



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

19 December 2018

Mr Stephen Glenfield
Chief Executive Officer
Financial Adviser Standards and Ethics Authority

Email: consultation@fasea.gov.au

Dear Mr Glenfield

RE: Code of Ethics for Financial Advisers Legislative Instrument

The Financial Planning Association of Australia¹ (FPA) welcomes the opportunity to provide feedback in response to the Financial Adviser Standards and Ethics Authority's (FASEA) proposed Code of Ethics Legislative Instrument and Explanatory Statement.

The FPA supports the introduction of mandatory ethical standards for financial advisers. However, given the broad and lasting impact on the profession, it is vital that the standards are workable, credible and there is a clear and shared understanding within the profession of how each part of the Code applies in practice. The FPA has significant concerns with the draft documents that warrant attention.

While the FPA has provided preliminary feedback in this submission, we request a time extension to permit due process and for FASEA to undertake a more effective consultation with all key stakeholders. This process should include roundtable discussions with practitioners and key stakeholders to ensure the final Code set in the Legislative Instrument and the guidance provided in the Explanatory Statement reflects the practical realities of the financial planning profession. In particular, consideration should be given to running a round table discussion with entities who have submitted a draft application with ASIC for approval of a Code Monitoring Scheme under RG269.

The FPA would welcome the opportunity to discuss with the FASEA Board the issues raised in our submission.

If you have any questions, please contact FPA's Head of Policy, Ben Marshan (ben.marshan@fpa.com.au) or myself (dante.degori@fpa.com.au) on 02 9220 4500.

Yours sincerely

Dante De Gori
Chief Executive Officer
Financial Planning Association of Australia

¹ The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practicing financial planners and 5,720 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 26-member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, 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, e.g. CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

Code of Ethics for Financial Advisers Legislative Instrument consultation

**FPA submission to
Financial Adviser Standards and Ethics Authority**

19 December 2018



CRITICAL CONCERN

The *Corporations Act 2001* (Cth) requires FASEA to make its new standards, including the Code of Ethics ('the Code'), by Legislative Instrument. An Explanatory Statement is not part of the Legislative Instrument and, therefore, not part of the Code. Its role includes to provide a plain English explanation of the Code, offer additional context and describe likely impacts and effects. Though it is not itself part of the Code, the Explanatory Statement can be used to assist readers in interpreting the Code.

While it does not form part of the Code, practitioners and Code Monitoring Bodies ('CMBs') are likely to look to the Explanatory Statement for guidance on how to comply with, and judge compliance with, the Code. This additional guidance provided by the Explanatory Statement will be indispensable in driving behavioral change in practitioners and ensuring they are able to apply the Code to their activities. It will also be necessary to ensure the Code is applied consistently by CMBs, particularly if there are multiple CMBs servicing the profession. The role of the Explanatory Statement will be particularly important as there will not be an established body of case law to provide further definition on the application of each part of the Code.

In this context, it is critical that the guidance provided by the Explanatory Statement is clear, accurate and practically workable. It must be consistent with practitioners' other legal obligations under the *Corporations Act 2001*, ASIC's regulatory guidance and under common law. It must reflect the practical realities of providing financial advice, including the complexities of the client-planner relationship, and the variety of business models and structures operating under the Australian Financial Services Licensing regime. Most importantly, FASEA must ensure that the guidance will deliver real benefits for clients.

The FPA has reviewed the draft Code and the draft Explanatory Statement and considers that there are significant concerns that would need to be addressed for the Code to operate effectively. However, due to the extremely short consultation period provided by FASEA, the FPA has been unable to adequately consult its members and analyse the issues that it has identified. Due to its broad and long-lasting effect on the profession, the Code and the Explanatory Statement warrant a detailed examination and review by all stakeholders. We believe this is not possible under the current restricted consultation process set by FASEA.

The Code and Explanatory Statement will have a broad and lasting impact on the profession and it is important that we get it right. As the Code of Ethics is not due to commence until 1 January 2020, there is no need to rush to finalise it and it would be prudent to take some additional time to undertake further consultation to address the issues that we have identified.



While the FPA has provided preliminary feedback in this submission on our concerns with the Code and the Explanatory Statement, we strongly recommend that FASEA delays finalising these documents in order to undertake a more effective consultation with all key stakeholders. This process should include roundtable discussions with practitioners to ensure the guidance provided in the Explanatory Statement reflects the practical realities of the financial planning profession. The commencement of the Code under s1546F of the *Corporations Act 2001* on 1 January 2020 provides sufficient time for this process to take place. The FPA would welcome the opportunity to take part in further consultation on the Code.

This approach would ensure the Code is credible and there is a clear and shared understanding within the profession of how each part of the Code applies in practice.

Recommendation:

The FPA strongly recommends FASEA extends the consultation period for the Code of Ethics and Explanatory Statement into 2019 to undertake more appropriate and detailed consultation and discussions with key stakeholders, including an industry roundtable and with entities who have submitted a draft application to ASIC for approval as a Code Monitoring Body under RG269, to work through the practical implementation of the Code standards and Explanatory Statement, prior to finalising and registering the documents.

In line with the above critical concern and recommendations, this submission contains the FPA's initial feedback (only) on the FASEA draft Legislative Instrument and Explanatory Statement for the Code of Ethics for Financial Advisers. We welcome the opportunity to participate in appropriate further consultation and round table discussions on these draft standards.



LEGISLATIVE INSTRUMENT

Introduction

The Code of Ethics is a static document that must out last changes in the law, current circumstances and issues in the regulatory environment, and media focus.

However, the introduction in the draft Legislative Instrument as currently worded lends itself to current issues and therefore sets a negative tone for the Code. The FPA questions the consumer benefit or value to industry of this introduction. We believe it serves no real purpose and suggest it is not in line with modern drafting.

The FPA recommends an introduction for the Code of Ethics in the Legislative Instrument should be factual, reflect the legal requirements under the Corporations Act, and use similar language as that used for the standards in the Code.

For example, the introduction of the Tax Agent Services Code of Conduct in s30-1 of the Tax Agent Services Act (TASA) states:

The Code of Professional Conduct regulates your personal and professional conduct as a registered tax agent, BAS agent or tax (financial) adviser.

If the Board investigates you and finds that you have failed to comply with the Code, the Board may give you a written caution, order you to take specified actions, or suspend or terminate your registration.

You must also notify the Board if certain circumstances change, including if you cease to meet the requirements for registration.

Recommendation:

The FPA recommends the introduction either be removed, or be amended in line with modern drafting of legislative instruments.



The Standards

The feedback provided in the following table is given in relation to the wording of the standards in the draft Legislative Instrument only. The FPA's initial feedback on the draft Explanatory Statement is provided in the next section of this submission.

