1 June 2018

Financial Adviser Standards and Ethics Authority
By email: consultations@fasea.gov.au

Financial Adviser Standards and Ethics Authority
Code of Ethics for Financial Advisers - Exposure Draft of Proposed Standard

Thank you for the opportunity to provide comments on the Code of Ethics for Financial Advisers – Exposure Draft of Proposed Standard (the draft Code).

The Australian Financial Markets Association (AFMA) is a member-driven and policy-focused industry body that represents participants in Australia's financial markets and providers of wholesale banking services. AFMA's membership reflects the spectrum of industry participants including banks, stockbrokers, dealers, market makers, market infrastructure providers and treasury corporations.

AFMA promotes the conditions that enable financial markets to enhance Australia's economic performance by:

- Advocating policies and regulation that support development of the financial markets and user confidence in them;
- Encouraging responsible conduct and efficient markets through industry codes, conventions, guides and preparing and maintaining standard documentation; and
- Promoting high professional standards through education and accreditation programs.

A number of AFMA members provide financial services to retail clients and their financial service providers are required to meet the FASEA requirements under the professional standards for financial advisers regime. In particular, our comments reflect the views of our members who provide financial services related to financial markets, including but not limited to advice on exchange traded financial products, and other products including foreign exchange derivatives.

Our comments are set out as general feedback, followed by comments on each of the proposed Standards in the draft Code.

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General feedback

AFMA strongly supports the implementation of the professional standards for financial advisers regime and the role of FASEA in implementing the regime. It is hoped that one of the outcomes of the regime is that consumers will have greater confidence that the provider with whom they are dealing is trained and competent to a minimum but nonetheless high standard that applies across the financial services sector, and is not dependent only on the standards that individual require their representatives to meet, which can and do vary across the industry. Importantly, a framework that applies across the industry will create portability of qualifications for advisers.

AFMA is also of the view that the framework should apply to all providers who advise retail customers on Tier 1 products, regardless of the size or type of firm. It is important to avoid any bifurcation of training and competency standards, which is not in the best interests of consumers.

In relation to the draft Code, the consultation paper states that the Code to be issued by FASEA is essentially a set of principles and core values. This is presumably to ensure that the Code can be applied across the broad range of retail financial services advice activities. However, there is also a risk that the draft Code will be so broad that code monitoring bodies will interpret the standards differently depending on the nature of the providers who are the members of a particular code monitoring body. Language that is subjective should be avoided given the difficulties that could arise in operationalising the Code and measuring compliance.

As a set of value statements, the draft Code lacks the specific standards that stipulate appropriate practices and rules of behaviour. As noted above, this may leave it open to interpretation by code monitoring bodies and may create inconsistency in practice and additional costs in implementation, notwithstanding the requirement that the code monitoring body's compliance scheme must meet the standards proposed in ASIC Consultation Paper 300: *Approval and oversight of compliance schemes for financial advisers*.

On the current model, a possible outcome is that code monitoring bodies will incorporate the FASEA Code into their own codes of conduct or professional practices (however described) and will monitor their own code. This may create inconsistency, confusion for consumers and difficulties in measuring compliance.

An alternative model could be that the compliance scheme implementing the Code of Ethics is uniform and implemented consistently across industry by the various code monitoring bodies. The compliance scheme could potentially be produced by FASEA in consultation with ASIC and the industry.

At the very least, to help ensure consistency, FASEA should provide further guidance on the practical interpretation of the Code , possibly in the form of a code of conduct, code of professional practices or other guidelines. This will also assist licensees to demonstrate compliance.

More broadly, the availability of suitable monitoring bodies for different segments of the industry will be key to the success of the professional standards regime. Although it is acknowledged that licensees have until 15 November 2019 to advise ASIC of their selected code monitoring body (or bodies) and existing providers have until 1 January 2020 to be covered by a compliance scheme, at the present time it is unclear who the code monitoring bodies will be, and whether for example their compliance schemes will be open to all advisers, or to advisers in particular segments but not others.

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

Acting in accordance with the "spirit" of the law and regulations is a subjective concept and one which providers may take different views on. Further, the spirit of any given law or regulation may not be readily discernible in materials available to providers (a provider could refer to case law, speeches, or explanatory memoranda, for example – but to be certain about what the spirit of the law entails could be challenging). Guidance is requested as to how compliance with this Standard would be demonstrated and what ASIC or the code monitoring body would regard as a breach.

AFMA draws FASEA's attention to the FX Global Code December 2017 which is a set of global principles of good practice in the foreign exchange market, developed to provide a common set of guidelines to promote the integrity and effective functioning of the wholesale foreign exchange market. It was developed in a partnership between central banks and market participants from sixteen jurisdictions.

