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# Accounting Professional & Ethical Standards Board Limited

## Invitation to comment

Discussion Paper:

Review of Miscellaneous Professional Statement APS 12:  
Statement of Financial Advisory Service Standards.

APESB Accounting  
Professional and  
Ethical Standards Board

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# Invitation to comment

The Accounting Professional and Ethical Standards Board (“APESB”) is conducting a review of Miscellaneous Professional Statement APS 12: Statement of Financial Advisory Service Standards (“APS 12”), which was issued in 2005.

The primary objective of the review is to update APS 12 and produce a new professional standard that is harmonious with APES 110: *Code of Ethics for Professional Accountants* (“APES 110”), which was published in June 2006. The proposed new standard is to be called APES 335 “Financial Advisory Services” (“APES 335”).

The APESB has issued this Discussion Paper to inform its review and to obtain the views of stakeholders on certain key issues related to the professional conduct of accounting body members and their quality of service performance, when providing financial advisory services<sup>1</sup>.

In summary, the Discussion Paper considers:

- The application and scope of proposed standard APES 335;
- The overarching principles that apply to the professional conduct of accounting body members when undertaking financial advisory services;
- Whether, and in what circumstances, members providing financial advisory services, should be required to uphold the principle of independence, as defined in APES 110;
- Any potential threats to a member’s ability to conform with the requirements of APES 110 in the provision of financial and/or investment advisory services and if so, appropriate safeguards to mitigate these threats;
- What requirements members should meet if they hold/receive client monies in the provision of financial advisory services;
- What form of quality assurance should be implemented to ensure member compliance with APES 335 and APES 320 *Quality Control for Firms* (“APES 320”); and
- Whether or not it is possible to provide the capacity to undertake meaningful quality reviews against the standard.

All parties who consider that they have an interest in the development of ethical and professional standards for accounting body members in this area, including representative users and user groups, are encouraged to make submissions. These submissions will assist the APESB in identifying the key areas for consideration in the development of APES 335.

<sup>1</sup> Please note that for the purposes of this paper, a reference to financial advisory services includes reference to investment advisory services.

All submissions and comments will be regarded as being on the public record.  
Submissions and comments should be addressed to the APESB as follows:

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Respondents may forward submissions to us by mail, email or facsimile transmission by close of business on 31 October 2008. Wherever possible, we would appreciate submissions in electronic form.

# Introduction

This Discussion Paper is intended to provide a constructive basis for cogent and effective comment and feedback from members and other stakeholders on issues surrounding the professional conduct of accounting body members in the provision of financial advisory services.

The Discussion Paper does not necessarily represent the current or future view of the APESB on any one issue.

Section 1 of this Discussion Paper contains background information related to the project. Section 2 outlines the literature and media reviews undertaken so as to inform this document's content. This is followed in Section 3 by a detailed discussion of the key issues for comment and review. Section 4 then summarises the questions that stakeholders are asked to specifically comment on in their submissions. Section 5 contains Appendices containing other relevant material and information.

## 1.1 The APESB and its Purpose

The APESB was established as an independent body in February 2006, as an initiative of CPA Australia ("CPA") and the Institute of Chartered Accountants in Australia ("ICAA"). CPA, the ICAA and the National Institute of Accountants ("NIA") are all members of the APESB, as defined in its Constitution.

The primary objective of the APESB is the development and issuing of appropriate professional and ethical standards, which apply to the membership of the three accounting professional bodies. A secondary objective of the APESB is to provide the opportunity or forum for the discussion and consideration of issues relating to professional standards for accountants.

It is the role of the APESB to identify practices and activities where specific application of the values and principles espoused in APES 110 should be established. These practices and activities are then codified in APESB standards. Where necessary, the APESB will also elaborate on the application of APES 110 or an existing APESB standard by way of Guidance Notes. A diagram of the current APESB standard setting model is outlined in Appendix 5.1.

The APESB is supported by a small team of technical and administrative staff known as the secretariat. The primary role of the secretariat is to oversee the drafting and development of relevant, up to date professional and ethical standards for members of the accounting profession and to provide administrative support to the Board.

A number of standard task forces may be convened by the secretariat on an ad hoc basis. Each of these task forces is charged with overseeing the development and review of practice standards in accordance with their subject area and the APESB work plan. In this particular instance, a task force has been convened to oversee the replacement of APS 12 with proposed standard APES 335.

The APESB follows a rigorous process for the development of professional and ethical standards. Based extensively on well documented processes adopted by international and national accounting standard setting bodies, the *Due Process and Working Procedures for the Development and Review of APESB Pronouncements* formalises the Board's approach to developing standards. This document will be used as a foundation document in the development of proposed standard APES 335.

## 1.2 Background to the Discussion Paper

Accountants who are members of CPA, the ICAA, and the NIA must comply with the ethical and professional standards approved by APESB. APES 110: *Code of Ethics for Professional Accountants*, other APESB professional standards and guidance notes<sup>2</sup> are binding on all members of these accounting professional bodies. Broadly, these standards aim to regulate members' ethical and professional conduct when they perform services to clients as well as employers.

As part of its ongoing review and relaunch of professional and ethical standards, the Board of Directors of APESB recently agreed to replace the existing APS 12 with proposed standard APES 335. The primary objective is to update APS 12 and produce a standard for the provision of financial advisory services that is harmonious with APES 110 and the new drafting conventions of the APESB.

As discussed in more detail in Section 3.2 of this Discussion Paper, APES 110 provides a conceptual framework to members for applying overarching and guiding professional principles. It gives guidance to identify threats to compliance with these principles; to evaluate the significance of those threats and, if such threats are other than clearly insignificant, to apply safeguards to eliminate or reduce them to an acceptable level, such that compliance with fundamental principles is not compromised.

Thus the professional decision making of members is informed by the values and principles articulated in APES 110. The objective of APES 335 will be to apply these fundamental values and principles to the provision of financial and/or investment advisory services by accounting body members and to further promote competent, professional and ethical practice in this area. Whilst APES 335 will primarily deal with professional requirements, it may also deal with the ethical requirements that are to be applied in the specific circumstances covered by the standard. These ethical requirements will supplement those in APES 110.

<sup>2</sup> APES110 *Code of Ethics for Professional Accountants*, professional and other guidance standards applicable to members are obtainable through professional bodies in hard copy or electronic forms.

APES 335 will acknowledge the legislative framework that applies to the provision of financial product advice and financial services, as prescribed in the Corporations Act 2001 (Commonwealth) (“the Act”). It is not intended to replace or be inconsistent with the current legal framework.

However, APES 335 will recognise the high expectations the public has of professional accountants as trusted business professionals. It will seek to uphold that level of public confidence by ensuring that the ethical conduct and professional performance expected of accounting body members in the provision of financial advisory services is codified and well understood.

### 1.3 The Purpose, Aims and Objectives of the Review

The purpose of this project is to replace APS 12 with APES 335 as part of the ongoing review and relaunch of professional and ethical standards by the Board of Directors of the APESB.

The objectives are to:

- (a) produce a standard that is harmonious with APES 110: *Code of Ethics of Professional Accountants*;
- (b) issue a clearer standard that is better able to be understood by members;
- (c) improve the likelihood of the standard being accepted and adopted in practice;
- (d) consider whether or not it is possible to provide the capacity to undertake meaningful, quality reviews against the standard;
- (e) set a standard for professional best practice for members in the provision of quality and ethical financial advisory services to clients; and
- (f) improve the practical application of the standard.

The aim of this Discussion Paper therefore is to generate effective and cogent feedback from members and external stakeholders to certain key questions concerning the professional conduct and quality of service performance of members’ when providing financial and/or investment advisory services to members of the public. These views will inform the development of APES 335.

### 1.4 A summary of the key issues for comment

The key discussion areas for comment in Section 3 of the Discussion paper include:

- (a) The application and scope of proposed standard APES 335;
- (b) The overarching principles that apply to the professional conduct of accounting body members when undertaking financial advisory services;
- (c) Whether, and in what circumstances, members providing financial advisory services, should be required to uphold the principle of independence, as defined in APES 110;
- (d) Any potential threats to a member’s ability to conform with the requirements of APES 110 in the provision of financial advisory services and if so, appropriate safeguards to mitigate these threats;

- (e) What requirements members should meet if they hold/receive client monies in the provision of financial advisory services;
- (f) What form of quality assurance should be implemented to ensure member compliance with APES 335 and APES 320; and
- (g) Whether or not it is possible to provide the capacity to undertake meaningful, quality reviews against the standard.

