

29 May, 2018

Financial Adviser Standards and Ethics Authority

By email: consultation@fasea.gov.au

Code of Ethics for Financial Advisers – Exposure Draft Comments by Stockbrokers and Financial Advisers Association

I refer to the Exposure Draft of the Code of Ethics for Financial Advisers released by FASEA for consultation in March 2018 (“the Exposure Draft”). The Stockbrokers and Financial Advisers Association (“SAFAA”) appreciates the opportunity to provide comment on the Exposure Draft.

SAFAA is the peak industry body representing both institutional and retail stockbrokers and investment banks in Australia. Our membership includes stockbroking firms and securities dealers, as well as individual advisers employed by those firms, across the spectrum, from the largest firms through to medium-sized and smaller firms, and with client bases ranging from wholesale to retail, and both offshore and local.

Introduction – Preliminary Comments

As a preliminary matter, SAFAA notes that financial advisers are likely to be subject to a number of Codes of Ethics, depending on the number of professional associations to which they may belong. A stockbroker who belongs to SAFAA and who also has accounting qualifications may well be a member of an accounting association as well. In addition, financial advisers who give tax advice in the course of their work are also most

likely to also be registered with the Tax Practitioners Board (TPB) as a Tax (financial) adviser and will as a result be subject to the TPB's Code of Professional Conduct.

The proliferation of Codes of Conduct applying to the one adviser is highly likely to cause confusion. This is a matter which SAFAA highlighted to Government during the consultation phase of the Professional Standards proposals.

The decision to overlay the FASEA Code of Ethics on all financial advisers is now a given, having been legislated. Whilst it would no doubt be impractical to endeavor to harmonise all of the various professional Codes with the proposed FASEA Code of Ethics, SAFAA is strongly of the view that at the very least, there is no reason why the FASEA Code of Ethics should not be consistent with the TPB's Code of Professional Conduct.

We note that the FASEA Code uses very different language to the TPB's Code. In our Submission on the particular paragraphs in the exposure draft, FASEA will note that SAFAA has a number of concerns with the language that has been used in the Exposure Draft. SAFAA's preliminary comment is that the TPB's Code is drafted in much simpler and more effective language, and from the point of view both of harmonization and of effectiveness, SAFAA supports the FASEA Code being re-drafted to borrow as many of the sections of the TPB Code as are relevant to financial advisers in general.

SAFAA Comments on the Exposure Draft

Paragraph 1

A relevant provider must act in accordance with the spirit - and not only the letter - of all relevant laws and regulations (including this Code)

What amounts to the spirit of laws and regulation could in many cases be a matter of interpretation and/or contention. This standard is too vague and capable of different results depending on who is making the determination of what is "the spirit" of a particular provision. This is not an effective or fair outcome.

We prefer the simpler approach of the TPB in Paragraphs 3 and 4 of the TPB Code:

3. You must comply with the taxation laws in the conduct of your personal affairs

4. You must act lawfully in the best interests of your client.

To the extent that certain conduct which might be within the law is considered lacking in ethical standards, then this should be dealt with by the broader ethical formulation in Paragraph 1 of the TPB Code:

1. You must act honestly and with integrity

In SAFAA's submission, the TPB approach is simpler, clearer and fairer, and avoids the use of subjective concepts. There is no reason why the same provisions should not be adapted to the FASEA Code.

Paragraph 2

A relevant provider must neither advise, refer, nor act in any manner where inappropriate personal advantage is derived by the relevant provider

SAFAA submits that this paragraph is somewhat clumsy in its drafting. The reference to an "inappropriate personal advantage" again creates a new term which is not in common use in the industry, and hence likely to create uncertainty.

What is well understood in the industry is the concept of conflicts of interest, and the appropriate management thereof. This has been the subject of Corporations Act (including FOFA) reforms, and considerable ASIC guidance. In SAFAA's submission, the FASEA Code should base itself on this, and not introduce an additional concept of a personal advantage that might be considered to be inappropriate on some yet to be identified criteria.

We note the reference in the TPB Code paragraph 4 cited above, to "act in the best interests of your client. We also note Paragraph 5 of the TPB Code, namely

5. You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax (financial) adviser.

In SAFAA's view, the TPB approach is clearer and the requirements better understood. There is no reason why the FASEA Code should not adopt the same or similar approach, with such modifications as may be needed.

Paragraph 3

A person must act with personal integrity and as an independently minded professional, for the benefit of each client

As with previous paragraphs, the drafting of Paragraph 3 is not as neat or straightforward as the TPB Code, and it is questionable whether it adds anything to ethical standards to draft the requirement in this way.

The reference to “personal integrity” does not add anything compared to the simple word “integrity” on its own.

Our members consider that the term “professional” brings with it the understanding that the adviser has acted with an independent mind. A simpler formula that has been proposed is:

“A relevant provider must act with integrity and professionally in respect of each client.”

As to the reference to “*the benefit of each client..*”, this has already been dealt with in paragraph 1, and does not need to be further repeated.

Paragraph 4

A relevant provider must act only in the basis of the free, prior and informed consent of a client

Feedback from our members is that this drafting is clumsy. A better and simpler formula is suggested below:

A relevant provider must provide each client with all relevant information in respect of a product.