The FX Global Code is an example of a code that has broad, cross border application to many entities but also contains a level of specificity, primarily through the use of illustrative examples, about behaviour that is considered acceptable and unacceptable. The examples were developed by practitioners as a way to give guidance to market participants in a form that is relatable to their market activities.

Notably, the FX Global Code does not impose legal or regulatory obligations on market participants, nor does it substitute for regulation – rather, it is intended to serve as a supplement to any and all local laws, rules and regulations by identifying global good practices and processes. In our view, this approach is a useful way to give guidance about compliance with the "spirit" of the relevant law and regulations.

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

It would be helpful to clarify that the intent of a referral should be in the best interests of the client, and that this Standard does not extend to any services or advice provided as a result of the referral.

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

As with Standard 1, the requirement to act with "personal integrity" is subjective and therefore open to interpretation. The wording should be amended to be an objective standard, or guidance should be provided to ensure providers understand the nature of the requirement, and what might be regarded as a breach.

We also suggest that guidance is required on the interpretation of "independently minded" as it could be perceived as challenging a licensee's ability to provide guidance to advisers and determine the standards of ethical behaviour that it expects.

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

We suggest that the word "free" should be better defined or the language altered to provide clarity about its intent. For example, it could be amended to read as "prior and informed consent of a client obtained without pressure from the adviser".

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

A relevant provider has no control over the design of a product (and in this context we note that there are forthcoming product design obligations which the Government proposes to legislate), so we suggest that instead of referring to "products", the Standard should refer to "advice, including advice in relation to products".

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

Taking account of all of the potential "broad effects" is an onerous obligation, and may not be appropriate in this context, given that the Corporations Act safe harbour provision already requires an adviser to take any additional steps when advice is provided that would reasonably be regarded to be in the client's best interests.

Standard 9 – Ensure that all advice and products are (a) offered in good faith and with competence; and (b) based on information that is neither misleading nor deceptive

As with Standard 5, given the relevant provider has no control over the design of product itself or statutory disclosure documents accompanying the product, for this Standard we suggest referring instead to "advice, including advice in relation to products".

In relation to paragraph (a), we suggest that the word "offered" should be replaced with the word "provided", as offer/offered has a particular meaning in a contract law context in terms of offer and acceptance of the issue of a financial product.

Paragraph (a) refers to "competence". This may duplicate the requirement in Standard 10 which also in effect refers to competency skills. Furthermore it could also take away from the important focus on the good faith requirement in paragraph (a). We suggest that the word competence is removed from paragraph (a) as the intent is covered by Standard 10.

Paragraph (b) could be interpreted as putting an onus on the relevant provider to ensure that information provided by the client, on which the advice / products provided are based is not misleading or deceptive. This would be an unreasonable obligation to place on the relevant provider. Accordingly, we suggest that (b) is redrafted to say in effect that the provider should ensure that all advice etc is "neither misleading nor deceptive."

If in fact the policy intent is for the relevant provider to be required to take steps to ensure that the client is not providing misleading or deceptive information in the advice process, then this obligation should be set out in a separate Standard. That Standard should at the most require that a relevant provider take reasonable steps to ensure that the client has not provided information (on which the relevant provider's advice is based) that is incorrect.

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

We suggest that the requirement should be to maintain an "adequate" or "appropriate" level of knowledge and skills, to align with ASIC 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 that Body

In AFMA's view, "potential" breaches of the Code should not be subject to investigation and discipline, only "actual" breaches. In addition to procedural fairness considerations, the criteria for what qualifies as a "potential breach" (eg. under a reasonable person test) would need to be considered and made clear to relevant providers. Further clarity will be needed in due course about the consequences of a breach and the types of powers that will be extended to the code monitoring body.

Standard 12 – Individually and in co-operation with peers, uphold and promote the ethical standards of the profession, and hold each other accountable for the protection of the public interest

Ideally, whistle-blower protections should be extended to non-employees and ex-employees to ensure that an individual (in this case, the relevant provider) would feel safe to speak up rather than be subject to sanctions as a result of not speaking up.

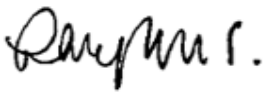
Code monitoring bodies should clarify in their compliance schemes what the expectation is in terms of "hold[ing] each other accountable".

Standards 4, 7 and 8 – Informed consent

These standards all refer to "informed consent from clients". We suggest that further clarity is needed on what is considered "informed consent" and the standard of proof. It is important to note that advisers may have different types of interactions with clients at different points in time – for example, execution-only interaction, at which point an adviser is implementing a client's instructions without influencing the client's decision, and they would not be able to ensure that the client's consent is informed.

Please contact me on 02 9776 7997 or tlyons@afma.com.au if you have any queries about this submission.

Yours sincerely



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