FASEA AND A NEW CODE OF ETHICS

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This article is worth
Ethics (0.25 CPD hours)
Professional Conduct (0.25 CPD hours)

FPA Dimension
Ethics

ASIC Knowledge Area
Financial Planning

INCLUDES:

- FPA Code of Professional Practice
- TPB Code of Professional Conduct
- FASEA draft code of ethics

Somewhat lost amongst industry discussion of the impending increase in planner education requirements has been the Financial Adviser Standards and Ethics Authority's (FASEA) consultation on a new code of ethics. Financial planning is no stranger to codes of ethics but this new code has the potential to be both broader, and more vigorously policed, than those currently in place.

Codes of ethics and conduct have been present in the financial advice industry for many years. Industry associations, such as the FPA, have required members to adhere to their individual codes. The Tax Practitioners Board (TPB) requires all registered tax (financial) advisers to meet the standards of their Code of Professional Conduct.

It is valuable to examine both the FPA and the TPB's existing codes and compare them to FASEA's new draft code.

FPA CODE OF PROFESSIONAL PRACTICE

The FPA's Code of Professional Practice is a wide-ranging document that includes a code of ethics, practice standards, and rules of professional conduct that reflect the advice process.

For the purpose of comparison to FASEA's draft code of ethics, it is best to focus on the FPA's eight-principle code of ethics. The eight principles are:

1. Place the client's interests first.
2. Provide professional services with integrity.
3. Provide professional services objectively.
4. Be fair and reasonable in all professional relationships, disclose and manage conflicts of interest.
5. Act in a manner that demonstrates exemplary conduct.
6. Maintain the abilities, skills and knowledge necessary to provide professional services competently.
7. Protect the confidentiality of all client information.
8. Provide professional services diligently.

Failure to meet the requirements of the FPA's Code of Professional Practice as a whole can be met with a range of sanctions. These may include fines, education, reprimands, supervision and expulsion. These sanctions may be imposed as a result of a Conduct Review Commission (CRC) hearing or they may be agreed as part of a summary disposal.

TPB CODE OF PROFESSIONAL CONDUCT

When the laws governing tax agents were federalised in 2009, financial planners found themselves subject to a new regulator, the TPB. One element of the TPB's oversight is to ensure planners who are registered tax (financial) advisers adhere to the Code of Professional Conduct codified in the *Tax Agent Services Act 2009*.

The TPB's code has 14 clauses split into five categories. They are:

Honesty and integrity

1. You must act with honesty and integrity.
2. You must comply with the taxation laws in the conduct of your personal affairs.
3. If you:
    - receive money or other property from or on behalf of clients, and
    - hold the money or other property on trust

you must account to the client for the money or other property.

Independence

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

Confidentiality

6. Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission.

Competence

7. You must ensure that a tax (financial) advice service that you provide, or that is provided on your behalf, is provided competently.
8. You must maintain knowledge and skills relevant to the tax financial advice services that you provide.
9. You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of a client.
10. You must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client.

Other responsibilities

11. You must not knowingly obstruct the proper administration of the taxation laws.
12. You must advise your client of the client's rights and obligations under the taxation laws that are materially related to the tax (financial) advice services you provide.
13. You must maintain the professional indemnity insurance that the Board requires you to maintain.
14. You must respond to requests and directions from the Board in a timely, responsible and reasonable manner.

It is when you delve into the individual standards, and compare them to existing codes, that the broader scope of FASEA's draft code becomes clear.

The TPB has the ability to impose administrative sanctions on planners who have been found to have breached the code.

These sanctions may include a written caution, training, limiting the services the planner can provide, supervision, suspension or termination.

The TPB may also apply to the Federal court to impose a civil penalty of up to $52,500 for individuals or $262,500 for corporations.

FASEA'S DRAFT CODE

FASEA's draft code of ethics will be enforceable under the *Corporations Act*. In its current form, it splits planner obligations into four classes of standards:

1. Standards of ethical behaviour;
2. Standards of client care;
3. Standards of quality process; and
4. Standards of professional commitment.

It is when you delve into the individual standards, and compare them to existing codes, that the broader scope of FASEA's draft code becomes clear.

Ethical behaviour

Ethical behaviour is broken down into three standards:

1. Acting in accordance with the spirit of all relevant laws and regulations.
2. Never advising or acting in a manner where inappropriate personal advantage is derived.
3. Acting with personal integrity and as an independently minded professional for the benefit of each client.

The spirit

The first area that appears different under FASEA's code of ethics is that it codifies the requirement to act in accordance with the spirit of the law. The FPA's Code of Ethics does include the requirement to adhere to the spirit of that code of ethics, but that is a much narrower requirement than to be subject to the spirit of all legislation and regulation.

Subjective interpretation of the spirit of one association's code is also likely to be less contentious than the subjective interpretation of all laws and regulations. How is the spirit of a law determined? Is it revealed

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by the words of the politicians and review panels that may have recommended that law? Is it revealed by the explanatory memorandum that accompanied the bill? Is it identified by guidance from the regulatory body charged with enforcing that law?

This is far from the first time that the spirit of the law has arisen as a concept when considering professional conduct.

One example is that the ATO cites the spirit of the law as being something to which tax planners should adhere to, in order to ensure they aren't crossing the line from tax planning to tax avoidance. Nonetheless, it is a far-reaching concept for the first standard in FASEA's draft code of ethics.

