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Mr Stephen Glenfield
Chief Executive Officer
Financial Adviser Standards and Ethics Authority

By email: consultation@fasea.gov.au

Dear Mr Glenfield,

AFA Submission: Draft Financial Planners & Advisers Code of Ethics 2019 Guide for Consultation

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 currently 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.

AFA's Response

The AFA is pleased to provide feedback on the "Financial Planners & Advisers Code of Ethics 2019" (the Guide).

This Guide is the third guidance document issued, following the 40 Page FG002 Financial Planners and Advisers Code of Ethics 2019 Guidance issued in October 2019 and the 13 page Preliminary Response to submissions on FG002 document in December 2019. We have been advised that the latest Guide does not replace the previous documents, but supplements them. Therefore, we now have three documents and 90 pages of guidance on the Code of Ethics. This is overwhelming for financial advisers, particularly at this point, as there are so many other factors for financial advisers to contend with. In this context, it is more than apparent that the actual outcome of establishing a Code of Ethics for financial advisers is substantially different from the original intent of the Code of Ethics.

The existence of three guidance documents, in addition to the Explanatory Statement and the actual Code itself, presents additional and unnecessary complexity as FASEA's expectations on certain issues seems to have changed with the interpretation contingent on which document a financial adviser reads. An example is the appropriateness of providing advice to a divorcing couple, where it now appears that FASEA suggests that this is still possible. The receipt of referral fees by licensees and CARS is another example of FASEA's differing guidance, with the published position in December 2019, being more flexible than the current position on this issue. These examples highlight how difficult it is for financial advisers to clearly understand the FASEA Code of Ethics, what is expected of advisers and how they can operate with comfort and surety that they are abiding by the Code.

It remains our view that the Code itself needs to be reviewed, rather than just focussing upon the delivery of multiple guidance documents, which merely adds to the complexity.

The introduction to the Code states that the Code is principles based. We would argue that some of the Standards are very prescriptive and therefore not principle based.

We note the repeated inclusion of messages about how the Code should be viewed:

Relevant providers should not consider each of the values and standards in the Code in isolation. They are intended to operate in combination to strengthen and inspire good practice. As such, the Code should be read and applied as a whole.

Financial Advisers would benefit from practical examples and explanations that demonstrate this message of totality.

We are disappointed that issues that the financial advice profession has raised in the past have still not been resolved. Key amongst these are:

- Clarification on situations where an adviser might pay for the receipt of referrals.
- An explanation of how to assess fair and reasonable and value for money under Standard 7.
- Clarification about how to efficiently provide scaled or limited advice, without continuing uncertainty about how much client data needs to be collected and how much deliberation needs to be devoted to the consideration of broader and likely future circumstances.

Given the increasing debate on the significant challenges that the financial advice profession faces with respect to the cost of providing financial advice, as well as the barriers to the accessibility of financial advice for everyday Australians, it is disappointing to see no acknowledgement of these issues in this Guide.

Unlike the December 2019 guidance document, there is no reference to the 26 November 2019 ASIC media release on compliance obligations with the FASEA Code of Ethics and the facilitative approach with respect to Standards 3 and 7. In the December document, FASEA stated that they supported the ASIC position.

As mentioned on page 7 of the Guide, we encourage discussion by financial advisers on the application of the Code of Ethics. We would like to see greater freedom for advisers to discuss the Code of Ethics questions contained in the FASEA Exam, and we therefore advocate for the removal of the current rules that prevent any such discussion. These restrictions are counter-productive to raising the level of discussion on the requirements of the Code.

There is discussion under the heading of "personal responsibility, compliance and enforcement" on page 7 of the Guide about the need to keep appropriate records to demonstrate, if called upon, your compliance with your obligations under the Code. Given the onerous compliance obligations, which ultimately increase the cost of providing financial advice to clients, we are extremely concerned that FASEA are imposing additional record keeping obligations, in addition to those which are required under existing laws and

regulations. The profession is on heightened alert and does not need extraneous and unnecessary additional red tape that adds to the cost of operating a financial advice business and advising clients.

Footnote 4 on page 7, states that “The Corporations Act does not formally allow for conflicts of interest, it merely sets a minimum standard for the management of conflicts of interest - should they arise. The Code extends these obligations.” This statement is incorrect. The Corporations Act and Regulations specifically allow both Monetary and Non-Monetary benefits that may otherwise be deemed as conflicts of interest. This includes commissions on life insurance, grandfathered commissions, small non-monetary benefits and training courses. Thus, we struggle to reconcile FASEA’s statement and intent.

Preamble Feedback

We see no practical purpose for repeating the Code Preamble, which is the same as the Code Legislative Instrument. It is our view that the preamble adds nothing to the context of the Code. The discussion on the ethos of the market does not clearly set out the background and the key reasons for the implementation of the Code of Ethics. The inference that professional services and commercial services are mutually exclusive is ideological and nonsensical as other professions including lawyers, doctors and accountants all provide professional services under commercial arrangements.

The statement that “the ethos of “the professions” aims to secure the public good through the subordination of self-interest in favour of serving the interests of others” is fanciful. Experienced and professional financial advisers should be remunerated according to their ability, in the same way as professionals from other industries such as medical specialists or barristers.

