

Submitted via the online form to MBIE on 9 November 2018

Code of Professional Conduct for Financial Advice Services

FSC response

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Code Standard One

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	✓
Neither agree or disagree	
Disagree	
Don't Know	

Comments

We support a Code which promotes strong ethical standards whilst protecting consumers. As drafted, the commentary on treating a client fairly in Standard One aligns well with that aim. However, aspects of the Standard have potential for confusion and could be enhanced.

Amend the Standard to 'Treat clients fairly'

We recommend amending the Standard to 'Treat clients fairly'. The 'duty to give priority to client's interests' in proposed section 431J of the Financial Markets Conduct Act versus 'acting in their interests' in the code appears to introduce different standards. Although we understand that there is a technical distinction between priority to client's interests in a conflicts scenario versus acting in their interests when giving financial advice, we question whether this is a prudent and/or sufficiently obvious distinction. Further, none of the commentary under Standard One relates to 'act in their interest' and this is addressed in Standard Three through the requirement to comply with section 431J. Including it in Standard One is unnecessary duplication.

Enhancements to the commentary

- Remove the words 'the spirit and intent of' from the final bullet point. By acting in accordance with all existing regulations and legislation, individuals will already need to comply with all expectations around 'spirit and intent' within those legal obligations.
- It would be preferable to align the commentary on 'interests of clients' as the use of 'promote' causes potential confusion. We recommend amending to 'prioritise the interests of clients'.
- Some FSC members have noted that, should the phrases 'act in their interest' and 'promote the interest of clients' remain in the final Code, they would need to be qualified by 'to the extent reasonable in the circumstances' to ensure advisers are not required to go to unreasonable lengths in clients' interests. Reasonableness limitations appear in both the existing Authorised Financial Adviser Code and section 431J in similar contexts.
- Guidance on what is meant by 'fairness is not one-sided' would be helpful. Some FSC members have noted that on its own 'fairness' is too subjective for a Code Standard, and asked for 'fairness' to be defined more fully. For example, the definition could include significant matters like exploitation, but not matters of courtesy, such as timeliness and respectfulness.
- Some FSC members highlight that the word 'vulnerable' could be interpreted broadly and extend beyond the financial advice context.

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Code Standard Two

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	✓
Neither agree or disagree	
Disagree	
Don't Know	

Comments

We agree with the inclusion of a Standard that seeks to promote integrity. We consider that the commentary could go further and include accountability and trust. We therefore recommend changing the commentary to say 'A person who acts with integrity is open and honest. This includes behaving in an accountable and trustworthy way, and consistently doing the right thing.'

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Code Standard Three

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	✓
Neither agree or disagree	
Disagree	
Don't Know	

Comments

Sequence of bullet points in commentary

Given that a person would generally identify a conflict of interest before managing the conflict, we recommend swapping the order of the first and second bullet points.

Bullet Point One – 'where practicable, avoid conflicts of interest'

This Standard has provided clarification using 'where practicable' as there are some instances where it is impracticable to avoid conflicts of interests. However, expanding this point would enhance the ability to manage a wider variety of conflicts. We recommend amending this point to 'where practicable, avoid, reduce or mitigate conflicts of interests'. If this is not amended, or removed altogether, there is a risk that it may be interpreted to mean that any conflict that could be avoided would need to be avoided. That would lead to a perverse outcome because many conflicts may be mitigated by disclosure or other means.

Bullet Point Four – adequately disclose conflicts of interests to clients

In respect of the fourth bullet, we suggest that disclosure should be made in accordance with the new FMC (financial advice disclosure) Regulations and other disclosure regulations as developed. Therefore, we recommend adding 'in line with existing regulations' to the end of the sentence.

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Code Standard Four

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	✓
Neither agree or disagree	
Disagree	
Don't Know	

Comments

We fully agree with the Standard, but the use of the example is distracting and undermines the intent of the Standard and the commentary. We recommend the example is removed.

