

9 November 2018

Financial Advice Code Working Group
Email: code.secretariat@mbie.govt.nz

Re: Consultation on draft of the Code of Professional Conduct for Financial Advice Services

Dear members,

We congratulate the Financial Advice Code Working Group on its efforts to ensure the Code of Professional Conduct for Financial Advice Services ('Code') is principles-based. FINSIA believes that statutory obligations that go beyond traditional legal obligations should be principles-based, leaving room for a financial advice sector-led initiative to set well-defined standards that complement the statutory principles.

We support well-defined standards being developed by the sector. However, it is also important to allow financial advisers to exercise professional judgement in providing advice and other services to their clients. With well over a thousand members (representing over ten per cent of our membership) in Australia and New Zealand who are financial advisers, FINSIA is well aware that the everyday experience of financial advisers involves providing advice and other services to each client that are tailored to the client's preferences and situation. A principles-based Code allows for a sector-led initiative that complements the Code by setting well-defined uniform standards that are flexible enough to allow financial advisers to exercise professional judgement.

Key points

- A. While we are broadly supportive of the Code, we are concerned that – except for the most egregious misconduct or incompetence - what each proposed standard specifically requires in a particular situation is not known in advance. For example, it is not clear what the obligation to treat clients fairly and act in their interests, specifically requires in any particular context.
- B. Further, different standards will conflict. For example, the requirements to act in the client's interests (Standard 1) and give advice that is suitable for the client (Standard 5) could conflict with the requirements to act with integrity (Standard 2) and not bring the financial advice industry into disrepute (Standard 8). Weighing up and balancing competing standards may not be a simple matter of giving each standard some work to do. Some standards might trump others in some situations. Without knowing in advance how to weigh or balance these conflicting obligations, advisers and consumers cannot be confident about what the Code requires in particular situations.
- C. In our view, it is crucial that, in applying these standards, there is regard for how the standards are generally understood in practice – in order to balance the ideal of protecting consumers, on the one hand, with the cost of having uncertain obligations, on the other. In our view, ideally the financial advice sector would lead the development of well-defined standards that complement the principles set out in the Code and balance the requirements of certainty and flexibility. This sector-led

initiative would help set clearer expectations about the conduct and competence of advisers.

- D. We would recommend that the standards in the Code be assessed by reference to the 'ordinary reasonable person' test. However, standards that are primarily directed at how professional expertise in the area of financial advice is exercised should be assessed by reference to the test of the 'prudent person engaged in the profession of giving financial advice'. These tests would help reduce the potential for subjectivity in the application of the standards, and give advisers and clients greater confidence about what to expect is required by the standards.

Our recommended tests are discussed in more detail below. While the recommended tests might be consolidated as general tests that apply to multiple standards, we have set out a separate test for each standard to highlight the particular elements for each standard.

In addition, it may be beneficial to specify within the Code the extent to which it applies. This would involve distinguishing matters concerning an advice relationship from other matters.

Sincerely,

S9(2)(a)

FINSIA

Email:

s 9(2)(a)

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

[Standard 1] Treat clients fairly and act in their interests

1. Overall, we agree with the standard.
2. However, in order to reduce uncertainty, we recommend that consideration be given to rewriting the standard as follows:

'A person who gives financial advice must always treat clients fairly and act in their interests. A person who gives financial advice treats a client fairly if an ordinary person, knowing all information relating to the client that the person who gives financial advice knows or ought reasonably to know, would reasonably regard the treatment as fair. A person acts in the interests of a client if an ordinary person, knowing all information relating to the client that the person who gives financial advice knows or ought reasonably to know, would reasonably regard the person who gives financial advice as acting in the interests of the client.'

Industry-led standards could complement the Code. For example, acting in the client's interests could be complemented with the following standard:

'In relation to a client, a person who gives financial advice must always act in order to pursue one or more of the client's goals agreed with the financial adviser -- unless pursuit of the client's goals is not practicable.'

To be clear, such a complementary standard should not be included in the Code. The reason for this is that as standards become more defined, a need arises for the financial advice sector to have control over the standard-setting process in order to avoid unintended consequences. In our view, the preferred approach is for a principles-based statutory code to set the outer limits of acceptable conduct and competence, and for a sector-led initiative to develop well-defined standards that provide confidence about what the standards require while allowing flexibility for professional judgement.

[Standard 2] Act with integrity

3. Overall, we agree with the standard.
4. However, in order to reduce uncertainty, we recommend that consideration be given to rewriting the standard as follows:

'A person who gives financial advice must always act with integrity. A person acts with integrity if an ordinary person, knowing all information relating to the client that the person who gives financial advice knows or ought reasonably to know, would reasonably regard the person who gives financial adviser as acting with integrity.'

[Standard 3] Manage conflicts of interests

5. We are concerned that the notion of managing has no content other than the bare requirement to deal with conflicts of interest in *some way*.
6. This standard may be particularly difficult to apply as it will involve weighing and balancing interests and duties (which are themselves uncertain) without having a method for doing so. It is crucial that, in applying this standard, close attention is paid to how it is generally understood in practice.

