NEW ZEALAND BANKERS ASSOCIATION

# Submission

to the

# Financial Advice Code Working Group

on the

# Draft Code of Professional Conduct for Financial Advice Services

9 November 2018



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## About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following seventeen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- MUFG Bank, Ltd
- China Construction Bank
- Citibank, N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- Industrial and Commercial Bank of China (New Zealand) Limited
- JPMorgan Chase Bank, N.A.
- Kiwibank Limited
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

## Background

3. NZBA welcomes the opportunity to provide feedback to the Financial Advice Code Working Group (**CWG**) on the Draft Code of Professional Conduct for Professional Advice Services (**Draft Code**) and commends the work that has gone into developing the Draft Code.

4. If you would like to discuss any aspect of the submission further, please contact:


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## Introduction

5. NZBA strongly supports the principles based approach that CWG has taken to the Draft Code. We consider that approach allows for a flexible application to a wide range of situations.

6. We believe that this flexibility, backed up by appropriate processes and controls of the Financial Advice Provider (**FAP**) and a heightened focus on ethical conduct, will best reconcile the aims of increasing access to advice and ensuring quality of advice.

## Code Standard 1

7. NZBA agrees with the inclusion of a standard that seeks to promote fairness and client-centric advice.

### Focus should be on broader concept of treating customers fairly

8. We advocate that Code Standard 1 should be simplified by removing "and act in their interests" in order to provide a simple and clear standard focussed on treating customer's fairly. In that regard, we consider that acting in a client's interests is a key aspect of treating a customer fairly. This, for example, is reflected in the Code Standard commentary which explains that fairness usually includes "applying business practices that promote the interests of clients". In comparison, we are concerned that the approach in the draft Code of including the need to act in clients' interests in addition to a fairness requirement may give rise to uncertainty about the scope of an adviser's duty to act in a client's interests.

9. Removing the wording regarding acting in the client's interests from the Code Standard wording would also be consistent with decisions made through the legislative process to date. In that respect, the Ministry of Business, Innovation and Employment (**MBIE**) considered whether the Financial Services Legislation Amendment Bill (**FSLAB**) should introduce a broader requirement to act in the client's interests. MBIE ultimately determined that the requirement should be limited to creating a 'priority' when there is a conflict. Consequently, s 431J of FSLAB requires that, where a conflict exists, a person giving financial advice must give priority to the client's interests by taking all reasonable steps to ensure that the advice is not materially influenced by the person's own interests, or the interests of a person connected with the giving of the advice.

### Feedback on commentary to Code Standard 1

10. The Commentary states that "fairness is not one-sided and depends on the particular circumstances". The concept of two-sided fairness has not been explained and further clarification would be helpful. For example, if the intention is that what is fair in the circumstances may also depend on client related factors, then some commentary to that effect could be of assistance.

11. The Commentary also states that "treating clients fairly usually includes…acting in accordance with the spirit and intent of the person's legal obligations, including under the FMCA, FMC Regulations and the Code." We support the view that advisers should not take an overly technical approach to applying the law. However, given the potential for disciplinary action and sanctions for a breach of this Code Standard, we consider that the requirement should be limited to acting in

accordance with the relevant principles-based legislation. If CWG agrees, that intention could be explained/expanded on in the commentary for clarity.

12. We understand that FSLAB permits advisers to limit the scope and nature of the financial advice provided, and that Code Standard 1 would, therefore, be read as subject to nature and scope. We recommend that Code Standard 1 (or the related commentary) makes this explicit.

## Code Standard 2

13. NZBA agrees with the inclusion of a standard that seeks to promote integrity.

14. We consider that the Commentary to this proposed Code Standard should refer specifically to the obligation to behave ethically, though we note this is likely implied.