We understand that the Code Working Group expects that in some cases the nature and scope of the financial advice will be implicit. In cases where the nature and scope are implicit, the financial adviser should not be required to communicate the material risks and consequences of the nature and scope. It would be helpful if this could be confirmed in the commentary.

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Code Standard Five

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	✓
Neither agree or disagree	
Disagree	
Don't Know	

Comments

We suggest that it would help if the Standard and commentary was amended as follows:

- Addition of guidance on the phrase 'in some situations, an in-depth analysis may be required'.
- Removal of the words 'in the profession of' as these are redundant words.
- Change 'strategy underpinning' to 'overall aim'. This reduces the connotation that 'strategy' means goals and planning, which are beyond the remit of many financial advisers.
- Some FSC members recommend the addition of a statement that in some scenarios it is inappropriate to recommend a financial product or service where a customer need has not been established, whereas in other scenarios it is appropriate. For example, scenarios where there is detailed specific advice requires customer needs to be identified, whereas general advice to a group of customers does not.
- Some FSC members additionally recommend that the commentary is clarified to reflect that the Standard should not prevent advice being given to a general audience (i.e. where the advice is not addressed to, or intended for, a specific client) or prevent published advice such as broker recommendations or tip sheets, or situations where customers do not want personalised advice. All of which are required to enable customer choice.
- In the broader context of our views on examples, some FSC members explicitly request removal of the example, noting the example is distracting and undermines the intent of the Standard and the commentary.

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Code Standard Six

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	
Neither agree or disagree	
Disagree	✓
Don't Know	

Comments

We recommend Code Standard Six is removed. We consider this Standard is already appropriately regulated by current and proposed legislation, proposed regulations, or delivered via contractual rights. We are concerned that introducing this Standard could result in inconsistent obligations and/or have the effect of imposing unnecessary additional costs without a flow-on benefit to consumers. Further guidance on protecting client information may be useful, but duplication is unnecessary.

If the Code Working Group considers there are gaps in the Privacy Act then it would be better for these to be addressed through the new Privacy Bill rather than having different (and potentially inconsistent) requirements in the Code.

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Code Standard Seven

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	
Neither agree or disagree	
Disagree	✓
Don't Know	

Comments

The majority of our members recommend this Standard is removed. We agree that complaints in relation to financial advice must be dealt with appropriately, consistently across the industry and to a high standard. However, this Standard is already appropriately regulated and governed with existing and proposed regulations, legislation and processes.

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Code Standard Eight

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	✓
Neither agree or disagree	
Disagree	
Don't Know	

Comments

Some members believe that 'not do anything that would, or would be likely to, bring the financial advice industry into disrepute' is sufficiently broad and that the Standard itself should not extend to '...promote confident and informed participation by consumers in financial markets'. In the course of drafting a revised commentary, thought could be given as to whether a wider reference to the purpose provisions in the FMCA might be included, as the FMCA purposes (and additional purposes) are designed to be read in conjunction with each other.

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Code Standard Nine

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	✓
Neither agree or disagree	
Disagree	
Don't Know	

Comments

We are supportive of the flexibility in meeting competency requirements provided to nominated representatives. This will ensure that different business models, systems and expertise are catered for.

However, we think the Standard could be clearer that:

- certain designations (including NZFMA accredited individuals or certified financial planners) could also be treated as meeting the requirements of certain qualification outcomes; and
- in relation to nominated representatives, the Standard is met where the combined capabilities of the nominated representative and financial advice provider equivalent to those of an individual who alone has achieved the general qualification outcomes.

We therefore recommend that the paragraph for nominated representatives refers to 'combined capabilities' and that the commentary refers to 'qualifications or designations' throughout.

We also suggest that, given the bullet points for individuals, entities and nominated representatives are indicative, the second paragraph of the Standard be amended to 'a person may demonstrate the standard in many ways, including but not limited to'.

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Code Standard Ten

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	✓
Neither agree or disagree	
Disagree	
Don't Know	

Comments

We are supportive of the flexibility in keeping competence knowledge and skill up-to-date. We also acknowledge the Code Working Group's aim to keep away from process, leaving the details to professional associations and the Financial Markets Authority.

