

2 November 2020

Mr Stephen Glenfield
Chief Executive Officer
Financial Adviser Standards and Ethics Authority
PO Box A255
SYDNEY SOUTH NSW 1235

By email: consultation@fasea.gov.au

Dear Mr Glenfield,

Draft FASEA Financial Planners & Advisers Code of Ethics 2019 Guide (October 2020)

Accounting Professional & Ethical Standards Board Limited (APESB) welcomes the opportunity to make a submission on the Financial Adviser Standards and Ethics Authority (FASEA) Draft Financial Planners & Advisers Code of Ethics 2019 Guide (October 2020) (Draft FASEA Guide).

APESB is governed by an independent board of directors whose primary objective is to develop and issue, in the public interest, high-quality professional and ethical pronouncements. These pronouncements apply to the membership of the three major Australian professional accounting bodies (Chartered Accountants Australia and New Zealand (CA ANZ), CPA Australia and the Institute of Public Accountants (the IPA)).

In Australia, APESB issues APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* (APES 110) as well as a range of professional and ethical standards, including APES 230 *Financial Planning Services* (APES 230). APES 230 sets the standards for members of the professional accounting bodies in the provision of quality and ethical financial planning services.

In developing this submission, we also refer to our previous submissions to FASEA on 31 May 2018 in relation to the Exposure Draft of Proposed Code of Ethics for Financial Advisers and on 19 December 2018 relating to the Consultation on the draft Financial Planners and Advisers Code of Ethics 2018 Legislative Instrument and Explanatory Statement.

Overall comments

APESB strongly supports the Draft FASEA Guide, particularly the emphasis on explaining the intent of the FASEA Code standards. We are of the view that this publication will provide valuable assistance to financial planners and advisers on the implementation of the FASEA Code.

APESB believes the focus in the Draft FASEA Guide on the obligations of the individual financial planners and advisers is imperative, in particular, that the "*Code requires relevant providers to exercise their professional judgement in the best interests of their client guided by the values and standards of the Code.*"¹

APESB is also supportive of the Draft FASEA Guide's emphasis on the principles-based nature of the FASEA Code and its aim to provide standards higher than law.

Specific comments

APESB believes that FASEA should consider the following matters in finalising the Draft FASEA Guide:

1. Expand references to actual conflicts of interest to address actual or apparent conflicts of interest

APESB is supportive of the Draft FASEA Guide's material in relation to conflicts of interest or duty and the intent and application of Standard 3 that financial planners and advisers "*must not advise, refer or act in any other manner where you have a conflict of interest or duty*". In particular, we support the guide's clarification of the difference between dealing with conflicts of interests under the *Corporations Act 2001*, which allows conflicts to be managed, and the FASEA Code, which extends or elevates requirements by prohibiting financial planners and advisers from acting if there is a conflict.²

The Draft FASEA Guide explains that Standard 3 relates to or deals with actual conflicts of interest. APESB is concerned that referring only to actual conflicts could create confusion or difficulty reconciling this to other frameworks that generally refer to actual or apparent conflicts. The latter represents an objective view of the situation, facts, and circumstances.

In APES 230, for example, the definition of professional independence comprises independence of mind and independence in appearance. In the *Corporations Act 2001*, requirements relate to actual, apparent and potential conflicts of interest:³

For the purposes of this policy, conflicts of interest are circumstances where some or all of the interests of people (clients) to whom a 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.

APESB supports the Draft FASEA Guide's introduction of the 'standard for judgement' and assessment from an unbiased, disinterested 'ordinary person's' perspective to assist financial planners and advisers in determining whether an arrangement is conflicted and prohibited under the FASEA Code.⁴ We believe that as this 'ordinary person's' perspective represents an objective view of the facts and circumstances, it represents an apparent conflict of interest. Therefore, the Draft FASEA Guide would be enhanced by referring to that fact.

¹ Page 4 of the Draft FASEA Guide.

² Page 13 of the Draft FASEA Guide.

³ RG 181.15 of ASIC Regulatory Guide 181 *Licensing: Managing conflicts of interest*.

⁴ Page 18 of the Draft FASEA Guide.

