

Code of Professional Conduct for Financial Advice Services

Submission Template

Submissions close Monday 30 April 2018

Please send submissions to:

code.secretariat@mbie.govt.nz or

Code Working Group

c/o Code Secretariat (Poppy Haynes and Max Lin)

Ministry of Business, Innovation & Employment

PO Box 1473

Wellington 6140

New Zealand

Submissions process

The Code Working Group (CWG) seeks written submissions on the issues raised in this document by **5pm on Monday 30 April 2018**

We welcome submissions on any or all consultation questions. You are welcome to comment only on the issues most relevant to you.

Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please direct any questions that you have in relation to the submissions process to code.secretariat@mbie.govt.nz.

Use of information

The information provided in submissions will be used to inform the CWG's development of the draft Code. We may contact submitters directly if we require clarification of any matters in submissions.

Release of information

The CWG intends to upload PDF copies of submissions received to MBIE's website at www.mbie.govt.nz. The CWG will consider you to have consented to publication of your submission, unless you clearly specify otherwise in your submission.

If your submission contains any information that is confidential or you otherwise wish us not to publish, please:

- indicate this on the front of the submission, with any confidential information clearly marked within the text
- provide a separate version excluding the relevant information for publication on our website.

Submissions remain subject to request under the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. The CWG will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

Private information

The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure of information about individuals. Any personal information you supply to the CWG in the course of making a submission will only be used for the purpose of assisting in the development of the draft code. Please clearly indicate in the cover letter or e-mail accompanying your submission if you do not wish your name, or any other personal information, to be included in any summary of submissions that the CWG may publish.

Information about you

<i>Share your details</i>	
i.	Please provide your name and (if relevant) the organisation you represent S 9 (2) (a)
ii.	Please provide your contact details S 9 (2) (a)
iii.	Please provide any other information about you or your organisation that will help us understand your perspective (e.g. the financial advice situations you have experience with). I have degrees in economics and law and have completed qualifications in tax and personal financial planning. I have spent 10 years as a legal adviser in the financial services industry with 5 as head of legal services (insurance, pensions and investments). These are solely my personal observations and views. I am currently employed in a non-legal position in the life insurance industry.
iv.	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. (See page 2 of this document) Please keep my personal details and name confidential.

Principles for drafting the Code

<i>Share your views</i>	
A.	What comments do you have regarding the overarching theme of “good advice outcomes” and the underlying principles? I do not agree with the principles of “good advice outcomes”. The word “outcomes” is the problem for me. The underlying principle should simply be “Good Advice”. Use of the word “outcomes” suggests the acceptability of advice can only be determined by benefit of hindsight and that that good advice can only be provided where outcomes are good. This clearly cannot be the case: notwithstanding the best advice, outcomes can range from good to mediocre and even bad, depending on a multitude of events and circumstances, many of which can never be predicted with any accuracy or even at all. No person could determine what acceptable advice/good advice would be if this were the test. By way of a simplistic example, every day 50% of litigation lawyers do not win their cases, but this does not mean they have given bad advice.

	<p>I respectfully submit that the word 'outcomes' simply causes confusion, is legally meaningless and will not add any benefit to clients. There is a lot of legal experience around the concepts of the reasonable man/ reasonable adviser. Determining reasonableness is something identifiable by reference to evidence. Good advice should be premised on that given by the reasonable adviser in the circumstances. For advisers to provide good advice, good advice must be something most advisers would agree was good at the time it is made. By contrast 'good outcomes' has no legal definition or reference (what causal connection would be required between the 'outcome' and the advice and how would loss be quantified?) and is completely subjective and in the domain often only in the mind of the client and dependent entirely of future events which may have nothing to do with the advice given.</p> <p>Bad advice that causes financial loss can be recognised and dealt with without the word 'outcomes' being present.</p>
B.	Are there any further principles that should be included, or existing principles that should be removed?

Ethical behaviour

Act with honesty, fairness and integrity

Share your views	
C.	<p>Do you agree with a requirement to act with honesty, fairness and integrity? If not, please set out your reasoning.</p> <p>Yes, absolutely.</p>

Keep the commitments you make to your client

D.	<p>Should minimum standards for ethical behaviour for the provision of financial advice extend beyond strict legal obligations, to include meeting less formal understandings, impressions or expectations that do not necessarily amount to strictly legal obligations? If no, please give reasoning. If yes, please propose how a standard for such commitments might be framed.</p> <p>No. Anything more results in confusion regarding obligations. Good advice coupled with honesty and integrity and fairness (reasonableness) are concepts familiar to most people and importantly, the law.</p>
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E.	<p>If there was a minimum standard requiring Financial Advice Providers – or Financial Advice Providers in some situations – to have their own code of ethics in addition to the Code, how would you frame the requirement for it to deal with keeping commitments?</p> <p>There should only be one set of ethics and it should apply to all. Ethics are set and go to a person’s character and actions. Advice given in the same circumstances can differ and still be ‘good’, there is a possible range of advice that is all acceptable. Ethics by contrast is not a sliding scale.</p>
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Manage and fully disclose conflicts of interest

