

1 June 2018

Professor Mark Brimble
Managing Director
Financial Advice Standards and Ethics Authority

By email: consultation@fasea.gov.au

Dear Professor Brimble,

AFA Submission: FASEA Code of Ethics for Financial Advisers

The Association of Financial Advisers Limited (AFA) has served the financial advice industry for over 70 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting wealth.

Introduction

The AFA supports a financial advice sector-wide Code of Ethics as FASEA has been tasked to develop. It is important that the Code has a material effect in terms of financial advisers better appreciating what they are expected to do. It is recognised that this is a process that has now commenced with the release of this draft FASEA Code of Ethics. It is appreciated that in this early stage, what has been provided, is brief and that over time more detail will need to be populated. We believe that greater detail will be required in order for financial advisers to understand their obligations and for Code Monitoring Bodies to be able to monitor the ethical conduct of financial advisers. In the absence of this certainty, the effectiveness of the Code will be undermined.

We note that paragraph 183.22 of ASIC Regulatory Guide 183 identifies that codes should deliver stronger consumer protection outcomes. This paragraph also states that codes should elaborate on, exceed or clarify the law. We support these principles and have considered this in the context of our review of the proposed FASEA Code of Ethics.

It is also appreciated that developing a sector wide universal code is a particularly significant challenge and that all stakeholders will need to contribute constructively so that at the end of the process we can all commit to supporting and promoting the new Code of Ethics.

We note the reference in the Background section to paragraph 3.58 of the Explanatory Memorandum and the expectation for Code Monitoring Bodies to apply ‘soft sanctions’. We believe that this reference to “soft sanctions” needs to be clarified either in the Code of Ethics or the Code Monitoring Body requirements.

As we have worked through the draft Code of Ethics we have continued to ask ourselves the question of how this Standard would be implemented by a Code Monitoring Body. This is an important question as Standards that are unclear and that a Code Monitoring Body could not police, will not be effective.

Summary of Recommendations

As addressed below, our key points of feedback are as follows:

- The Code needs to place greater focus upon conduct at the licensee level.
- The Code needs to distinguish between personal advice and product recommendations from general advice and product dealings.
- The selection of certain words and the implication of those words needs to be considered or at least subject to greater explanation.
- The Standards need to be clearly understood by advisers and the observance of non-compliance by Code Monitoring Bodies needs to be largely objective and practical.
- It is essential to appreciate that advisers operate as part of a larger system and do not have complete control of the template or content of the Statements of Advice they present to their clients or the information that they rely upon.
- The Standards need to better emphasise the importance of genuinely understanding the client’s personal circumstances.

Principles for the Code of Ethics

The AFA supports a principles and core values-based approach. We also agree that the development of the Code should give consideration to examples of historical consumer detriment, the role of institutional culture and organisational systems.

One of the things that is most apparent from the Round 2 Hearings at the Royal Commission is that the financial advice sector remains vulnerable to negative stories about misconduct on the part of a minority of licensees and advisers. One thing that is critical in addressing this, is more action to remove the wrong people from the financial advice sector. A lot of this responsibility rests with licensees and important processes such as the management of terminations and the quality of processes to undertake reference checking for new advisers.

This Code seems to have been structured on the basis that all the current issues can be addressed at the financial adviser level. One very important factor that has been highlighted by the Round 2 Hearings at the Royal Commission is the culture and conduct at a licensee level. It is apparent that the Standards in the Code of Ethics are very focussed at the level of the adviser and their relationship with their clients. With the exception of potentially Standard 12, it is not apparent that there is anything in this Code that could be considered to be operating at a licensee level. Even this Standard still appears to place the obligations at the adviser level. We believe that it is appropriate to consider some Standards that would be applied at the licensee level or at least are applicable to conduct at

the licensee level. It might also be appropriate to have a Standard that more directly encourages advisers to stand up against inappropriate actions by licensees.

We recognise that FASEA has not been instructed to design a code of ethics for licensees, however we appreciate that some licensee managers are practicing advisers and therefore it is important to recognise the role of licensees in this Code.

How the Code Addresses Consumer Detriment

FASEA have asked for feedback on how the Code addresses consumer detriment. In part the consultation paper addresses this through the table on “Analysis of Proposed Code Against Conduct Issues and Cases”. In our view this is a challenging exercise, which necessarily needs to be based upon a detailed assessment of the common causes behind consumer detriment.