The majority of financial advisers have for a long time considered themselves to be professional and conduct their businesses in a professional manner. The preamble fails to recognise these financial advisers who have long been a part of the financial advice profession. The suggestion that it is the newest profession and that they need to transition from providing commercial services to professional services is viewed as offensive by many.

Values Feedback

We recognise the importance of linking the Values to the Standards, however, the section on the Values repeats much of what is in the Legislative Instrument Explanatory Statement. and the inclusion of the Values that apply to each Standard could be more meaningful if this was done in terms of which Values do not apply. Furthermore, there is minimal discussion under each Standard as to how the Values apply to that particular Standard.

Appendix 1 sets out a summary table where the Values are shown for each Standard. There are only four cells where a Value does not apply, and in three of the four cases, it is the Value of Fairness.

We recognise that FASEA is endeavouring to demonstrate the relevance of the Values, however it might be that this needs to be done in a different way.

Standard 1 Feedback

We understand the intent of this Standard and support the objective, which is to avoid financial advisers working around the law or the Code. Our support for this Standard is qualified to the extent of our objections to the Code as set out in this and our other submissions.

The coverage on Standard 1 misses the mark in terms of the Fundamental Questions.

Question 1 takes a simplistic view of the issue of a wholesale investor versus a retail investor. It is possible to treat a client who qualifies as a wholesale investor client, but lacks financial literacy and knowledge, in an appropriate way through a wholesale approach. There is a potentially viable alternative, where the adviser can treat the client as a wholesale client, but compensate for their lack of knowledge by providing additional education and disclosure. This might serve to deliver the advice at a lower cost to the client, but at the same time providing a better outcome. Oversimplifying such issues for the purpose of setting out the expectations under the Code, fails to acknowledge that clients and their needs are not often 'black and white' and in reality there are often many shades of grey.

Question 2 is entirely based upon the assumption that paid referrals deliver a poor outcome for clients. This may not at all be the case. The APESB 230 Standard allows paid referrals for accountants, provided it is a once off and a flat fee.

We question the author(s) understanding of how joint ventures operate in the advice industry. Typically there are no referral fees, as the venture is structured with shared ownership. We are also concerned that the discussion on referral fees received by licensees and CARS, will cause additional uncertainty and confusion, as it differs to the guidance set forth in the December 2019 document.

Question 3 also over simplifies Grandfathered commissions. It takes no account of the complexities that are involved in moving a client from an older grandfathered commission product to a newer product. These factors include exit fees, tax consequences and Centrelink implications, all of which could result in serious client detriment. Furthermore, Grandfathered commissions will be rebated to clients from 1 January 2021 (at the latest). Therefore, it might be in the clients best interest to stay in their existing products and wait until the rebate commences, rather than being forced to trigger unintended consequences as a result of a forced move to a newer product. Often advisers will charge a client a higher fee under an ongoing fee arrangement, as opposed to a Grandfathered commission arrangement, as the cost to serve is higher. The cost of the financial advice to recommend the move to the newer product also needs to be considered when assessing the benefits of moving to a newer product. These examples demonstrate the complexities associated with these issues which must be contemplated with the client in mind.

Standard 2 Feedback

There are some commentators that suggest that the requirements of Standard 2 do not go above and beyond the law, as ASIC already expects financial advisers to consider the clients broader position and likely future circumstances. The discussion on this Standard has led to a great deal of uncertainty and anxiety amongst advisers and licensees about the implications for providing scaled or limited advice. This is a poor outcome for clients who wish to access specific advice in a cost-effective manner. It may be FASEA's positioning of this Standard, that has led licensees to request their advisers collect more information as part of the fact find process.

The reference to a "demonstrably poorer" product in Question 1 leaves the industry guessing as there is no explanation as to why the product is demonstrably poorer. The example is confusing. The fact that the client wants a different product, does not change the advice that is given by the adviser. Where an adviser is faced with such a situation, they have a choice to vary the advice, implement the client's preference as an execution only transaction or refuse to follow the client's instructions. Furthermore, if the adviser refuses to act on the client's instructions, the client could proceed themselves and invest without access to financial advice. Walking away from the client when faced by a situation such as this, may not be in the best interests of the client, as it is clear that they need education and knowledge.

The tests under the Best Interests Duty are that the advice is fit for purpose and the client is in a better position. It is not a requirement that the client is placed into the best product.

Standard 3 Feedback

When the Code was released in February 2019, with Standard 3 placing a ban on all conflicts of interest or duty, the AFA argued that the revised wording made the Standard unworkable. Subsequent guidance from FASEA has not been successful in shifting our concerns on Standard 3 and we remain convinced that in its current form, Standard 3 is not practical. It was extremely disappointing that FASEA did not at any stage consult on the current wording of Standard 3, and had there been consultation, it would have avoided the problems that have since emerged. This is due to the fact that the Standard is just not practical in a financial advice context, on the basis of a literal interpretation of the wording in the Standard.

FASEA continues to try and redefine exactly what Standard 3 requires, and this is once again evident in the Guide. It is now 20 months since the Code was released and the opposition to Standard 3 is as strong as ever. We implore FASEA to recognise that this Standard is simply unworkable and revert to the version that was issued for consultation in November 2018:

You must not advise, refer or act in any other manner if you would derive inappropriate personal advantage from doing so.