F.	<p>Should the Code include a minimum standard on conflicts of interest in addition to the legislation?</p> <p>These should be disclosed. In particular, where only limited ‘product’ or ‘provider’s’ solutions are recommended. Conflict of interest should be defined to include the above but also any other matter that could influence the advice given which is particular to the adviser and not specific to that client.</p>
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Do no harm to the client or the profession

G.	<p>Do you agree that a person who gives financial advice must not do anything or make an omission that would or would be likely to bring the financial advice profession into disrepute? If not, please set out your reasoning.</p> <p>Yes.</p>
H.	<p>Is an additional minimum standard on doing no harm to the client necessary? If so, what standard do you propose?</p> <p>No. This introduces an unnecessary complication and fraught with uncertainty. Recommending insurance brings harm to the client’s bank balance!!! What does ‘do no harm’ mean in the context of an individual? (as opposed to bringing the profession into disrepute. Good advice given with suitable ethics is all that is required to properly and appropriately protect clients.</p>

Keep your client’s data confidential

I.	<p>In which situations, if any, should the retention, use or sharing of anonymised bulk customer data be subject to Code standards?</p>
J.	<p>Do you agree that the Code should cover the various aspects of maintaining client confidentiality discussed in this paper?</p>
K.	<p>Are there other aspects of maintaining client confidentiality to consider?</p>

Ethical processes in Financial Advice Provider entities

L.	<p>Do you agree that the Code should require the Financial Advice Provider to document and maintain its “ethical processes”?</p> <p>No. These should apply to all universally. Ethics are ethics.</p>
M.	<p>Should the Financial Advice Provider be required to have a publicly available corporate code of ethics? Are there particular situations where a corporate code of ethics should be or should not be required?</p> <p>No. These should apply by operation of law and apply universally.</p>
N.	<p>Should Financial Advice Providers also be subject to additional standards in respect of leadership and culture? If so, how should these be framed?</p> <p>No. the provision of good advice will ensure suitable leadership and culture.</p>
O.	<p>Do you propose other additional standards of ethical behaviour that should apply to Financial Advice Providers?</p> <p>No. Honesty, fairness and integrity should suffice. It may however be useful to give examples of what fairness and integrity mean in the different advice contexts. For example, fairness may extend to more than ‘being fair’ to the client. Fairness means honestly and objectively making determinations about products and product providers – the absence of personal and unjustified bias, convenience or influence for example. Integrity is having an acceptable methodology, based on objective facts and data. All these ethics go not only to appropriate dealing with the client but also to the acceptability of advice.</p>

Ethics training

P.	<p>Do you agree that Financial Advice Providers should be required to meet standards relating to ethics training? If not, please state your reasoning.</p> <p>Yes, but the matters contained in o above should make up the bulk of any such training.</p>
Q.	<p>Should ethics training requirements apply to all officers and employees of a Financial Advice Provider, as appropriate to their role and contribution to the process of financial advice provision? If not, please state your reasoning.</p> <p>Officers and advisers only. Not all employees</p>
R.	<p>Should there be a requirement for ongoing refresher training on ethics?</p> <p>No. Ethics is a state of mind, habits and actions. Persons who continually need reminding probably are not suitable to be trusted financial advisers.</p>

Resolving ethical dilemmas

S.	<p>Do you agree that Financial Advice Providers should be required to have in place, and use, a framework for resolving ethical dilemmas that may arise in giving financial advice? If not, please set out your reasoning.</p> <p>No. ethics is ethics. A framework for dealing with conflicts, complaints and ensuring advice is fair and has the necessary integrity (based on objective facts and evidence) etc is required though.</p>
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Compliance functions

T.	<p>Should there be a requirement for explicit sign-off on the soundness of financial advice provided directly by a Financial Advice Provider?</p> <p>Only if the financial adviser giving that advice is not suitably qualified.</p>
U.	<p>Do you agree that Financial Advice Providers should be required to have in place a compliance function aimed at following up on concerns raised by employees and other stakeholders? If not, please set out your reasoning.</p> <p>Yes. If you mean a complaints procedure.</p>
V.	<p>Should this extend further into an internal audit obligation, having in place processes to systematically test for and detect violations of ethical behaviour?</p> <p>Only if advice is being given by individuals not themselves suitably qualified.</p>
W.	<p>Are there any potential compliance costs for small and/or large Financial Advice Providers that need to be considered?</p>

Responsibility for the whole advice process

X.	<p>Do you agree that Financial Advice Providers should be required to be able to demonstrate that they meet the standards of ethical behaviour as if the Financial Advice Provider carried out the whole advice process directly itself? If not, please set out your reasoning.</p> <p>Yes but they should not assume responsibility for work or advice outside their areas of expertise given by persons they believe are suitable to do so.</p>
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Reinforcing good ethical behaviour