## 1.5 Drafting of proposed standard APES 335

The proposed standard APES 335 will be drafted in accordance with the APESB *Due Process and Working Procedures Guide for the Development and Review of APESB Pronouncements*, published in November 2007. That document is available online from the APESB website at [www.apesb.org.au](http://www.apesb.org.au).

Relevant professional and ethical standards issued by International Federation of Accountants (“IFAC”) and the International Ethics Standards Board for Accountants (“IESBA”) will also be used, where applicable, as the base pronouncement from which to develop this standard.

APES 335 will be principles based, rather than rules based, so as to encourage and facilitate ethical behaviour and the exercise of professional judgement in the accounting profession.

# 2

## Literature Review

To inform the discussion of the key issues for comment within this Discussion Paper, an extensive literature and media review was conducted.

The literature review examined relevant national and international professional standards and guidance. It also included an examination of relevant ASIC, industry, consumer and government research papers and reports on the financial services industry, since the Financial Services Reform Act became operational on 11 March 2003. A review of similar documents related to current accounting issues was also undertaken.

The literature review has assisted in identifying the current and future professional issues that may face accountants in the provision of financial advice to clients, and in identifying the practical implementation issues that may be associated with APES 335.

A media search of relevant articles from mainstream and industry publications was also conducted to identify issues that may impact on financial advisory services provided by accountants in the future.

The review of current media included matters pertaining to accountants and superannuation advice and compliance with the exemption in Regulation 7.1.29A of the Act.

A reference list of the documents and media references reviewed is outlined in Appendix 5.2.

Relevant content arising from the literature and media reviews is discussed more fully under each of the key discussion areas for comment, within Section 3 of the Discussion Paper.

## Key Discussion Areas

### 3.1 Application and scope of APES 335

This section will discuss issues in relation to the scope and application of APES 335. In particular it considers which members should be caught by APES 335, the type of financial advice that should be covered by its scope and the definitions of financial advice and financial advisory services to be included.

APS 12 applied to accounting body members in public practice when they provided financial advice to clients or employers.<sup>3</sup> Members in public practice outside Australia were also expected to follow the provisions of APS 12, to the extent that those provisions were not inconsistent with their local regulations and laws. All other members (including those outside of Australia) were required to follow the provisions of APS 12, to the extent to which they were not prevented from doing so due to the specific requirements of an employer, AFS licensee or local regulations and laws.

The application of APES 335 is intended to be wide. It is proposed that it extend to all arrangements by which members in public practice in Australia undertake financial advisory engagements in the course of their business/practice. Compliance with the proposed standard will be mandatory for those members.

Members in public practice and practising outside Australia are expected to follow the provisions to the extent to which they are not prevented from doing so by specific requirements of local regulations and/or laws.

In relation to all other members, it is proposed that APES 335 should apply to all members (including those outside of Australia) to the extent to which they were not prevented from doing so due to the specific requirements of an employer, AFS licensee or local regulations and laws, regardless of the form of entity through which the member provides the advice and regardless of the type of advice given.

Given other current APESB practice standards and APES 110<sup>4</sup> cover all members, including members in business; the APESB need to assess the application of APES 335 to a certain category of members, unless there are reasons or implementation issues that would apply uniquely to the implementation of APES 335.

<sup>3</sup> CPA Australia and the Institute of Chartered Accountants in Australia, 2005, *APS12 Statement of Financial Advisory Service Standards: Miscellaneous Professional Statements*, October, CPA Australia, Melbourne, at clause 1.2.

<sup>4</sup> See clause 100.1 of APES 110.

In terms of scope, APS 12 defined “financial advice” as meaning any financial advisory service carried out by the member, including but not limited to<sup>5</sup>:

- providing advice on financial products such as shares, managed funds, master funds, wrap accounts, and life insurance carried out pursuant to an Australian Financial Services Licence;
- the taxation aspects attaching to such advice;
- dealing in financial products; and
- the provision of financial advice not subject to AFS licensing, such as non product related advice on financial strategies or structures.

Financial advisory services were defined as the provision of professional services by the member in the course of assisting clients to manage their financial affairs specifically related to wealth and retirement planning, personal risk management and allied advice.

It is proposed that APES 335 maintain a similar definition of financial advisory services, whether or not those services are provided as an AFS Licensee or a representative in the provision of financial services under the Corporations Act, or in the giving financial advice which is not subject to licensing requirements. It is intended only to extend the definition to include reference to “investment advisory services” being the implementation of financial planning advice and strategy.

It is proposed that the definition of financial advice however be extended to include members providing advice in the areas of mortgage broking, finance broking or procurement of loans on behalf of clients, margin lending and gearing facilities arranged as a consequence of other financial advisory services, whether or not contained within the definition of financial product or services within the Corporations Act.

Recent public debate on the regulation of margin lending<sup>6</sup> and current failures in the area<sup>7</sup> and the imminent regulation of mortgage broking<sup>8</sup> have led to a leadership position being taken on this point. Fundamental to this position is the overarching principle to protect the public interest.

It is proposed that taxation advice given by a member on tax matters related only to the financial advice being provided to the client, continue to be included within the scope of APES 335. Where the member is asked merely to provide tax advice to a client and is not undertaking any other financial advisory services, then that member will not be deemed to be providing advice as a financial advisor.<sup>9</sup> However, a member providing taxation services would need to comply with APES 220 *Taxation Services*.

<sup>5</sup> See clause 3 of APS 12.

<sup>6</sup> Cooper, J. 2008, “Clients finish last for too many planners”, the Australian Financial Review, 14 May, p69

<sup>7</sup> D’Aloisio, T., 2008, “Securities markets, participants and ASIC”, a speech given by the ASIC chairman to the SDIA conference, 22 May.

<sup>8</sup> Australian Government, Treasury, 2008, *Green Paper: Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services & Credit Regulation*, Australian Government, Canberra, pp 1–48, downloaded at [www.treasury.gov.au/greenpaperonfinancialservicesandcreditreform\(consultations\)](http://www.treasury.gov.au/greenpaperonfinancialservicesandcreditreform(consultations)), Sherry, Nick, the Hon Senator, 2008, “The Government’s priorities in superannuation and financial services”, a speech to the Institute of Actuaries’ Financial Services Forum, 19 May, Melbourne, pp1–7.

<sup>9</sup> Accounting Professional and Ethical Standards Board Limited, 2007, *APES 220 Taxation Services*, October, Accounting Professional and Ethical Standards Board Limited, Melbourne, pp. 1–7.

The APESB recognises that Regulations 7.1.29A of the Corporations Act contains an exemption in respect of recognised accountants who provide recommendations in relation to self-managed superannuation funds. This advice includes advice in relation to the establishment and structure of a self-managed superannuation fund and to ensure the person complies with the Superannuation Industry (Supervision) Act 1993 (“Cth.”), (“the SIS Act”). It is envisaged that this type of advice is covered by APES 335.

APESB 335 is not intended to detract from any responsibilities which may be imposed by law. Members must also be familiar with and comply with any duties, obligations and responsibilities that apply under common law, the Corporations Act and any other relevant legislation.

Further, in applying the requirements of APES 335, members should be guided by both the words and the spirit of the standard.

#### **Discussion Questions – Application and Scope**

1. Should APES 335 cover all members who provide financial advice to members of the public or should it be limited in its application to members in public practice in Australia?
2. If you believe the latter statement is correct, please give your reasons why you believe APES 335 should be so limited. Are there any implementation issues that you believe the APESB should consider that are unique to APES 335 and which require the scope of the proposed standard to be limited to a specific category of members, such as members in public practice?
3. Do you consider that the current definition of financial advice within APS 12 should be enhanced to include the provision of advice and services related matters such as the procurement of loans, margin lending and other gearing strategies?
4. Will the proposed enhancement of the scope and application of APES 335 assist members to meet the overarching principle of the public interest and the fiduciary nature of the accounting relationship?
5. Do you also consider that the application and scope outlined above is appropriate in the context of meeting public expectations in the provision of financial advisory services by accounting body members?
6. If not, please provide the reasons supporting your response and explain an alternative application and scope that you consider to be appropriate.

## 3.2 Overarching Guiding Principles for the provision of financial and investment advice

### (a) The fundamental principles

Recent research indicate that ethical practice is highly valued by Australian Accounting firms to build reputation and brand<sup>10</sup>.

A distinguishing mark of the accountancy profession in the pursuit of these objectives is its acceptance of the responsibility to act in the public interest<sup>11</sup>. A member's responsibility is therefore not exclusively to satisfy the needs of an individual client or employer.

