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1 June 2018

Email: [consultation@fasea.gov.au](mailto:consultation@fasea.gov.au)

**Re. Code of Ethics for Financial Advisers – Exposure Draft**

Dear Sir/Madam,

We thank you for the opportunity to provide comment on the exposure draft of FASEA's *Code of Ethics for Financial Advisers*. We strongly believe in advisers being held to ethical standards that reflect the professional and wider community's expectations. An environment in which these standards are upheld builds community trust in the financial planning profession.

We generally support the proposed Code and commend FASEA for its use of plain language and broad Standards. The FPA understands the Code is principles-based, but is concerned that it includes obligations that are not sufficiently clear for financial advisers or Code Monitoring Bodies. We have outlined our concerns and suggestions below for your consideration.

If you have any queries or comments, please do not hesitate to contact me at [policy@fpa.com.au](mailto:policy@fpa.com.au) or on 02 9220 4500.

Yours sincerely

**Dimitri Diamantes CFP®**  
*Policy Manager*  
Financial Planning Association of Australia<sup>1</sup>

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The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom over 11,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Graham McDonald, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, or working toward, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.

# **CODE OF ETHICS FOR FINANCIAL ADVISERS – EXPOSURE DRAFT**

FPA submission to:

FASEA

1 June 2018

## **INTRODUCTION**

The FPA supports setting principles-based standards for financial advisers. Although this approach lacks the certainty of prescriptive rules, it allows the Code to be applied in a nuanced way that is sensitive to the details of each case. It also allows for the Code - without textual amendment - to respond more readily to changes in professional practice and community expectations.

Nonetheless, advisers and the community deserve to know in advance what in general terms the Code requires. Vague standards such as acting in the 'spirit' of the law have no content that expectations can be linked to.

In the body of our submission, which follows, we highlight these and other concerns.

## CONSULTATION QUESTIONS

1. How does the Code address the consumer detriments that have arisen in financial advice, particularly Standard 2, which is intended to ensure that the advice (or referral or other service) that a consumer gets from an adviser does not produce inappropriate personal advantage to the adviser?

**Standard 2: [Relevant providers] Must neither advise, refer, nor act in any other manner, where inappropriate personal advantage is derived by the relevant provider.**

- a) What types of personal advantage are appropriate vs inappropriate?
- b) What might be the unintended consequences of the current draft?
- c) How might the Standard be expressed to avoid unintended consequences?

2. How do the other Standards respond to this type of consideration?

3. The practical application of the proposed Code in terms of:

- a) Adviser practice
- b) Licensee practice
- c) Education and support
- d) Compliance requirements
- e) Consumer experience

### ***FPA responses***

1. Standard 2 helps protect against consumer detriment by holding advisers to a broad obligation (backed by sanctions) that is based on values shared across the community. This contrasts with an approach that simply requires the client to consent to personal advantage derived by the adviser, or an approach that narrowly restricts certain forms of remuneration. Given the trust the client places in the adviser, it is important that the adviser is assessed against these shared values, in order to help align the adviser's interests with those of the client.

Personal advantage derived by an adviser is inappropriate if the benefit is considered to prevent the adviser from acting in the best interests of the client. Examples of types of personal advantage that are, or are likely to be, inappropriate are:

- advice fees for which little or no service is provided;
- advice fees for inappropriate or poorly performed services;
- benefits from third-parties, that are likely to align the interests of the adviser with those of the third party; and
- benefits that are undisclosed to the client

Example of types of appropriate personal advantage:

- advice fees paid by the client to the adviser for appropriate services that are agreed to and provided as agreed

A potential unintended consequence of the draft is that some instances of personal advantage that are undisclosed are considered appropriate. (Note that Standard 4 requires the adviser to act on the basis of the client's informed consent.) To make it clear that undisclosed personal advantage shouldn't be allowed, the standard should prohibit both inappropriate and undisclosed personal advantage.