We recommend including a specific requirement for individuals to keep up-to-date with products and product-types. One way to address this is to add a second bullet point that reads: 'awareness and understanding of the products and product-types they provide financial advice on'.

For individual advisers, and for consistency with other professions, some FSC members consider that a minimum number of CPD hours should be prescribed. This could be set at an absolute residual level that any individual who provides financial advice would need. This could be 7-10 hours each year with requirements to include not only the 'competence, knowledge, and skill to provide the financial advice they give' and 'up-to-date understanding of the regulatory framework for financial advice' but also understanding of other generally applicable financial services delivery legislation such as the Fair Trading Act, Privacy Act and Consumer Guarantees Act.

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Code Standard Eleven

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	✓
Neither agree or disagree	
Disagree	
Don't Know	

Comments

We agree with the Standard, but are concerned about the transitioning of former Authorised Financial Advisers who have not completed the investment strand and are therefore not sufficiently qualified to provide investment plans. As written the commentary may inadvertently elevate all current Authorised Financial Advisers to an investment plan level.

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Code Standard Twelve

Overall, do you agree or disagree with this standard and proposed commentary?

Agree	✓
Neither agree or disagree	
Disagree	
Don't Know	

Comments

We understand that Code Standard 12 is intended to relate to all types of financial advice excluding investment planning. Under the heading 'Individuals' it states 'in the case of the investment strand ...'. This language should be deleted as investment planning is covered in Code Standard 11.

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Is there anything missing from the draft Code

Yes	✓
No	
Unsure	

If yes, what is missing?

Acknowledging that they may be addressed through other regulation, there are two areas we believe could add value to the code:

1. Inclusion of commentary on 'independence'
The current Authorised Financial Adviser (**AFA**) Code of Conduct Standard Three prevents an AFA from stating or implying that they are 'independent' if a reasonable person would not consider that this is the case. Our members feel this is an important inclusion and that it was an enhancement to the current disclosure regime. We recommend including the same in the new Code, perhaps in Code Standard Three commentary. We acknowledge that this issue may be covered in the disclosure requirements.
2. Servicing
To ensure good consumer outcomes, it is important that as an industry we understand and agree expectations around proactive, and regular, servicing of customers, where servicing is relevant. We note that there is mention in the commentary for Code Standard Four of 'the nature of ongoing advice support', some FSC members believe there is room in the Code for more explicit commentary around servicing expectations. The explicit commentary could address both current products and closed-to-new business, products. Within the FSC, our members are working to agree what good servicing looks like and we welcome a conversation on this topic.

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Do you have any feedback on the examples, or suggestions on other examples that should be included in the draft Code?

There are differing views among FSC members regarding whether the inclusion of examples within the code is valuable or problematic. Providing examples of 'best practice' in addition to the minimum standards for compliance is challenging, not only to draft but also to cover adequately scenarios and their nuances.

Is there anything else you want to say?

The FSC strongly supports the Code's focus on conduct rather than compliance. To reinforce this focus, we recommend that any introduction to the Code should explicitly state that the intent of the Code is to focus on conduct, with the intent of changing behaviours and attitudes.

We also strongly support the Code Working Group's approach in providing high-level principles without being prescriptive about process. We particularly support the move to write in plain language and avoid complicated technical jargon.

The draft Financial Advice Code aligns well with the FSC's own recently released Code of Conduct which is good, as it is important that suppliers and advisers are on the same page when it comes to conduct and culture. The financial services sector in New Zealand is going through a necessary step change and the Financial Advice Code is set to play a vital part in this transformation.

On a drafting note, we understand the desire to use clear signposts and provide links to existing regulations and legislation. However, we feel that the Code should sit as a stand-alone document, relying on and existing alongside other documents such as the Financial Markets Conduct Act and supporting regulations. Where reference is made to such other documents, we feel it is clearer to either repeat the exact wording from the source, or exclude the wording completely.

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