## Code Standard 3

15. NZBA supports the inclusion of a standard that promotes the effective management of conflicts of interest. We have the following comments on Code Standard 3 as currently drafted:

    (a) We believe that the focus should be on identifying, assessing and appropriately managing those conflicts of interest (as opposed to avoiding conflicts where practicable, as proposed).

    (b) There will be conflicts of interest in many business models, and the current language could be interpreted as requiring a FAP to change its business model. We understand that this is not the CWG's intention, while also recognising that including additional commentary that carves out business models from the scope of Code Standard 3 is likely to be impractical.

    (c) Finally, disclosure should be made in accordance with the new Financial Markets Conduct (Financial Advice Disclosure Requirements) Regulations (**Disclosure Regulations**). To the extent that disclosure is covered in the Disclosure Regulations that should be adequate disclosure.

16. Against that background, we recommend the following changes be made to Code Standard 3:

> [Standard 3] **Manage conflicts of interests**
>
> A person who gives financial advice must have arrangements in place to *identify, assess and appropriately* manage conflicts of interests, *including clearly disclosing the conflicts of interest to clients.* ~~including arrangements to:~~
>
> - ~~where practicable, avoid conflicts of interests~~
> - ~~identify conflicts of interests~~
> - ~~ensure that conflicts of interests are controlled in accordance with the requirements of the FMC Act~~
> - ~~adequately disclose conflicts of interests to clients.~~

## Code Standard 4

17. NZBA agrees with the inclusion of a standard that seeks to ensure clients understand the financial advice.

## Code Standard 5

18. NZBA supports the inclusion of a standard that promotes the suitability of financial advice. We have the following comments in relation to Code Standard 5:

    (a) It should include a reasonableness requirement, similar to the drafting of Code Standard 4.

    (b) It should not be prescriptive with respect to how suitability is achieved. We consider that, at present, this Code Standard is unclear in places. For example, the phrase "the strategy underpinning the advice" is unclear.

    (c) The example refers to a "bank's systems", inferring that those systems are technology-related. This drafting does not reflect the reality that many FAPs will have a range of processes in place to ensure suitability (training also being a key component).

19. We therefore recommend the following changes:

> [Standard 5] **Give financial advice that is suitable for the client**
>
> A person who gives financial advice must *have reasonable grounds* ~~ensure~~ that the financial advice is suitable for the client~~. The person must have reasonable grounds for the financial advice~~, having regard to the nature and scope of the financial advice and the client's circumstances.
>
> Reasonable grounds for the financial advice means grounds that a prudent person engaged in the profession of giving financial advice would consider to be adequate in the same circumstances, *having regard to the nature and scope of the financial advice.* ~~including in relation to:~~
>
> - ~~the strategy underpinning the financial advice~~
> - ~~each financial advice product covered by the financial advice.~~
>
> The client's circumstances means those aspects of the client's situation, needs, goals, and risk tolerance that a prudent person engaged in the profession of giving financial advice would *take into account in providing* ~~consider to be relevant to~~ the financial advice, *having regard to the nature and scope of the financial advice.*

20. Finally, we note that derivatives issuers are already required under standard condition 12 of their FMCA licence to undertake a suitability assessment of products for retail clients. We consider that those tests should be aligned.

## Code Standard 6

21. NZBA does not support the inclusion of a standalone privacy standard that replicates obligations already set out in the Privacy Act 1993, typical contractual advisor/client confidentiality obligations, and (in the case of banks) the Code of Banking Practice. Our primary concern is that this may result in privacy standards that are misaligned.

22. For example, elements of Code Standard 6 that appear to extend beyond the Privacy Act requirements raise the following issues:

    (a) Requiring client consent for information to be used in an anonymised form – this is unnecessarily restrictive and should be removed. It would be useful for product providers, industry groups and regulators to be able to

ascertain anonymous information to better understand customers, even if there is no legal requirement for the information to be provided.

(b) Requiring that client information be held only for purposes of the engagement – this is vague. Also, often it is not known how long an 'engagement' will be. This requirement also seems inconsistent with Information Privacy Principle 9 in the Privacy Act, which could cause confusion.

