumer benefits of the Code are realised.

The Code will have a broad and lasting impact on the profession and will require businesses to assess their business models, processes, and systems to ensure they enable advisers to meet the Code's standards. However, businesses cannot commence this assessment process until outstanding issues with the workability of the Code are resolved and the FASEA Code Guidance finalised.

It will also take time for licensees to conduct training for the 25,000 advisers on the ASIC Financial Adviser Register to ensure they appropriately interpret and apply the Code to the services provided to clients.

We are concerned this is not possible under the current restricted consultation process set by FASEA for the Guidance.

Recommendation

The FPA strongly recommends FASEA extends the consultation period for the Code of Ethics Guidance to undertake more appropriate and detailed consultation and discussions with key stakeholders, to work through the practical workability and implementation of the Code standards.

The FPA recommends FASEA work with Government and ASIC to facilitate compliance with the Code for a 12 month period based on FASEA's delay in setting the standards and providing clear guidance.

Application of the Code

Page 6 of the Guidance states:

> *The Code is a compulsory code of ethics for all relevant providers who provide financial services to retail clients.*

The Guidance also refers to 'your professional services'. However, financial services and professional services are broader than financial advice.

The Act requires relevant providers to comply with the Code. Section 910A defines a relevant provider as "*persons authorised to provide personal financial advice to retail clients in relation to relevant financial products*".

While the Guidance makes it clear that the Code does not apply to wholesale advice, it has created confusion as to which professional services are covered under the Code.

FPA members have also specifically questioned whether the Code applies to execution only services and the provision of strategic advice with no product recommendations, that they may provide for some clients.

Recommendation

The FPA recommends FASEA should clarify which services the Code applies to.

Living document

The Guidance refers to the Code as a living document subject to change. FASEA has stated in discussions with industry that the Guidance is also a living document. As stated above, FASEA understands that practitioners, licensees, the disciplinary body with oversight of the Code, and AFCA, are likely to look to the Guidance to determine how to comply with, and judge compliance with the Code.

This means that advisers and all parties involved in bringing the Code to life for consumers must be able to rely on the Code and the Guidance in place at the relevant time. Strong version control must apply to a 'living document subject to change' for this to occur with ongoing public access to clearly dated previous versions of the Code and the Guidance.

Recommendation

The FPA recommends FASEA apply strong version controls to documents and publish historical versions of the Code and Code Guidance on an ongoing basis.

Conflicts of interest

The Guidance makes it clear that FASEA wants advisers to use their professional judgement when providing services to clients.

> *As noted previously, individual circumstances will differ in practice and, as with every profession, there is an allowance for differences of professional opinion on how the ethical rules of the profession should apply in a particular case. Doing what is right will depend on the particular circumstances and requires you to exercise your professional judgement in the best interests of each of your clients. (Page 6)*

However, the Guidance contradicts this premise by implying that advisers are not capable of making professional decisions in the best interest of their client if a conflict arises.

A strict interpretation of Standard 3 would apply to any conflict of interest, no matter how remote or unlikely to influence an adviser's behaviour. This could include the adviser having minor shareholdings in a company they are recommending for investment; having remote personal relationships with personnel in that company; or unavoidably knowing people as they live in a small community.

Based on the language of the Code, the Explanatory Statement, and the Guidance, these examples could create a conflict and an adviser is not permitted to use their professional judgement to act in the best interests of the client. Rather if the conflict exists, an adviser cannot act for the client at all.

FASEA has stated that the fact that a conflict is permitted under the law does not alter an adviser's obligation to only act free of any conflict.

There are conflicts in all business operations, regardless of the service provided to consumers. This includes conflicts that cannot be practically avoided and therefore standard 3 will prevent planners from acting in many common situations, even if the conflict is unlikely to influence an adviser's behaviour.

In our view, there must be some qualification, exceptions or an element of materiality to make the conflict of interest standards workable.