A further fundamental principle is the fiduciary nature of the accounting relationship and the obligation of the member to act in the best interests of their client.<sup>12</sup> This obligation lies at the heart of the fiduciary role that members assume when they undertake financial advisory engagements for clients, in their capacity as professional accountants.<sup>13</sup>

Given this fiduciary role, clients are entitled to expect that members will avoid any conflict of interest that poses or may pose a significant threat to the members' public conduct and performance in providing financial advice, or that may create or creates a negative perception of their ability to provide financial advice on that basis. This obligation is enshrined for members in public practice in Section 220 of APES 110 and applies to all engagements.

The APESB notes the announcement of ASIC<sup>14</sup> that a taskforce which will review whether and in what circumstances a fiduciary relationship exists between a financial adviser and a client but believes that the fiduciary obligations outlined in APES 110 for professional accountants apply to members irrespective of whether the services provided are financial advisory services or other services. There is also significant evidence both nationally and internationally that a fiduciary relationship should be recognised as being appropriate for financial service relationships.<sup>15</sup> Accordingly the APESB proposes that the fiduciary nature of the relationship between an accountant and client in the provision of financial advisory services be recognised.

10 Banarra Trust, 2007, *Evaluation of How Professional and Business Ethics are applied in practice by accounting firms: A Report to the Financial Reporting Council*, September, Banarra pp. 1–50

11 See paragraph 100.1 of APES 110.

12 See The Institute of Chartered Accountants in Australia, 2006, *Accountants and Ethics: 1st Edition*, September, the Institute of Chartered Accountants in Australia, Sydney.

13 The Institute of Chartered Accountants in Australia, 2006, "Values, codes of ethics and the law," *A Discussion Paper Prepared by Professor Jack Flanagan of the University of Notre Dame*, Australia, Sydney, June, The Institute of Chartered Accountants in Australia, Sydney, pp. 1–33. The Institute of Chartered Accountants in Australia, 2007, *Reinventing Financial Planning*, a paper authored by Robert M. Brown, March, the Institute of Chartered Accountants in Australia, Sydney, pp.1–17.

14 D'Aloisio, T., 2007, "Regulating financial advice – current opportunities and challenges", a speech given by the ASIC Chairman to the FPA National Conference, 28 November, Sydney at pp 16–17.

15 See Financial Planning Standards Board, 2007, *Code of Ethics for CFP(tm) Certification*, downloaded at [www.fpsb.org/CMS/index.php?option=com\\_content&task=view&id=54&Itemid](http://www.fpsb.org/CMS/index.php?option=com_content&task=view&id=54&Itemid), Financial Planning Standards Board, 2006, *Regulatory Environment Comparison Table*, May, Financial Planning Standards Board, Denver, U.S.A., pp1–6, and Certified Financial Planner(tm) Board of Standards, 2007, *Standards of Professional Conduct*, Rev. 10/07, Certified Financial Planner™ Board of Standards Inc, Washington, pp 1–2.

APES 110 is structured around a number of fundamental principles that are intended to underpin the professional conduct of members and their performance of professional services. The fundamental principles are:

- (i) integrity;
- (ii) objectivity;
- (iii) professional competence and due care;
- (iv) confidentiality;
- (v) professional behaviour.

Clearly, adherence to these key principles may mean that in some circumstances the members of professional accounting bodies who act as financial advisers are required to meet higher standards than required by laws and regulation.

The APESB believes that these key principles do not have to be expressly reiterated in APES 335, unless it is to clarify or articulate, both to the public and for members and their clients, any specific performance standard that members are expected to meet in relation to the provision of financial advisory services.

However, APES 110 has slightly altered the definitions of each of these principles to that defined in APS 12, as will be discussed more fully in this section. Accordingly, the APESB believes that the application of these principles in the current financial advisory services market may require some review.

#### **(b) In the public interest**

The public interest is defined in APES 110<sup>16</sup> as the collective wellbeing of the community of people and institutions that the members serve. The accountancy professions' public consists of clients, credit providers, governments, employers, employees, investors, the business and financial community, and others who rely on the objectivity and integrity of members to assist in maintaining the orderly function of commerce.

It is therefore incumbent on members in the provision of financial advice, to at all times safeguard the interest of their client and employers provided they do not conflict with the duties and loyalties owed to the public interest.<sup>17</sup>

In light of this principle, the APESB accepts that members have a responsibility to increase community confidence in financial advice and financial markets. Members also play an important role in assisting key stakeholders, who rely on sound financial advice and effective financial management in a variety of business, financial and taxation matters.

The principle also includes an obligation to ensure confident and informed decision making by clients and the provision of expert objective advice and assistance in the accumulation and protection of financial assets, so as to ensure provision for retirement in particular.

<sup>16</sup> See paragraph 100.1 of APES 110

<sup>17</sup> See paragraph 100.1 of APES 110, clause 6.2 of APS 12 and The Institute of Chartered Accountants in Australia, 2007, *Financial Planning Forum*, November, The Institute of Chartered Accountants in Australia, Sydney.

The attitude and behaviour of members in providing such services also has an impact on the economic well being of the community in general. The APESB therefore believes that stakeholders must be satisfied that members are upholding the public interest at all times and that members are acting honestly and in good faith.<sup>18</sup>

The APESB is interested in your views as to whether, in the context of financial advice, you believe the public interest principle has specific connotations for accounting body members or raises specific and unique obligations not currently articulated in APES 110. If so, the APESB seeks your view on how this should be articulated in APES 335.

### **(c) Integrity**

APS 12<sup>19</sup> outlined that members were expected to be straightforward, honest and sincere in their approach to professional work, which included a duty to be responsive and accountable, committed to acting responsibly and reliably with respect to all professional relationships.

APES 110 has only slightly altered the wording of this obligation.

The APESB seeks comment on whether the integrity principle as outlined in APES 110<sup>20</sup>, is sufficient to ensure that members comply with this principle when providing financial advisory services.

### **(d) Objectivity**

The principle of objectivity outlined in section 120 of APES 110 imposes an obligation on all members not to compromise their professional or business judgment because of bias, conflict of interest or the undue influence of others. Relationships that bias or unduly influenced the professional judgment of the member are to be avoided.

Members in public practice are additionally bound by section 280, which imposes an obligation to maintain objectivity across all services, in particular as it relates to interests in, or relationships with, a client or Directors, officers or employees.

This differs slightly from the wording used in clause 8 of APS 12 where the focus included the maintaining of an impartial attitude and the upholding of the principles of professional independence.<sup>21</sup> APS 12 reiterated the professional aspect of independence as distinct from any requirements imposed by the law.

Independence is defined in APES 110<sup>22</sup> as:

- (a) independence of mind: the state of mind that permits the provision of an opinion without being significantly affected by influences that compromise professional judgment, allowing an individual to act with integrity and exercise objectivity and professional scepticism.
- (b) independence in appearance: the avoidance of facts and circumstances that are so significant that a reasonable and informed third party, having knowledge of all relevant information, including safeguards applied, would reasonably conclude a member's integrity, objectivity or professional scepticism had been compromised.

<sup>18</sup> See clause 6 of APS 12

<sup>19</sup> See clause 7.1 of APS 12

<sup>20</sup> See section 110 and 110.2 of APES 110

<sup>21</sup> See clauses 8.1 to 8.4 of APS 12

<sup>22</sup> See the definition of independence on page 86 of APES 110

In particular, APS 12 focussed on member's providing financial advisory services recognising the potential threats created by personal and business relationships, the acceptance of commission or other benefits and financial involvements by reason of their nature or degree which might threaten their objectivity. It imposed a positive obligation on the member not to be adversely influenced by third party remuneration in the provision of advice to their client.

The APESB is interested in stakeholder comment on whether and in what circumstances members providing financial advisory services should be required to uphold the principle of independence, as defined in APES 110. The issues relevant to this discussion will be articulated in more detail in Section 3.3.

### **(e) Professional Competence and Care**

The obligation of professional competence and due care in Section 130 of APES 110 requires members to maintain professional knowledge and skill at the level required to ensure that clients or employers receive competent professional service and to act diligently in accordance with applicable technical and professional standards when providing their services.