STANDARDS	FPA CONCERNS	FPA RECOMMENDATIONS
<i>The Values</i>		
<p>You must always act in a way that demonstrates, realises and promotes the following values:</p> <ul style="list-style-type: none">a) trust;b) competence;c) honesty;d) fairness;e) diligence. <p>These values are paramount. All the other provisions of this Code must be read and applied in a way that promotes the values.</p>		<p>The FPA supports the values and provisions in section 5 of the draft Legislative Instrument.</p>



Ethical behaviour		
Standard 1:		
<p>You must act in accordance with all applicable laws, including this Code, and not try to avoid or circumvent their intent.</p>	<p>We note the TASA includes intent as: <i>actions being done in a way intended by the law and deriving financial benefit.</i></p> <p>However, in the context of the new Code for financial advisers the 'intent of the law' may contradict an adviser's best interest duty under s961B of the <i>Corporations Act 2001</i>.</p> <p>For example, the intent of the social services laws versus the requirement on advisers to act in the best interest of their client and to help put their client in better position.</p> <p>The social services laws create the legal framework for government services to be provided for the benefit of the community, to improve the wellbeing of individuals and families in Australian communities. While these laws intend to limit to provision of such services to those people most in need, it may be in the best interest of an adviser's client and help put the client in a better position to recommend the client structure their financial affairs to enable the client to access certain social security benefits.</p> <p>For this standard 'intent' is very broad and unclear as to what it is trying to achieve. It also puts advisers at risk of breaching their best interest duty.</p>	<p>The FPA recommend FASEA replace the words "their intent" with "them".</p>
Standard 2:		
<p>You must act with integrity and in the best interests of each of your clients.</p>		<p>The FPA support this standard as worded in the draft Legislative Instrument.</p> <p>(See comments below regarding the draft Explanatory Statement guidance on this standard).</p>



Standard 3:

<p>You must not advise, refer or act in any other manner if you would derive inappropriate personal advantage from doing so.</p>	<p>The FPA is concerned about the intent and clarity of this standard, and how it will apply in practice.</p> <p>For example:</p> <ul style="list-style-type: none">• <i>'act in any other manner'</i> - is extremely ambiguous. This is not assisted by the explanation in the Explanatory Statement.• <i>'inappropriate'</i> - what is deemed inappropriate versus appropriate. This introduces a subjective element for the CMB to monitor. While some clarity is offered in the Explanatory Statement that <i>"personal advantage is 'inappropriate' when it would be, or would reasonably appear to be, inconsistent with acting in the client's best interests"</i>, the FPA has significant concerns about the examples in this section of the Explanatory Statement in relation to this term which reinforce our original concerns about the ambiguity of the standard (see section below for more detail).• <i>"personal advantage"</i> – is an undefined, subjective and unmeasurable term. <p>This standard also lacks a subject of the implied action of the adviser. That is, <i>"You must not advise, refer or act in any other manner..."</i> for whom? This is a very open ended standard that makes it unworkable in practice.</p>	<p>The FPA recommend this standard be redrafted.</p> <p>Including a clear explanation of the intent of the amended version of this standard in the Explanatory Statement would assist in its successful implementation.</p>
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Client care

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.

The following examples demonstrate the need for clarity in relation to the meaning of to “*act for a client*” and “*existing client*” in relation to this standard.

Many financial planners have long-term relationships with clients where the service is provided on a fee for service or transaction only basis with no ongoing agreement. The client may not currently be consulting with their planner or receiving any advice. Hence, the client is not considered an existing client as defined in the *Corporations Act 2001*. However, the client is still considered a client by the planner, and the client still considers the planner to be their planner.

Financial planners form relationships with clients. Some may have formal service agreements and ongoing fee arrangements in place; others may be informal or transactional, as described above. It is unclear as to whether interactions with these clients where no advice has been provided, constitutes ‘acting for the client’.

Similarly, it is unclear as to who is considered to be an ‘existing client’ under the Code.

Free

The term “free” implies free from influence. However, the meaning of financial product advice in s766B of the *Corporations Act* clearly defines advice as a recommendation or statement of opinion that is intended to influence a person who is making a decision about financial products.

Therefore the requirement for the client’s “free” consent clearly contradicts the definition in the *Corporations Act 2001*.

The FPA seeks clarity as to the meaning of this standard, particularly in relation to “act for a client” and “existing clients”.

The FPA recommends the term “free” be removed from this standard.



<i>Standard 5:</i>		
<p>All advice and financial products that you present to a client must be in the best interests of the client and appropriate to the client's individual circumstances.</p>	<p>The definition of personal financial advice in s766B(3) of the Corporations Act is based on the definition of financial product advice which is clearly defined in s766B(1)(a) as:</p> <p><i>(1) For the purposes of this Chapter, financial product advice means a recommendation or a statement of opinion, or a report of either of those things, that:</i></p> <p><i>(a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products.</i></p> <p>This clearly shows that the provision of advice encompasses the advice and all recommendations given to the client, including recommendations involving products. Hence, there is no need to specifically include financial products.</p> <p>The word "present" has multiple meanings. In the context of this standard the meaning to present, as in "formally hand-over" all advice, is implied. However, not all advice necessarily fits with this meaning of the word, creating ambiguity as to the full application of this standard.</p>	<p>The FPA supports a standard that all advice must be in the best interests of the client and appropriate to the client's individual circumstances.</p> <p>The FPA recommends removing the words "financial products" as they are unnecessary and do not provide additional meaning or obligations to the standards. It also too heavily focuses the provision of advice on financial products, rather than on the advice and the strategic management of the client's financial affairs.</p> <p>We recommend consideration be given as to the clarity of the standard and the reliance of the word "present".</p>
<p>You must be satisfied that the client understands your advice, and the benefits, costs and risks of the financial products that you recommend, and you must have reasonable grounds to be satisfied.</p>	<p>While judicial definitions of 'reasonable grounds' are well established, relevant providers may not be familiar with or rely on definitions of jurisprudence. Therefore, it would be beneficial for a clear definition of 'reasonable grounds' to be included in the Legislative Instrument and Explanatory Statement.</p>	<p>The FPA recommends FASEA include a clear definition of "reasonable grounds".</p> <p>As discussed above, the FPA recommends removing the words "financial product".</p> <p>The FPA also recommends the following amendments to this standard would remove repetition and improve clarity without changing its meaning:</p> <p><i>You must have reasonable grounds to be satisfied that the client understands your advice, and the benefits, costs and risks of the advice that you recommend.</i></p>



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 FPA has significant concerns with the words “broad effects”, and “broader”, “longer-term”, and “likely”.