The Guidance states:

> *The Code relates to actual conflicts of interest. You should also be alert to the challenges posed to your professional integrity by potential and perceived conflicts of interest and duty. (Page 7)*

The intent and meaning of this statement is unclear, particularly when it is considered in combination with other standards of the Code, and raises the following questions:

- Can the adviser manage potential and perceived conflicts by acting in the best interest of each client, so they do not escalate to 'actual conflicts'?
- If an adviser demonstrably acts in the best interests of each client, then is there no 'actual conflict'?
- Who determines what an actual conflict is and how is this determined? Would it be the adviser's duty to determine what is an actual conflict based on each client-adviser relationship and circumstances?
- Is a conflict that stops an adviser from acting in the best interest of each client, an actual conflict?

- If the adviser is able to demonstrate that they are still able to act in the best interest of the client and that the advice is clearly appropriate for the client even if a conflict exists, can they still provide advice to the client?

Recommendation

The FPA strongly recommends FASEA provide clear guidance on what steps can be taken to demonstrate a potential conflict does not become an actual conflict, if in particular the best interest tests in the Code are achieved.

The FPA recommends FASEA should make it clear when a potential or perceived conflict will become an actual conflict; and if advisers are permitted to provide services to clients if they can clearly demonstrate that the advice is in the best interest of the client and appropriate for the client's circumstances even if a conflict exists.

The FPA recommends FASEA work with stakeholders to jointly determine a workable solution to the conflict of interest requirements in the Code. In particular around the issues of variable remuneration models, legal remuneration types, minor share holdings, and personal relationships (particularly within smaller communities).

Remuneration

The FPA is concerned that the FASEA Code of Ethics Guidance is unclear and contradictory on benefits financial advisers may receive under the Code.

The following sections of the Guidance relate to adviser benefits.

Guidance examples	
Reference	**Guidance**
Conflict of interest and duty (pg7)	It is important to note that the mere fact that a conflict is permitted under another part of the law does not offset your duty to act in the best interests of your client free from any conflict of interest or duty. Your duty so to act may only be modified or set aside if you are compelled to do so by Law.

Standard 1, Example 3	It may be lawful to receive a 'grandfathered' financial product commission from the old product. However…the intent of the preservation of existing contracts by the CORPORATIONS AMENDMENT (FUTURE OF FINANCIAL ADVICE) BILL 2011 is that advice transitions over time to a fee for service arrangement in the public interest. At a client review, if you avoid recommending a new product because you receive a commission on the existing product, you will breach the Code. Adviser's interest in continuing to receive the grandfathered product commission conflicts with the duty to advise the client in the client's best interest - must avoid such a conflict between interest and duty
Standard 2, Example 5	Under the Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017, a firm can lawfully receive life insurance commissions. However, any business models currently obtaining these commissions are under a limited/scaled advice model which immediately breaches the adviser of standard 2.
	The FPA is concerned that this approach would not apply equally across the profession and may disadvantage specialist advisers and those providing advice under a restricted authorisation or licence.
Standard 3	...commissions are a conflict that jeopardises the adviser's ability to act in their client's best interest, such conflicts should be avoided, even if the commission is permitted under the law Brokerage fees, asset based fees or commissions all impact on the best interest of clients It is not sufficient to decline a stamping fee if it may be retained by your principal (Example 9). Either the firm must decline the benefit altogether, or you must rebate it in full to your client.
Standard 7 in the Legislative Instrument and Explanatory Statement	*Except where expressly permitted by the Corporations Act 2001, you may not receive any benefits, in connection with acting for a client, that derive from a third party other than your principal.* *This Standard prohibits you receiving "third party" benefits for acting for a client (unless the Act expressly allows).*

The FPA questions FASEA's stated 'intent' of the FOFA Bill that adviser's transition to a fee for service arrangement. In announcing the FOFA reforms, then Minister for Financial Services, Superannuation and Corporate Law, The Hon Chris Bowen MP, stated the clear intent was to ensure a range of charging options were available:

