Stockbrokers
And Financial Advisers
Association Limited

28 June, 2018

Ms Kelly Fung
Lawyer
Financial Advisers
Australian Securities and Investments Commission
GPO Box 9827
SYDNEY NSW 2000

By email: policy.submissions@asic.gov.au

Dear Ms Fung,

ASIC Consultation Paper CP 300 – compliance schemes for financial advisers

We refer to ASIC Consultation Paper CP 300 – Approval and Oversight of Compliance Schemes for Financial Advisers.

We make the following submission.

Executive Summary

- We are very worried about the over-engineering of ASIC's proposed code monitoring regime.
- ASICs proposals to include consumers in Code Monitoring is a response to populism. Involving consumer representatives in Code Monitoring will be counter-productive as consumers will not have the detailed knowledge of financial services regulation necessary to make an informed contribution.

- In many cases the proposed regime is too prescriptive and will impose a heavy cost on the industry.

- The result of ASIC's plans is that there will be an ever-diminishing number of financial advisers, with an increasing cost burden left for those that remain in the industry.

- This will result in a shortage of retail financial advisers. Consumers will be the losers.

Who we are

SAFAA is the peak industry body representing institutional and retail stockbrokers and investment banks in Australia. SAFAA is the only body representing individual advisers in the listed product sector in Australia.

SAFAA was originally established following the de-mutualisation of the ASX under the name Securities and Derivatives Industry Association (SDIA). The purpose of its establishment was to provide a professional association and industry representative body for stockbrokers.

Throughout its history, SAFAA has had in place a Code of Ethical Conduct and has set professional standards for the listed products sector. This also extended to educational standards. SAFAA has a number of educational accreditations which are the only such qualifications in the market.

SAFAA's membership is a combination of organizational (entity) membership, and individual membership. Advisers who are employed by a firm which is an organizational member enjoy the full benefits of SAFAA membership without having to become an individual member. Nevertheless, many individuals choose to be Individual Members in their own right. Through organizational membership, SAFAA represents and impacts upon far more individuals in the industry than the number of actual Individual Members on its register.

SAFAA intends to apply to ASIC to operate a compliance scheme for the Listed Products Sector. Because of its background, SAFAA considers that it is the logical body for individual advisers in the Listed Products Sector to join.

SAFAA has been approved by the Tax Practitioners Board (TPB) as a recognized professional association for tax (financial) advisers under the TASA framework. SAFAA

has therefore already established a professional standards, complaints and professional conduct framework which meets the TPB's requirements under the largely similar professional standards regime already in place under the taxation legislation. SAFAA intends to make such modifications and enhancements to its existing framework to meet the requirements of the framework for retail financial advisers.

As a general and final matter, the proposed framework for approval in CP 300 is in our submission heavily over engineered, and in a number of cases, unnecessarily so. The TASA approval requirements, whilst still thorough, are considerably less prescriptive, but are designed for a very similar professional standards framework. SAFAA recommends that the ASIC framework could benefit from being more harmonized with the TPB's requirements, which in our view are very sensible.

Specific Submissions

1. The "**if not why not**" approach. SAFAA supports the adoption of an "if not why not approach" by ASIC to its requirements for approval of compliance schemes, as set out in CP 300. It is essential that ASIC's requirements be flexible, and not so strict, or difficult to satisfy, as to effectively prevent small or medium compliance schemes from operating.

   A compliance scheme will be more effective if it is relevant to, and has a better understanding of, the industry sector in which it will operate. The experience of consumers is likely to be much better if the body to whom they may refer code complaints has a better understanding of the sector.

   The only reservation that SAFAA has with an "if not why not" approach is the extent to which an explanation as to "why not" will be nevertheless considered unacceptable by ASIC, and approval withheld for the scheme. Any minimum requirements for approval need to be clearly explained to scheme applicants.

2. **Governance.** We note the proposed provisions relating to Governance at section C2, and in particular, the following Consultation questions:-,

C2Q1 Do you agree that the governing body should be comprised only of non-executive members? If not, please give details and provide alternatives.

C2Q2 Do you agree that the governing body should include an independent chair and a balance of industry and consumer representatives? If not, please give details and provide alternatives.
C2Q3 Do you agree that the criteria listed at paragraph 70 should be applied to determine the chair's independence? If not, please give details and provide alternatives.
C2Q4 Do you think that the existence of an independent governing body and role separation will be effective to minimise the potential for conflicts of interest in the monitoring body? If not, please give details and provide alternatives.

SAFAA does not support the proposals with respect to Governance in CP 300. It is not clear to us how the "if not why not" approach is intended to operate with respect to these matters.

To insist that the governing body of a compliance scheme be comprised only of non-executive members, that the chair be independent, and for there to be consumer representatives, is inconsistent with professional bodies operating a compliance scheme.

The Governing Body of SAFAA (the Board) comprises Directors elected by organizational members and individual members, a Chair appointed by the Board, and an executive member (the Managing Director) appointed by the Board. Other professional bodies operating in the financial advice market have governing bodies structured along similar lines.