Y.	What principle or mechanism do you propose the Code could include to reinforce good ethical behaviour on a day-to-day basis? <i>Not sure the Code can do this other than to include explicit examples.</i>
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Conduct and client care

Advice situations

<i>Share your views</i>	
Z.	Are there other delivery methods that should be considered when testing our thinking? <i>“Good advice” should apply regardless of delivery method. Naturally the scope and extent of advice might differ but again this should be disclosed.</i>

Advice-giving standards

AA.	How do the current client care standards work in practice, especially in advice-giving situations not previously covered by the AFA Code? In answering this question, please ignore “scope of advice” (CS-8) and “suitability” (CS-9 and part of CS-10).
BB.	Could any aspect of the current client care standards be worded better? (For example, we are aware that the definition of “complaint” could be improved.)
CC.	Are there any aspects of the current client care standards that could be expanded or clarified (for example, in light of the published findings of the Disciplinary Committee)? <i>Examples are always helpful to educate but perhaps they should be contained outside the actual code.</i>
DD.	Are there any potential compliance costs for small and/or large Financial Advice Providers that need to be considered?
EE.	Are there any additional matters that should be addressed in the advice-giving standards? Those listed above? Others?

Advice process

FF.	Do you think there are any other components that should be included in the design considerations of an advice process?
GG.	Should the Code include guidance material to help determine what needs to be considered when designing an advice process? Yes. Guidance will help financial advice providers understand the requirements. It would also help if the guidance includes examples that meet the requirements, and examples that do not meet the requirements, together with commentary.
HH.	Are there any other important aspects you think should be included in the advice process for all types of financial advice activities under the new regime?
II.	Should any of the key aspects that we have listed above be removed? If so, why?
JJ.	Are there any situations in which an advice process need not be followed? Yes, where no advice is asked for as long as the request is accompanied by a statement about the benefits of advice/potential consequences of no advice.

Personalised suitability

KK.	What comments do you have about a proposed minimum standard on personalised suitability analysis? What are your views on the example above?
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Organisational standards

LL.	What are the practical advantages and disadvantages of including organisational standards as described? What explanatory material or examples could we provide in the Code that might help to make these standards easier to comply with in practice?
MM.	Would implementing these organisational conduct and client care standards create a particular compliance burden for your firm? If yes, please explain why.

General competence, knowledge and skills

<i>Share your views</i>	
NN.	Do you agree with our interpretation of the meaning of “competence, knowledge, and skills”? If not, why not?
OO.	Are there other factors, which contribute to combined expertise , that we have not listed? We are particularly interested in factors that are relevant to financial advice that is given by a Financial Advice Provider directly, including by digital means.
PP.	What do you think are the advantages of this approach to general competence, knowledge and skills? <i>A general approach is required to ensure advice is not mandated – it could never be. It is critical to understand that different types of financial advice require different skills and knowledge.</i>
QQ.	What do you think are the disadvantages of this approach to general competence, knowledge and skills?
RR.	In what ways do you think this proposed standard contributes to, or detracts from, the legislative purposes (for example ensuring the quality and availability of advice, avoiding unnecessary compliance costs, and promoting innovation and flexibility)?
SS.	What factors should we consider in determining whether to make the proposed unit standard a renewing obligation? <i>No renewing should be required as long as CPD is maintained.</i>

Particular competence, knowledge and skills

<i>Share your views</i>	
TT.	What are the advantages and disadvantages of our approach of identifying two types of financial advice? What impact would it have on the type of advice you give and on your compliance costs? <i>Product advice is not financial advice. It should be identified as the outcome of what is essentially a sales process, rather than an advice process.</i>

UU.	<p>How should RFA's experience be recognised?</p> <p>This is not easy. What I do know is that no formal education currently available that I have seen can install the necessary skill and knowledge required. Relying on an academic achievement would be completely unreliable. A suitably qualified person can determine an adviser's skill level in 5 minutes by asking the right questions.</p>
VV.	<p>What do you think are the advantages of this approach to particular competence, knowledge, and skill?</p>
WW.	<p>What do you think are the disadvantages of this approach to particular competence, knowledge, and skill?</p>
XX.	<p>In what ways do you think this proposed standard contributes to, or detracts from, the legislative purposes (for example ensuring the quality and availability of advice, avoiding unnecessary compliance costs, and promoting innovation and flexibility)?</p>
YY.	<p>What alterations, if any, would you suggest to the baselines we have nominated: specialist strand for product capability, Level 5 for discipline capability, and relevant degree (or other degree plus Level 6) for planning capability?</p> <p>Whatever is decided, formal training must be designed by expert advisers, with subject matter determined by persons who understand what is actually involved and required in giving good advice. The current level 5 certificate is a good example of something not at all fit for purpose. Assuming the purpose is "good advice".</p>

Other comments

<i>Share your views</i>	
ZZ.	<p>Are there any other comments you would like to make to assist us in developing the Code?</p>