With an adequate explanation for “inappropriate personal advantage”, it is our belief that this version can work in practice, whilst also achieving FASEA’s intended outcomes.

The updated guidance endeavours to tweak the objective of this standard and now implies that a conflict of interest is only prohibited where it is contrary to the client’s best interest. Whilst we appreciate the updated guidance and its intent, this stance does not change the strict legal obligation to “avoid all conflicts of interest” under the Code.

The guidance promotes a reliance on professional judgement; however, this is never going to be practical given the prescriptive obligations in the Code that stipulates that an adviser can have no conflicts of interest or duty.

We argue that the obligations on advisers, as set down in standard 3, go well beyond the expectation of other professions. Accountants can be paid a referral fee under the APESB 230 Standards. Lawyers can provide legal advice and recommend and pursue litigation. Doctors can consult with a patient and recommend and then undertake an operation instead of proposing alternative medicine. It is not correct to suggest that Standard 3 is consistent with the expectations of other professions.

Another major flaw in Standard 3 is that there is no measure of materiality. On a true legal basis, an adviser who holds shares in any of the big four Australian banks, would have a conflict of interest in recommending that same bank shares to a client, despite the fact that these bank shares would be included in most equity portfolios.

The efforts that FASEA has gone to in order to explain this Standard seems to exacerbate some of the existing issues. The following guidance increases the level of confusion:

The Code does not seek to ban particular forms of remuneration, nor does it determine that particular forms of remuneration will always give rise to an actual conflict of interest or duty. That said, you should remain open to the possibility that certain forms of remuneration will always fail to meet the requirements of the Code of Ethics.

This statement says a lot without necessarily saying anything of value. It highlights the increased confusion resulting from the guidance.

The Guide and other FASEA documents seek to distinguish actual conflicts from potential or perceived conflicts, yet at no point provide any examples to demonstrate the difference. If this is an important distinction, then it needs to be explained.

In the 'Applying the standard' section there are a number of references to fair and reasonable and represents value for the client. Standard 7 actually refers to 'value for money'. We question why 'value for money' has been changed to 'value' in some parts of this document.

The first sentence in the 'Applying the standard' section describes the assessment process in terms of needing to consider the context of the whole Code. The expectations in assessing compliance with this Standard are ever increasing in terms of complexity. The discussion of a "standard of judgement", is a remarkably complex exercise that involves a disinterested person, an unbiased person, a reasonable person and an ordinary person. Critical to this whole exercise is the expectation that this ordinary person of ordinary intelligence could be expected to have at hand and understand all the relevant facts. In trying to explain this unworkable standard, FASEA's explanation is simply 'tying people up in knots'.

Feedback on Standard 3 Fundamental Questions

Question 1 refers to the exercise of professional judgement. However, the wording of Standard 3 leaves no room for the exercise of professional judgement. A conflict of interest is simply a conflict of interest and a conflict of duty is literally a conflict of duty.

The Explanatory Statement to the Code of Ethics Legislative Instrument includes a case under Standard 3 where it is made clear that there is a conflict of duty in servicing both members of a couple, when divorcing. The Guide now seems to have modified this position and opened up the prospect that it may be possible to advise both of them. It refers to "fairly consider the clients as independent individuals". However, this concept is not clearly explained.

Whilst we can envisage a situation where the clients could be in a position where there are no ongoing competing interests, it seems surprising that FASEA are now adding confusion to an area where they have been quite definitive in previous documents.

Other than the discussion of the "standard of judgement", which is practically challenging, it seems that the requirements of Standard 3 are no clearer with the release of the updated Guide.

As noted above we are disappointed to see no answer on the issue of paying for referrals, despite the fact that this has been raised repeatedly in the past and recognised as an issue in the December 2019 Guidance document.

Standard 4 Feedback

The discussion on Standard 4 in the Guide has caused a great deal of concern and discussion amongst financial advisers and licensees. This has caused greatest concern amongst risk advisers and financial advisers who have bought a financial advice business or register of clients in recent years. There are many risk advisers who believe that this Standard puts their entire business at risk and is likely to lead to many risk clients losing access to financial advice, as it would no longer be possible to economically service them.

On 18 October 2019, the AFA and FPA jointly wrote to FASEA on the application of Standards 4 and 7 in relation to consent from existing clients for life insurance only business. This submission is attached, and remains relevant to this round of consultation on Standard 4 (and later with Standard 7). We believe that this is a critical issue and that FASEA needs to modify their stance on life insurance only clients.

It is our view that the guidance on Standard 4 has extended substantially beyond the original scope of Standard 4. Standard 4 is focussed on the requirement to have a client's free, prior and informed consent before acting for that client. It does not make any reference to fees in either the Legislative Instrument or the Explanatory Statement. The focus in this Guide should be on having consent prior to acting for the client.