We have provided further feedback on the table on “Analysis of Proposed Code Against Conduct Issues and Cases” later in this submission.

Other Issues to Consider in Relation to Standard 2:

- a) What type of personal advantage are appropriate vs inappropriate?
- b) What might be the unintended consequences of the current draft?
- c) How might the Standard be expressed to avoid unintended consequences?

In answering the first question, it is important to state up-front that financial advisers are professionals and need to be paid accordingly for the services that they provide. As a paid professional service provider, there is always going to be a risk of inappropriate advantage. In our view there are two key tests for this:

- Did the achievement of a personal advantage adversely impact upon the adviser’s obligation to act in the best interests of the client? and
- Was the level of remuneration appropriate in the context of the value provided?

Where the personal advantage did not impact upon the quality of the advice and the level of remuneration was appropriate, then it clearly does not represent an inappropriate personal advantage. Where the nature of the personal advantage was such that it impacted upon the appropriateness of the advice then it is reasonable to conclude that it was an inappropriate personal advantage. Where the advice was appropriate, however the remuneration was excessive then we believe the assessment is less clear cut, however we would certainly land on the side of this being an inappropriate personal advantage.

Another approach in assessing this point about inappropriate personal advantage is whether all remuneration is consistent with the requirements of the Conflicted Remuneration legislation and Regulatory Guide 246 (Conflicted and Other Banned Remuneration).

As discussed below the inclusion of ‘refer’ and ‘act’ opens up concerns about the scope of Standard 2. Issues with respect to referrals are necessarily quite different to the provision of personal advice. The word ‘act’ may apply to dealing or execution only transactions, which may not be the primary focus of this Standard.

The definition of a relevant provider, as set out in section 910A of the Corporations Act, includes all financial advisers who are authorized to provide personal advice to retail clients. It is our understanding that the Code of Ethics will apply to all relevant providers (Section 921E) and with respect to all their actions and advice. We are not aware of any exemption for general advice or execution only services provided by relevant providers. We believe that this might present a problem. We would be equally concerned if the Standards that were applied to a relevant provider

in the process of providing general advice or execution only services were fundamentally different to the requirements for other providers of these services. Issues of having a level playing field are important to address.

In terms of the point about seeking to express the Standard in order to avoid unintended consequences, we wonder whether the Standard should simply state a view on inappropriate personal advantage, without the inclusion of the reference to “advise, refer nor act”.

How do the Other Standards Respond to this Type of Consideration?

We have set out our views on each of the twelve Standards below.

The Practical Application of the Proposed Code in Terms of:

- a) Adviser practice
- b) Licensee practice
- c) Education and support
- d) Compliance requirements
- e) Consumer experience

We believe the intent of the Code and the core principles are directed at the issue of adviser practice. Subject to feedback on this version of the Code, we feel that this will be adequately addressed.

As expressed above, we do not believe that this Code adequately addresses licensee practice. It is our view that the Code needs to address the expectations of relevant providers who also play a management role within a licensee. We would go further to suggest that these obligations could be extended to apply to all licensees, even if this was to apply via the means of a voluntary election.

Education of the adviser is addressed through Standards 9 and 10. Education of clients is broadly addressed through the emphasis on informed consent. We are unclear as to whether the reference to support is a reference to support of the adviser or the client. In both cases we do not feel that the Code places a strong focus upon this.

Establishing the correct compliance culture is key to ensuring that the overwhelming majority of financial advice is of a high quality. This culture and attitude plays out in terms of how advisers respond to and respect the compliance function. A strong but mature relationship between the compliance function and the advisers within a licensee better ensures that advisers take their compliance responsibilities seriously and that the compliance team are appropriately conscious of the impact of their requirements on the process and value of advice. In addition, with respect to the compliance culture, we also make the point that the role of senior leadership in setting the correct “tone at the top” is particularly important. Without this leadership, it is often ineffective. We do not believe that the Code adequately addresses the compliance culture or requirements.

The issue of consumer experience comes back to more than just the fundamental expectation that the advice is of a high quality. Customer experience is also highly dependent upon the adviser’s emotional intelligence skills and their ability at developing good personal relationships with their clients. The ability to show genuine care and interest in a client is also a key factor. It is our view that the current draft does not sufficiently address the issue of consumer experience.

Code Preamble

The first sentence on the ethos appears to blame ‘markets’ for the inappropriate pursuit of self-interest. We question the importance of adding the reference to ‘the market’ in this sentence and suggest that it complicates the meaning of this point.