It would be nonsensical for there to be consumers appointed to the Board of SAFAA, or for the Chair to be an independent person.

Industry Associations, properly constituted, with a democratically elected board, play an important role in the democratic process. In the case of SAFAA, the Association has been representing members for 20 years and has played a vital role in the evolution of the financial services industry in Australia.

While many ASIC executives are fully aware of the contribution this Association has made to the financial services industry over the last 20 years, we respectfully draw your attention to the 10 years' worth of submissions made by the Association and available for inspection on SAFAA's website under the Advocacy banner. A further 10 years' worth of submission have been archived.

In our view, the proposals regarding Governance are, at least in relation to professional bodies, unnecessary. If it is the intention that the "if not why not" approach is to be applied so that a professional body is not required to meet the proposed requirements in C2 by explaining that it is a professional body, then

that would clarify our concerns, however this should be clearly enunciated by ASIC.

We note that the TPB does not have any comparable requirements in relation to recognized professional associations under the TASA framework. SAFAA submits that the TPB approach is the better approach.

SAFAA also notes that the Minister, and the Minister's Office, on a number of occasions during the consultation process for the Professional Standards legislation, expressed that it was the Government's expectation that professional associations would come forward and operate compliance schemes under the new framework. In the absence of any exceptions for professional associations, the proposed requirements in C2 directly contradict this.

3. **Expertise.** We note the proposed provisions relating to Governance at section C3, and in particular, the following Consultation questions: -

C3Q1 Do you agree with our proposed approach of assessing the expertise of monitoring bodies by assessing the matters outlined in paragraph 76? If not, please give details and provide alternatives.
C3Q2 Will it be practical to provide information about the members of the proposed initial governing body in an application for approval of a compliance scheme? If not, please give details and provide alternative methods we may use to assess the expertise of the governing body.
C3Q3 Do you agree that there should always be one member of the governing body who, at some point in the five years before being appointed to the governing body, met the training and competence standards that would have allowed them to give personal advice to retail clients on 'Tier 1' or relevant financial products? If not, please give details and provide alternatives.
C3Q4 Do you agree that there should always be one member of the governing body who has experience in and knowledge of the principles of procedural fairness and administrative law? If not, please give details and suggest alternative ways that the governing body may be able to access this expertise. C3Q5 Are there other aspects of a monitoring body's expertise that we should assess before granting approval for a compliance scheme? If so, please provide details.

For the same reasons as set out in relation to C2 above, SAFAA does not support the proposals with respect to Expertise, unless it is made clear that professional bodies are exempted under the "if not why not" approach.

To operate effectively, it would clearly be necessary for a compliance scheme to apply appropriate levels of expertise in its operations. This would include experience in relation to retail advice, and principles of procedural fairness and

administrative law. However, to require that the Governing Body evidence those skills, or satisfy them as conditions of appointment of individual members, does not sit with the nature of a professional body.

In relation to the SAFAA Conduct Review and Disciplinary System ("CRDS"), established as the mechanism for hearing complaints against members for failure to comply with the Code of Ethical Conduct, matters are dealt with by a Professional Conduct Tribunal. They are not dealt with by the SAFAA Board.

Whilst the Board retains overall responsibility for the effective operation of the CRDS, the PCT is responsible for determining conduct matters referred to it.

The PCT is appointed on a case by case basis from a panel of SAFAA members. Panel members are selected based on the relevance of their skills to the subject matter of the dispute or complaint.

The relevant matter, in SAFAA's submission, is whether the scheme has access to the appropriate level of skills for it to determine professional standards matters. A professional body such as SAFAA should not be required to satisfy the various matters in C3 of CP 300 in relation to its Board of Directors.

4. **Decision-making process.** We note the proposed provisions relating to Decision making at section D7, and in particular, the following Consultation questions: -

D7Q1 Do you agree that the governing body should be responsible for making the final determination about whether a financial adviser has failed to comply with the code? If not, please give details and provide alternatives that address the need to ensure that the decision maker is impartial.
D7Q2 Is it reasonable to expect the governing body to make a determination within 45 days of a matter being referred to it? If not, what other timeframe would be appropriate?
D7Q3 Do you agree that the governing body should comply with the principles set out in Table 4 in carrying out its decision-making activities? If not, please give details and provide alternatives.

We refer to our comments under Section 3 above in relation to C3. The proposals in relation to decision-making do not reflect the Conduct Review and Disciplinary System which SAFAA has established, nor do they reflect the arrangements in place, as far as we are aware, at other professional bodies, such as AFA, FPA, etc. The Proposals in D7 should not be required in relation to professional bodies.

As mentioned above, matters under the SAFAA CRDS are determined by the Professional Conduct Tribunal, and not by the SAFAA governing body (the Board). The PCT operates under delegated authority from the Board, so the Board could if it considered appropriate determine a matter, however for all practical purposes, it will be the PCT, and associated Appeal procedures, that will determine Code matters.