> *The introduction of adviser charging regime, which retains a range of flexible options for which consumers can pay for advice and includes a requirement for retail clients to agree to the fees and to annually renew (by opting in) to an adviser's continued services….. It is important to note that the adviser charging regime does not prevent client-agreed deductions being allowed from a client's investment to pay for financial advice or flexibility in payment options. The client does not have to pay the advice fee, or ongoing fees, up front, and in full.*[1]

Further, the permission in Standard 7 to receive benefits from a third party if allowed under the Act, appears to be at odds with FASEA's approach to benefits in its application of standards 1, 2 and 3 in the Guidance, which makes it unclear.

Following due process of the relevant Bills procession through Parliament, the Corporations Act makes it clear that advisers are permitted to receive the following benefits:

- Grandfathered commissions on investments and superannuation until 1 Jan 2021 (the Government has committed to phase out these commissions by 1 January 2021, a timetable Parliament agreed to just weeks ago)
- Life Risk Commissions under the conditions set in Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017 (the Government has committed to maintain the Life Insurance Framework until ASIC conducts a review of the Framework in 2021).
- Asset based fees on superannuation and investment accounts, which are paid directly by the client
- Certain non-monetary benefits - as set out at s963C, such as benefits for a genuine education or training purpose
- Referral fees (these are commonplace in business in Australia and able to be accepted and paid by lawyers, accountants and other professionals)

FASEA has created a new test in its Guidance – whether a disinterested person, in possession of all the facts, might reasonably conclude that variable income could induce an adviser to act in a manner inconsistent with the best interests of the client. This test has never been applied in this context before and makes it difficult for advisers to understand what is acceptable and what

[1] http://ministers.treasury.gov.au/ministers/chris-bowen-2009/media-releases/overhaul-financial-advice

is not.

Advisers' benefits, particularly conflicted remuneration is a complicated topic. The Government is working through a process approved by the Parliament on grandfathered commissions and a review of the Life Risk Framework. It is appropriate to let those processes take their course. We do not think it is appropriate for FASEA to subvert these arrangements without their proper consideration by the Government and the Parliament. The Code of Ethics should be read to be consistent with Commonwealth primary legislation.

Where remuneration arrangements have been specifically considered by the Government and the Parliament, FASEA should not attempt to alter them through the Code of Ethics.

FASEA needs to provide clear advice in its Guidance on its expectations for the above forms of remuneration, if it considers that they should cease from 1 January 2020, it should make a clear statement to this effect.

Recommendation

The FPA recommends FASEA include a clear statement in the Guidance that an adviser will not breach the Code simply by accepting remuneration that is lawfully provided under the Corporation Act.

Referrals

Examples for standards 1, 3, 5 and 7 in the Guidance refers to client referral fees and arrangements.

The FPA notes that, at the round table briefing session held on 14 November, FASEA confirmed its intention to ban adviser referral fees and arrangements; that this ban would only apply to relevant providers who are bound by the Code, not businesses who are not bound by the Code. This is currently not clear and is inconsistent with the Guidance and Explanatory Statement.
As stated in the Guidance, the Explanatory Statement for Standard 3 states:

> *If the client wishes, you may refer the client to another relevant provider if neither you nor your principal will receive any benefits from the referral.*

The FPA seeks clarification if this position applies to referrals to other professionals, which would be contradictory to FASEA's statement at the round table briefing session.

The FPA is concerned that based on the current Guidance these restrictions could impact on competition in the financial advice profession. This issue is exacerbated as the Guidance appears to 'ban' client referrals involving external parties, but permits in-house client referrals where the adviser shares in the overall benefit to the business.