The reference in the second paragraph to renouncing the pursuit of self-interest, seems to suggest some formal pledge. We note that self interest remains an issue in all professions, whether that is medicine or law or others (Please refer to the ABC’s Four Corners program on medical practitioners on Monday 28 May 2018). A complete eradication of self-interest may be an unachievable goal. It may be that the objective is more to do with the prioritisation of the client’s interests.

The reference in the fourth paragraph to “those who formerly provided a commercial service”, somehow seems to imply that there is something wrong with providing a commercial service, without providing any context. In making this point, there needs to be greater clarity in terms of what is meant by a “commercial service”.

The fifth paragraph suggests that the Code and the Standards are a matter of legal obligations. Whilst there is no doubt that they become obligations for financial advisers once the Code becomes effective, we question whether they are in fact legal obligations in the true sense of the word, particularly to the extent that they might extend beyond the actual law.

We note the introductory sentence to the Code, that “A relevant provider must act, at all times and in all cases, in a manner that is demonstrably consistent with the following principles, in the discharge of their professional duties.” The meaning of the reference to principles in this sentence is unclear. Does this refer to the Values and the Standards?

We also believe that there may be a fundamental complication in that this sentence seems to be applying all the Standards at all times, even when the adviser is providing general advice or assisting the client by the means of an execution only service. There are Standards that incorporate requirements that may not be appropriate in the broader context of general advice or execution only services. We have addressed this above and believe that this requires some clarification.

Code of Ethics - Values

Whilst the AFA does not disagree with the Values as proposed, we do not consider that the inclusion of single words adequately explains their meaning or what is required. In our view more than single words are required to provide meaning and to ensure that a standard universal understanding is adopted.

Another key point that we make is how these Values play out in terms of their inter-relationship with the Standards. Only one of these five Values (Competence) is actually used as part of the Standards. We believe that there needs to be more clarity in terms of how the Values influence the Standards and how they align with the Standards.

To what extent is a Code Monitoring Body expected to monitor the application of these Values? As an example, how far does an adviser need to go to demonstrate Diligence?

Code of Ethics - Standards

Standard 1: Act in Accordance with the spirit – and not only the letter – of all relevant laws and regulations (including this Code).

Whilst we can support this Standard in principle, it is a practical reality that the financial advice sector has evolved in recent years and that some of the changes to the law are applied on a prospective basis. These changes have been pursued in the sense that they better reflect expectations, however have not been applied retrospectively. This is the case with things like grandfathered conflicted remuneration and the Opt-in obligation. It might be a dangerous complication to imply that the new requirements reflect the spirit of the law and that therefore a reliance on the grandfathering arrangement is actually a breach of this Standard.

It is difficult to see how this Standard could be monitored. There would in most cases need to be a reasonably high level of judgement applied to make such an assessment. In the absence of a greater level of specificity, this would be a difficult Standard for a Code Monitoring Body to enforce.

We are not convinced that this is a stand-alone Standard and would suggest that it might fit better in the preamble.

Standard 2: Must neither advise, refer nor act in any other manner, where inappropriate personal advantage is derived by the relevant provider.

In addition to the points raised above, we also suggest that there needs to be greater clarity around acting and referrals. Whilst it is appropriate that an adviser is accountable for doing due diligence on any party they may refer their clients to, they should not be held accountable for unexpected issues that emerge with any service provided by the referral partner. The fact that a referral fee may be paid should not make the adviser responsible for the services provided by the referral partner. One of the important controls in this space is for the adviser to disclose all referral fees that they receive. It is often the case that financial advisers will receive no fee for a referral, however they will have a reciprocal referral arrangement with other professional service providers. We would not expect reciprocal referral arrangements to be considered an inappropriate personal advantage.

In our initial interpretation of this Standard, we had assumed that it applied to inappropriate remuneration received by the adviser, although we note that it may have broader application. We also recognise that this could be viewed from the perspective of advantages derived by the licensee. Further clarification on this would be beneficial.

The practice of utilising Approved Product Lists is common in financial advice. Financial advisers in some cases favour this as it limits the number of products that they need to have detailed understanding of and delivers administrative efficiency. We also propose that this should not be classified as an inappropriate personal advantage.

Overall our assessment of this Standard has given due consideration to whether it provides clarification to the Best Interest Duty, which at this point is unclear.

Standard 3: Act with personal integrity and as an independently minded professional, for the benefit of each client.