As currently worded this standard will be problematic for those operating under a limited licence, such as intra-fund advice providers, SMSF limited licence, as well as advisers responding to client requests for advice on short-term issues.

The following Note in s961B(2) of the Corporations Act specifically allows for this type of advice to be provided:

Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.

The Note in the law of the best interest duty is included to allow advisers to scope the advice as directed by the client. Standard 1 of the draft Legislative Instrument requires advisers to comply with the law, and hence for this legal requirement to apply to all the Standards in the Code. Therefore this standard must be able to operate in limited, intra-fund and scoped advice scenarios.

The inclusion of the words “broad effects”, and “broader “longer-term”, and “likely” will have unintended consequences for these valid and permissible forms of advice. These concerns are reinforced and heightened by the explanation of the intent of this standard in the draft Explanatory Statement.

The FPA recommends:

- removing the words “broad effects”, “broader”, “longer-term”, and “likely” from this standard; and
- amending the standard to ensure it is workable in the provision of limited, intra-fund and scoped advice scenarios.

(See feedback on Standard 6 of the Explanatory Statement below)



Quality process

Standard 7:

<p>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.</p> <p>Except where expressly permitted by the <i>Corporations Act 2001</i>, you may not receive any benefits, in connection with acting for a client, that derive from a third party other than your principal.</p> <p>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.</p>	<p>The following comments are provided in addition to the feedback on Standard 4 above, which is also relevant to this standard.</p> <p>The FPA supports clear and transparent disclosure of remuneration.</p> <p>In principle, the FPA supports the intent this standard but there must be a requirement on licensee to help advisers to meet this standard.</p> <p>In our experience, the adviser may not be aware of the monetary and non-monetary benefits the licensee receives, such as shelf fees for example.</p> <p>We note that s912A(1)(ca) of the <i>Corporations Act 2001</i> requires that a financial services licensee must take reasonable steps to ensure that its representatives comply with the financial services laws (as defined in s761), which includes the obligation to comply with Code of Ethics (s921E).</p> <p>Given the licensee is not subject to the Code of Ethics, it is critical that the licensee is obliged to disclose benefits the principal receives to the adviser so the adviser can disclose to the client all benefits the adviser and the principal will receive in connection with acting for the client, in order to meet the standard.</p>	<p>In principle, the FPA supports the intent this standard but there must be a requirement on the licensee to help adviser to meet this standard.</p> <p>Clarification is required on the following matters:</p> <ul style="list-style-type: none"> • The meaning of “acting for the client” • The meaning of “existing client” <p>See above for discussion on these terms.</p> <p>Concerns about the wording of this standard are discussed in detail in Standard 7 of the Explanatory Statement section below.</p>
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Standard 8:

<p>You must maintain complete and accurate records relevant to services (including advice) you provide to each client (including former clients).</p>	<p>The FPA supports the need for clear and accurate record keeping. However, the FPA is concerned about the ability of advisers to comply with the requirement to 'maintain' records, particularly in relation to former clients.</p> <p>It is unclear as to whether 'maintain' is intended to mean the adviser must ensure the records are 'up-to-date', or to 'keep' (as in hold on to) the records.</p> <p>Records of the services and advice an adviser provides to a client would most likely contain personal information about the clients.</p> <p>Therefore, such records must remain with the client file to ensure adherence with privacy and other laws, as well as professional obligations. The client file must remain with the entity who holds (or 'owns') the legal contract with the client – this will be either the authorised representative or the licensee. Given the inclusion of personal information, it would be inappropriate to require any party except the entity with the legal contract with the client (the entity that "owns" the client), to hold such records. This may or may not be the authorised representative. In the case of employed representatives, generally their employment contracts would make it a breach of contract for them to personally maintain client records and files.</p>	<p>The FPA recommends FASEA ensure the requirement for the adviser to maintain records, including of former clients:</p> <ul style="list-style-type: none"> • is permissible under privacy and other laws; • takes into account the legal contracts regarding clients ownership.
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Standard 9

<p>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.</p>	<p>As discussed in response to Standard 5 above, the definition of personal financial advice in s766B of the <i>Corporations Act 2001</i> is based on the definition of financial product advice which clearly shows that the provision of advice encompasses all recommendations given to the client, including recommendations involving products.</p> <p>The wording of this standard implies that the adviser is responsible for ensuring the 'product' is neither misleading nor deceptive. That is, the product is true to label. However, the adviser is reliant on information and research available on the products, provided by third parties including research houses and product providers, to undertake</p>	<p>The FPA recommends:</p> <ul style="list-style-type: none"> • removing the words "and all products you recommend". • replacing the word "offered" with a less sales oriented word such as "provided".
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	<p>thorough analysis of the suitability and appropriateness of each recommendation and product to the client’s needs and circumstances.</p> <p>The performance of the product, and whether it is true to label, or whether information and research on the product is misleading or deceptive, is outside the control of the adviser and must be the responsibility of product providers and research houses. This view was support by the Senate Economics Legislation Committee in its recent Inquiry into the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018.</p> <p>The adviser can only ensure the advice they provide (which includes all recommendations) is neither misleading nor deceptive.</p> <p><u>Offered</u></p> <p>The FPA is concerned about the use and reliance on the term ‘offer/offered’ as it is very sales focused – as in an offer as a proposal to sell or buy. Selling a product is not advice. It also implies the adviser is not focused on the needs and best interest of the client.</p>	
<p>Professional commitment</p>		
<p><i>Standard 10</i></p>		
<p>You must develop, maintain and apply a high level of relevant knowledge and skills.</p>	<p>The FPA is concerned about the terms “develop” and “high” in this standard.</p> <ul style="list-style-type: none"> • “Develop” in this context has implicit meaning that the gaining of competency starts again at the point in time when the Code commences for that adviser. However, the adviser may already have met the education standards, hence the term “develop” is inaccurate. • “High” in relation to the level of knowledge and skills of an adviser, is undefined. Licensees are responsible for ensuring the competency of advisers operating under their licence. A requirement to ensure a “high” level of knowledge and skills will lead to the subjective interpretation of the standard and inconsistency in its application. The education and CPD requirements which have been set by FASEA will in and of 	<p>The FPA recommends</p> <ul style="list-style-type: none"> • removing the term “develop” and amending the standard to ensure a focus on strengthening and maintaining knowledge and skills; and • removing the term “high” and amending the standard to require advisers to maintain and apply “relevant knowledge and skills”.



	themselves ensure a “high” level of relevant knowledge and skills” are maintained by advisers.	
<i>Standard 11:</i>		
You must cooperate with ASIC and monitoring bodies in any investigation of a breach or potential breach of this Code.		The FPA supports this standard as worded in the draft Legislative Instrument.
<i>Standard 12</i>		
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.	The FPA supports the inclusion of the requirement to be proactive in relation to the standards set in the Code	The FPA supports the wording of this standard in the draft Legislative Instrument.