23. If the CWG would like to reference privacy obligations within the Code we would support a reference to the Privacy Act within the commentary of Code Standard 1. However, care should be taken to ensure that this does not confuse clients regarding redress for Privacy Act breaches or the role of the Privacy Commissioner.

## Code Standard 7

24. We agree with the inclusion of a standard that seeks to promote the effective management of complaints.

## Code Standard 8

25. NZBA agrees with the inclusion of a standard that seeks to protect the reputation of the financial advice industry.

26. We believe that "not do anything that would, or would be likely to, bring the financial advice industry into disrepute" is sufficiently broad, and that the standard itself should not extend to "…promote confident and informed participation by consumers in financial markets". We suggest instead that the latter obligation (which appears intended to replicate one of the FMCA purposes) is brought into the commentary section only for context. This is because any finding that an FAP has brought the industry into disrepute will inevitably mean that the FAP is also acting inconsistently with promoting confident and informed participation by consumers in financial markets.

27. We also note that, even with the removal of the requirement to "…promote confident and informed participation by consumers in financial markets", Code Standard 8 may pose some double jeopardy challenges for FAPs as employment legislation and FSP business disciplinary models cover similar scenarios. As an alternative, the intent of this Code Standard could be brought within the ambit of Code Standard 1, with clarification that it applies only where the FAP is acting in accordance with their employment agreement and in the giving of financial advice.

## Code Standard 9

28. NZBA agrees with the inclusion of a standard that seeks to provide minimum standards of general competence, knowledge and skill. In particular, we acknowledge the flexibility that it allows in relation to nominated representatives who are only required to "complete the learning outcomes specified for their role".

29. We do, however, think the standard could be clearer that:

(a) certain designations (including NZFMA accredited individuals or certified financial planners) could also be treated as meeting the requirements of certain qualification outcomes; and

(b) in relation to nominated representatives, the standard is met where the combined capabilities of the nominated representative and financial advice provider is equivalent to those of an individual who alone has achieved the general qualification outcomes.

## Code Standard 10

30. NZBA agrees with the inclusion of a standard that seeks to provide minimum standards of competence, knowledge and skill for designing an investment plan.

## Code Standard 11

31. NZBA agrees with the inclusion of a standard that seeks to provide minimum standards of competence, knowledge and skill for designing an investment plan.

## Code Standard 12

32. NZBA agrees with the inclusion of a standard that seeks to provide minimum standards of competence, knowledge and skill for other types of financial advice.

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

34. Under the heading nominated representatives, we also propose the following changes:

> … complete the learning outcomes specified for their role by their financial advice provider ~~that mean that,~~ *and,* together with the procedures, systems and expertise of the financial advice provider, ~~the nominated representative has~~ *means that* the *combined* capabilities *are* equivalent to those of an individual who alone has achieved the qualification outcomes of the relevant strand of the New Zealand Certificate in Financial Services (Level 5).

## Other comments

- In light of findings from the Bank Conduct and Culture review by the Reserve Bank of New Zealand and Financial Markets Authority, it may be appropriate to consider whether any of the Code Standards, in addition to Code Standard 4, should refer to any expectations regarding the extent (if any) of ongoing support to customers following the provision of initial advice.

- The current standard 3 of the AFA Code prevents an AFA from stating or implying that they are 'independent' if a reasonable person would not consider that the case. There should be a restriction in the Code to that effect.

- Banks sometimes engage organisations that provide third party broker services to sell some products (**Third Party Brokers**). NZBA expects that each of these Third Party Brokers will become a licensed FAP and will, in turn, employ or manage nominated representatives to sell products. The extent to which responsibility for compliance with the Code will be on the Third Party Broker FAP or product provider is unclear. If Code related responsibilities fall on both, banks would need to understand how this might work in practice.