Professional services in this context means services requiring accountancy or related skills performed by a professional accountant and includes financial management services.<sup>23</sup>

Professional competence and due care has numerous elements:

- attainment of professional competence;
- maintenance of professional competence, incorporating an understanding of continuing professional developments;
- diligence<sup>24</sup> being the responsibility to act in accordance with the requirement of an assignment, carefully, thoroughly and on a timely basis; and
- where appropriate, making clients, employers or other users of these services aware of the limitations inherent in the services so as to avoid a misinterpretation of an expression of opinion as an assertion of fact.<sup>25</sup>

These elements are similar to the obligations found in APS 12<sup>26</sup>. It also contained a specific obligation in this context to communicate with the client in a way that builds a candid and trusting relationship, that assists the client to identify and understand his or her needs and objectives and that ensures clear, concise and effective explanations of the reasoning which leads the advice and the appropriate recommendation to their client.

<sup>23</sup> See the definition of professional services on page 87 of APES 110

<sup>24</sup> See section 130.4 of APES 110

<sup>25</sup> See section 130.6 of APES 110

<sup>26</sup> See clause 11 – technical and professional standards of APS 12

The APESB believes that these obligations have resonance in the context of the current public debate on the provision of superannuation advice to members of the public and advice on self managed superannuation funds to trustees in general.<sup>27</sup>

The APESB is not inviting comment for the purposes of this paper on the policy debate surrounding the exemption in Regulation 7.1.29A of the Act.<sup>28</sup> However, the APESB is of the view that the public debate on superannuation advice; the recent marketing of sophisticated financial products to self managed super fund trustees; and the upcoming review of the self managed super fund sector by the Federal Government<sup>29</sup>, accords a timely opportunity for the APESB to seek comment from stakeholders about the professional obligations of accountants in the provision of this type of advice.

In addition, recent evidence suggests that professional advice on the establishment of self managed super funds; trustee obligations and the fees and costs associated with such funds, is inadequate to assist clients to make informed decisions on whether or not to establish such a fund.<sup>30</sup> The APESB is aware of the views of the professional accounting bodies<sup>31</sup> that there is no evidence that accountants are acting contrary to ethical standards and professionalism in assisting their clients to establish a self managed super fund. However, the APESB seeks comment on whether, in relation to the principle of professional competence and care in particular, there are specific professional standards the APESB should consider adopting in APES 335; for members who specialise in superannuation advice.

#### **(f) Confidentiality**

The principle of confidentiality outlined in Section 140 of APES 110<sup>32</sup> imposes obligations on members to:

- refrain from disclosing outside the firm confidential information acquired as a result of professional and business relationships without the proper or specific authority of the client or employer or unless there is a legal duty to disclose; and
- using confidential information acquired as a result of professional and business relationships to their personal advantage or the advantage of third parties;
- members are also expected to maintain confidentiality in a social environment.

27 See Appendix 5.2 for numerous media and literature references to the current public debate on the provision of self managed superannuation advice and superannuation advice in general, the exemption in Regulation 7.1.29A and current government reviews of superannuation advice. In particular see Australian Government, 2008, "Simple advice on choices within an existing superannuation account", *Financial Services Working Group Consultation Paper*, May, Canberra., Sherry, Nick, the Hon Senator, 2008, "Key note address to SPAA Conference," *a Speech Given to the SPAA Conference*, 12 March, Brisbane, pp. 1–7. Financial Planning Association of Australia Limited, 2008, "FPA calls for end to SMSF exemptions for accountants," *Media Release*, 5 May, Financial Planning Association of Australia Limited, Sydney. Hoyle, S., 2008, "One law to rule them all," *Professional Planner – General News: Media Monitors*, 13 June, p. 28, reference no 00037536002., the ATO's reviews of self managed superannuation trusts and trustee obligations and ASIC's work in the area including it's shadow shopping reports.

28 Parliamentary Joint Committee on Corporations and Financial Services, 2007, *Inquiry into the Structure and the Operation of the Superannuation Industry: A Report*, 7 August, Australian Government, Canberra, pp. 1 to 198. Financial Planning Association of Australia Limited, 2008, "FPA welcomes government review and consultation of SMSF's", *Media Release*, 12 March, Financial Planning Association of Australia Limited, Sydney.

29 Sherry, Nick, the Hon Senator, 2008, "Key note address to SPAA Conference," *a Speech Given to the SPAA Conference*, 12 March, Brisbane, op cit.

30 See the Joint Committee on Corporations and Financial Services, 2007, *Inquiry into the Structure and the Operation of the Superannuation Industry: A Report*, op cit

31 The Institute of Chartered Accountants in Australia, 2008, "Accounting Profession refutes claims in today's Australian Financial Review", 13 February, *Media Release*, downloaded at [www.charteredaccountants.com.au/index.cfm?su=/news\\_releases\\_2008/february.](http://www.charteredaccountants.com.au/index.cfm?su=/news_releases_2008/february.), responding to a front page article in the Australian Financial review of 13 February 2008 "Super Advises Under Fire over Changes".

32 See section 140 of APES 110

When providing financial advisory services, the Australian Financial Services Licensee whom the member represents was not deemed to be a third party in APS 12<sup>33</sup>.

The APESB is considering merely reiterating the requirement to comply with these obligations in APES 335. However, it seeks comments on whether it should include additional references specific to a financial services context<sup>34</sup> and if so, what those references should be.

### **(g) Professional Behaviour**

The principle of professional behaviour in Section 150 of APES 110 imposes an obligation on members to comply with relevant laws and regulations and avoid any action or omission that may bring discredit to the profession.

Further, in marketing and promoting of themselves in their work, members are not entitled to bring the profession into disrepute. Members are expected to be honest and truthful and should not make exaggerated claims about the services they are able to offer; the qualification they possess or experience they have gained; or make disparaging references or unsubstantiated comparisons to the work of others.

The APESB seeks comment on whether there are specific issues that should be identified in APES 335 relating to the practical application of this principle in the provision of financial advisory services, such as the right of clients to choose their own financial adviser and the transfer of client files between members; and the nature and negotiation of relevant terms of engagement between the member and the client.

#### **Discussions Questions – Application of APES 110 Principles**

7. Do you agree that the ethical principles outlined in APES 110 establish an appropriate basis for professional performance by members engaged in provision of financial advisory services?
8. Are there specific issues that arise in a financial services context that are important to identify in APES 335 and why?
9. Do you think the fiduciary principle should apply accountants in the provision of financial advisory services? If not, why not?
10. In the context of financial advice, do you believe the public interest principle has specific connotations for accounting body members or, raises specific and unique obligations not currently articulated in APES 110? If so, how this should be articulated in APES 335?
11. Are there any particular threats to compliance with the principles for accountants in a multi disciplinary practice?
12. In relation to the principle of professional competence and care, are there any specific professional standards the APESB should consider adopting in APES 335 in relation to superannuation advice?

<sup>33</sup> See clause 10.2 of APS 12.

<sup>34</sup> This would replicate the standard in APES 220 for taxation services.

### 3.3 Independence and the impact of Current Remuneration Models

The APESB believes that independence is an outcome of applying fundamental principles, rather than a fundamental principle in itself.<sup>35</sup> It can be argued that in the context of financial advisory services, independence is therefore linked as an outcome to the fundamental principles of objectivity, integrity and professional behaviour in particular and the overarching principle of acting in the public interest. There is also quite clearly a link to the fiduciary relationship between a professional accountant and their client and the obligation to place a client's interests before those of the adviser<sup>36</sup>.

There has been much debate and discussion about how independence relates to the role of auditors and in particular the dual activity of assurance and non assurance services: the issue being whether there are other types of professional work that accounting firms can do that are compatible with their role as an auditor.<sup>37</sup>

The APESB now seeks comment from stakeholders about how the concept of independence, as defined in APES 110, applies to financial advisory services and if particular threats to independence arise from current remuneration structures found in the financial services industry.

#### (a) A summary of current remuneration models

There are numerous remuneration models that have been adopted by financial planning and accounting firms in Australia. These current models are well known and will not be reiterated in detail within this paper.

In summary however, at one end of the spectrum there is full fee for service, where clients pay for a service that is calculated on the basis of an hourly rate, a task based scale of fees, an annual restrainer, a negotiated fee or a combination there of. This form of fee is unrelated to the sale of a product or funds under management. Clients receive a full rebate of any commissions flowing to the Licensee from product manufacturers.

At the other end of the spectrum advisers may be remunerated solely by commissions paid by product providers following a purchase of a product recommended by the adviser.<sup>38</sup> A commission is paid upfront and is usually followed by a trailing commission, which is paid for as long as the client holds the investment. The commission model is usually associated with the cost of the financial advice being bundled up with other costs to form a single percentage cost for the client. In between these there are complex combinations of commission rebates, percentage 'fees', trailing commissions, incentives, hourly rates and retainers.