EXPLANATORY STATEMENT

Glossary

Principal

The definition of “principal” in the Explanatory Statement is inconsistent with the same definition in section 4 of the draft Legislative Instrument. The definition in the draft Legislative Instrument includes the following:

Note: Your employer may be your principal. If you are a financial services licensee, you will not have a principal.

Recommendation:

The FPA recommends FASEA include the above Note in the definition of “principal” in the Explanatory Statement to ensure consistency with the same definition in section 4 of the draft Legislative Instrument.

Enforcement of the Code of Ethics

Sanctions

The sanctions a CMB is permitted to impose on a relevant provider (including provisional relevant provider) if it has been determined the provider has breached the Code, are set in ASIC’s Regulatory Guide RG269 - *Approval and oversight of compliance schemes for financial advisers*. The draft Explanatory Statement is inconsistent with this regulatory guidance. RG269.145 includes:

(g) requiring the financial adviser to pay a financial sanction;

(h) suspending the financial adviser’s coverage by the compliance scheme; and

(i) in extreme circumstances, revocation of the financial adviser’s membership of the industry association and/or coverage by the compliance scheme.



The ability for a CMB body to impose a fine, or suspend the adviser's coverage by the compliance scheme, are absent from the draft Explanatory Statement.

The ability to revoke the adviser's coverage of the compliance scheme and/or membership of the industry association in the draft Explanatory Statement is restricted by FASEA to cases where the relevant provider did not comply with a sanction ordered by the CMB. Paragraph 9 states:

“However, the most serious sanction that can be imposed by a monitoring body (for example, if a relevant provider did not comply with a sanction ordered by the monitoring body) is exclusion from coverage of the monitoring body's compliance scheme.”

It should also be made clear in this section that the sanctions for a breach of the Code can be imposed on a relevant provider, including a provisional relevant provider.

ASIC has also detailed key expectations the Regulator holds in relation to the operation of compliance schemes and CMBs which we strongly suggest should be reinforced in the Explanatory Statement. For example, RG269.146 states:

“We will not set strict guidelines about which sanction(s) should be imposed for which kind of failure to comply with the code.....”

This shows ASIC's view that a CMB may apply more than one sanction where a breach of the Code has been determined by the CMB.

Recommendation:

The FPA recommends paragraph 8 of the Explanatory Statement be amended to ensure the sanction(s) available to the compliance scheme, including the ability to impose more than one sanction for a breach of the Code, are consistent with those set under RG269.



Compensation and damages

RG 269.143 states:

“The sanctions imposed by monitoring bodies are not intended to provide redress to consumers. That is the role of internal dispute resolution processes, AFCA or AFS licensee remediation programs.”

However, paragraph 14 of the Explanatory Statement makes it unclear as to the role of the CMB in regard to consumer redress and compensation. This should be clear in the Explanatory Statement.

Recommendation:

The FPA recommends including a clear statement in paragraph 14 of the Explanatory Statement as to the role of the scheme and CMB in relation to consumer redress and compensation, in line with ASIC’s clear expectations in RG269.143.

The Introduction

Refer to the FPA’s comments and recommendation above regarding the introduction in the draft Legislative Instrument.

The FPA suggests the context in which the Code is made is based on the regulatory and environmental conditions of the day, which are subject to change and open to interpretation. In contrast, a Code of Ethics is static and must remain relevant to that ever-changing context.

Recommendation:

The FPA recommends amending paragraph 22 of the Explanatory Statement to describe the legal parameters under which the Code of Ethics is made.



The Standards

The FPA provides the following initial feedback on the information contained in the draft Explanatory Statement. As discussed above, the FPA would welcome the opportunity to participate in further appropriate consultation, including roundtable discussions on the Code and the proposed guidance in the draft Explanatory Statement.

EXPLANATION OF STANDARDS	FPA INITIAL FEEDBACK
<i>Ethical behaviour</i>	
<i>Standard 1</i>	
<p>25. This Standard requires, as an ethical duty, that you comply with your legal obligations and not seek to avoid them. This is a minimum ethical obligation.</p>	<p>This statement seems to be conflicted. The FPA agrees that there is a legal and ethical obligation, but a legal obligation does not necessarily give rise to an ethical one and vice versa. Complying with the law is not an ethical obligation rather a compulsion. Law creates an obligation to comply, it does not necessarily create an ethical obligation.</p>
<i>Standard 2</i>	
<p>26. This Standard requires, as an ethical duty, that you act with integrity. It also requires you to act in the best interests of each client. It may be described as the fundamental ethical duty.</p> <p>27. Acting with integrity requires openness, honesty and frankness in all dealings with clients. These qualities underpin the trust that clients should have in you as a professional. It also requires you to keep your promises (explicit and implied) and honour the commitments you or your principal make to your clients.</p> <p>28. The duty to act in each client's best interests is fundamental.</p> <p>29. You act in a client's best interests if what you do—the advice you give, the products and services you recommend—are appropriate to meet the client's objectives, financial situation</p>	<p><u>Implied promises</u></p> <p>An explicit promise involves an actual promise to do something. However, we question the practicalities of enforcing a requirement of an implied promise, or an implied commitment to do something. Even with a test for 'reasonable doubt' or 'in all likelihood', it would be extremely challenging for a CMB to prove that an adviser or principal implied a promise. This could create a situation of a client's interpretation versus that of the adviser or principal.</p> <p><u>Principal promises</u></p> <p>The adviser may not be aware of promises that may have been implied by their principal. Something that is "implied" is a matter of interpretation. The adviser may correctly or incorrectly hold a view that the principal has not implied to do something. It is unreasonable to hold the adviser accountable for a promise implied by the licensee.</p>



and needs, taking into account the client's broader, long-term interests and likely future circumstances. The test is, in short: will your advice and recommendations improve the client's financial well-being?

Broader, long-term interests and likely future circumstances

Discussed in standard 6 below.

The test - financial well-being

As detailed in ASIC Regulatory Guide RG175, when assessing whether an adviser has complied with the best interests duty, the Regulator will consider whether the client is likely to be in a "better position if the client follows the advice" (RG175.224 - 251).

The FPA questions whether a test of "financial well-being" will conflict with the advisers' legal obligation under RG175. It will also create uncertainty and confusion to have two different tests for the same best interest duty requirement.

