

19 December 2018

By email
consultation@fasea.gov.au

To Whom It May Concern,

Re: Code of Ethics Draft Legislative Instrument

FINSIA¹ thanks FASEA for the opportunity to provide feedback on the exposure draft of *Code of Ethics Legislative Instrument*.

FINSIA agrees that advisers should adhere to a code of ethics. We support aspects of the FASEA Code of Ethics. We detail our concerns, and offer recommendations for amendment, below.

Standard 2:

You must act with integrity and in the best interests of each of your clients.

According to the Explanatory Statement (at paragraph 29):

The test is, in short: will your advice and recommendations improve the client's financial well-being?

Key terms are not defined in the legislative instrument or enabling legislation. We refer to the ordinary definitions below:

- "wellbeing" is defined as 'good or satisfactory condition of existence; welfare.' [Macquarie Dictionary [Online]]
- the relevant sense of "satisfactory" is defined as '1. in good condition; not harmed, damaged or sick. 2. satisfactory but not outstanding' [Macquarie Dictionary [Online]]
- "financial" is defined as 'relating to money or how money is managed' [Cambridge Dictionary [Online]]

While we understand that a client's "financial well-being" is broad enough to cover the client's awareness of their material financial well-being, we recommend the Explanatory Statement be amended to clarify that improving a client's level of awareness of their financial condition can, even by itself, meet the test.

In addition, while we understand that well-being includes a reasonable expectation of a future state, we think that the Explanatory Statement should be amended to clarify that well-being includes improving the client's likely outcome relative to their goals (for example, their retirement income for the duration of their retirement and at a given level of confidence).

¹ FINSIA is a professional body for individuals. Our members are from the financial services sector, bringing with them a broad range of knowledge, experience and views.

Also, we recommend that “financial well-being” be replaced with “financial condition” because a client may not already have “financial well-being”.

We recommend that the test be rewritten as follows:

- ‘will your advice and recommendations improve the client’s financial condition or their awareness of their financial condition?’

Also, paragraph 30 of the Explanatory Statement states:

[s 961B], together with sections 961C, 961D and 961E, have the effect that the person satisfies the section 961B duty if the person:

- identifies the retail client’s objectives, financial situation and needs, as disclosed to the person; and
- identifies and *completes any reasonably apparent gaps in the information*; and
- conducts a reasonable investigation of potential financial products; and
- bases his or her judgments on the client’s relevant circumstances.

This should be amended to reflect that s 961(2) states that the provider satisfies the best interest duty if they have done all the prescribed steps in that section, including ‘where it was reasonably apparent that information relating to the client’s relevant circumstances was incomplete or inaccurate, *made reasonable inquiries to obtain complete and accurate information*’ [my emphasis].

Standard 4:

You may act for a client only with the client’s free, prior and informed consent. If required in the case of an existing client, the consent should be obtained as soon as practicable after this Code commences.

Paragraph 43 of the draft Explanatory Statement says ‘Existing clients’ consent must be obtained as soon as practicable after the Code commences. Section 3 of the Code defines when it commences.’ We recommend that the Explanatory Statement include examples to illustrate the application of the ‘as soon as practicable’ requirement.

Standard 6:

You must take into account the broad effects arising from the client acting on your advice and actively consider the broader, long-term interests and likely circumstances of the client.

The Legislative Instrument should be amended to state that the broad effects, including on persons other than the client, arising from the client acting on the adviser’s advice must be taken into account to the extent that those effects are relevant to the client’s own objectives; financial situation; needs; interests; or current or likely future circumstances. This change is to place a reasonable limit on the scope of the obligation.

Standard 7:

The client must give free, prior and informed consent to all benefits you and your principal will receive in connection with acting for the client, including any fees for services that may be charged. If required in the case of an existing client, the consent should be obtained as soon as practicable after this Code commences.

Except where expressly permitted by the Corporations Act 2001, you may not receive any benefits, in connection with acting for a client, that derive from a third party other than your principal.

You must satisfy yourself that any fees and charges that the client must pay to you or your principal, and any benefits that you or your principal receive, in connection with acting for the client are fair and reasonable and represent value for money for the client.

There has been concern expressed about a consequence of the standard being that advisers will need to obtain consent from existing clients for benefits the adviser or their principal will receive in connection with acting for the client – even where the benefit, if received before the Code starts to apply, would not have required the client’s consent. We ask FASEA to consider whether the client’s interests would be appropriately served by alternative means (for example, requiring the adviser to disclose to the client that the adviser or their principal will receive such benefits unless certain action is taken; and who must take the action) rather than requiring the adviser to obtain the client’s consent.

We also recommend that the second paragraph of the standard be amended to the following:

Except where permitted by the Corporations Act 2001, you may not receive any benefits, in connection with acting for a client, that derive from a third party other than your principal.

This change would allow a relevant provider to receive third-party benefits that are impliedly permitted under the *Corporations Act 2001*.

Standard 9:

All advice you give, and all products you recommend, to a client must be offered in good faith and with competence and be neither misleading nor deceptive.

In our view, “products” should be removed from the standard – at least insofar as the adviser must ensure that products recommended are neither misleading nor deceptive. This is because advisers cannot ensure that products recommended are neither misleading nor deceptive. The best the adviser can do is to assiduously research the products they recommend to ensure those products are neither misleading nor deceptive.

We recommend that the standard be amended to the following:

All advice you give, and all products you recommend, to a client must be offered in good faith, with competence and with a professionally justifiable belief of being neither misleading nor deceptive.

Standard 10:

You must develop, maintain and apply a high level of relevant knowledge and skills.

We recommend that “high” be replaced with “appropriate” to focus attention on the likely value of the knowledge and skills to the consumer, rather than on an abstract ideal.

Standard 11:

You must cooperate with ASIC and monitoring bodies in any investigation of a breach or potential breach of this Code.

Section 910A of Corporations Act states "'monitoring body" for a compliance scheme means the person that monitors and enforces compliance with the Code of Ethics under the scheme.' We recommend that the Legislative Instrument be amended to the following:

- 'You must cooperate with ASIC and monitoring bodies in any investigation of a breach or potential breach of this Code where you may be involved in the breach or potential breach.'

This change is to place a reasonable limit on the scope of the obligation.

Standard 12:

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

Paragraph 65 of the Explanatory Statement states 'This Standard deals with relevant providers' professional relationships with each other, emphasising that they need to be supportive and aligned to the profession as a whole—being, and being seen to be, a profession that acts ethically and professionally.'

While paragraph 66 of the Explanatory Statement provides more concrete guidance, it is of limited scope. We recommend more detailed guidance is provided in the Explanatory Statement, covering a broader range of situations intended to be covered by the standard. We recommend that the Explanatory Statement be expanded to provide examples of situations where advisers would need to act and situations where they would not need to act. For example, if an adviser suspects that another adviser has inadvertently committed a breach of the Code, should the adviser report the breach to a third-party such as the other adviser's licensee or monitoring body, or a regulator?

Should you have any queries relating to this submission, please contact Dimitri Diamantes SA Fin, Head of Policy: d.diamantes@finsia.com.au

Kind regards,

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