We recommend that consideration be given to rewriting the standard as follows:

'A person who gives financial advice must have arrangements in place to manage conflicts of interests, that a person engaged in the profession of giving financial advice

would if being prudent regard as adequate for the circumstances of the business of the person who gives financial advice -- including arrangements to:

- where practicable, avoid conflicts of interests
- identify conflicts of interests
- ensure that conflicts of interests are controlled in accordance with the requirements of the FMC Act
- adequately disclose conflicts of interests to clients.'

[Standard 4] Take reasonable steps to ensure that the client understands the financial advice

7. Overall, we agree with this standard.
8. However, in order to reduce uncertainty, we recommend that consideration be given to rewriting the standard as follows:

'A person who gives financial advice must take steps to ensure that the client understands the financial advice and all material risks and consequences of:

- the nature and scope of the financial advice (and of any limitations on the nature and scope)
- following the financial advice, including any associated fees and costs.

Considered together, the steps must be such that a person who engages in the profession of giving financial advice would if being prudent regard them as adequate to ensure that the client understands the financial advice and all such materials risks and consequences.'

[Standard 5] Give financial advice that is suitable for the client

9. Overall, we agree with this standard.
10. We support the test for suitability being that the financial adviser 'must have reasonable grounds for the financial advice, having regard to the nature and scope of the financial advice and the client's circumstances.' Generally, we also support 'reasonable grounds for the financial advice' being defined to mean 'grounds that a prudent person engaged in the profession of giving financial advice would consider to be adequate in the same circumstances, including in relation to: the strategy underpinning the financial advice; [and] each financial advice product covered by the financial advice.'

We recommend that consideration be given to rewriting the standard as follows:

'A person who gives financial advice must ensure that the financial advice is suitable for the client. The person must have reasonable grounds for the financial advice, having regard to the nature and scope of the financial advice and the client's circumstances. Reasonable grounds for the financial advice means grounds that a person engaged in the profession of giving financial advice would if being prudent consider to be adequate in the same circumstances, including in relation to:

- the strategy underpinning the financial advice
- each financial advice product covered by the financial advice.

The client's circumstances are those aspects of the client's situation, needs, goals, and risk tolerance that a person engaged in the profession of giving financial advice would if being prudent consider to be relevant to the financial advice.'

[Standard 6] Protect client information

11. Overall, we agree with this standard.
12. However, we recommend that to reduce uncertainty consideration be given to rewriting the standard as follows:

‘A person who gives financial advice must take steps to protect client information against loss and unauthorised access, use, modification, or disclosure. Considered together, the steps must be such that a person who gives financial advice would if being prudent regard them as adequate.’

[Standard 7] Resolve complaints

13. We are concerned that the criterion of resolving has no content other than the bare requirement of ‘provid[ing] arrangements for resolving complaints’ in some way. We are also concerned that the standard does not distinguish major and minor complaints.
14. There should be regard for how this standard is generally understood in practice. We recommend that consideration be given to rewriting the standard as follows:

‘A person who gives financial advice must provide arrangements for resolving complaints by clients. The arrangements must be such that an ordinary person would reasonably regard them as adequate for the circumstances of the business of the person who gives financial advice. A complaint is an expression of dissatisfaction made to or about a person, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.’

[Standard 8] Not bring the financial advice industry into disrepute

13. Overall, we agree with this standard.
14. NA

[Standard 9] Have general competence, knowledge, and skill

17. Overall, we agree with this standard.
18. We note that it may be appropriate for the sector to develop higher standards for financial advisers (for example, setting the minimum standard as a combination of a graduate certificate and professional qualifications in financial advice). To be clear, these standards would be sector-led and not form part of the Code. Rather, they would complement the Code.

[Standard 10] Keep competence, knowledge, and skill up-to-date

19. Overall, we agree with this standard.
20. However, to reduce uncertainty we recommend that consideration be given to rewriting the standard as follows:

‘The minimum requirements for continuing professional development are:

An individual must complete learning activities. Considered together, the completion of these learning activities must be such that a person who engages in the profession of giving financial advice would if being prudent regard the completion as being designed to ensure that the individual maintains both:

- the competence, knowledge, and skill to provide the financial advice they give
- to the extent relevant to their role, an up-to-date understanding of the regulatory framework for financial advice in New Zealand.

An entity must review procedures, systems and expertise to ensure that it maintains the capabilities to provide the financial advice it gives. The procedures, systems and expertise must considered together be such that a person who engages in the business of providing financial advice would if being prudent regard them as ensuring the entity maintains the capabilities to provide the financial advice it gives.

The code does not limit the ways that a person may demonstrate continuing professional education. However, an individual may demonstrate that they are maintaining an up-to-date understanding of the regulatory framework for financial advice by achieving the qualification outcomes of the then current Level 5 unit standard that includes understanding of the regulatory framework for financial advice in New Zealand.’

We note that it may be appropriate for sector-led standards to complement the Code. For example, a sector-led standard might set a minimum number of hours of accredited professional education per year.