Standard 7 relates to consent for the payment of fees, yet the discussion on Standard 4 in the Guide makes repeated references to fees and commissions. Fees are referred to eleven times and commissions are referred to three times. We strongly argue that it is inappropriate for FASEA to now assert that Standard 4 relates to fees, when this issue is already separately addressed in Standard 7. This is particularly important, given that ASIC has provided a Facilitative Compliance approach on Standards 3 and 7, but not on Standard 4. In our view, both broadly and in the context of the ASIC 26 November 2019 announcement on the Code, extending Standard 4 to fees and commissions throughout this Guide, is simply inappropriate.

We would also argue that the description of the intent of Standard 4 is inconsistent with the application of the standard and the Fundamental Questions. In particular, the intent describes how “Advisers should confirm that the client freely consents to the ongoing service offering, fees payable and payments for any additional services offered”. This specifically relates to any future or additional services offered, and not with respect to the receipt of ongoing payments, which appears to be the primary focus of the Fundamental Questions.

In our 18 October 2019 joint submission with the FPA, we highlighted some key differences that apply with respect to life insurance business.

- The need for formal annual reviews may be less frequent than for other areas of advice. The ongoing commissions do not cover the full cost of regular reviews.
- Upfront commission does not cover the full cost of providing the initial financial advice, and thus the ongoing commissions help recoup the costs for the provision of the initial advice.
- Support at the time of claim is a critical element of the life insurance advice value proposition. Many advisers do not charge a fee for this important service and rely on ongoing commissions to meet the costs of providing this crucial service. This naturally involves a high level of cross subsidisation, between those who do not claim and those who do. Restricting this practice will result in claimants having to pay fees to cover the costs of claims management and advocacy which is likely to be tens of thousands of dollars (using the example of fees charges by lawyers who operate in this space).

In our view, some of the Fundamental Questions are inconsistent with the key point made in the application section that “If you have already received the client’s free, prior and informed consent, Standard 4 has been met”. Unfortunately, this issue is unnecessarily causing elevated anxiety amongst financial advisers. At this point in time, with so many other challenges, and with the extended impact of COVID 19, this is disappointing.

Implications for the Purchase of a Business or Book of Clients

We believe that Standard 4 has the potential to have a detrimental impact on the advisers who have recently purchased a financial advice practice and for those who are currently looking to sell their businesses (of which there are many). The impact will be greatest on risk practices, and will have flow on consequences to the entire life insurance market.

When a financial adviser purchases a financial advice business or a book of clients, the purchase effectively facilitates the assignment of existing arrangements between the adviser and the client to the new adviser. This results in all the rights and obligations of the former adviser being assigned to the new adviser. This includes the obligations with respect to complying with the arrangement and the provision of Fee Disclosure Statements and Renewal Notices. The existing agreement is considered to apply to the new adviser, until the next renewal is required. In a life insurance context, authorisation to service the client and to receive commissions is transferred to the new adviser. At the time of transfer, the clients are typically given the opportunity to opt out of being transferred. Under the law, they are considered to have previously provided consent to the ongoing arrangement.

The discussion in Standard 4, potentially threatens this ongoing position and we suggest that FASEA avoids undermining this existing financial advice sector practice. Otherwise the

direction of the discussion on Standard 4 could substantially impact the value of businesses and create difficulty for those seeking to sell an existing business. This is causing great uncertainty at this time. It should also be understood that in many cases the arrangement is with the CAR and not the individual financial adviser. This would also substantially threaten the impacted clients, who would lose access to financial advice. If their adviser's business is no longer viable, then the clients will be major losers as a result.

We recommend that in the case of the purchase of a business or a book of clients, the consent obtained by the former adviser is treated as applying to the new adviser.

Feedback on Standard 4 Fundamental Questions

We believe that Question 1, which refers to receiving consent from any client who the adviser continues to receive a fee or a commission for is inappropriately mixing up Standard 4 and Standard 7. This Standard applies to obtaining consent prior to the offer of any additional services, not to the receipt of fees.

Question 2 has caused great concern and a lot of confusion. If consent has previously been provided through the signing of an engagement letter or an Authority to Proceed, then as discussed on the top of page 21 of the Guide, consent has been provided and no further action is required. As discussed above, the relationship with existing life insurance clients is different, and the same rules should not apply. This has caused confusion with respect to what irregular contact means. Importantly, any consideration of contact should include phone calls and emails/letters.

It is also important to make it very clear that with the majority of retail advised life insurance products, should a commission be turned off, the client does not receive a corresponding premium reduction. The pricing and policy administration systems do not enable this. Therefore, in turning off the commission, this would only serve to disadvantage the client as they would no longer have access to advice or support, especially in the event of a claim. Having access to someone to ask questions about their policy is valuable. It is important to appreciate that the probability of making a claim increases as the client gets older, so turning off access to support as they clients get older is absolutely not in their best interest, particularly if they have held the product for a long time. Is this really the outcome that FASEA intended?

With Question 3, the concept of annual renewal and annual review have been mixed up. An annual renewal requirement has not yet been legislated, so it is questionable that FASEA should be implying that this is a requirement. In any case, renewal, in any form, does not apply to Life Insurance only clients, which is an important distinction that should be noted.