Products and service

As discussed above in relation to the Code, the definition of personal financial advice in the Corporations Act clearly states that advice includes all recommendations including those involving products and services. The FPA recommends the removal of the words "*the products and services you recommend*".

30. Section 961B of the *Corporations Act 2001* imposes an obligation on persons who provide personal advice to a retail client to act in the best interests of the client in connection with the advice. That section, 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.

31. The ethical duty in Standard 2 is wider than the section 961B obligation. It is based on a more professional relationship between the relevant provider and the client, where the relevant provider has a duty to look more widely at the client's interests and to consider the client's likely future circumstances. For example, any potential need for a client or a client's family

As discussed above, the FPA promotes and expects advisers to consider the short, medium and long term needs of the client. However, we also note the legal ability of the adviser to scope the advice as directed by the client. This must be clearly acknowledged in the Code and the Explanatory Statement to ensure a consistent approach to monitoring by CMBs, and certainty for advisers and licensees.

The FPA believes that the adviser has a professional obligation to inform the client of the limitations of scoping the advice they require, and any potential risks and effects the adviser's advice may have on other needs of the client that may be outside the scope of the advice. Hence we support paragraph 32 of the draft Explanatory Statement.

However, the Legislative Instrument and the Explanatory Statement must acknowledge the legal permission in s961B of the Corporations Act, for the client to limit the scope of the advice.

Paragraph 33 implies that an adviser cannot ever fulfil their ethical duty. It also disrespects the privacy of the client and the legal ability in s961B to scope the advice based on the client's needs and direction.



member to move into aged care accommodation in the near future would need to be factored into any financial advice you give that client.

32. This means that you will need to work out—and, if necessary, help the client to work out—what the client's objectives, financial situation, needs, interests (including long-term interests), current circumstances and likely future circumstances are. To comply with the ethical duty, it will not be enough for you to limit your inquiries to the information provided by the client; you will need to inquire more widely into the client's circumstances.

33. You are not relieved of the ethical duty merely because the client does not provide enough information, even when asked.

34. Other aspects of the duty to act in the client's best interest include:

- you must keep confidential all information about the client that you are given or obtain in connection with you or your principal acting for the client. You must not use or disclose this information for any purpose other than advising the client unless the client has specifically agreed or the law requires you to;
- you must treat all clients in a respectful and professional way;
- you must treat all clients fairly, as between themselves. You should provide adequate professional services to all clients, managing your business so that each client has a fair share of your attention, skills and time.

Treating clients fairly

The FPA assumes the intent of this guidance is to ensure clients receive the services they have agreed to under the terms of the advice engagement, and that the adviser only receives benefits for the services provided (in line with the intent of the fee disclosure statement and opt-in requirements in the *Corporations Act 2001*).

However, we are concerned about the practicalities and appropriateness of this guidance. It is unclear as to the meaning of 'fairly, as between themselves'; and 'fair share'. This could potentially be interpreted as an equal share of the adviser's attention, skills and time. However, this ignores that the client's needs, circumstances, and financial capability are unique to each client and therefore the advice provided is tailored to those unique characteristics. The time, skills and attention an adviser gives a client are dependent on these client characteristics. It also ignores that some advice is more complex and may require more attention, skills and time than less complex advice; equally, some clients seek scoped advice while others may want more holistic advice.

This means that in reality an adviser will service each client based on the unique set of needs, circumstances and financial capability of that client.

The FPA questions the practicalities of a CMB monitoring and measuring compliance with this guidance. There is no one size fits all in advice. Nor are all clients' understanding of the advice process the same. Meaning, from the perspective of someone who considers the advice from the outside looking in, such as a CMB, someone with a relatively simple financial situation may require little time. However, based on the client's circumstances and financial capability, the adviser requires more time with such a client so as to ensure the



	<p>client understands the advice and the rationale for the adviser's recommendations. Similarly, a relatively complex financial situation that may seem from an outsider's perspective to require a significant amount of time to ensure the client's understanding of the advice, may in fact require a shorter period than expected due to the financial capability of the client.</p>
<p><i>Standard 3</i></p>	
<p>35. The primary ethical duty in this Standard is that you must not advise your client if you would derive inappropriate personal advantage from doing so. The concept of "personal advantage" encompasses receiving benefits (which are widely defined in subsection 4(1)).</p> <p>36. However, it is not limited to benefits, and covers other advantages that may accrue.</p> <p>37. This Standard also prevents a relevant provider from acting "in any other manner" for a client if the provider would derive inappropriate personal advantage from so acting.</p> <p>38. Personal advantage is "inappropriate" when it would be, or would reasonably appear to be, inconsistent with acting in the client's best interests.</p> <p>Examples:</p> <ul style="list-style-type: none">• Harry recommends that his client acquire a particular financial product. Harry's remuneration includes a bonus depending on the volume or value of that financial product that is sold. Harry's taking the bonus is inappropriate, as the prospect of the bonus would reasonably appear to influence his advice to Fred.	<p><u>Personal advantage</u></p> <p>The FPA has significant concerns about paragraph 36 which states that "personal advantage" includes receiving benefits (as defined) and "other advantages that may accrue". The reliance on the undefined term of "personal advantage", rather than the definition of "benefit", creates guidance which is nondescript and open-ended as to what could constitute a personal advantage, making it an impossible standard to comply with, measure or monitor.</p> <p>It would be useful to have some examples of personal advantages that are not benefits.</p> <p><u>Acting in any other manner</u></p> <p>Clarity is also needed in relation to the meaning of "acting in any other manner for the client". This is extremely ambiguous. As discussed above, the FPA seeks clarity as to the intended meaning of 'to act' for a client.</p> <p><u>Inappropriate</u></p> <p>The FPA supports the clarity provided by paragraph 38 in relation to what would be deemed as "inappropriate".</p> <p>However, as discussed above in Standard 3 of the draft Legislative Instrument, the FPA is concerned about the intent and clarity of this standard, and how it will apply in practice. These concerns are exacerbated by the examples in this section of the draft Explanatory Statement which reinforce our original concerns about the ambiguity of the standard</p> <p><u>Subject</u></p> <p>The draft Explanatory Statement does not clarify the subject of the implied action of the adviser. That is, "<i>You must not advise, refer or act in any other manner...</i>" for whom? This is a very open ended standard that makes it unworkable in practice.</p>