We fully support the intent of the requirement to act with personal integrity for the benefit of each client. Personal integrity is however a very broad concept that could potentially imply obligations

both within and outside the professional sphere. We also believe that personal integrity could be a subjective judgement. To overcome this, we believe additional detail is required in terms of what constitutes personal integrity and what elements would be subject to monitoring by a Code Monitoring Body. The other complication that this reference to personal integrity creates is that it removes a focus upon integrity at the licensee level. We have given consideration as to whether it would be better to remove the word ‘personal’.

We question the meaning and intent of “independently minded”. We are very conscious of the constraints in the use of the word independent under Section 923A of the Corporations Act, and wonder whether the use of ‘independently minded’ is seeking to intersect with the definition in Section 923A. Independently minded needs to be defined and clarified.

We also feel that it is appropriate to give consideration to whether this “independently minded” obligation could conflict with an employees’ employment agreement in some circumstances and whether employment agreements will need to change as a result.

Standard 4: Act only on the basis of the free, prior and informed consent of a client.

The AFA has the concept of informed consent in our existing Code of Conduct and have for some time felt that financial advice business models and advice processes should be based around educating clients and ensuring that they fully understand and agree with the decisions that they are making.

The addition of the words ‘free’ and ‘prior’ raise questions with respect to ‘free from what’ and ‘prior to what’. One meaning of free is with respect to no charge, which is clearly not the intention. Does free mean free from influence or encouragement? Changing behaviours and encouraging clients to make decisions is an important part of being a financial adviser. This is particularly the case where the advice may be in a new area where the client may not have had previous experience or knowledge. Importantly, is encouraging a client to make a decision that is clearly in their best interest, in breach of the ‘free’ part of this Standard? It is also the case that some clients have unreasonable expectations and one of the things that the financial adviser does is to assist to modify those expectations or at least make them more realistic or alternatively discuss with them the option of employing a higher risk asset allocation to grow their wealth more quickly. The delivery of disappointing news in terms of things like when they will be in a position to retire, or what income they will have in retirement may impact upon whether the decision could be defined as ‘free’. We believe that the intent of this requirement should be that the client has not been coerced into a strategy or product that they are not comfortable with. It certainly should not focus upon situations where clients are educated to a point where they agree to a strategy or product recommendation.

The reference to ‘prior’, opens up the question as to whether it is prior to the advice or prior to the implementation. It seems problematic, to suggest that it would be prior to the provision of the advice. Prior to the implementation should surely be taken for granted as this is a requirement of the law. What does the point about ‘prior’ refer to?

It should be noted that on occasions financial advisers are providing advice to a person who has been appointed as a power of attorney for the client, either through a standard power of attorney or through an enduring power of attorney. It is assumed that the adviser would only be required to confirm the informed consent of the attorney.

We also make the point that sometimes financial advisers provide services in terms of general advice and execution only dealing. As discussed above, it would appear that there is a risk that general advice and execution only transactions might be inconsistent with this Standard.

It appears that there is a level of alignment between Standard 2 and Standard 4 and that they might be more effective when working together.

Standard 5: Ensure that all advice and products are:

- a) In the best interest of each client,
- b) Appropriate to the individual circumstances of each client,
- c) Presented in terms easily understood by the client.

Financial advisers provide strategy advice, advice with respect to products, dealing in products and also other services. The reference to advice and presumably advice with respect to products is clear. Dealing in products may be on the basis of personal advice or otherwise it might be on the basis of no advice or an execution only transaction. Execution only transactions appear to pose a problem again in terms of the application of this Standard. The provision of services is an area of greater uncertainty. Not all services provided by a financial adviser fit within the boundary of a financial product. Have services deliberately been excluded from this Standard? It is sometimes the case that a client will decline to follow the advice of their adviser or the client requests an investment in a product that the adviser does not support. A client may choose to do nothing, even when doing nothing may be inconsistent with their best interests. These situations need to be taken into account in this Standard.

Where the advice is personal advice to a retail client, then the Best Interests Duty (Section 961B) will apply. The inclusion of the reference to best interest in Standard 5 (a) appears to simply reflect the legal obligation.

The requirement for the advice and product to be appropriate to the individual circumstances of each client seems to be picking up a combination of the obligations under Section 961G, Section 961B(2)(a) and Section 961B(2)(f). Thus, this once again seems to be repeating the law.