In terms of Question 4, there may be a range of reasons why a client does not respond for a period of time. Where the client is subject to a renewal, then the arrangement should be permitted to continue until they fail to renew. Ceasing the arrangement prematurely may be to the disadvantage of the client. In the case of life insurance clients, as discussed above, the client does not benefit from turning off commissions and this would only be to their disadvantage. Life insurance clients need to be treated differently.

Question 5 is confusing the obligations under the law versus the obligations under the Code. Under the Code, if the client has already provided consent, then no further action is required. It is only under the Corporations Act that renewal may be required.

In terms of Question 6, we question why FASEA is including references to grandfathered commissions in a draft Guide issued in October 2020, less than 3 months prior to the commencement of the ban on grandfathered commissions. This is only a draft Guide and it is unlikely to be finalised prior to this grandfathered commission ban coming into force. This is once again going to cause unnecessary anxiety and exacerbates the risk of FASEA being seen as having totally unreasonable expectations.

As recently communicated by ASIC, in their COVID 19 guidance to financial advisers (FAQ 10), the law on renewal obligations, enables clients to renew by sending an email to the adviser or by sending a text message. In this context, we question why FASEA deems it necessary under Question 7 for clients to provide signed consent. Given the challenges that have been posed during the COVID 19 lockdown and social distancing measures, where face to face meetings are increasingly rare, the expectation of getting a paper based signed consent is totally unreasonable. The implied expectation for insurance only clients is substantially above any requirement in the law, and if enforced, would only work to the disadvantage of clients.

Of all the elements in the Guide, it is the guidance on Standard 4 that we think requires the most substantial change.

Standard 5 Feedback

The guidance on this Standard has created concerns that FASEA is talking about a different concept of the best interests duty to that which is contained in Section 961B of the Corporations Act. This is related to the highlighted intent section that includes “it may be necessary for product recommendations to go beyond what is currently on a Licensees’ approved product list (APL) if the adviser is aware of a product that would be in the client’s best interests”. This seems to increase the threshold of the Best Interests Test to the best product for a client rather than a product that is in the best interests of the client. Explained simply, there are likely to be many products that meet the requirements of the Section 961B Best Interests Duty. The idea of a single best product is a matter of judgement that depends upon a range of factors and is too subjective to rely upon as a standard.

The discussion also fails to elaborate on the discussion of products, particularly the distinction between platforms and individual investment options. There are numerous investment options, even on one platform and it is unreasonable to suggest that financial advisers can have a good understanding of each of these investment options.

The AFA is extremely concerned about the strong focus on the selection of a specific product which serves to understate the real value of financial advice, which is the financial strategy, the behavioural change and the emotional benefits. The real value add from financial advice is in these strategy areas, not in the selection of one product over another.

Whilst we strongly support the importance of a client’s sound understanding of the advice, and the related benefits, costs and risks, this is dependent upon the client’s willingness and capability to understand. Some clients simply want to rely upon their adviser. The adviser can only go so far in encouraging the client to take an interest in understanding the advice and the implications of the advice. So, we pose the question, what should an adviser do if a client is not interested in trying to adequately understand the advice, but is still committed to following the advice provided by their adviser? Surely it is not in the best interests of the client for the adviser to refuse to continue to advise this client. This could also serve to permanently disadvantage segments of the population who might struggle more than others to understand the complexities in the financial advice world. Whilst we support the intent, the problem with the Code is that in several areas it is simply divorced from the real world, and in this regard might be contrary to the interests of everyday clients.

With respect to the first sentence in the ‘Applying the standard’ section, the fact that financial advice needs to be tailored to the needs of each client is a basic concept, just as is the inappropriateness of a one size fits all approach.

We question the merits of the reasonable/disinterested person test as it is an assessment of the client’s understanding of the advice and the related benefits, costs and risks. Unless the reasonable/disinterested person understands the thinking and background of the actual client, how can they make a judgment under this test?

In terms of the consideration of compliance with Standard 5, we question the second bullet point about the need to be aware of new products, including those that may not be on the licensees APL. Regulatory Guide 175 refers to the need to consider products not on the APL, including a client's existing products, where the client asks about a specific product and where there is no product on the APL that meets the client's needs. It is not at all possible to consider all new products available to a client. This expectation is far from reality, as there are a large number of platforms and thousands of investment options.

Feedback on Standard 5 Fundamental Questions

Question 1 introduced the term "demonstrably more appropriate" product, however there is no explanation or discussion about what this actually means. An example is needed. The statement about having "a general understanding of other well rated products", does not seem to consider all the product options available. There are literally thousands of options, many of which are well rated. The reference to the modelling tool seems to imply that financial planning software recommends products. This could not be further from the truth and is contrary to the existing legal obligations under which advisers operate.

The answer to this question is once again based upon the assumption that there is only one 'demonstrably more appropriate' product and the premise that the selection of this product is somehow obvious. This does not take into account the reality of providing advice and the multitude of products that are available to help meet a client's objectives.

Question 2 does not provide sufficient information on the specific case, to be of any value. Unless this is a description of a situation where the adviser has emailed the SoA to the client and they have signed the Authority to Proceed with no discussion, then there is important context that is missing. Advisers cannot rely on a signature on the ATP, unless they have adequately explained the advice and all the consequences of the advice.