The FPA is concerned that based on the current wording in the Guidance this could disadvantage particular business models over others. Particularly, large institutions and businesses with a diversified service offering/ business structure would still be permitted to leverage in-house client referrals for the benefit of the business, but smaller firms and entities that specialise in the provision of financial advice only would be restricted from third party referrals including referrals to and from other professionals such as accountants, advice specialists and lawyers (not property developers or product providers)

It is also unclear how the Code applies to referral arrangements with ongoing contractual obligations binding the parties under contracts law. For example, an agreement to pay an accountant a referral fee that terminated in June 2019, but under that agreement, where a termination event occurs, there is a continued payment for 2 years following that termination (ie, 2 years beyond June 2019). As this is a contract that was entered into prior to the FASEA Code of Ethics coming in place, does contract law override the FASEA Code of Ethics?

Example 7 demonstrates that conflicts around in-house referrals can be avoided, in part, by comparing fees of external professionals with those of in-house professionals to show the referral is in the best interest of the client. There is concern about the ability of advisers to make such a comparison if the fees schedules of third party professionals are not publicly available.

Recommendation

The FPA recommends the Guidance makes it clear that the Code, including FASEA's intended ban of referral fees and arrangements, would only apply to relevant providers who are bound by the Code, not businesses who are not bound by the Code.

Existing clients

In relation to existing clients, the adviser is required to "seek the client's free and informed consent to the adviser's advice as soon as practical following the commencement of the Code" under standards 4 and 7.

It is unclear on how this should be achieved, particularly if the client has already provided an authority to proceed and the adviser has implemented the advice; client reviews have been conducted; and consent has been reconfirmed through the annual Fee Disclosure Statement (FDS) and the renewal notice (opt-in).

Clarity is needed as to the action the Code applies to in relation to existing clients. For example, if an adviser provides advice pre-1 January 2020, that advice is not covered by the Code. A financial adviser may have an ongoing role in implementing the advice or managing the client's affairs post 1 January 2020. However, the FPA suggest it would be inappropriate and outside the legal prospective application of the Code as set in the Act, to capture that initial act of providing advice within the scope of the Code based on that ongoing arrangement.

Retrospective application would be inappropriate, outside the legal parameters of the Code, and would be unworkable. For example, some advice arrangements are long-standing with the initial advice that was the foundation of the management of current assets and ongoing services, provided long ago, under the laws of the time. The FPA does not support the application of the Code retrospectively to pre-1 January 2020 advice.

However, if an adviser has an ongoing arrangement to provide services to a client post 1 January 2020, it is reasonable to apply the Code to those future services for that arrangement to continue. For example, if an adviser is concerned that their client does not understand the advice, or elements of the advice, or how the current environment affects the advice (for example), it is sensible to expect that the adviser should take action to address their client's understanding, regardless of whether that advice was provided before or after 1 January 2020. This would be in line with Standard 5 of the Code.

The FPA understands Standard 5 requires the adviser to be satisfied that the client understands the advice. The explanatory statement to the Code of Ethics expands on this requirement by stating that the client should understand the advice and recommendations the adviser gives; the benefits of the recommended products; the costs involved; and the risks involved. While the client does not have to be an expert, the adviser needs to take steps to ensure that the client has sufficient understanding of these elements to make an informed decision about the advice.

Ensuring the client understands the advice, as required under standard 5, is crucial to gaining the client's free and informed consent, including in relation to existing clients under standards 4 and 7.

If an adviser is not satisfied that the client understands, examples 12 and 15 of the Guidance offers options for addressing this issue. Under the Code, if the adviser is still not satisfied that the client understands and is making an informed decision, the adviser cannot implement the advice or, in the case of an existing client, cannot continue to provide services to the client.

However, a genuine sticking point for advisers that requires clarity is around what is in the best interest of the existing client:

- continuing to assist the client with their financial affairs which will put them in a better financial position, even if the adviser has concerns about the client's understanding of the advice, versus
- discontinuing the engagement, leaving the client with no help and potentially resulting in the client being in a significantly worse financial position.

This is a particular concern for advisers with long standing relationships with clients who trust and rely on their services.