We note that the Standards do not emphasise the importance of developing a genuine understanding of the client's needs, objectives and personal circumstances. This is a key area where some financial advisers may struggle, and we consider it to be an area that requires particular attention.

In terms of the requirements of Standard 5 (c) for products to be presented in terms easily understood by the client, we note that product information might be presented by a product provider in the form of a Product Disclosure Statement (PDS) or alternatively by the financial adviser in terms of the content and delivery of a Statement of Advice (SoA). As the financial adviser is not responsible for the presentation of product information in a PDS, we do not believe that the adviser can be held accountable for this. We therefore suggest that this requires clarification.

We also note that the requirement in terms of easily understood by the client may be particularly challenging in the context of complex products. Other challenges would emerge in the context of disadvantaged clients, and we would not like to see advisers avoiding servicing such clients as a result of this Standard. Thus, there needs to be provision for these two factors and as a result the use of the word "easily" may need to be reconsidered in order to avoid these particular challenges.

In terms of SoAs, there is already a requirement for them to be Clear, Concise and Effective. It is further noted that the presentation of an SoA is subject to the disclosure obligations that apply to SoAs. There has been a debate for some time that Statements of Advice are typically too long and complex for them to be easily understood by clients. Licensees and also ASIC, through their example SoA, heavily influence the templates used in practice. This tends to result in longer documents, which might not meet the expectations of consumers. Therefore, there is always a risk that a legally compliant SoA could be deemed not to meet the expectation of being easily understood.

It is also important to note that many advisers are subject to the rules of their licensee in terms of the presentation of an SoA, and where they might feel that the licensee's template is inconsistent with this Standard, that they would be forced to break a licensee rule in order to comply with this Standard

In our view some of the issues addressed above could be resolved if this Standard was worded with respect to "personal advice and product recommendations" rather than "all advice and products". The other issues with respect to being easily understood by the client need to be separately addressed.

Standard 6: Take into account the broad effects arising from a client acting on their advice.

The challenge with this Standard is understanding what the 'broad effects' might be. We could envisage that at the simplistic end, an adviser recommending that a client switch from one superannuation product to another, should appreciate that they might lose their existing insurance, or that they may not be able to get new insurance on the same basis. It would also be possible to envisage a scenario where the linkage between the advice and a client outcome is much less predictable or less directly related to the advice. We fear that this may be difficult to implement, other than for the most obvious and direct linkage to the advice, which we suspect is defeating the intent of such a Standard.

The future is inevitably uncertain and financial advisers cannot be expected to foresee all the potential consequences. There should be a focus upon the immediate implications. Neither should advisers be blamed for matters out of their control and visibility.

In addition, we question whether this Standard might already be addressed by the Best Interests Duty and in particular Section 961B(2)(g), which requires an adviser to take any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

We believe that this Standard should not apply to general advice and we therefore recommend that it be modified to refer to "their personal advice".

Standard 7: Obtain informed consent to act and to receive agreed fees and payments for agreed services.

We support this Standard. We suggest that it might be beneficial to be more precise in terms of the meaning of "act", which we have assumed to mean both provide financial advice and to implement the financial advice.

In our 2014 Code of Conduct, we have gone further by the inclusion of the following requirement:

"Ensure that your remuneration represents fair value for your clients. Clearly and concisely explain to clients all remuneration that you will receive for the services that you provide to them so that the client fully understands and agrees to both the services they will receive and the amount you will receive."

We believe that this Standard could do more to address the issue of fair value.

It would appear that this Standard implies the requirement for the utilisation of a letter of engagement. It would be appropriate to clarify this and to also state the point in time that such an agreement is established.

Standard 8: Obtain informed consent, and agree, to maintain records relevant to the advice provided, in accordance with relevant privacy, regulatory and confidential obligations.

It is our view that this Standard is for some reason combining two elements that don't necessarily go together. Obtain informed consent is typically applied in terms of agreement to implement the advice. Maintaining records relevant to the advice provided, is a legal obligation. Financial advisers also generally seek client consent to the management of their personal data prior to proceeding to prepare the advice. This client declaration dictates what they can do with the client data from that point. This is an important step for an adviser to take, however we do not feel that it should be the basis for a Standard in the Code of Ethics and cannot see why it has been linked to informed consent. It is also important to note that it is the adviser's file that is being referred to in this Standard.

At the core of it, this could be simply interpreted as a requirement to comply with the law in terms of privacy and confidentiality. We do not see the relevance of this to a Code of Ethics and would recommend that this Standard be removed.