35 Accounting Professional and Ethical Standards Board Limited, 2007, *Comments on the proposed sections 290 and 291: Independence Part 2 of the Code of Ethics for Professional Accountants*, October, Accounting Professional and Ethical Standards Board Limited, Melbourne, pp.1–6.

36 The Institute of Chartered Accountants in Australia, 2007, *Reinventing Financial Planning*, a paper authored by Robert M. Brown, op cit. The Institute of Chartered Accountants in Australia, 2007, *Financial Planning Forum*, op cit.

37 Accounting Professional and Ethical Standards Board Limited, 2007, *Comments on the proposed sections 290 and 291 of the Code of Ethics for Professional Accountants*, April, Accounting Professional and Ethical Standards Board Limited, Melbourne, pp.1–6.

38 D'Aloisio, T, 2007, speech, op cit

Nevertheless, the predominant remuneration models in the industry are based on commissions/trails. However, there is evidence of a trend towards a fee for service model (usually percentage based) and away from commission based models.<sup>39</sup> This trend has coincided with statements by some professional associations to indicate a preference for fee for service models<sup>40</sup>; to ensure that fees for advice are separately identified from other fees<sup>41</sup>; to ban access to certain alternative remuneration payments and benefits; and to insist on the adviser and client negotiating fees for service and the mechanism for the collection of payment, prior to any service being provided.<sup>42</sup>

Internationally, remuneration practices and associated regulations for financial advisers vary<sup>43</sup>. There appears to be no preference for fee for service models, except in Japan at the higher service end in the USA<sup>44</sup>. For example, in the USA brokers registered under the Securities Exchange Act may offer financial advice and charge commissions. Financial planners registered under the Investment Advisers Act mostly avoid (90%) the use of commissions.<sup>45</sup>

Only India appears to have banned the receipt of certain commissions, such as commissions associated with mutual funds and insurance sales<sup>46</sup>. The focus internationally remains on disclosing the compensation arrangements offered and in allowing clients to be given the option to choose to receive fee for service only.<sup>47</sup>

#### **(b) Independence and remuneration practices**

As mentioned in section 3.3, Independence includes the provision of an opinion which is not significantly affected by influences that compromise professional judgment, allowing an individual to act with integrity and exercise objectivity and professional scepticism; and the avoidance of facts and circumstances that are so significant that a reasonable and informed third party, having knowledge of relevant information, including safeguards applied, would reasonably conclude that a member's integrity, objectivity or professional scepticism had been compromised.

39 Manning, P., 2008, "High price for advice," the Australian Financial Review, 21 June, at p. 21 which discusses the fee models of MLC's Godfrey Pembroke and NAB' Financial Planning. See also an Industry Superannuation Network study conducted by Newspoll in May 2008 which found that 84% of participants believed that commissions undermined the independence of financial advice.

40 See clause 17.2 of APS 12 at page 6.

41 Financial Planning Association of Australia Limited, 2006, *Guidance to FPA Members on Principles to Manage Conflicts of Interest*, 23 June, Financial Planning Association of Australia Limited, Sydney, Principle 1.

42 See clause 17.1 of APS 12 at page 6 and of the FPA Guidance to FPA members on Principles to Manage Conflicts of Interest. For an international perspective see clause .11 and .13 "Defining the engagement objectives – Personal Financial Engagements", AICPA, 2007, *Statement on Responsibilities in Personal Financial Planning Practice*, June, AICPA at page 20,013.

43 New Zealand Institute of Chartered Accountants, 2008, *Invitation To Comment: Consultation Paper: Financial Advisory Engagements Undertaken By Professional Accountants*, February, Professional Standards Board of the New Zealand Institute of Chartered Accountants, Auckland, New Zealand.

44 Financial Planning Standards Board, 2006, *Regulatory Environment Comparison Table*, May, Financial Planning Standards Board, Denver, U.S.A., pp1–6 at page 3.

45 D'Aloisio speech 2007 op cit.

46 Ibid

47 Certified Financial Planner(tm) Board of Standards, 2007, "Focus on ethics: Compensation Disclosure", *CFP Board Report*, 7 November, Certified Financial Planner Board of Standards Inc, Washington, pp 1–2. Certified Financial Planner Board of Standards, 2007, *Standards of Professional Conduct*, op cit, N.Z Institute of Chartered Accountants op cit at p13.

APS 12 stated that independence came from how fees for service were determined, not how the fee was received. However, it did cite a preference for a fee for service approach as being more consistent with professional independence.<sup>48</sup> It also focussed on members' recognising the potential threats created by personal and business relationships; the acceptance of commission or other benefits; and financial involvements which, by reason of their nature or degree, might threaten the member's objectivity. It imposed a positive obligation on the member not to be adversely influenced by third party remuneration in the provision of advice to a client.

There appears to be international recognition that some remuneration practices may lead to unresolved conflict of interest and inappropriate or unethical advice.<sup>49</sup>

ASIC defines a conflict of interest as a circumstance where some or all of the interests of clients to whom an AFS Licensee, or its representative, provides financial services are inconsistent with or diverge from some or all of the interests of the Licensee or its representatives. This includes actual, apparent and potential conflicts of interest.<sup>50</sup>

Conflicts of interest and how they are managed are a reputational issue for the accounting profession. Whilst there are numerous real and potential conflicts of interest that may be encountered in the provision of financial advisory services, the primary focus currently is on conflicts associated with remuneration practices.

The receipt of commission, for example, may put a financial adviser in a position of conflict, or an appearance of conflict. That conflict exists at several levels. The first level is that a third party is paying the remuneration, not the client. The second level is that a product must be sold to receive remuneration in the first instance. The third level of conflict is that advisers may be tempted to recommend the product that pays the highest level of remuneration.<sup>51</sup>

A number of participants to a recent profession survey held strong views about financial planners' remuneration.<sup>52</sup> The view that remuneration of financial planners should be based on fee for service was expressed on a number of occasions. Other participants had no issue with commission base remuneration providing that full disclosure was made to clients.

<sup>48</sup> See clauses 19.1 and 17.2 of APS 12

<sup>49</sup> ASIC Shadow Shopping report 2006 op cit, which identified that in 48% of licensed cases – the advice involved an actual conflict of interest around adviser remuneration. In 38% of licensed cases, the advice involved an actual conflict around a fund associated with a license. Advice that was clearly or probably non compliant was about six times more common where the adviser had an actual conflict of interest over remuneration. NZ Institute of Accountants op cit at page 12/13,

<sup>50</sup> Australian Securities & Investment Commission, 2006, Regulatory Guide 181: Management of Conflicts of Interest, ASIC, Sydney

<sup>51</sup> The Institute of Chartered Accountants in Australia, 2007, *Reinventing Financial Planning*, a paper authored by Robert M. Brown, op cit; The Institute of Chartered Accountants in Australia, 2007, "Reinventing financial planning", *Media Release*, 21 November, downloaded at [www.charteredaccountants.com.au/index.cfm?su=/A120282375/headerMode=ba](http://www.charteredaccountants.com.au/index.cfm?su=/A120282375/headerMode=ba); Kohler, A., 2008, "Stamp out double dipping", *Professional Planner – General News: Media Monitors*, 13 June, p. 7, reference no 0003753532

<sup>52</sup> The Institute of Chartered Accountants in Australia and Deloitte, 2008, "The Governance of Superannuation Funds – the industry three years on from trustee licensing," *a Joint Report from the Institute of Chartered Accountants in Australia and Deloitte*, March, Sydney. See also Barrett, P. 2008, "Navel gazing costing industry and consumers", an article in *Money Management Magazine*, 8 May, p.18, downloaded from Media Monitors, reference 000363192.

These views appear consistent with the breadth of views identified in the literature and media searches. There appear to be two countervailing views: one is that there is a fundamental structural problem within current remuneration models and their reliance upon the sale of financial products (or the existence of assets on which to charge a fee)<sup>53</sup> in order to generate remuneration from third parties. This view maintains that the current models must be replaced with a fee for service model (where fees are calculated by reference to time, and/or by reference to a published scale of fees that is not based on a percentage or on existence of assets) so as to avoid the conflicts of interest that are inherent in the current system.<sup>54</sup>

The counter view is that the debate on remuneration has moved on and the focus should be on providing consumers with the opportunity to choose the method of remuneration by which their advisers should be paid. This view argues that where remuneration models give rise to conflict of interests, such conflicts can be properly resolved by disclosure and transparency.