2. The other standards also seek to address the potential for consumer detriment. The approach of the Standards, which is laudable, is to place broadly-worded obligations on advisers in order to protect clients. However, there are some challenges with FASEA's proposed wording.

For example, Standard 1 attempts to protect clients by requiring advisers to act in accordance with the spirit of the law. Setting broad obligations that go beyond legal requirements is something we support. However, as discussed below, the term "spirit" doesn't set a clear standard. In turn, clients receive an uncertain level of protection and advisers will not know what is expected of them. It is preferable to focus on setting clear standards that will guide behaviour.

Standard 5 c) also helps the consumer by placing the onus on the adviser to help the client understand the advice. Broadly, we support this obligation. However, as discussed below, an unintended consequence of requiring that advice be presented in terms easily understandable by the client is that some advice that is in the best interests of the client is ruled out because it is not feasible to present it in *easily* understandable terms. Some effort may be required on the part of the client. Our recommended solution is to change the threshold to "understandable" as opposed to "easily understandable".

Standard 6 also addresses the potential for consumer detriment by requiring advisers to take into account the broad effects of the client acting on the adviser's advice. While "broad effects" is not a precise term, we believe there is a strong degree of shared understanding about the sorts of effects that an adviser should take into account when advising a client. Again, by providing a benchmark against which to assess the adviser, the client is afforded a high degree of protection.

Under 'Issues and Concerns', we have provided a more detailed discussion of the possible unintended consequences of the Standards as proposed by FASEA. In addition, we have outlined alternative wording to both enhance protections for clients and also provide clear and achievable obligations for advisers.

3. In our view, the following practical consequences will follow from the introduction of the Code:

*Adviser practice*

- the cost of giving advice is likely to increase – advisers may seek to offset these costs through efficiency gains (e.g. by increasing the use of technology)
- advisers will accelerate their transition to a fee-for-service model
- advisers will advise on a broader range of products within each class
- advisers will demand warranties from product providers as to the veracity of product information
- advisers will be even more cautious in interactions with or on behalf of their clients
- some advisers may bring forward their retirement or sell their practices

- advisers will tend to move to licensees who nurture an environment conducive to meeting the Code obligations
- advisers may restrict their ongoing advice offer to clients with more complex needs
- the quality of documentation in relation to advice will improve

#### *Licensee practice*

- licensees will expand approved product lists
- licensees will demand warranties from product providers as to the veracity of product information
- licensees may require that advisers charge on a fee-for-service basis
- licensees may restrict ongoing advice services to clients with more complex needs

#### *Education and support*

- there is likely to be a greater focus on education focusing on ethical reasoning
- continuing professional development is likely to focus even more heavily on ethics
- the level of support per adviser is likely to increase
- the standard of continuing professional development is likely to rise
- education, training and support on new standards, policies and procedures will be implemented

#### *Compliance requirements*

- there will be an even greater focus on requiring advisers to clearly articulate the reasons for advice
- there will be a greater focus on requiring advisers to show that information relied on by the adviser (e.g., information provided by clients and product providers) has been verified
- there will be an increased focus on technology to identify compliance risks
- new standards, policies and procedures will be drafted

We note that consultation on ASIC's approval and oversight of code monitoring schemes is still underway. In turn, it is too early to tell with confidence what the impact of the Code on compliance requirements will be.

#### *Consumer experience*

- client understanding of advice to them will improve
- client trust in advisers will improve
- demand for advice will increase
- clients may find the range of ways that advice can be paid for narrows
- incidence of unprofessional behaviour by advisers will reduce
- if the client does have a complaint, they'll have more power with the introduction of the Code
- advice will be more personalised

## ISSUES AND CONCERNS

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

In our view, the requirement to act in accordance with the spirit of the law should not form part of the Code. This is because “spirit” is a vague, ambiguous and uncertain term.

Appeals to spirit could be used to justify all manner of obligations that go well beyond the meaning of the law based on conventional principles of interpretation. This is deeply problematic in a jurisdiction that values the rule of law.