Client understanding of the advice, and the related benefits, costs and risks is not a black and white consideration. There are numerous shades of grey, and yet this Guide and the Fundamental Questions do not in any way adequately address these shades of grey. To better understand the application of this Standard, we would expect to see the inclusion of examples, that meaningfully address this reality.

Standard 6 Feedback

The AFA acknowledges that financial advice should consider reasonably foreseeable events that are important and relevant to the client's situation. We agree that the advice should take into account the client's broader, long-term interests and likely circumstances to the extent that this is both realistic and achievable. Realistically, this obligation needs to be related to what is relevant, not what is hypothetically possible. In the absence of greater certainty and guidance, this restricts the ability of financial advisers to provide scaled or limited advice.

The challenge presented by the guidance on Standard 6, is that that the required level of understanding may only be obtained once the adviser has done a complete fact-find, that revealed other factors that might impact the consideration of providing scoped or limited advice. This information may only emerge over time. In reality, and particularly in certain ethnic groups, there is a high level of reluctance to discuss deep and personal issues in the early phase of a financial advice relationship. Financial advisers do not want to be in a position where they can be retrospectively judged for providing limited scope financial advice, when the warning signs may only emerge later. This requirement is adding one further obstacle to providing scoped or limited advice, that may reduce the amount of scoped or limited advice provided.

The top of page 26 refers to a holistic risk assessment. It is unclear what is meant by a holistic risk assessment. Is this an assessment of the client's risk profile, or is it an assessment of the risk of the advice or is it an assessment of the risk of providing scoped or limited advice which

might be in breach of Standard 6? There is also a reference to conducting ‘sufficient information gathering’, however there is no description of what ‘sufficient’ might involve. It would be beneficial to explain this, including reference to trigger points and warning signs.

Question 1 does not provide additional guidance, rather it repeats the points raised above in the ‘Applying the standard’ section. Financial advisers need real world examples that demonstrate compliance with the requirement for sufficient information. We would encourage the provision of examples.

Standard 7 Feedback

A key concern of the FASEA Code of Ethics Standard 7 is what is actually meant by “fair and reasonable and represent value for money”. The Guide fails to address this question. The concept of value is extremely subjective and is best seen through the eyes of the client utilising the lens of their objectives, behaviours and emotions. The guidance at the bottom of page 7 only lists factors that are obvious to the exchange of value between the adviser and the client.

With non-monetary benefits, it is important to note that often these are not related to a specific client. For example, the invitation to an entertainment event or training course by a product provider, could be as a result of interest displayed in their products over an extended period of time. These types of benefits are adequately disclosed in the adviser’s Financial Services Guide and should not need to be a primary focus of Standard 7.

In the ‘Applying the standard’ section on existing client consent and the reference to the earlier discussion on Standard 4, we refer to the issues that we have raised under Standard 4 and the joint letter that the AFA, along with the FPA, provided to FASEA on 18 October 2019. We are eager to highlight the issues that we have raised with respect to life insurance clients, where reviews may be less frequent and where part of the ongoing commissions may relate to the upfront cost of advice (which is not fully covered by the capped commission) and in all cases relate to the commitment by advisers to provide support and services in the future, particularly at claim time. These are important considerations that should materially influence the requirements of Standard 7 for life insurance clients.

We do not agree to the application of the reasonable/disinterested (unbiased) person test that is referred to at the top of page 28. It is not a disinterested person that needs to undertake the assessment. The concept of value is subjective and is best assessed by the client. A disinterested person will have no appreciation of what the client does and does not value. FASEA needs to demonstrate how this test might work in practice.

Fortunately, financial advisers have more time through the ASIC facilitative compliance approach, however there is a lot more clarity that is needed. We should also make the point that we are disappointed that there is no reference to this ASIC facilitative compliance approach in the discussion on Standard 7, which FASEA supported in the December 2019 guidance.

The issue of referral payments to licensees and CARS requires further clarity. For example, in the case of a small CAR (one or two advisers) what type of expenses could this income be spent on to avoid the potential risk that the income will be deemed a payment which benefits the individual financial adviser.

In the paragraph above Fundamental Questions, which includes the discussion on seeking consent from existing clients, we submit that where consent has previously been provided (through an Authority to Proceed within a Statement of Advice or a Renewal notice), there should be no requirement to take any further action. There is ongoing uncertainty about when consent might be required and our feedback on this has been included in our response to Standard 4. We strongly oppose this expectation for life insurance only clients. The guidance in this paragraph includes a requirement to obtain consent within 12 months. Given ASIC’s

facilitative compliance approach until the commencement of the Single Disciplinary Body and other ongoing uncertainties, we question this 12-month timeframe. Furthermore, does the 12 months commence from when the Guide is finalised or 12 months from the commencement of the Code of Ethics?

Feedback on Standard 7 Fundamental Questions

With respect to Question 1, we would like to highlight that the APESB 230 Standard does not prevent the receipt of a payment for a referral, provided that the payment is non-recurring and a fixed amount. This is explicit in the Definition of Third Party Payments in Clause 2 of APESB 230. Thus, the scenario in Question 1 would not represent a breach for an accountant under APESB 230, however it constitutes a breach for a financial adviser under the Code. If an objective of the FASEA Code is to bring the standards for financial advisers in line with other professions, then why has FASEA completely ignored the APESB 230 standard and set higher thresholds on matters such as referral fees?