Others believe the answer lies in solving both real and perceived structured conflicts in the industry and the mere disclosure and transparency does not address this.<sup>55</sup>

The Joint Committee who undertook the recent Federal Parliament Enquiry into superannuation also recognised that consumers should be able to choose how they remunerate their adviser, including commissions, if they are well disclosed and managed.<sup>56</sup> The ASIC Retail Investor Taskforce has an objective to consider industry remuneration arrangements and conflicts of interest. For now, the ASIC Chairman has stated that ASIC will allow the market to ‘vote with its feet’ on the remuneration models and that different remuneration arrangements are acceptable.<sup>57</sup>

The APESB’s objective with APES 335 is to establish professional obligations that will enable members and firms to provide financial advice to clients so that:

- A member’s objectivity will not be impaired, either in fact or appearance in the provision of financial advice; and
- Threats to a member’s objectivity arising from remuneration structures are avoided, or reduced to an acceptable level through the application of effective safeguards.

It will also ensure that the overarching principle of protection of the public interest is at the forefront of its deliberation on this issue, in addition to recognition of the fiduciary nature of the professional relationship between an accountant and a client.

53 The Institute of Chartered Accountants in Australia, 2007, *Reinventing Financial Planning*, a paper authored by Robert M. Brown, op cit

54 The Institute of Chartered Accountants in Australia, 2007, *Financial Planning Forum*, op cit. See also the numerous references in the literature and media reviews on the issue of remuneration structures in the financial services industry.

55 Ibid. See also Brinsden, C., 2008, “Financial advisers compromised by commissions says survey”, AAP newswire, 19 May, Australian Associated Press, reference 00036654515.

56 Parliamentary Joint Committee on Corporations and Financial Services, 2007, *Inquiry into the Structure and the Operation of the Superannuation Industry: A Report*, op cit

57 D’Aloisio, 2007 speech, op cit.

In addition to the matters raised above, the APESB requests submissions on the following:

- Whether a fee for service model that is unrelated to the sale of products or the accumulation of funds under management is believed to guarantee the substantial alignment of the interests of professional accountants with the interest of their clients.
- Whether trailing commission fees should be avoided due to perceived or actual conflict of interest that cannot be reconciled.
- Whether APES 335 should contain a positive statement that professional fees associated with financial advisory services must reflect fairly and equitably the value of work performed for the client.

#### **Discussion Questions – Independence and Remuneration**

13. How does the concept of independence, as defined in APES 110, apply to financial advisory services?
14. Are there particular threats to independence that arise from current remuneration structures found in the financial services industry?
15. Is independence in the provision of financial advice, a necessary part of achieving the overall objectives of the public interest and acting in the client's best interests?
16. Do you agree that a fee for service standard that is unrelated to the sale of products or the accumulation of funds under management guarantees the substantial alignment of the interests of professional accountants with the interest of their clients?
17. Do you believe there should be expressed prohibitions on certain types of remuneration in the performance of financial advice engagements?
18. Are there any particular threats for accountants in a multi disciplinary practice?
19. Are there appropriate safeguards that can be applied so that a broad remuneration structure can co-exist with the members overarching professional obligations?
20. What issues, if any, arise for the implementation of appropriate safeguards to reduce identified threats in this area?
21. Should APES 335 contain a positive statement that professional fees associated with financial advisory services must reflect fairly and equitably the value of work performed for the client?

#### **(c) Alternative Remuneration or "Soft Dollar" benefits**

APS 12 defines alternative remuneration benefits as all monetary and non monetary benefits, except direct client advice fees and monetary commissions that financial advisers and their licensees may receive for the recommendation of certain financial products.<sup>58</sup>

<sup>58</sup> See clause 21.2 of APS 12

In applying the test outlined in ASIC Policy Statement 181<sup>59</sup>, some professional associations have recognised that mere disclosure of the conflicts of interest arising from alternative remuneration benefits is not be enough to uphold the public interest.

To satisfy professional and legal obligations, a number of Codes of Practice, including APS 12,<sup>60</sup> state that some alternative remuneration benefits, particularly linked to product or volume sales, are banned, because their receipt places advisers in direct conflict with the interests of their clients. Further, these Codes prohibit the acceptance of free travel and accommodation to conferences based on the volume of sales of a manufacturer's product, computer hardware or office accommodation, cash or gifts over the value of \$300. These Codes are seen by Government and regulators as going some way to manage conflict of interest within the industry.<sup>61</sup>

In addition to banning the receipt of certain benefits, APS 12 also:

- Included a positive obligation to avoid alternative remuneration benefits received from third parties that placed the interests of the member in significant conflict with those of the client;
- Banned the receipt of certain benefits;
- Required the receipt of other benefits to be registered for public disclosure in an Alternative Remuneration Schedule if they totalled over \$300 in any one year;
- Allowed for receipt of certain benefits under \$300 with disclosure;
- Allowed for certain benefits and subsidization related to training and continuing professional development; and
- Banned buyer of last resort contracts where volume bias towards a financial product was included.

The APESB is interested in feedback on the following issues when developing APES 335:

- Whether and if so, what other alternative remuneration benefits should be banned from receipt by accounting body members;
- Whether in practice the Alternative Remuneration Schedule has been successful in reducing conflicts of interest;
- If not, should the practice be replaced with another and if so what standard?

#### Discussions Questions – Alternative Remuneration

22. Do you believe that there are other alternative remuneration benefits that should be banned from receipt by accounting body members?
23. In your experience, has the Alternative Remuneration Schedule been successful in practice in reducing conflicts of interest?
24. If not, should the Schedule be replaced with another and if so what standard?

<sup>59</sup> ASIC Policy Statement 181 op cit

<sup>60</sup> See also IFSA/FPA, 2004, *Industry Code of Practice on Alternative Forms of Remuneration in the Wealth Management Industry*, Sydney.

<sup>61</sup> Parliamentary Joint Committee on Corporations and Financial Services, 2007, *Inquiry into the Structure and the Operation of the Superannuation Industry: A Report*, op cit , D'Aloisio speech 2007 op cit.

### 3.4 Potential Threats to Compliance with APES 110 and APES 335

APES 110 recognises that it is impossible to define every situation that creates a threat to compliance with fundamental principles and the appropriate corresponding action/s. Members have an obligation to identify, evaluate and address threats to compliance rather than merely comply with a specific set of rules.

Many threats to compliance fall into the following categories<sup>62</sup>:

*Self-interest threats* – which may occur as a result of the financial or other interests of the individual or their family.

*Self-review threats* – which may occur when a previous judgement needs to be re-evaluated by the accountant responsible for that judgement.

*Advocacy threats* – which may occur when an accountant promotes a position or opinion to the point that subsequent objectivity may be compromised.

*Familiarity threats* – which may occur when, because of a close relationship, an accountant becomes too sympathetic to the interests of others.

*Intimidation threats* – which may occur when an accountant may be deterred from acting objectively by threats, actual or perceived.

Where threats are significant, a member should apply safeguards to eliminate or reduce to an acceptable level. The objective is to ensure that compliance with the fundamental principles is not compromised.

Safeguards that may eliminate or reduce such threats to an acceptable level fall into two broad categories: safeguards created by the profession, legislation and regulation and safeguards in the work environment.

The Code also allows for a degree of judgment to be incorporated when determining whether or not safeguards are required and what safeguards will be deemed appropriate in the circumstances. Where administrative burdens of the suggested safeguards are considered to be costly or inappropriate for small entities, alternatives may be adopted.

The APESB is seeking to identify the threats to compliance with APES 335, which may arise in the provision of financial advisory services.

It also seeks comment on the types of safeguards, if any, that should be adopted to reduce the threat of non compliance with APES 335 and what, if any safeguards firms and members should adopt within their workplaces. The APESB is also interested in any cost or other burdens that implementing certain safeguards may have on small businesses in particular.

This feedback is important because one of the key objectives of the review is to improve the likelihood of APES 335 being accepted and adopted in practice. In this regard feedback is also sought on how APES 335 should be communicated to members to ensure this objective is met.

<sup>62</sup> The Institute of Chartered Accountants in Australia, 2007, *Annual Report on Professional Conduct for the year ended 30 June 2007*, September, The Institute of Chartered Accountants in Australia, Sydney, downloaded from [www.charteredaccountants.com.au](http://www.charteredaccountants.com.au).

**Discussions Questions – Threats to Compliance**

25. What are the potential threats to members' ability to conform with the requirements of APES 110 and APES 335 generally, in the provision of financial advice to clients?
26. If threats exist, what safeguards do you suggest to mitigate those threats?
27. What, if any safeguards should firms and members adopt within their workplaces?
28. Are there any particular threats to general compliance with APES 335 for accountants in a multi disciplinary practice?
29. How should APES 335 be communicated to members to improve the likelihood of the standard being accepted and adopted in practice?
30. Are there any cost or other burdens that may be associated with the implementation of certain safeguards, that may have an adverse impact on small businesses in particular?