Recommendation

The FPA recommends that the Guidance provide clarity on the application of the Code to advice provided to existing clients and ongoing advice arrangements.

General Advice

Example 11 relates to the provision of general advice. The FPA supports requirements that ensure consumers clearly understand when they are receiving general advice and the difference between general and personal advice.

However, the FPA is concerned that the requirement in the Guidance for the adviser to 'conduct sufficient investigation of the client's circumstances to establish that providing general advice is consistent with the client's wishes, needs for advice and purpose for which the advice is being sought', may lead the client to believe that personal advice is being provided even if the adviser has made it clear the advice is general in nature.

This has the potential of significantly increasing consumer confusion as to whether they are receiving general or personal advice as it will be clear that personal circumstances have been taken into account, particularly in relation to one-on-one interactions (rather than general advice provided to a group of clients in a seminar for example).

Recommendation

The FPA recommends FASEA make it clear that relevant providers can still provide general advice, and highlight the additional requirements advisers would need to fulfill, beyond the general advice warning in the Corporations Act, when providing one-one-one general advice.

Limited or scaled advice

Scaled advice is very common. In fact, it is likely that all advice is scoped or scaled to varying degrees.

Based on the Guidance, the FPA has concerns about the ability of financial advisers to scope or scale the advice as permitted under s961B of the Corporations Act. The approach to providing scaled or limited advice under the Code also appears inconsistent with the financial advice licensing regime.

The licensing regime requires relevant providers to be authorised. This authorisation may be restricted to certain types of advice only. This raises the question as to whether an adviser providing advice under a restricted authorisation or licence is permitted to meet the requirements FASEA suggests in the Guidance in relation to scaled advice.

Based on our interpretation of the Guidance, the FPA supports the intent of FASEA's suggestion that an adviser should assess whether scaled advice is in the best interest of the client, and the need to address other potential multiple advice needs in the future.

However, these requirements must also be considered in the broader context of the practicalities and impact of FASEA's approach to scaled advice including the following statement in Example 5:

> *The integrity risk to the adviser may be heightened where the business model under which the adviser operates conflicts with the client's need for advice on a particular issue*

The FPA is concerned that this approach would not apply equally across the profession and may disadvantage specialist advisers and those providing advice under a restricted authorisation or licence.

The Code's value and standards relating to competency are also relevant. Under the Act specialist advisers and those providing advice under a restricted authorisation or licence, are required to be competent in the areas of advice they provide. This approach is reflected in Standard 10 of the Code:

> *For example, if you specialise in a particular area, you should not provide advice outside that area unless you have the necessary skills and competencies to do so in a professional way (page 35 of the Guidance).*

The new education standards will ensure all advisers, regardless of their specialisation or authorisation will have a standard holistic base level of knowledge and competency in financial advice. Existing financial advisers must meet the new education standards by 1 January 2024.

However, the new Code is set to commence four years earlier on 1 January 2020. This creates uncertainty as whether specialist advisers or those operating under a restricted authorisation, would be deemed as competent under the Code to meet FASEA's expectations in relation to scaled or limited advice.

Recommendation

The FPA recommends FASEA provide clear guidance on where it is FASEA's intent that advice can and cannot be scoped, using common specialisations such as intrafund advice, risk specialists and investment implementation specialists (such as stockbrokers).

Competence

Under the value of Competence (page 8) FASEA states:

> *If you don't possess the particular competencies required to assist your client, in accordance with other ethical requirements in the Code, you must refer your client to another professional.*

This seems inconsistent with the approach taken under the guidance for Standard 3 which if the adviser has a conflict of interest or duty, and the client wishes, the adviser may refer the client to another relevant provider if neither you nor your principal will receive any benefits from the referral.

If an adviser is not competent to provide advice, and is unable to supplement their competence by accessing the expertise of others, it is understandable that the adviser would decline the engagement. If the adviser does not enter into an engagement with the consumer, the person is not a client and therefore the Code does not apply.

