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Code Working Group
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by email

Submission: Code of Professional Conduct for Financial Advice Services – Consultation Paper

- 1 Chapman Tripp welcomes the opportunity to consider and submit on the Consultation Paper.
- 2 We believe that, of all of the various regulatory instruments that will underpin the new financial advisers regime, the Code is perhaps the most important when it comes to ensuring it represents and reflects a balance of industry feedback. It will be essential that it serves not only its consumer protection objective, but also that it is workable and sensible for the entire spectrum of financial adviser businesses, so that advice becomes more accessible and useable.
- 3 Accordingly, in our submission, rather than respond on every question, we have we have focused on what we see are the key points, and have made some supporting recommendations.
- 4 We are happy to discuss any aspect of our submission with you further.

Key Points and Recommendations

Competence requirements: The advice/planning distinction should not drive the different qualification levels

- 5 Chapman Tripp believes that more desirable outcomes would be achieved if the highest of the minimum standards of competence, knowledge and skills apply when specialist financial advice or advice on complex financial products is being provided (for example, advisers specialising in advising on complex arbitrage opportunities would require completion of courses relating to arbitraging activities at a bachelor's degree (NZ Level 7 or higher)).
- 6 We believe that the requirements of general competence, knowledge and skill applicable to all financial advisers should be set at a comparatively lower level (Level 5 and maybe below for simple advice), even if the advice fits within the definition of financial planning. We do not believe the advice/planning distinction should drive the different qualification levels.
- 7 The medical industry provides the ideal comparison where specialists require additional qualifications, whereas the GPs are required to have the base level of qualifications.

- 8 We accept that there may be particular skills (including demonstration of a capability of preparing a coherent financial plan) that are needed to prepare a financial plan, but we believe this would be best achieved by requiring particular financial planning qualifications rather than requiring the higher general qualification – an economics, accounting etc. bachelor degree.
- 9 The draft suggests essentially two qualification levels: one for product advice, the other for financial planning. We are expecting the Code to produce specific qualifications at varying levels depending on the product type, nature of advice given and types of circumstances in line with Clause 32(1)(b) of Schedule 5 of the proposed revised Financial Markets Conduct Act. We believe that the broad range of financial products covered by the proposed Code requires that the highest level of competence requirements required should be relevant to each type of industry being regulated, and that the general competency requirements should be designed to demonstrate only a reasonable commercial understanding.

Competence requirements: Other comments

- 10 We have the following additional comments on the proposed competency requirements:
- 10.1 We are attracted to the theory underlying competency being assessed in aggregate and see benefits in allowing pathways for supervised development within organisations. However, we think it will be important that the Code makes it clear how this works in practice, and we would have some concerns that advisers “on the frontline” may be uncertain in real-time situations whether s/he (when viewed in aggregate with others) is meeting the obligation. We believe clarity on this point will be essential, so as to avoid any continuation of “advice paralysis”.
- 10.2 We support the concept of assessing current knowledge and skill by using a recognised test of prior learning for current advisers who do not meet the required standards.
- 10.3 Similar to our submission above, we query the reference in paragraphs 156 and 167 to Nominated Representatives being able to demonstrate the second minimum standard of general competence, knowledge, and skill by having “*met – within the last three years, the requirements of a unit standard structured along the lines of current Level 5 Unit Standard 26360*”:
- (a) We do not believe that a Level 5 qualification will be appropriate in all cases, in particular in very simple advice scenarios (industry feedback will be important on this point).
- (b) Does this allow providers to substitute their own training programmes, where they are adequate? We submit that this should be permitted.
- 10.4 We believe further consultation would be required on the specific qualifications required for each industry, and on simple advice provided. In particular, it will be important to test particular qualification levels with particular professions (recognising that, for example, what is a suitable qualification for an insurance adviser may be quite different for a financial adviser).

11 Also, in line with our previous submissions on this topic, we strongly welcome the proposal in paragraph 176 to grandfather existing AFAs.

Ethical behaviour

12 To the extent that the Code Working Group wishes to specify ethical requirements in the Code, we recommend such ethical principles and standards be clear and defined. General concepts, particularly “fairness” are very subjective and should be resisted – what is fair to one, may be unfair to others.

Conflicts and Privacy dealt with in legislation

13 We submit that the Code should not need to deal with conflicts of interests and privacy issues when they are dealt with specifically in other areas of the law. Duplication of, or overlapping, requirements results in inefficiency. The former code dealt with conflicts when the legislation did not. It is now covered (and covered adequately in our view) by the proposed section 431J.

14 Similarly, the Privacy Act regime, as well as general duties of confidentiality under law, in our view adequately address these topics.

Suitability analysis should not be required in all circumstances

15 We support the concept of flexibility in the requirement for a suitability analysis in all circumstances. For example, a suitability analysis should not be required if an adviser talks in front of a crowd or writes a paper for a general audience. More generally, the requirements on broker reports and published materials needs to reflect the practicality that the client will often be unknown.

16 In this context, while we would not support the Code making a distinction similar to the “old” class / personalised boundary, we do believe the Code should allow for circumstances where it is simply not feasible to make a determination, generic or otherwise, as to suitability. Accordingly:

16.1 we would not support a generic suitability requirement in all cases (as is suggested in paragraph 137 of the Consultation Paper); and

16.2 we would support an approach where the standard explicitly does not apply in these types of circumstances (as contemplated by paragraph 141 of the Consultation Paper), but on an expanded basis so that it is clear that no suitability analysis is required in such circumstances.

17 We do not believe this would erode consumer protection in any way. For example, the relevant adviser will still be bound by the general duties in the Act (including the duties to act with care diligence and skill, and not be misleading or deceptive), underpinned by the fair dealing regime in Part 2.

18 Conversely, however, a generic suitability requirement may compromise accessibility of advice, by deterring advisers from providing what is otherwise useful material which has a legitimate “place” in the advisory landscape. It is for exactly this reason that the class advice concept was introduced to the FAA regime. And while (as we say above) we do not support a return to that concept, we do believe the new regime should accommodate this

type of generic material (and recognise that consumer protection is still achieved without the need for suitability analysis).

Financial planning - boundary

- 19 We understand that the Code Working Group submitted to the Select Committee that the definition of “financial advice” be expanded to cover certain types of “financial planning” activities.
- 20 While we appreciate that is a matter for the legislative process, in our view any change along these lines needs to be approached with some caution, so as to ensure the legislation does not inadvertently overreach into scenarios which are not intended. For example, we do not believe that budget advisory or debt reduction planning services should be financial advice unless the service otherwise involves a recommendation or opinion to acquire or dispose of a financial product.
- 21 We look forward to the opportunity of submitting on the draft Code itself, when it becomes available.

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