As regards D7Q2, it is entirely impractical to require matters to be determined within 45 days in all cases. The time needed will depend on a whole variety of matters on a case by case basis. It is not necessary that ASIC prescribe any time limits. That would be unduly prescriptive and would fail to take into account the vast range of potential delays that could be occasioned for a range of reasons.

The SAFAA CRDS specifies various dates for each stage of a referral to the PCT, and ASIC is entitled to consider the timetable for each compliance scheme seeking approval to ascertain whether or not those dates satisfy the test of "reasonableness" for determining a matter under section 921L.

5. **Proactive monitoring activities.** We note the proposed provisions relating to Proactive monitoring at section D3, and in particular, the following Consultation questions: -

   D3Q1 Will a minimum of one thematic own-motion inquiry and one compliance statement process each year, with associated verification activities, be sufficient proactive monitoring activities to ensure that compliance with the code is appropriately monitored and enforced under a compliance scheme? If not, please give details and provide alternatives.
   D3Q2 Are the proposed proactive monitoring activities appropriate for monitoring compliance with the standards set out in the draft code? If not, please give details and provide alternatives.

   The proposed requirement for a compliance scheme to conduct one thematic own-motion enquiry each year is an unnecessary requirement for an effective compliance scheme. This is a prime example of what SAFAA submits is an over-engineering of the Code monitoring framework.

   Proactive monitoring is within the scope of ASIC's function, and we submit, something that is better and more efficiently done by ASIC across the financial advice sector or targeted based on the information and surveillance that ASIC is in the best position to have. Requiring compliance schemes to perform the same role foists ASIC's work onto compliance schemes and is not within the original contemplation of the role of a Code enforcement body. It would impose cost and complications on the operation of compliance schemes, which is already likely to be a significant factor. The proactive monitoring is likely to be less

targeted, more piecemeal and less coordinated than if ASIC were to discharge this function.

SAFAA does not support the proposals in D3.

6. **Annual Work plan.** We note the proposed provisions relating to preparation and submission to ASIC of an Annual Work plan at section D2, and in particular, the following Consultation questions: -

   D2Q1 Do you agree that a monitoring body should prepare a risk based annual work plan? If not, please give details and provide alternatives.
   D2Q2 Do you agree that the annual work plan should be provided to ASIC each year, from 1 January 2020? If not, please give details.
   D2Q3 Do you agree that the annual work plan should be made public? If not, please give details.

   SAFAA does not support the proposed requirements for an annual risk-based work plan. This is another example of what SAFAA considers to be over-engineering of the compliance schemes, resulting in additional administrative and cost burdens onto compliance schemes.

   SAFAA devotes considerable time and resources to professional and educational standard setting and service delivery. If approved as a code monitoring body, SAFAA is committed to dealing as expeditiously as possible with any referrals relating to potential Code breaches. However, devoting resources to writing annual work plans would divert scarce resources away from standard setting and enforcement, and would just add unnecessary costs which will all eventually contribute to driving up the cost of advice to retail investors.

7. **Reporting.** We note the proposed provisions relating to reporting at Section E1, and in particular,

   E1Q1 Do you agree that monitoring bodies should produce public annual reports covering the matters outlined in paragraph 167? If not, please give details (e.g. about which data in particular should not be made public) and provide alternatives.
   E1Q2 Do you agree that monitoring bodies should produce quarterly reports for ASIC and meet with ASIC on a quarterly basis to discuss the matters outlined in paragraph 167? If not, please give details and provide alternatives.

We refer to our comments in Section 6 above about over-engineering of process. A requirement for quarterly reports is an unnecessary burden and will simply add to cost. The key element of Code monitoring and an effective compliance scheme is that matters are dealt with expeditiously and standards are upheld and enforced. The only reports that should be required are the reports of advisers who have received a sanction, for any further action by ASIC and/or for noting on the Adviser Register.

We note that the TPB regime required the compilation of annual statistics as to matters dealt with and sanctions imposed, and the reporting of those figures on the body's website. This is cost effective and transparent, and we submit that the ASIC regime should be harmonious with the TPB arrangements.

Conclusion

- We are very worried about the over-engineering of ASIC's proposed code monitoring regime.

- ASICs proposals to include consumers in Code Monitoring is a response to populism. Involving consumer representatives in Code Monitoring will be counter-productive as consumers will not have the detailed knowledge of financial services regulation necessary to make an informed contribution.

- In many cases the proposed regime is too prescriptive and will impose a heavy cost on the industry.

- The result of ASIC's plans is that there will be an ever-diminishing number of financial advisers, with an increasing cost burden left for those that remain in the industry.

- This will result in a shortage of retail financial advisers. Consumers will be the losers.

Should you require any further information, please contact Peter Stepek, Policy Executive, on (02) 8080 3200 or email pstepek@stockbrokers.org.au.

Yours sincerely,

Andrew Green
Chief Executive