**3.5 Holding and Receiving Client Monies**

The APESB is interested in situations, where, in the course of providing financial advice to clients, a client may request the member/firm to hold, receive or otherwise deal with monies that are the property of the client.

Section 270 of APES 110 currently binds members in public practice who may not assume custody of client monies or other assets unless permitted to do so by law and if so, in compliance with any additional legal duties imposed on the member holding such assets.

Section 270.2 contains detailed requirements and guidance to ensure members/firms adhere to high standards of professional conduct and performance in the course of holding, receiving or otherwise dealing with client monies and safeguards against threats to objectivity arising from holding client assets.

The Act also contains provisions with respect to money handling and trust accounting provisions to address situations where a financial adviser receives money or property on behalf of a client. Anti money laundering legislation now also covers this area and those obligations are reiterated in section 270.3 of APES 110.

Members who hold funds in trust must keep records necessary to show that the funds have been correctly administered. Members are referred to Professional Statement APS 10 and Guidance Note (GN 3) which deals with Trust Accounts, for the approved principles relating to the custody of client monies and the audit of trust accounts. The APESB is also working on a replacement standard for these existing professional statements, which is likely to be APES 310 Client Monies.

The APESB considers that members/firms should carefully assess whether they need to have any involvement with client monies when providing financial advisory services, but seeks comment on when such monies may come into the possession of members; the circumstances in which those monies are held, transferred or otherwise dealt with and the professional standards that you think should apply to such circumstances.

In particular the APESB is considering whether there should be specific obligations in APES 335, for members in public practice to:

- report on all monies held in trust for financial advisory services and be audited in relation to same;
- ensure prompt transmission of monies received on behalf of a client, say from fund managers and other third parties, to the client;
- not appropriate investment funds to settle the fees of the member or for any other use in lieu of their transfer directly to the client, unless agreed to by the client in writing;
- where funds are to be banked by member in public practice on behalf of a client, use a separate bank account as the trust account, to be maintained in accordance with the requirements of the professional body to which the member belongs.

Stakeholders are asked to give consideration to whether these obligations should apply if APES 335 applies to all members who provide financial advisory services and not just members in public practice.

#### **Discussions Questions – Holding/Receiving Client Monies**

31. Do you consider that there is ordinarily any need for a member/firm to hold or receive client monies in the course of provision of financial advisory services?
32. What are the circumstances in which a member may be required to hold, receive or otherwise deal with client monies in the course of providing financial advice?
33. Do you agree that existing accounting professional standards in relation to Client Monies should apply to these situations?
34. Should these standards be reiterated, in a financial advice context, within APES 335? If not, please explain the basis of your view?
35. Would your view be different if APES 335 applied to all members, not just members in public practice?
36. Are there additional requirements that members should meet if they hold/receive client monies in respect of clients for whom they provide financial advice?

### 3.6 Quality Assurance

The APESB recognises that the quality assurance functions of each of the accounting professional bodies are a key feature of a co-regulatory framework and are essential to promote and ensure member compliance with APES 110 and other professional standards, such as APES 335. These programs also ensure that members provide high quality services to their clients.<sup>63</sup>

These programs are linked to APES 320: Quality Control for Firms<sup>64</sup>, which covers all the work done by a member in public practice, regardless of the specialisation, such as audit, tax, or financial planning.

Members who hold certificates of public practice and their firms are required by APES 320 to establish and maintain a system of quality control policies and procedures, designed to provide reasonable assurance that a practice and its staff comply with professional standards, regulatory and legal requirements. A quality control system consists of policies designed to achieve this objective and the procedures necessary to implement and monitor compliance with those policies.

Currently APS 12<sup>65</sup> states that member compliance with that standard may be assessed as part of the quality assurance program run by the respective accounting body of which they are a member. However, currently, to be eligible to undergo audit under these programs an accountant must be in public practice.

The APESB expects that APES 335 will include similar statements to those made in APS 12 about monitoring compliance with the proposed standard. The issue becomes what form of quality assurance can be adopted if APES 335 applies to members in business as well as members in public practice.

The APESB believes that extension of appropriate quality assurance to members who provide financial advisory services and who are caught by APES 335, is essential to maintaining public confidence in the accounting profession.

There is evidence that external compliance reviews of members in public practice are widespread and recognised by the accounting professional bodies, so as to avoid duplication of costs and to minimise disruption to practices<sup>66</sup>. This is subject to the external reviewer's work being sufficient to rely on. The aim of these external review programs is to identify risk exposures, with a view to implementing a targeted risk management strategy. The end result should be a lowering of claims and a potential reduction in insurance premiums. These outcomes are to be commended.

<sup>63</sup> See CPA Australia, 2007, *Quality Review Program & Member Step by Step Guide*, CPA Australia Ltd, Melbourne, pp.1–4. CPA Australia, 2007, *Practice Profile Questionnaire*, CPA Australia Ltd, Melbourne. CPA Australia, 2007, *Specific Engagements Questionnaire*, CPA Australia Ltd, Melbourne. The Institute of Chartered Accountants in Australia, 2007, *the ICAA Quality Review Program: Upholding the integrity of the profession*, the Institute of Chartered Accountants in Australia, Sydney, downloaded from [www.charteredaccountants.com.au](http://www.charteredaccountants.com.au).

<sup>64</sup> Insert full reference for APES 320

<sup>65</sup> See clause 23 of APS 12

<sup>66</sup> See The Institute of Chartered Accountants in Australia, 2007, *the ICAA Questionnaire to match reviewer*, the Institute of Chartered Accountants in Australia, Sydney, downloaded from [www.charteredaccountants.com.au](http://www.charteredaccountants.com.au). ICAA Quality reviews now assess and, if appropriate, place reliance on reviews by other bodies (such as, the Audit Quality Review Board and Gold Seal) to avoid duplication and minimise disruptions and costs to practices. This is subject to the other body's work being sufficient to rely upon.

In addition, the ICAA and CPA Australia, for example, have a reciprocal arrangement regarding quality reviews. While the review programs are operated separately by the individual bodies, a review by one body is fully recognised by the other body.

The APESB is aware of some practical problems that may arise in monitoring compliance with APES 335, including whether or not reviewers will be able to access:

- the manuals, working papers and other documents of an Australian Financial Services Licensee, for whom a member may work or be authorised to represent, and which is not itself a member of the accounting professional bodies;
- a cross-section of recently completed engagement files, in circumstances again where the accountant is an authorised representative of an Australian Financial Services Licensee and there may be confidentiality concerns. In this regard however, the standard letter currently in use seeking the client's consent to such review and assuring the client that the review taking place is in no way a review of the affairs of the particular client or a reflection on the standards of the practice being reviewed, may assist to alleviate some of this concern.

#### **Discussions Questions – Quality Assurance**

37. What form of quality assurance should apply to members who provide financial advice, so as to ensure compliance with APES 335?
38. What are the practical implications of implementing such programs?
39. Are there additional implications if APES 335 is extended to apply to members in business?
40. Does the current quality assurance function of the accounting professional bodies adequately meet public expectations in relation to the co-regulatory responsibilities of the profession?
41. Is it possible to undertake meaningful quality reviews against the proposed standard?

## Conclusion

### 4.1 A summary of the questions for comment as outlined in the discussion paper

The APESB seeks comments and feedback on the following specific questions:

1. Should APES 335 cover all members who provide financial advice to members of the public or should it be limited in its application to members in public practice in Australia?
2. If the answer is the latter, what are the reasons and implementation issues that the APESB should consider that are unique to APES 335 and require the scope of the proposed standard to be limited to a specific cohort of members.
3. Do you consider that the current definition of financial advice within APS 12 should be enhanced to include the provision of advice and services related matters such as the procurement of loans, margin lending and other gearing strategies?
4. Will the proposed enhancement of the scope and application of APES 335 assist members to meet the overarching principle of the public interest and the fiduciary nature of the accounting relationship?
5. Do you also consider that the application and scope outlined above is appropriate in the context of meeting public expectations in the provision of financial advisory services by accounting body members?
6. If not, please provide the reasons supporting your response and explain an alternative application and scope that you consider to be appropriate.
7. Do you agree that the ethical principles outlined in APES 110 establish an appropriate basis for professional performance by members engaged in provision of financial advisory services?
8. Are there specific issues that arise in a financial services context that are important to identify in APES 335 and why?
9. Do you think the fiduciary principle should apply accountants in the provision of financial advisory services? If not, why not?
10. In the context of financial advice, do you believe the public interest principle has specific connotations for accounting body members or, raises specific and unique obligations not currently articulated in APES 110? If so, how this should be articulated in APES 335?
11. Are there any particular threats to compliance with the principles for accountants in a multi disciplinary practice?