<ul style="list-style-type: none"> Sally has 2 clients, Bill and Ben. Her duty to Bill conflicts with her duty to Ben. In this case, any benefits Sally gets from either Bill or Ben would be inappropriate as, if she acted for either of them, she would not be acting in the other's best interest. 	<p><u>Conflict of interest</u></p> <p>The FPA has significant concerns about the wording and the intent of this example. The FPA recommend this example be amended or removed.</p> <p>This example is extremely broad and non-specific. As each client and their circumstances are unique, there is a need for an adviser to undertake an assessment to identify any potential conflicts of duty that may exist based on each particular client-adviser relationship.</p> <p>This example lacks an explanation in regard to the nature of the conflict and whether there is an expectation (under this guidance) that a conflict will always exist. For example, are Bill and Ben related parties? Are they domestic partners and therefore there is a situational conflict; or is there a real conflict in their interests?</p> <p>This raises the question as to whether, under this proposed guidance, an adviser can have husband and wife as joint clients (same advice, same interests), but if the adviser has a husband as client 1 and wife as client 2 and separate advice is provided, does this create a potential conflict, and in all circumstances?</p> <p>Further, does there have to be an actual conflict or is it enough that a relationship exists and therefore a conflict may exist currently or in the future?</p>
<p>39. This Standard does not catch advantages accruing to a provider's principal. Thus, for example, Sally may refer Bill and Ben to her fellow relevant providers Lewis and Clark, even though they each have the same principal as Sally. Each of Lewis and Clark will need to consider whether he would derive an inappropriate personal advantage from providing advice.</p> <p>40. Disclosing to the client the advantages you would receive, and obtaining your client's consent (see, for example, Standard 7), will not relieve you of the duty to comply with this Standard.</p>	<p>The FPA questions the interaction of this guidance with paragraph 50 which states:</p> <p><i>".....although you will not have a duty to act in the best interest of the family members if they are not clients of you or your principal."</i></p> <p>If Bill and Ben (for example) are considered family members, then under paragraph 50 a best interest duty would apply to both parties even if they have different advisers, as both Bill and Ben would be clients of the principal. Based on the example above, this would mean the conflict between Sally's duty to Bill and her duty to Ben, would also exist for Lewis and Clark - that is the conflict between each adviser's client's best interest and the best interest of the family member (as a client of the principal) would remain.</p>



Client care	
<i>Standard 4</i>	
<p>41. This standard requires that you only act for a client with the client's free, prior and informed consent.</p> <p>42. This means that, before you start to act, you must have explained to your client, clearly and simply:</p> <ul style="list-style-type: none"> • what services will be provided; and • the terms on which they will be provided; and • the records that will be made of the services, and the privacy and confidentiality arrangements applicable to them. <p>43. Existing clients' consent must be obtained as soon as practicable after the Code commences. Section 3 of the Code defines when it commences.</p> <p>44. "Informed" consent requires that the client understands and agrees to the arrangements. You will need to be satisfied of this, and have reasonable grounds to be satisfied.</p>	<p>See the FPA's feedback on the draft Legislative Instrument and above, particularly in relation to</p> <ul style="list-style-type: none"> • "act for a client" • "existing clients" • "Free" • "Reasonable grounds"
<i>Standard 5</i>	
<p>45. This standard elaborates on the "best interest of the client" duty in Standard 2 and also ensures that you satisfy yourself that the client understands your advice and the products and services you recommend. This requires detailed engagement with and assistance to the client</p> <p>46. The discussion of Standard 2 in paragraph 29 above addresses when advice and recommendations will be in the "best interest of the client". This Standard emphasises the need for advice and recommendation to be appropriate to the client's individual circumstances (which will require you to take into account the client's broader, long-term interests and likely future circumstances).</p>	<p><u>Products and services</u></p> <p>As discussed above in relation to the Code, the definition of personal financial advice in the Corporations Act clearly states that advice includes all recommendations including those involving products and services. The FPA recommends the removal of the words "<i>the products and services you recommend</i>" from paragraph 45.</p> <p><u>Take into account the broader, long-term interests and likely future circumstances</u></p> <p>As stated above, it is unreasonable to expect either the client or adviser to know the long-term interests the client may have. An individual's interests change with experience and changes in circumstances.</p> <p>Equally, while it may be possible and is important to consider the long-term financial planning needs that may be relevant to each client, this is based on their known and foreseeable</p>



47. This Standard also emphasises the importance of the client properly understanding the advice and recommendations you give, and their implications. It requires you to be satisfied that the client understands:

- the advice and recommendations you give; and
- the benefits of the recommended products; and
- the costs involved in acquiring, holding and disposing of the recommended products; and
- the risks involved in acquiring, holding and disposing of the products, and how you recommend they be managed.

48. This means that your advice must be clear and simple.

49. This Standard expressly requires that you have reasonable grounds to be satisfied.

circumstances. However, this is not always possible. For example, if a client declines to provide all the necessary information required for an adviser to take into account the client's "broader, long-term interests and likely future circumstances". In these circumstances, an adviser can only advise the client of the need to consider their future financial needs, including common longer-term financial planning needs (such as aged care and insurance) and particular legal requirements (eg. in relation to superannuation), before acting on the advice.

Satisfied

The FPA supports the intent of paragraph 47 and the detailed requirements in the associated bullet points.

However, we seek clarity as to how an adviser is expected to clearly demonstrate to a CMB that the adviser was "satisfied" about the client's understanding of the advice provided. Put another way, clarity is needed as to the defence for an adviser being satisfied of their client's understanding, should a complaint be lodged with a CMB by the client. What are the reasonable grounds to the adviser being satisfied of the client's understanding that would provide such a defence? How is acknowledgement of the client's understanding to be qualified?

Clear and simple

Paragraph 48 requires the advice to be clear and simple. This ignores the fact that financial products and concepts can be complex. It also does not take into account a test for simple, or each client's financial literacy and capability. What may be simple for one client, may be complex for a different client.

"Easily understood" acknowledges each client's circumstances are unique, as will be the advice provided, and that the financial capability and literacy of each client will vary. The important matter is that the adviser tailors the advice so it is appropriate for the client's needs, circumstances, risk tolerance and capability, and that the client understands the advice provided.



Standard 6

50. This standard expressly requires you to take into account the broad effects of the client acting on your advice. These effects are not limited to effects on the client. For example, your advice may have implications, not just for the client personally, but also for other family members of the client. These will need to be taken into account, although you will not have a duty to act in the best interest of the family members if they are not clients of you or your principal. You will also need to consider whether your product recommendations should be limited to so-called “ethical” investments.

51. This Standard expressly requires you to take into account the broader, long-term interests and likely circumstances of your client. For example, any potential need for the client or one of the client’s family members to move into aged care accommodation in the near future would need to be factored into any financial advice you give the client.

The FPA supports and promotes advisers to consider the short, medium and long term financial planning needs of the client. The six financial planning needs of the client are all interrelated and include cash flow, debt management, investment, risk management, estate planning, and structuring. These needs include aged care and retirement needs more broadly.