We do not oppose an appeal to spirit *per se*. For example, we would have no issue with encouraging relevant providers to develop, in accordance with their understanding of the underlying ethos or spirit of the Code, professional practices that are of a higher standard than the standards under the Code. Given that professional practice informs the interpretation of the Code, such encouragement is likely to help Code jurisprudence evolve. However, it is quite another thing to set a legal standard that provides no objective guidance about what the standard requires.

### ***Recommendation***

We propose that the standard should be amended as follows:

#### **Standard 1: Act in accordance with all relevant laws and regulations.**

This amendment avoids the subjectivity of FASEA’s proposed formulation while still allowing for the code monitor to impose sanctions for breach of relevant law once that breach is determined.

In addition, a statement of aspiration to act in accordance with the spirit of the Code could be made, provided it is not part of the Code and can’t be used as a textual aid to interpreting the Code.

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

We support the proposed standard. However, we believe it should be amended to clarify that undisclosed personal advantage is necessarily inconsistent with the standard.

### ***Recommendation***

We propose that the standard should be amended as follows:

#### **Standard 2: Must neither advise, refer, nor act in any other manner, where inappropriate or undisclosed personal advantage is derived by the relevant provider.**

This amendment clarifies that undisclosed personal advantage is necessarily inconsistent with the standard.

### ***Standard 3: Act with personal integrity and as an independently minded professional, for the benefit of each client.***

We are concerned about the reference to “independently minded” in FASEA’s proposed standard. The danger of this wording is that it will be interpreted as being primarily concerned with statistical patterns of product recommendations across the adviser’s client base, rather than whether the adviser has acted in the best interests of each client.

### ***Recommendation***

We propose that the standard should be amended as follows:

**Standard 3: Act with personal integrity and in the best interests of each client.**

This amendment clarifies that the focus of the standard is the best interests of each client. The statistical patterns across the adviser's client base may be a relevant factor in assessing whether the adviser has met the obligation, however it is not what the standard is aimed at.

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

We are concerned that "free" might be interpreted as meaning free from influence. The adviser's role is to influence the client behaviour in a way that promotes the client's own interests. It is difficult to see how the proposed standard could be met without fundamentally altering the role of the adviser.

If there are specific concerns about client capacity or about decisions that should never be influenced, these decisions should be addressed with specific legislation or professional standards rather than a high level principle.

***Recommendation***

We propose that the standard should be amended as follows:

**Standard 4: Act on the basis of the prior and informed consent of the client**

***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.***

We believe the word "products" should be removed because, in our view, doing so would set the right limits on the obligation contained in the standard. Products being advised on are covered by "advice" anyway.

In addition, the obligation should be qualified to ensure that advisers can meet it. Given an adviser is reliant on others (such as the client and third-parties such as product providers) for information, an adviser cannot ensure that the requirements in paragraph a) or b) of the standard will be met. The adviser can only take steps to ensure that these requirements are met.

In addition, we are concerned about the use of the expression "easily understood". Some advice and products may not be easy to understand, and indeed some client circumstances are complex in themselves. It would be a disservice to clients if this advice and these products are ruled out.

***Recommendation***

We propose that the standard should be amended as follows:

**Standard 5: Take reasonable steps to ensure that all advice offered to a client is: a) based on the relevant provider acting in the best interest of the client, b) appropriate to the individual circumstances of the client, c) presented in terms understandable by the client.**

This amendment sets an achievable obligation and gives advisers more flexibility to meet their clients' needs, while ensuring that clients can comprehend the advice and products being offered.

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

We support the proposed wording of this standard.

***Recommendation***

We propose that the standard should be kept as:

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

***Standard 7: Obtain informed consent to act and to receive agreed fees and payments for agreed services.***

We don't see why "act" is needed here, given it is already mentioned in Standard 4.