[Standard 11] Have particular competence, knowledge, and skill for designing an investment plan

21. Overall, we agree with the standard.
22. However, to reduce uncertainty we recommend that consideration be given to rewriting the standard as follows:

‘The minimum standards of particular competence, knowledge, and skill for designing an investment plan are the qualification outcomes under the investment strand of the New Zealand Certificate in Financial Services (Level 5) approved by the New Zealand Qualifications Authority in September 2014 (NZQA reference 2315). The code does not limit the ways that a person may demonstrate their particular competence, knowledge, and skill for designing an investment plan. However, a person may demonstrate the standard by any one of these ways:

For an individual:

- a person who engages in the profession of giving financial advice would if being prudent regard the individual as having achieved the qualification outcomes under the investment strand of the New Zealand Certificate in Financial Services (Level 5) or of the National Certificate in Financial Services (Financial Advice) (Level 5); or
- the individual is an authorised financial adviser immediately before the commencement of the code

For an entity:

- the entity gives financial advice through (and only through) individuals who demonstrate the standard for an individual; or
- have procedures, systems and expertise that considered together a person who engages in the business of giving financial advice would if being prudent regard as ensuring that the entity has the capabilities equivalent to those of an individual who alone has achieved the qualification outcomes under the investment strand of the New Zealand Certificate in Financial Services (Level 5)

For a nominated representative:

- achieve the learning outcomes specified for their role by their financial advice provider. Considered together, the completion of these learning outcomes

together with the procedures, systems and expertise of the financial advice provider, must be such that a person who engages in the profession of giving financial advice would if being prudent regard the nominated representative as having the capabilities equivalent to those of an individual who alone has achieved the qualification outcomes under the investment strand of the New Zealand Certificate in Financial Services (Level 5).'

We note that it may be appropriate for the sector to develop higher standards for financial advisers (for example, setting the minimum standard as a combination of a graduate certificate and professional qualifications in financial advice). To be clear, these standards would be sector-led and not form part of the Code. Rather, they would complement the Code.

[Standard 12] Have particular competence, knowledge, and skill for other types of financial advice

23. Overall, we agree with the standard.

24. However, to reduce uncertainty we recommend that consideration be given to rewriting the standard as follows:

'The minimum standards for continuing professional development are:

An individual must complete learning activities. Considered together the completion of these learning activities must be such that a person who engages in the profession of giving financial advice would if being prudent regard the completion as being designed to ensure that the individual maintains both:

- the competence, knowledge, and skill to provide the financial advice they give
- to the extent relevant to their role, an up-to-date understanding of the regulatory framework for financial advice in New Zealand.

An entity must have procedures, systems and expertise that considered together a person who engages in the business of providing financial advice would if being prudent regard as ensuring that it maintains the capabilities to provide the financial advice it gives.

The code does not limit the ways that a person may demonstrate continuing professional education. However, an individual may demonstrate that they are maintaining an up-to-date understanding of the regulatory framework for financial advice if a person engaged in the profession of giving financial advice would if being prudent regard them as having achieved the qualification outcomes of the then current Level 5 unit standard that includes understanding of the regulatory framework for financial advice in New Zealand.'

We note that it may be appropriate for the sector to develop higher standards for financial advisers (for example, setting the minimum standard as a combination of a graduate certificate and professional qualifications in financial advice). To be clear, these standards would be sector-led and not form part of the Code. Rather, they would complement the Code.

General questions

25. Yes

26. The Code should set out an approach to reconciling competing standards. While reconciliation involves an evaluative judgement, it should be made clear from whose point of view the reconciliation should be made. Rather than this point of view being that

of the particular decision-maker, we believe the relevant perspective should be that of an ordinary person who is informed and is being reasonable. Although this standard is broad, it at least highlights the need to reflect the views of the community rather than one's own (if different from the community's).

Final questions – tell us about yourself (*Please note this information will be published with your submission unless there is a withholding ground under the Official Information Act. Responses are optional.*)

27. What is your name?

S9(2)(a)

30. Your role or professional title

S9(2)(a)

28. Is this an individual submission or on behalf of an organisation?

On behalf of an organisation

29. If you give financial advice, are you an AFA, RFA, QFE adviser or other?

NA

30. What types of financial advice do you or your organisation give?

NA

31. What your organisation's name?

Financial Services Institute of Australasia (FINSIA)

32. What type of organisation is it? (e.g. bank, dealer group, independent adviser, education provider . . .)

Professional body with over eight thousand members across Australia and New Zealand, with origins dating back to 1886

33. Is your organisation's size small (1–10 staff), medium (10–50 staff) or large (50+ staff)?

Medium

34. If there are other things we should know about you or your business that would provide context to your answers, please provide details below.

No

35. Please indicate whether your submission contains any information that is confidential or whether you do not wish your name or any other personal information to be included in a summary of submissions.

Submission is not confidential. However, please do not make personal names or other personal information contained in the submission public.

36. Please provide your contact details (email and/or phone number)

s 9(2)(a)