12. In relation to the principle of professional competence and care, are there any specific professional standards the APESB should consider adopting in APES 335 in relation to superannuation advice in particular?
13. How does the concept of independence, as defined in APES 110, apply to financial advisory services?
14. Are there particular threats to independence that arise from current remuneration structures found in the financial services industry?
15. Is independence in the provision of financial advice, a necessary part of achieving the overall objectives of the public interest and acting in the client's best interests?
16. Do you agree that a fee to service standard that is unrelated to the sale of products or the accumulation of funds under management guarantees the substantial alignment of the interests of professional accountants with the interest of their clients?
17. Do you believe there should be expressed prohibitions on certain types of conduct in the performance of financial advice engagements?
18. Are there any particular threats for accountants in a multi disciplinary practice?
19. Are there appropriate safeguards that can be applied so that a broad remuneration structure can co-exist with the members overarching professional obligations?
20. What issues, if any, arise for the implementation of appropriate safeguards to reduce identified threats in this area?
21. Should APES 335 contain a positive statement that professional fees associated with financial advisory services must reflect fairly and equitably the value of work performed for the client?
22. Do you believe that there are other alternative remuneration benefits that should be banned from receipt by accounting body members?
23. In your experience, has the Alternative Remuneration Schedule been successful in practice in reducing conflicts of interest?
24. If not, should the Schedule be replaced with another and if so what standard?
25. What are the potential threats to members' ability to conform with the requirements of APES 110 and APES 335 generally, in the provision of financial advice to clients?
26. If threats exist, what safeguards do you suggest to mitigate those threats?
27. What, if any safeguards should firms and members adopt within their workplaces?
28. Are there any particular threats to general compliance with APES 335 for accountants in a multi disciplinary practice?
29. How should APES 335 be communicated to members to improve the likelihood of the standard being accepted and adopted in practice?
30. Are there any cost or other burdens that may be associated with the implementation of certain safeguards, that may have an adverse impact on small businesses in particular?
31. Do you consider that there is ordinarily any need for a member/firm to hold or receive client monies in the course of provision of financial advisory services?

32. What are the circumstances in which a member may be required to hold, receive or otherwise deal with client monies in the course of providing financial advice?
33. Do you agree that existing accounting professional standards in relation to Client Monies should apply to these situations?
34. Should these standards be reiterated, in a financial advice context, within APES 335? If not, please explain the basis of your view?
35. Would your view be different if APES 335 applied to all members, not just members in public practice?
36. Are there additional requirements that members should meet if they hold/receive client monies in respect of clients for whom they provide financial advice?
37. What form of quality assurance should apply to members who provide financial advice so as to ensure compliance with APES 335?
38. What are the practical implications of implementing such programs?
39. Are there additional implications for quality assurance if APES 335 is extended to apply to members in business?
40. Does the current quality assurance function of the accounting professional bodies adequately meet public expectations in relation to the co-regulatory responsibilities of the profession?
41. Is it possible to undertake meaningful quality reviews against the proposed standard?

## 4.2 Call for submissions and timeframes

All parties who consider that they have an interest in the development of ethical and professional standards for accounting body members in the area of financial services, including representative users and user groups, are encouraged to make submissions to inform this review. These submissions will assist the APESB in identifying the key areas for consideration in the development of APES 335.

All submissions and comments will be regarded as being on the public record.

## 4.3 Mechanism for feedback

Respondents may forward submissions to us by mail, email or facsimile transmission by close of business on 31 October 2008. Wherever possible, we would appreciate submissions in electronic form.

Submissions and comments should be addressed to the APESB as follows:

The Chairperson

Accounting Professional and Ethical Standards Board Limited

Level 7, 600 Bourke Street

MELBOURNE VIC 3000

Email: [sub@apesb.org.au](mailto:sub@apesb.org.au)

Tel No: (03) 9670 8911

Fax No: (03) 9670 5611

## PLEASE COMPLETE THE FOLLOWING QUESTIONS:

Respondent: \_\_\_\_\_

Please indicate whether you are responding on behalf of:

Self       Organisation/Firm

Name of Organisation/Firm: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

## Questions for Accounting Body Members submitting responses:

**(Please tick the appropriate box)**

1. Do you regularly provide financial advisory services to clients, either yourself or through your firm?

Yes       No

2. If yes, please indicate the proportional significance of those financial advisory services to other professional services you/your firm provides.

High       Medium       Low

3. Do you hold a Certificate of Public Practice?

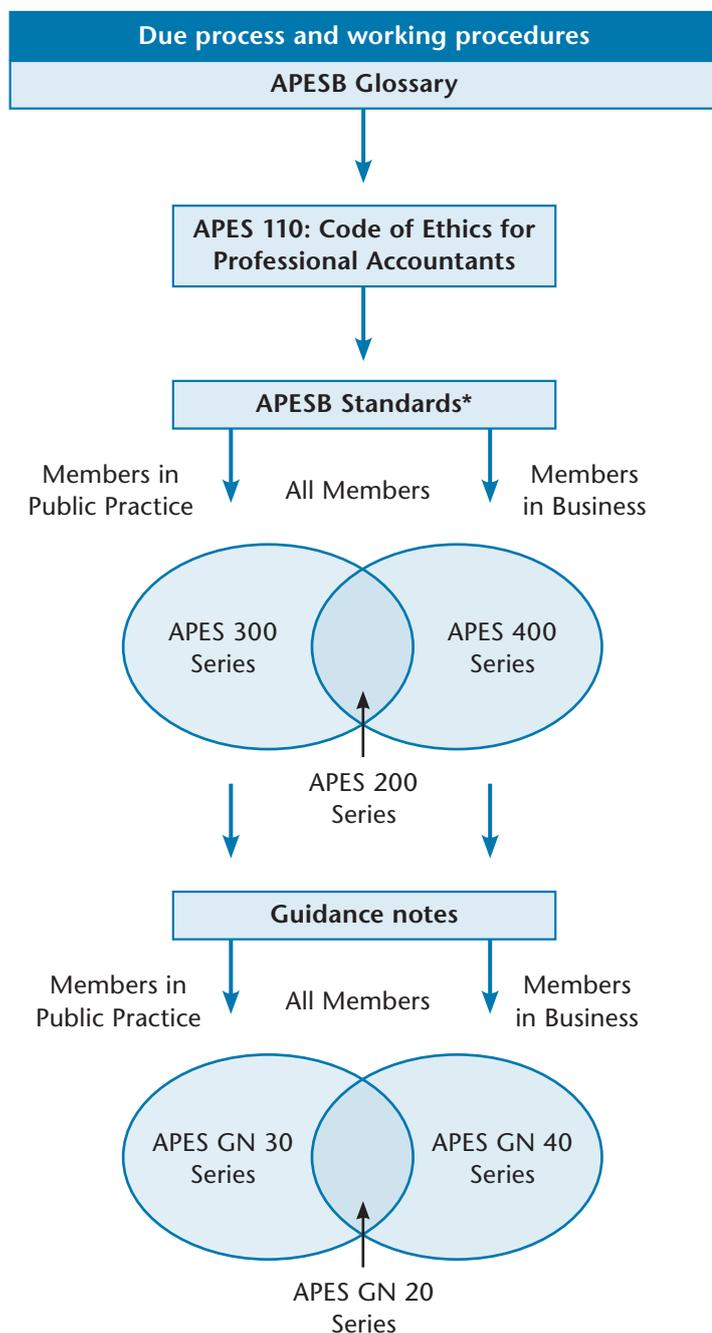
Yes       No

4. Are you a member of another professional body or membership association for financial advisers? If yes, please state the name of the professional body or association.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## Appendices

### 5.1 Diagram of the Current APESB Standard Setting Model



## NOTES

### **Conceptual Framework for APESB standards**

- Principles based
- Mandatory for Professional Accountants

### **APESB Standards\***

- Introduce Principles
- Mandatory Requirements in black letter
- Guidance and/or explanation in grey letter

### **APESB Guidance Notes**

- Do not introduce new Principles
- Guidance on a specific matter on which the Principles are already stated in a Standard
- Guidance is only in grey letter

See: APESB: Due Process & Working Procedures for the development and review of APESB Pronouncements at page 17.

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