The financial planning needs can be used to show clients how a simple, single change or trigger event can activate multiple financial planning needs for the client. For example, a change in superannuation law can affect the client’s superannuation adequacy - which is a long term goal, a short term tax effectiveness tool and investment vehicle that affects the client’s cash flow, risk strategy, debt management and structures as contributions can be made from pre and post-tax monies. It can also impact on estate planning needs.

However, the FPA has significant concerns regarding the guidance for proposed Standard 6 and how advisers should meet the requirement to consider the broad effects of the client acting on their advice.

Consideration of family members

This guidance makes inappropriate assumptions about the circumstances of the client’s family including that the:

- that the family relationships are positive - the client and family members may be estranged or have strained relations;
- the means of other family members to support their own financial needs, including aged care needs.

Adviser’s contractual relationship

The adviser has a contractual relationship with the client, not with the client’s family members. This guidance ignores client instructions to the adviser. For example, the client may instruct the adviser not to consider the aged care needs of family members.

Family member

This is not defined in the draft Legislative Instrument or draft Explanatory Statement. The meaning of family is often reliant on the definition of spouse and dependents. All these terms are defined differently in various laws in relation to tax, insurance, immigration, social security, and superannuation, for example, making this a very complex issue.

From a lay person’s perspective, it also cannot be assumed that each client shares the same understanding of the concept of family. It may have a different meaning to each client.



Best interest of family members

Principals are licensees. Some licensees have thousands of advisers with hundreds of clients. It is unreasonable to expect an adviser to even know if the family member of their client is a client of the adviser's principal.

If a family member of a client is a client of the principal, under this proposed guidance, this would create an obligation that the adviser also has a best interest duty to the family member, even though the adviser has no relationship (legal or otherwise), or legal engagement or agreement with the family member.

The *Corporations Act 2001* applies the best interest duty to the direct adviser-client relationship. If a family member of the client is a client of the principal, under paragraph 50 FASEA is extending this to adviser-family member/non-client relationship. However, there is no relationship here as the family member is not a client of the adviser, but of the principal.

If the best interest of the actual client conflicts with the best interest of the family member/non-client, under the law the adviser must prioritise the best interest of client under the best interest duty obligation to the adviser-client relationship in the *Corporations Act 2001*. However, this would put the adviser in breach of FASEA's adviser-family member/non-client best interest duty.

This must also be considered in the context of example 2 in para 38 (Standard 3 above). Under this example the extension of the best interest duty to the family member would mean the adviser could not act for either the client or family member if a conflict exists, even though the family member is not an actual client of the adviser.

The adviser's relationship and legal contract for the advice is with their client. However, this guidance would potentially create a conflict of interest between the adviser's best interest duty to their client, and that of the family member. It is unreasonable and would potentially put the adviser in breach of their legal engagement with their client, if they were not able to provide advice to their client because of the conflict between their legal best interest obligations to their client and the proposed best interest duty to the client's family members under this paragraph. This would potentially put the adviser in breach with the *Corporations Act 2001* best interest obligation, and in turn, with Standard 1 of the Code.

[The FPA strongly recommends the references to and requirements directed towards "family members" be removed from the Explanatory Statement.](#)

Broader, long-term interests and likely circumstances

As part of the financial planning process, the FPA promotes financial planners identifying and considering the short, medium and long term needs of the client, including aged care needs, in developing appropriate advice strategies and recommendations that are in the best interest of clients. However, this guidance is open-ended as to how remote the adviser



	<p>must go in considering the “broader, long-term interests and likely circumstances” of the client. The problem with enforcing adherence with such a requirement lends itself to the experience with negligence law and the fact that many circumstances are not foreseeable. This creates an unreasonable liability for advisers and enforcement complexity for CMBs.</p> <p><u>Ethical Investments</u></p> <p>Laws created by the Parliament are considered representative of community expectations. The <i>Corporations Act 2001</i> does not restrict the product recommendations an adviser can make. Rather it sets clear legal requirements to ensure the advice that is provided, which includes the recommendations, is in the best interest of the client.</p> <p>It is therefore inappropriate for the draft Explanatory Statement to limit the products an adviser can recommend to their client to “ethical investments”.</p>
<p>Quality process</p>	
<p><i>Standard 7</i></p>	
<p>52. This Standard requires the client’s free, prior and informed consent to all relevant remuneration arrangements for you and your principal. To meet this Standard, the client must be given a clear and simple explanation of the fees and charges, and the benefits you or your principal will receive, that are attributable to you or your principal acting for the client. There is an extended definition of benefits in subsection 4(1), to include monetary and non- monetary benefits. The explanation can be given by you or someone else.</p> <p>53. Existing clients’ consent must be given as soon as practicable after the Code commences. Section 3 of the Code defines when it commences.</p> <p>54. You must also be satisfied that your client understands and agrees to these arrangements, and you must have reasonable grounds to be satisfied.</p> <p>55. This Standard prohibits you receiving “third party” benefits for acting for a client (unless the Act expressly allows). This also applies to a relevant provider who is an individual financial services licensee. However, it does not prevent a corporate</p>	<p>Please see discussion above regarding the following concerns:</p> <ul style="list-style-type: none"> • “Existing client” • An adviser’s ability to know all the benefits the principal will receive that are attributable to the adviser or the principal acting for the client • Meaning of “acting for the client” • “Reasonable grounds” <p><u>Value for money</u></p> <p>We note that the requirement is for the adviser to satisfy themselves, not the client, that the benefits payable and received in relation to the advice, represent value for money for the client.</p> <p>Total fees and charges payable by clients may vary from client to client depending on the complexity of the client’s circumstances, the service sought by the client, and the time spent to provide those services. Such fees and benefits also vary from adviser to adviser, and firm to firm, due to a range of valid reasons including the experience, skills, and expertise of the adviser. Australian competition laws permit each business and service provider to establish their own fees for their clients. This standard in the Code must respect the right for advisers to set their own fee structures for clients, in adherence with the permissible remuneration</p>



financial services licensee from deriving third party benefits because one of its authorised representatives provides advice to clients. Corporate financial services licensees are not relevant providers subject to the Code.

56. This standard also requires that all fees and charges payable to you or your principal, and benefits you or your principal receive, for acting for the client are fair and reasonable, and represent value for money for your client. This is an integral part of your duty to deal fairly with your client, and in his or her best interests. There is an extended definition of **benefits** in subsection 4(1), to include monetary and non-monetary benefits.