***Recommendation***

We propose that the standard should be amended as follows:

**Standard 7: Obtain prior and informed consent to receive agreed fees and payments for agreed services.**

***Standard 8: Obtain informed consent, and agree, to maintain records relevant to the advice provided, in accordance with relevant privacy, regulatory and confidentiality obligations.***

***Recommendation***

We propose that the standard should be retained as follows:

**Standard 8: Obtain informed consent, and agree, to maintain records relevant to the advice provided, in accordance with relevant privacy, regulatory and confidentiality obligations.**

***Standard 9: Ensure that all advice and products are: a) offered in good faith and with competence, b) based on information that is neither misleading nor deceptive.***

We believe the word "products" should be removed because, in our view, doing so would set the right limits on the obligation contained in the standard. Products being advised on are covered by "advice" anyway.

In addition, it is impractical for advisers to be demonstrably consistent with b) on FASEA's current wording. An adviser cannot ensure that information provided by others is neither misleading nor deceptive. It can only take steps to satisfy itself that the information is neither misleading nor deceptive.

***Recommendation***

We propose that the standard should be amended as follows:

**Standard 9: Ensure that all advice is: a) offered in good faith and with competence, b) based on information that the relevant provider reasonably believes is neither misleading nor deceptive**

Inserting the qualification "reasonably believes" will make the standard achievable.

***Standard 10: Develop and maintain a high level of relevant knowledge and skills.***

Use of “high level” sets a vague standard, providing no basis for assessment.

***Recommendation***

We propose that the standard should be amended as follows:

**Standard 10: Develop and maintain the abilities, skills and knowledge necessary to provide their advice competently.**

This amendment reduces uncertainty by referring to professional competence rather than a vague standard. There is a broad consensus about what professional competence requires.

***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.***

We don’t know why this standard has been included. Arguably, it would allow the code monitoring body to sanction conduct that shows contempt for the disciplinary process.

***Recommendation***

We propose that the standard should be amended as follows:

**Standard 11: Accept that potential breaches of this Code will be subject to investigation and, if appropriate, discipline from the responsible Code Monitoring Body, undertaken in accordance with ASIC’s approval and oversight of that Body.**

Including “if appropriate” avoids confusion by making the obvious point that potential breaches don’t necessarily lead to discipline.

***Standard 12: 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.***

Including an obligation to “promote” makes the standard uncertain and potentially very broad. For these reasons, we do not support the inclusion of “promote”.

***Recommendation***

We propose that the standard should be amended as follows:

**Standard 12: Individually and in cooperation with peers, uphold the ethical standards of the profession, and hold each other accountable for the protection of the public interest.**

This amendment addresses our concerns about the uncertainty about, and potential breadth of, a duty to promote ethical standards.

<b>Standard</b>	<b>FASEA's proposal:</b>	<b>FPA's potential alternative proposal:</b>	<b>FPA's reasoning</b>
	<b>A relevant provider must:</b>	<b>A relevant provider must:</b>	
Comment not forming part of Code		Act in accordance with the spirit – and not only the letter – of this Code.	<ul style="list-style-type: none"> <li>• this should merely be a comment on (and not part of the Code) to reduce the risk of overreach by official interpreters</li> <li>• if kept in the Code, this provision might be a green light to read more into the Code than under usual principles of interpretation</li> </ul>
1	Act in accordance with the spirit – and not only the letter – of all relevant laws and regulations (including this Code).	Act in accordance with all relevant laws and regulations.	<ul style="list-style-type: none"> <li>• clarifies the scope of the Code</li> <li>• allows for code monitor to impose sanctions once breach of law is determined by regulator or tribunal</li> </ul>
2	Must neither advise, refer, nor act in any other manner, where inappropriate personal advantage is derived by the relevant provider.	Must neither advise, refer, nor act in any other manner, where inappropriate or undisclosed personal advantage is derived by the relevant provider.	<ul style="list-style-type: none"> <li>• clarifies that undisclosed personal advantage is necessarily inconsistent with the standard.</li> </ul>
3	Act with personal integrity and as an independently minded professional, for the benefit of each client.	Act with personal integrity and in the best interests of each client.	<ul style="list-style-type: none"> <li>• “independently minded” – more restrictive than “best interests”, with no extra consumer benefit</li> </ul>
4	Act only on the basis of the free, prior and consent of a client.	Act on the basis of the prior and informed consent of the client.	<ul style="list-style-type: none"> <li>• “free” – may conflict with generally understood role of</li> </ul>