Question 2 references 1 January 2020 as though it is in the future. It is not. It was 10 months ago, and yet we are still in a situation where the application of the FASEA Code of Ethics remains highly uncertain. In terms of the value of Question 2, it is necessary to explain the circumstances under which an assessment of the structure of these referral arrangements would lead to the view that it negatively impacts on the ability of relevant providers to meet their obligations under the Code. In what circumstances might this apply? How will this be assessed? Guidance with respect to the operations of a smaller CAR would be beneficial. The explanation on the top of page 29, refers to inappropriate influence on the advice, yet this is a referral scenario and not an advice scenario. What advice are they referring to? How is the advice and product recommendation relevant? How are the best interests of the client being assessed? These 5 bullet points are similar, but not identical to the 4 bullet points in the test discussed in the 'Applying the standard' section in Standard 3. We cannot see how this test is being modified and used in assessing a referral arrangement by a licensee or CAR. This guidance is confusing and unrelated to the underlying issue.

With respect to Question 3, our feedback is as per our response to Question 7 under Standard 4, and is repeated below.

As recently communicated by ASIC, in their COVID 19 guidance to financial advisers (FAQ 10), the law on renewal obligations, enables clients to renew by sending an email to the adviser or by sending a text message. In this context, we question why FASEA deems it necessary for clients to provide signed consent. Given the challenges that have been posed during the COVID 19 lockdown and social distancing measures, where face to face meetings are increasingly rare, the expectation of getting a paper based signed consent is totally unreasonable.

Standard 8 Feedback

There is no question that record keeping obligations are important, and the client records must be comprehensive, recoverable and securely stored.

The answer to Question 1 applies to all electronic records and not just the scenario of an adviser transitioning from paper-based client files to an online system. It may be that for an older practice, that has been in business for many years, that such a transition may only be undertaken for current and recently ceased clients, rather than all clients going back to the commencement of the business.

Question 2 is confusing. The reference to a new job and moving practice, implies that it relates to an employed adviser. They would therefore not own the client files and would not have any right to transfer the clients. This is not a record keeping obligation, but instead a client ownership matter. Such a question needs to be clearer about whether this relates to an employed adviser or an Authorised Representative who owns the client files. If the clients are being transferred from one practice to another, then this would imply that they have been

sold. Examples, such as these, need refinement and improvement to reflect the practicalities of the financial advice profession.

There is a need for more guidance on the record keeping requirements in the circumstances of the sale of a business or the retirement of an adviser from a business where they were previously a part owner.

Standard 9 Feedback

We acknowledge and support the importance of financial advisers not providing financial advice that is misleading or deceptive and not making references to products that are misleading or deceptive. Financial advisers, on the other hand, are not responsible for Product Disclosure Statements and cannot be held accountable for information in a PDS that is misleading and deceptive where it is not reasonably obvious as to the existence of the misleading and deceptive information.

The guidance in the 'Applying the standard' section seems reasonable, including the five bullet points that are listed covering the considerations by a financial adviser. We support these expectations, which provide guidance on the steps an adviser should undertake in seeking to comply with this Standard.

The answer to Question 1 is obvious. The inclusion of this question is a wasted opportunity. Financial advisers will gain much more from an example demonstrating where judgement is required.

Question 2 is based upon an unrealistic premise. Licensees cannot determine that a product is in the best interests of most clients. The best interests test applies at an individual client level and is largely based upon their personal circumstances. It cannot be assessed across a group of people. The question implies the application of pressure by the licensee to use a certain product. No financial adviser should stay in a licensee that pressures them to recommend in-house products and we have no evidence to suggest that this is a systemic issue within the financial advice sector.

The question "Am I required to provide evidence the in-house product is in the best interests of the client?", disregards the current obligations with the best interests duty. Advisers understand their obligation to evidence that their advice is in the best interest of their clients. The four bullet points provided are similar to one of the answers under Standard 3 and another under Standard 7, however much of this response seems unrelated to Standard 9. Understanding the advice, benefits, costs and risks relates to Standard 5. The concept that the fee structure must be in the best interests of the client, is a new concept, but in any case, this relates to Standard 7. The third bullet point on the fees being fair and reasonable and represent value also relates to Standard 7. The disinterested or unbiased person test listed in bullet point 4 also appears to relate to Standard 7. In conclusion, none of these bullet points relate to Standard 9 which is the requirement that the product recommended being offered in good faith and with competence and be neither misleading nor deceptive. Given the time that has elapsed to issue this guidance, some of the errors and omissions set forth are concerning.

Standard 10 Feedback

The discussion in the 'Applying the standard' section is repeating the FASEA education requirements and the FASEA CPD requirement. This is not new information. The final paragraph refers to potential issues with an adviser providing advice outside their area of speciality. It goes on to suggest referring the client to an adviser with the necessary skills and knowledge, however there is no discussion as to how an adviser should look to extend the areas that they provide advice on, in a manner that is compliant with Standard 10. This would be beneficial.