Standard 9: Ensure that all advice and products are:

- a) Offered in good faith and with competence,
- b) Based on information that is neither misleading nor deceptive,

Standard 9 starts with the same set of words as Standard 5, being "Ensure that all advice and products are". It is difficult to see why these are different Standards with the same focus. Taking this point further, the requirement in Standard 5(c) on "presented in terms easily understood by the client" has a level of similarity with Standard 9 (b) - "based on information that is neither misleading nor deceptive". We recognise that Standard 5 sits under the grouping of Client Care and Standard 9 sits under Quality Process, however the distinction is not apparent to us. We are not entirely opposed to repeating things where it expands or reinforces the message, however we are unsure that this adds value in this context.

Standard 9 (a) combines 'good faith' and 'competence'. We are not sure of the reason to combine these two points in the one sentence as they seem very different. We also feel that the term 'good faith' needs further clarification. How does 'good faith' differ from the requirements in Standard 5 with respect to the advice or product being in the best interest of the client or appropriate for the client. The personal advice and product recommendations need to be in the best interest of the client in order to achieve the required outcome. It needs to link back to the client's goals and objectives. What does the provision of advice or product recommendations that are compliant with the best interest duty but not in 'good faith' actually look like? We also suggest that the word 'offered' should be changed to 'provided' as 'offered' may sound more like a marketing exercise rather than an advice process.

In terms of competence, we note the importance of product knowledge. As we stated previously it is not possible to have a detailed knowledge of all products, and therefore it is important that advisers do have a good understanding of the products that they utilise on their Approved Product List and any other product that they provide advice on.

With respect to the requirement in Standard 9 (b) that the advice or product is based on information that is neither misleading nor deceptive, we question whether this is a reference to information contained in a PDS or in the SoA, or otherwise delivered verbally in the course of presenting the advice. Financial advisers should not be held accountable for misleading and deceptive information contained in a PDS, unless they were aware at the time that the advice was provided that the PDS contained misleading and deceptive information. It is appropriate to expect advisers to take

reasonable steps in researching a product and preparing the advice, but can't assume the responsibility of the product provider. To address this complication, it might be better to change 'products' to 'product recommendations'.

We are also conscious that this could also be a reference to advice being based on information provided by the client that is misleading or deceptive. How would it be reasonable to hold the adviser responsible, when the client provided information that was deliberately misleading or deceptive? You could envisage that this could be the case where the client had an unknown criminal background, or were otherwise trying to avoid an insurance premium loading or exclusion for an existing health condition that they did not want to disclose. Advisers already have an obligation under Section 961B(2)(c) to make reasonable enquiries when they have reason to believe that some of the information provided by the client is incomplete or inaccurate.

It is our view that the issues addressed in this Standard could be addressed as part of other Standards. We do not see the need for this as a stand-alone Standard. However, should this Standard be retained, then as stated above under Standard 5, we believe that this should be phrased with reference to "personal advice and product recommendations".

Standard 10: Develop and maintain a high level of relevant knowledge and skills.

The AFA supports a Standard that promotes the achievement of relevant knowledge and skills. We have a similar statement in the AFA Code of Conduct. We are conscious that this Standard will apply to all advisers, including those who are new and those who are older and more experienced. We envisage that the requirement for a 'high level' of relevant knowledge and skills may be applied in a manner that restricts new younger advisers from expanding their range of services. It is important to get the balance right here and it may be that it should focus upon an appropriate level of relevant knowledge and skills to provide the advice that is required.

We note that the reference to relevant knowledge and skills will generate confusion in terms of what is relevant. We believe that it should be expressed in terms of what is relevant to the area of advice that the adviser specialises in. For the purposes of greater clarity, we would recommend changing this to "Develop and maintain an adequate level of knowledge and skills relevant to the advice you provide."

We recognise that developing and maintaining knowledge and skills is in part addressed by the requirements of continuing professional development, which FASEA will separately address.

We suggest that this Standard should refer to the FASEA Education and CPD requirements.

Standard 11: Accept that potential breaches of this Code will be subject to investigation and discipline from the responsible Code Monitoring Body, undertaken in accordance with ASIC's approval and oversight of the Body.

The statement that potential breaches of the Code will be subject to investigation by the responsible Code Monitoring Body is simply a statement of fact as set out in the Professional Standards legislation. This should not need to be the content of a Standard. When this is extended further it might imply that a potential breach is subject to discipline, which should not be the case. Only confirmed breaches of the Code should be the subject of disciplinary action.