			<p>professional adviser</p> <ul style="list-style-type: none"> <li>advisers influence clients</li> <li>normal influence may be seen as overbearing the will of the client</li> </ul>
5	<p>Ensure that all advice and products are:</p> <ol style="list-style-type: none"> <li>in the best interest of each client,</li> <li>appropriate to the individual circumstances of each client,</li> <li>presented in terms easily understood by the client.</li> </ol>	<p>Take reasonable steps to ensure that all advice offered to a client is:</p> <ol style="list-style-type: none"> <li>based on the relevant provider acting in the best interest of the client,</li> <li>appropriate to the individual circumstances of the client,</li> <li>presented in terms understandable by the client.</li> </ol>	<ul style="list-style-type: none"> <li>“reasonable steps” qualification makes standard achievable</li> <li>including “products” as a separate element is inappropriate</li> <li>“easily understood” – some advice and products may not be easy to understand; disservice to clients if this advice and these products are ruled out</li> </ul>
6	<p>Take into account the broad effects arising from a client acting on their advice.</p>	<p>Take into account the broad effects arising from a client acting on their advice.</p>	<ul style="list-style-type: none"> <li>we support FASEA’s proposed wording</li> </ul>
7	<p>Obtain informed consent to act and to receive agreed fees and payments for agreed services.</p>	<p>Obtain prior and informed consent to receive agreed fees and payments for agreed services.</p>	<ul style="list-style-type: none"> <li>“to act” already covered by Standard 4</li> </ul>
8	<p>Obtain informed consent, and agree, to maintain records relevant to the advice provided, in accordance with relevant privacy, regulatory and</p>	<p>Obtain informed consent, and agree, to maintain records relevant to the advice provided, in accordance with relevant privacy, regulatory and confidentiality obligations.</p>	<ul style="list-style-type: none"> <li>we support FASEA’s proposed wording</li> </ul>

	confidentiality obligations.		
9	<p>Ensure that all advice and products are:</p> <p>a) offered in good faith and with competence,</p> <p>b) based on information that is neither misleading nor deceptive.</p>	<p>Ensure that all advice is:</p> <p>a) offered in good faith and with competence,</p> <p>b) based on information that the relevant provider reasonably believes is neither misleading nor deceptive</p>	<ul style="list-style-type: none"> <li>including “products” as a separate element is inappropriate</li> <li>impractical for adviser to be demonstrably consistent with b) on FASEA’s current wording</li> <li>“reasonably believes” qualification required to make standard practical</li> </ul>
10	Develop and maintain a high level of relevant knowledge and skills.	Develop and maintain the abilities, skills and knowledge necessary to provide their advice competently.	<ul style="list-style-type: none"> <li>“high level” – vague standard and, in our view, overreaches</li> </ul>
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.	Accept that potential breaches of this Code will be subject to investigation and, if appropriate, discipline from the responsible Code Monitoring Body, undertaken in accordance with ASIC’s approval and oversight of that Body.	<ul style="list-style-type: none"> <li>“if appropriate” avoids confusion by making the obvious point that potential breaches don’t necessarily lead to discipline</li> <li>arguably, this standard allows code monitoring body to sanction conduct that shows contempt for the disciplinary process</li> </ul>
12	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.	Individually and in cooperation with peers, uphold the ethical standards of the profession, and hold each other accountable for the protection of the public interest.	<ul style="list-style-type: none"> <li>meaning of “promote” is uncertain and potentially very broad</li> </ul>