A relevant provider must obtain instructions from the client in respect of a product before acting.

Paragraph 5

A relevant provider must 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

Sub-paragraph (b) is not necessary in view of (a). Advice and products that were not appropriate to the individual circumstances of each client could not be in the best interests of the client. As mentioned above, SAFAA prefers the straightforward simplicity of TPB Code Paragraph 4 quoted above.

As regards (c), this wording is problematic. It could be construed as requiring an advisor to conduct an individual assessment of the comprehension levels of each individual client, and to tailor every piece of advice to those standards.

A preferable approach in our view is to include a statement that a relevant provider must take reasonable steps to satisfy themselves that the client understood the advice and the features of the product.

Paragraph 6

A relevant provider must take into account the broad effects arising from a client acting on their advice

SAFAA submits that this paragraph is so vague as to be meaningless. Again, the best interests duty, as it is understood, encapsulates the obligations applying to an adviser. The simple statement along the lines of TPB Paragraph 4 is all that needs to be said. The Paragraph 6 of the Exposure Draft should simply be dispensed with.

Paragraph 7

A relevant provider must obtain informed consent to act and to receive agreed fees and payments for agreed service.

The first half of this paragraph duplicates Paragraph 4 above. The second half is also arguably within the scope of Paragraph 4, however if an express provision relating to fees is seen as of significance, a better approach in our view is to state something to the effect that:

A relevant provider must disclose any fees or other remuneration payable by the client prior to providing the advice or product to the client.

Paragraph 8

A relevant provider must obtain informed consent, and agree, to maintain records relevant to the advice provided, in accordance with relevant privacy, regulatory and confidentiality obligations

The maintenance of records is a statutory requirement under the Corporations Act and, in relation to market transactions, the relevant Market Integrity Rules.

It is not clear to SAFAA why this requirement should be treated as an ethical obligation, or why it should be the subject of the requirement to obtain informed consent from the client.

A simple statement that a relevant provider must comply with all applicable laws relevant to the provision of the financial advice, should be all that is needed. Paragraph 8 should be dispensed with.

Paragraph 9

A relevant provider must ensure that all advice and products are offered in good faith and with competence; (b) based on information that is neither misleading nor deceptive.

SAFAA's preference is for the Code to require a relevant adviser to act honestly and with integrity. Adding the reference to offering advice and products "in good faith" does not necessarily add anything more. If one is not acting in good faith, how can this be acting with integrity?

The wording in (b) is very confusing to us. Advice is usually based on information provided by the client as to their person needs, circumstances and requirements.

If the intention is to include a requirement that the adviser not provide information to the client which is misleading or deceptive, then a preferable approach, in SAFAA's view, would be to simply state:

A relevant provider must not engage in conduct that is or is likely to mislead or deceive a client in the provision of advice on any product.

Paragraph 10

A relevant provider must develop and maintain a high level of relevant knowledge and skills

The reference to "a high level" is problematic – how does a new adviser in their first years as a practitioner satisfy this standard before they become more experienced? And what is the definition of "high", and who is responsible for defining that term?

We note that the corresponding provision in the TPB Code at paragraph 7 states:

You must ensure that a tax (financial) advice service that you provide, or that is provided on your behalf, is provided competently.

A paragraph in similar terms, appropriately modified to the provision of a financial advice or product, would be a more effective provision in the FASEA code to existing Paragraph 10.

Paragraph 11

A relevant provider must accept that potential breaches of this Code will be subject to investigations and discipline from the responsible Code Monitoring Body undertaken in accordance with ASIC's approval and oversight of that body.

We are unsure why this matter is a question of ethics. The matter applies by legislation, and the provisions governing the relevant compliance scheme by which an adviser is required to be covered. There is no scope for an adviser not to accept this, even if they wished they had that option, and there is no reason for this matter to be part of the Code of Ethics.

Paragraph 12

A relevant provider must 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

This paragraph is in our view extremely vague, and it is difficult to determine what compliance with the requirement would involve. What does acting in co-operation with peers entail, and what would amount to failing to meet this standard? The standard involved in individually upholding and promoting the ethical standards is no clearer either.

It is also unclear what steps an adviser is required to take to hold other advisers accountable.

In SAFAA's view, the formulation of Paragraph 12 is fundamentally flawed. We note that a formulation that is more commonly seen is framed in the opposite way, namely, not to engage in conduct that would bring the profession into disrepute. Whilst that formulation also employs terms which are not specifically defined, it is in our view a formulation that is more generally understood amongst professionals and the community.

CONCLUSION

The proposed FASEA Code is a fundamentally significant component of the professional standards framework, and it is essential to take the time firstly, to get the drafting right,

and secondly, to ensure that the Code is harmonized with the range of other obligations imposed on financial advisers. SAFAA members hope that the above comments assist FASEA to achieve these outcomes.

We would be happy to discuss any issues arising from our submissions on this issue. Should you require any further information, please contact Peter Stepek, Policy Executive, on (02) 8080 3200 or email pstepek@stockbrokers.org.au .

Yours sincerely,

A handwritten signature in black ink that reads "Andrew Green". The signature is written in a cursive style with a large initial 'A' and 'G'.

Andrew Green
Chief Executive