Recommendation

The FPA recommends FASEA make it clear in their guidance why an adviser is required to refer the client to another adviser if they declined the engagement and therefore not obliged to 'refer to another professional' under the code.

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Client of the Principal

Clarity is needed around the application of the best interest of family members, as required under Standard 6 of the Code. Based on the wording in the Code and Explanatory Statement, this requirement is unworkable.

Principals are licensees. Some licensees have thousands of advisers with hundreds of clients. It is unreasonable to expect an adviser to even know if the family member of their client is a client of the adviser’s principal.

If a family member of a client is a client of the principal, this would create an obligation that the adviser also has a best interest duty to the family member, even though the adviser has no relationship (legal or otherwise), or legal engagement or agreement with the family member.

The Corporations Act applies the best interest duty to the direct adviser-client relationship. If a family member of the client is a client of the principal, FASEA is extending this to adviser-family member/non-client relationship. However, there is no relationship here as a family member is not a client of the adviser, but of the principal.

If the best interest of the actual client conflicts with the best interest of the family member/non-client, under the law the adviser must prioritise the best interests of client under the best interest duty obligation to the adviser-client relationship in the Corporations Act. However, this would put the adviser in breach of FASEA's adviser-family member/non-client best interest duty. For example, where a retired client has the goal of enjoying life or spending their retirement savings, this may conflict with their children's goal of receiving an inheritance from their parents. It is normal practice to assist the retiree, who is the advisers direct client, to achieve their goals with their assets.

This must also be considered in the context of Standard 3. Under this example the extension of the best interest duty to the family member would mean the adviser could not act for either the client or family member if a conflict exists, even though the family member is not an actual client of the adviser.

The adviser’s relationship and legal contract for the advice is with their client. However, the Code would potentially create a conflict of interest between the adviser’s best interest duty to their client, and that of the family member. It is unreasonable and would potentially put the adviser in breach of their legal engagement with their client, if they were not able to provide advice to their client because of the conflict between their legal best interest obligations to their client and the best interest duty to the client’s family members under the Code. This would potentially put the adviser in breach with the Corporations Act best interest obligation, and in turn, with Standard 1 of the Code.

As the legal engagement is with the client (not a family member) it is also unclear how the requirement to consider the interest of the family member can work in relation to privacy laws given there is no contractual arrangement permitting the disclosure of information about the family member to the adviser.

For example, if an adviser manages a client in Townsville but the client's brother is managed by another adviser under the same licensee in Tamworth, how is either adviser expected to take into consideration the other person's interests and have a best interest duty for the other person where no client authority has been provided to share information with a third party adviser to the relationship?

It is unclear how FASEA expects Standard 6 to work in practice.

Recommendation

The FPA recommends FASEA make it clear in their guidance how an adviser takes into account the interests of a family member when they don't have accurate client information or authority of the family member to have access to this information.

Reporting to ASIC

Example 31 states that the adviser has complied with Standard 12 as he has reported his concerns about potential inappropriate advice provided to a client by a former colleague to the licensee and ASIC.

This is inconsistent with the reporting requirements for the Code in the Corporations Act.

The Corporations Act sets the responsibility for oversight of the Code with code monitoring bodies of compliance schemes. Section 922HD requires a notice to be lodged with ASIC only if a code monitoring body determines that a relevant provider has failed to comply with the Code, or a sanction has been imposed. Not prior to the investigation being carried out as suggested by Example 31 of the Guidance.

ASIC does not monitor compliance with the Code of Ethics[2], nor does it investigate reports of suspected breached of the Code. It is code monitoring bodies who investigate potential

[2] https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-280mr-asic-to-provide-relief-from-financial-adviser-compliance-scheme-obligations/

breaches of the Code, not ASIC.

Requiring advisers to report to ASIC suspicions of a breach of the Code in order to comply with Standard 12 is inappropriate and inconsistent with the primary Commonwealth legislation.