The answer to Question 1 seems to be transferring this responsibility back to the licensee. This highlights the fact that FASEA has done no apparent work on the issue of specialist training and qualifications. Seemingly this is a gap in the FASEA regime.

The response to Question 2 is sensible, however it would be good to see further discussion on how an adviser could work with an experienced SMSF adviser in the delivery of this advice and in the development of these skills. We would like to believe that FASEA would support the idea that the adviser can provide this type of advice with the assistance of someone who is suitably qualified, and who is mentoring the adviser.

Standard 11 Feedback

We have no specific feedback on Standard 11. Question 1 and the answer to the question presents a very basic consideration of this Standard.

Standard 12 Feedback

Once the financial advice profession has a Code of Ethics that is both accepted and understood, then we would agree that the profession should promote the Code and publicly support compliance with the Code. Unfortunately, the financial advice profession does not have full confidence in the Code given the fundamental flaws set out above and the substantial uncertainty arising from these practical issues. Until such time as these matters are rectified, in consultation with the advice profession, it is unlikely that the profession will be able to promote and have confidence in the Code.

We support the proposition that financial advisers should hold each other accountable to high ethical standards and they should be prepared to take action when they are aware of another adviser who is doing the wrong thing. The challenge is how to best facilitate this in a manner that is efficient and responsive. The experience, in terms of how to escalate these concerns in the past, has not been supportive.

We equally acknowledge the important role that supervisors play in the guidance and training of Professional Year candidates. Those early experiences can shape the values of new advisers for the long term, so it is important that the right messages are delivered and that the importance of behaving in an ethical and professional manner is clearly understood.

We would have expected to see more on the expectations of advisers under this Standard in the 'Applying the standard' section.

With respect to Question 1, we question the prevalence of this practice of transferring client files to a new adviser. Whilst it might happen in medicine, it is unlikely to happen in law and accounting. It should also be noted that there is an obligation on the previous licensee to retain a copy of the client's records. The licensee is unlikely to support such a practice of open transfer of full client files, when it will create additional risks for them. The costs of extracting the client file from a financial planning software system and reviewing it prior to providing it to the new adviser would need to be taken into consideration. This is not standard practice in financial advice and would require substantial change for this to become the norm. How is this Question and the concept of providing client files to a new adviser, relevant to this Standard?

Question 2 provides a good reason as to why financial advisers would be hesitant about transferring client files to a new adviser. This issue needs to be considered in the context of the increasing litigious environment that financial advisers exist within. Unlike other professions, economic and market factors can materially influence the later assessment of the advice. The quality of advice should be judged on the prevailing factors and client objectives at the time of providing the advice and not in hindsight. For example, it is unrealistic to expect financial advisers to predict a market down-turn.

We note and accept the actions that are available to a new adviser on the discovery of poor advice in the past. Option A through the IDR process is inevitably a precursor to option B and seeking redress through AFCA. ASIC would typically only respond to more serious matters of misconduct, rather than isolated cases of inappropriate advice. Importantly, FASEA has missed one other key avenue that is available to the new adviser, which is reporting the former adviser to their professional association.

We are disappointed to see that the Questions on Standard 12 have been limited to the issue of transferring client files from a former adviser to a new adviser. We would have thought that there was much more room to address this Standard, including with respect to what happens within a licensee and an advice practice when issues of inappropriate advice and potential misconduct are discovered. This issue of upholding the reputation of the profession is an important one and worthy of a more detailed discussion.

Concluding Remarks

We are critical of many aspects of this document, as we were with respect to the October 2019 Code of Ethics guidance document. This document, which simply adds to the previous two guidance documents, does not provide meaningful additional insight into the expectations of FASEA. In many cases, the guidance has created new and substantial grounds for concern and anxiety. There remain key unresolved questions.

Ultimately in a number of areas, particularly with respect to Standards 3, 4 and 7, we believe that the Code needs to change and that the existing issues cannot be addressed through additional guidance.

FASEA will need to change their approach and engage with the financial advice profession in a deliberate, structured and comprehensive way to address the significant number of outstanding issues. The profession needs to be part of building the solution, not simply the recipients of updated guidance that is released from time to time.

For this Code to work, it needs to have the support of the broad financial advice profession. At this point, it remains a long way from achieving that objective.

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

Yours faithfully,



Philip Kewin
Chief Executive Officer
Association of Financial Advisers Ltd

Appendix 1 - Relationship Between Standards and Values

Standard	Trustworthiness	Competence	Honesty	Fairness	Diligence
Standard 1	Yes	Yes	Yes	Yes	Yes
Standard 2	Yes	Yes	Yes	Yes	Yes
Standard 3	Yes	Yes	Yes	Yes	Yes
Standard 4	Yes	Yes	Yes	Yes	Yes
Standard 5	Yes	Yes	Yes	Yes	Yes
Standard 6	Yes	Yes	Yes	Yes	Yes
Standard 7	Yes	Yes	Yes	Yes	Yes
Standard 8	Yes	Yes	Yes	NO	Yes
Standard 9	Yes	Yes	Yes	Yes	Yes
Standard 10	Yes	Yes	Yes	Yes	Yes
Standard 11	Yes	NO	Yes	NO	Yes
Standard 12	Yes	Yes	Yes	NO	Yes