It seems that this Standard is simply restating the law, but is also potentially confusing the consequences of a potential breach of the Code. We question the purpose of including this as a Standard. It is probably better placed in the preamble.

Standard 12: Individually and in cooperation with peers, uphold and promote the ethical standards of the profession, and hold each other accountable for the protection of the public interest.

In responding to this standard, we certainly accept that more needs to be done to ensure that the wrong people are removed from the financial advice sector. We support a broad range of measures to encourage other advisers and employees to call out poor conduct in the financial advice sector. This might be extended to include whistle-blower schemes and protections, which have not worked as effectively in the past as should have been the case.

We believe that it is possible to interpret this Standard as either being focused upon working as a profession to assist all advisers to be the best they can be, or alternatively for the profession to do more to remove the wrong advisers. Both angles have merit, however it is unclear what the primary focus of this Standard is.

Standard 12 seems to assume a cooperative scenario with peers. It might be more likely to be an uncooperative environment, where the party receiving the feedback from colleagues rejects that feedback.

We seek clarification of the intent to combine ‘individually’ and ‘in cooperation with peers’. Is this intended to be a focus on the adviser’s personal conduct, or the conduct of others? We believe that this confuses the first part of this Standard. One viable option would be to remove this entirely and simply start from “uphold”.

We raise the question of how you demonstrate promoting ethical standards and whether a lack of evidence of promoting ethical standards would therefore constitute a breach of the Code of Ethics? We would also pose the question as to whether a failure to report known misconduct was a breach of the Code of Ethics?

We support this Standard however we believe greater clarity is required as to whether this a call to encourage each other to promote ethical standards and the protection of the public interest, or is it encouragement for advisers to call out unacceptable conduct by others. It certainly may be the case that it addresses both, however this would need to be more clearly articulated.

Missing Standards

Our review of the proposed 12 Standards indicates that there is a gap in terms of advisers meeting their committed obligations to their clients. The AFA has a principle in our 2014 Code of Conduct on Service Standards, which states – “Provide professional service that is aligned to your clients’ circumstances and your agreements with them.” This principle is based upon offering a level of service that meets the needs of the client and then delivering on that commitment. We believe that in the context of the issues raised recently about fees for no service, a standard of this nature is particularly important.

As stated above, we believe that there could be more in these Standards about charging client an appropriate amount for the services provided. We note the discussion of fees in Standard 7, however we do not believe that this addresses all the relevant issues with respect to fees.

We also consider that the importance of developing a genuine understanding of the clients needs, objectives and personal circumstances has not been adequately emphasised.

Further we pose the question as to whether the code should address issues related to client acquisition, such as the nature of referral arrangements or cold calling etc.

Analysis of Proposed Code Against Conduct Issues and Cases

In our opinion the "Conduct to address" category of "Client Care" in the "Analysis of Proposed Code Against Conduct Issues and Cases" table fails to adequately address the important need to develop a genuine understanding of the client's personal circumstances. We also believe that it does not adequately address the point that advisers should demonstrate genuine concern and care for their clients.

The section on "Quality of documentation" in the same table should also recognise the importance of Records of Advice.

The inclusion of the Values in this table highlights the fact that these Values require more than a single word to explain what they require. We also believe that this table should better address the importance of the provision of promised services on a timely basis.

In terms of conduct issues and cases, we would suggest the addition of the following:

- Failing to develop a genuine understanding of the client's personal circumstances.
- Applying the adviser's own beliefs to every client's circumstances.
- Designing the type of advice to enhance the prospect of a sale.
- Making unrealistic projections or promises.
- Advising on the basis of product, without adequate focus upon the strategy.
- Failing to provide a fair consideration of the client's current strategy and products.
- Charging excessive fees or misrepresenting the level of fees to be paid.

Concluding Remarks

We thank you for the opportunity to provide feedback on this draft Code of Ethics. We have raised a number of points above, some of which are with respect to the wording and the focus. Other points of feedback, such as a focus upon conduct at the licensee level and the implications for general advice and other services, are more fundamental.

The AFA welcomes further consultation with FASEA should you require clarification of anything in this submission. If required, please contact us on (02) 9267 4003.

Yours sincerely,



Philip Kewin
Chief Executive Officer
Association of Financial Advisers Ltd