57. The Act includes detailed requirements about remuneration arrangements, including “conflicted remuneration”: see Part 7.7A Divisions 3 and 4 of the Act. The Code does not remove the need to comply with the requirements of these Divisions, and a relevant provider may be able to rely on disclosures given under those Divisions to help establish compliance with this standard.

requirements in the *Corporations Act 2001*. It is up to the client to either accept those fees, based on clear and full disclosure, or to choose to seek advice from another adviser.

However, this guidance must also be considered in the context of the CMBs ability to monitor compliance with the Code and make appropriate determinations in relation to consumer complaints. In this context, the client’s view of value for money may be seen as relevant by the client making the complaint.

The value an individual places on a service or item is extremely subjective and can vary significantly. A client’s view of value for money can also change over time. For example, some clients may have a short term view of financial matters and therefore strongly believe the advice provided by their adviser represents high value for money when, for example, markets are performing well, however this view may change if market conditions become more volatile.

The FPA questions the ability for a CMB to apply an appropriate and consistent ‘value for money’ test for monitoring compliance with this proposed guidance, particularly given it is a subjective test from the perspective of the adviser.

Corporations Act 2001

The FPA supports the intent of the guidance that advisers’ “may” rely on the disclosures given under the relevant Divisions in the *Corporations Act 2001* to help establish compliance with this standard. However, to ensure consistency, this should be definitive - the FPA recommend replacing the word “may” with “can”.

Standard 8

58. This Standard requires that a relevant provider keep complete and accurate records of advice and services provided.

As discussed in the Legislative Instrument section above, the FPA has concerns about the legal ability for an adviser to “keep” client records, if the adviser does not legally ‘own’ the relationship with that client. Clarification is needed in relation to the meaning of “keep”. An alternative term such as “make” should be considered.

Standard 9

59. This Standard requires that all financial product advice, and all financial products, offered to a client be offered in good faith. This means that you must act honestly, and in the best interest of the client, in giving the advice and making the recommendations. You will not be acting in good faith if there is

See the FPA’s feedback and recommendations above to:

- Standard 9 of the Legislative Instrument.
- Standard 6 of the Explanatory Statement
- The term “offered”



something you are aware of, or ought to be aware of, that would lead to the conclusion that your advice is not in the clients' best interests, taking into account the broad effects arising from the client acting on your advice and the broader, long- term interests and likely circumstances of the client.

60. The Standard also requires that all financial product advice, and all financial products, be offered "with competence". Among other things, this requires that all relevant providers act efficiently, honestly and fairly. Paragraph 912A(1)(a) of the Act requires licensee to "do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly"; this Standard ensures that a corresponding ethical duty applies to all relevant providers.

61. Finally, this Standard requires that financial product advice given, and financial products recommended, are not misleading or deceptive.

- The inclusion of financial products

The issues raised by the FPA above are exemplified by overlaying our concerns in the requirements above into this one standard, and the inclusion of the words "or ought to be aware of".

As discussed above, the adviser should not be held accountable for the financial product, only for the advice and the appropriateness of the product for the client. It is also unreasonable to impose a best interest duty on the adviser for a family member that may be a client of the principal (but not a client of the adviser directly) and this additional best interest duty extend to the adviser's proposed accountability for the financial product, and ever changing long-term interests and likely circumstances of the client. Not only is this inappropriate and potentially in conflict with the adviser's obligations to their actual client, it is questionable as to how a CMB could monitor compliance with this proposed guidance.

Efficiently, honestly and fairly

The FPA supports a requirement that all advisers act efficiently, honestly and fairly; that the advice provided is not misleading or deceptive; and that the adviser is competent to provide the advice sought by the client.

The FPA has concerns about the wording in the guidance that the advice "be offered with competence":

- the term "offered" implies to sell or to buy - this is not advice.
- for the advice to be "offered with competence" places the emphasis of the competence in the wrong place in the advice process - an adviser must determine that they are competent to provide the advice the client is seeking prior to entering into an advice engagement with the client. Not at the stage of "offering", or providing the actual advice to the client. The FPA's Code of Professional Practice requires that if an adviser is not competent to provide the advice sought by the client, the adviser must not provide the advice to the client and decline the client engagement.



Professional commitment

Standard 10

62. This Standard imposes, as an ethical duty, a requirement to develop and maintain a high level of relevant knowledge and skills. For example, if you specialise in a particular area, you should not provide advice outside that area unless you have the necessary skills and competencies to do so in a professional way.

63. Meeting the continuing professional development requirements (part of the education and training standards—see subsection 921B(5) of the Act and the *Corporations (Relevant Providers Continuing Professional Development) Standard Determination 2018*)—will assist with meeting this duty.

See feedback and recommendations above in response to Standard 10 of the draft Legislative Instrument, particularly in relation to the term “develop”.

Standard 11

64. This Standard is a positive duty to cooperate with any investigation of a breach or potential breach of this Code by a monitoring body or ASIC. This duty applies in addition to the offences in sections 921M and 921P of the Act.

The FPA supports the intent of this standard.

However, we question the inclusion of s921P of the Act in the guidance. The Code of Ethics and this guidance applies to relevant providers. Section 921P places an obligation on the CMB to ensure that the compliance scheme is publicly available.



Standard 12

65. 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.

66. One element of this duty affects relevant providers who are acting as supervisors for provisional relevant providers undertaking the professional year (see the *Corporations (Provisional Relevant Providers Professional Year Standard) Determination 2018*). This Standard requires that you must provide supervision that is in the best interest of the provisional relevant provider, that is, supervision that actively assists him or her in getting the full benefit of the professional year.

Being seen to be

The FPA seeks clarity as to FASEA's expectations on how an adviser can comply with suggested guidance of "...being seen to be a profession...". Greater clarification is also sought for expectations of monitoring compliance with "being seen to be" by a CMB.

We question the sincerity and value to consumers of "being seen to be a profession that acts ethically and professionally", and how this adds value to actually "being a profession that acts ethically and professionally".

Supervisors

It is unclear as to the meaning of "best interest" in this context. While the best interest duty in relation to a client requires an adviser to put the client's interests ahead of their own or those of related third parties, it is unreasonable to suggest that the supervisor must put the interests of the provisional relevant provider ahead of their own and those of related third parties. This would put the supervisor at risk of breaching their own professional obligations and their obligations to their employer, through a client-centric best interest obligation they must show toward a colleague.

It is also unclear as to an appropriate measure for what would constitute the "full benefit of the professional year". Whether a provisional relevant provider gets the full benefit of the professional year is heavily reliant on the provisional relevant provider's behaviour and performance.

These are important factors for imposing a specific ethical obligation on supervisors for their oversight of provisional relevant providers to ensure supervisors cannot inadvertently and inappropriately be held accountable for a provisional relevant provider failing to meet the requirements of the professional year.