Personal advantage
The second standard of FASEA's code of ethics also involves a broader concept than is covered by the FPA or TPB.

Both the FPA and TPB's codes look specifically at conflicts of interest, whereas this standard examines personal advantage in isolation. In doing so, it raises the question – when does personal advantage become 'inappropriate'?

Some instances may be obvious. Charging fees for no service would be inappropriate. Other situations are less clear cut.

Could 'grandfathered' commissions permitted by the *Corporations Regulations* be considered inappropriate?

Recent comments from politicians, regulators and the judicial arm have indicated they believe they are inappropriate.

Integrity and professionalism
The last ethical standard, while also seemingly broad, is consistent with both the FPA and the TPB's codes.

The FPA's full Code of Professional Practice is committed to defining what it is to be a professional, while the second principle of its code of ethics defines integrity. The TPB requires that all planners act with honesty and integrity. Any difference in FASEA's code would come down to how these terms are defined by the bodies enforcing the code.

Client care
Client care is also divided into three standards:

1. Act only on the basis of the free, prior and informed consent of a client.
2. Ensure all advice and products are in the client's best interests, appropriate to their circumstances and presented in terms easily understood by the client.
3. Take into account the broad effects arising from a client acting on the advice.

The client care standards appear more in line with current planner practices and codes of ethics. In fact, large parts of FASEA's client care standards are already covered by planners' obligations under the *Corporations Act*.

Quality process
The standards of quality process under the draft code are:

1. Obtain informed consent to act and receive agreed fees and payments for agreed services.
2. Obtain informed consent, and agree, to maintain records relevant to the advice provided, in accordance with relevant privacy, regulatory and confidentiality obligations.
3. Ensure that all advice and products are offered in good faith and with competence and based on information that is neither misleading nor deceptive.

The quality process standards also largely reinforce existing laws and obligations to which planners are already required to adhere. The standards in FASEA's draft code are more prescriptive that those in the FPA or TPB's codes of ethics, but are standards planners would expect to already meet.

That said, there are issues, particularly around fees, that may arise. Once again, commissions come under the microscope. Can a client in an ongoing commission arrangement be said to be receiving an agreed service if they don't have regularly scheduled reviews? The same issue arises regardless of whether the commissions are grandfathered or in relation to life insurance.

Professional commitment
The draft code's standards of professional commitment are:

1. Develop and maintain a high level of relevant knowledge and skills.
2. 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.
3. 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.

The first professional commitment standard will largely be met by the existing, and incoming, education standards. It also mimics sentiments expressed in the industry's existing codes. The second standard is a self-strengthening commitment required of all planners under the code. It is the third professional commitment standard that introduces a new, enforceable concept to the industry.

Guilty bystanders

The third professional commitment standard of FASEA's draft code of ethics reads like an enforceable bystander obligation. In essence, if a planner sees a colleague, or fellow industry participant, doing something questionable, they are required to hold that person to account. If they fail to do so, they may fall foul of their code of ethics and be penalised.

Enforcement

All financial planners will be required to abide by the code from January 1 2020 and will need to choose a body to monitor their adherence to the code. This monitoring body will have the ability to apply sanctions to an advice provider for breaches of the code.

Until monitoring bodies begin to be approved by ASIC, the scope of the sanctions they can apply will not be clear. That said, it is likely that the range and quantum of sanctions will be greater than is the case under the current industry body codes.

While a professional association, such as the FPA, may be registered as a monitoring body, they will have greater authority to enforce the code than is currently the case. In fact, code monitoring bodies may face penalties under the *Corporations Act* if they fail to adequately monitor the new code of ethics.

THE NEW CODE WILL MATTER

This increased impetus is why the new code of ethics should matter to every financial planner. Not only will planners need to adhere to the best interests duty, disclosure requirements and other black-and-white legal obligations, they will also have to follow this new code of ethics that is markedly broader than their current obligations.

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QUESTIONS

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1 On what date will planners' obligation to adhere to FASEA's new code of ethics commence?

a. 1 January 2019.
b. 1 July 2018.
c. 1 January 2020.
d. As soon as the code is finalised.

2 Which of the following requirements of FASEA's draft code of ethics is not covered by the TPB's Code of Professional Conduct?

a. Ensure all advice and products are in the client's best interests.
b. Maintain a high level of relevant knowledge and skills.
c. Act in accordance with the spirit of all relevant laws and regulations.
d. Ensure all advice and products are appropriate to the client's circumstances.

3 Breaches of which current codes of ethics or conduct can be punished by civil penalties enforced by the Federal Court?

a. The FPA's Code of Professional Practice.
b. The TPB's Code of Professional Conduct.
c. FASEA's code of ethics.
d. All of the above.

4 Who will investigate breaches of FASEA's code of ethics?

a. Registered code monitoring bodies.
b. FASEA.
c. ASIC.
d. TPB.

5 Which of the following is not a standard in FASEA's draft code of ethics?

a. 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.
b. Obtain informed consent, and agree, to maintain records relevant to the advice provided, in accordance with relevant privacy, regulatory and confidentiality obligations.
c. Take into account the broad effects arising from a client acting on the advice.
d. You must maintain the professional indemnity insurance that ASIC requires you to maintain.

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