2. Emphasise that the ‘disinterested person’ must understand the facts

As noted in point 1 above, APESB is supportive of the inclusion of the standard of judgement in assessing conflicts of interest. However, APESB believes that it is crucial that the ‘disinterested person’ in the ‘standard of judgement’ not only knows all the facts but also understands the facts. This matter has been included in guidance material relating to the standard of judgement (refer to the first paragraph on page 19 of the Draft FASEA Guide). Still, we believe it should be included in the 4 points that constitute the standard of judgement, for example:

1. *A disinterested person (an unbiased third party with nothing to gain or lose from how the question of conflicts is resolved),*
2. *who knows and understands all of the facts,*
3. *would reasonably conclude (that is, has good reasons that other reasonable people would find convincing),*
4. *that the arrangement could induce the adviser to act other than in the best interests of the client then, that arrangement gives rise to a conflict and is prohibited.*

APESB believes this amendment would strengthen the standard of judgement without changing the intent of the assessment.

3. Include an explicit statement that potential and perceived conflicts of interest or duty can challenge compliance with other parts of the FASEA Code

Although the Draft FASEA Guide states that Standard 3 of the FASEA Code is intended to be concerned or deal with actual conflicts, the guide also states that financial planners and advisers “*should also be alert to the challenges posed to your professional integrity by potential and perceived conflicts of interest and duty*”.⁵ For example, under the value of Fairness, the guide notes that “[b]eing fair requires that you look beyond your own interests and consider how others may judge or perceive your actions.”⁶

APESB believes the guidance aims to clarify that although references in the FASEA Code to ‘conflicts of interest’ relate to actual conflicts, financial planners and advisers need to be aware that potential or perceived conflicts can impact compliance with other parts of the FASEA Code. We understand this concept is not necessarily just about other requirements outside of the FASEA Code. APESB is of the view that this intention could be made clearer by explicitly stating that potential and perceived conflicts of interest or duty can challenge compliance with other parts of the FASEA Code.

4. Provide more definitive guidance on the types of remuneration that are unacceptable in most instances under Standards 3 and 7 of the FASEA Code

APESB believes that the Draft FASEA Guide could be more definitive in respect of the types of remuneration that are unacceptable under Standards 3 and 7 of the FASEA Code. For example, page 17 of the Draft FASEA Guide states:

The Code does not seek to ban particular forms of remuneration, nor does it determine that particular forms of remuneration will always give rise to an actual conflict of interest

⁵ Page 7 of the Draft FASEA Guide.

⁶ Page 11 of the Draft FASEA Guide.

or duty. That said, you should remain open to the possibility that certain forms of remuneration will always fail to meet the requirements of the Code of Ethics.

APESB understands that the remuneration methods used by financial planners and advisers consist of fee for service (fixed or time-based), asset-based fees and third-party payments.

Standard 7 of the FASEA Code states:

Except where expressly permitted by the Corporations Act 2001, you may not receive any benefits, in connection with acting for a client, that derive from a third party other than your principal.

While Standard 7 does not strictly prohibit third party payments permitted under the *Corporations Act 2001*, the Draft FASEA Guide states that the “*requirement to limit the benefits an adviser may derive from a third party is intended to reduce the likelihood of third party influence on the advice given.*”⁷ Importantly, third party payments are prohibited under the FASEA Code unless allowed by the *Corporations Act 2001* and not otherwise prohibited by the Code, as Standard 3 must still be considered to ensure that financial planners and advisers are acting in the best interests of the client free from any conflicts of interest.⁸

APESB is of the view that the Draft FASEA Guide could be strengthened by stating the types of remuneration that would fail to meet the requirements of the FASEA Code in most instances.

We believe this guidance would be useful to financial planners and advisers, consistent with the FASEA Code and other guidance in the Draft Guide, which appears to highlight that third party payments are not a preferred remuneration method and generally create conflicts of interest.

Concluding comments

We trust you find these comments useful in your final deliberations. Should you require additional information, please contact APESB’s Chief Executive Officer, Mr. Channa Wijesinghe, at channa.wijesinghe@apesb.org.au.

Yours sincerely



Nancy Milne OAM
Chairman

⁷ Page 26 of the Draft FASEA Guide.

⁸ Pages 7 and 27 of the Draft FASEA Guide.