Recommendation

The FPA recommends Example 31 be amended to remove the requirement placed on advisers to report to ASIC suspicions of a breach of the Code of Ethics by another adviser.

The FPA recommends FASEA clarify with the Government, ASIC and the TPB where suspicions of a breach of the Code of Ethics should be reported by another adviser in the absence of approved Code Monitoring Bodies and the Government's implementation of Royal Commission Recommendation 2.10[3].

[3] http://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/taking-action-banking-superannuation-financial-1

Summary of Recommendations

Legal parameters

1. The FPA is of the view that:

    - If the wording in the Code, as set in the Legislative Instrument, is not clear or will not work in practice, the Determination should be amended, and
    - The Guidance should not be used to introduce new requirements into the Code or override laws that have been approved through the Parliamentary process.

Timing of the code

2. The FPA strongly recommends FASEA extends the consultation period for the Code of Ethics Guidance to undertake more appropriate and detailed consultation and discussions with key stakeholders, to work through the practical workability and implementation of the Code standards.

3. The FPA recommends FASEA work with Government and ASIC to facilitate compliance with the Code for a 12 month period based on FASEA's delay in setting the standard and providing clear guidance.

Application of the code

4. The FPA recommends FASEA should clarify which services the Code applies to.

Living document

5. The FPA recommends FASEA apply strong version controls to documents and publish historical versions of the Code and Code Guidance on an ongoing basis.

Conflicts of interest

6. The FPA strongly recommends FASEA provide guidance on what steps can be taken to demonstrate a potential conflict does not become an actual conflict, if in particular the best interest tests in the Code are achieved.

7. The FPA recommends FASEA should make it clear when a potential or perceived conflict will become an actual conflict; and if advisers are permitted to provide services to clients if they can clearly demonstrate that the advice is in the best interest of the client and appropriate for the client's circumstances even if a conflict exists..

8. The FPA recommends FASEA work with stakeholders to jointly determine a workable solution to the conflict of interest requirements in the code. In particular around the issues of variable remuneration models, legal remuneration types, minor share holdings, and personal relationships (particularly within smaller communities).

Remuneration

9. The FPA recommends FASEA include a clear statement in the Guidance that an adviser will not breach the Code simply by accepting remuneration that is lawfully provided under the Corporation Act.

Referrals

10. The FPA recommends the Guidance makes it clear that the Code, including FASEA's intended ban of referral fees and arrangements, would only apply to relevant providers who are bound by the Code, not businesses who are not bound by the Code.

Existing clients

11. The FPA recommends that the Guidance provide' clarity on the application of the Code to advice provided to existing clients and ongoing advice arrangements.

General Advice

12. The FPA recommends FASEA make it clear that relevant providers can still provide general advice, and highlight the additional requirements advisers would need to fulfill, beyond the general advice warning in the Corporations Act, when providing one-one-one general advice.

Limited or Scaled advice

13. The FPA recommends FASEA provide clear guidance on where it is FASEA's intent that advice can and cannot be scoped, using common specialisations such as intra-fund advice, risk specialists and investment implementation specialists (such as stockbrokers).

Competence

14. The FPA recommends FASEA make it clear in their guidance why an adviser is required to refer the client to another adviser if they declined the engagement and therefore not

obliged to ‘refer to another professional’ under the code.

Client of Principal

15. The FPA recommends FASEA make it clear in their guidance how an adviser takes into account the interests of a family member when they don’t have accurate client information or authority of the family member to have access to this information.

Reporting to ASIC

16. The FPA recommends Example 31 be amended to remove the requirement placed on advisers to report to ASIC suspicions of a breach of the Code of Ethics by another adviser.

17. The FPA recommends FASEA clarify with the Government, ASIC and the TPB where suspicions of a breach of the Code of Ethics should be reported by another adviser in the absence of approved Code Monitoring Bodies and the Government’s implementation of Royal Commission Recommendation 2.10