

Code of Professional Conduct for Financial Advice Services

Submission

Submissions close Monday 30 April 2018

Please send submissions to:

code.secretariat@mbie.govt.nz or

Code Working Group
c/o Code Secretariat (Poppy Haynes and Max Lin)
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

Submissions process

The Code Working Group (CWG) seeks written submissions on the issues raised in this document by **5pm on Monday 30 April 2018**

We welcome submissions on any or all consultation questions. You are welcome to comment only on the issues most relevant to you.

Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please direct any questions that you have in relation to the submissions process to code.secretariat@mbie.govt.nz.

Use of information

The information provided in submissions will be used to inform the CWG's development of the draft Code. We may contact submitters directly if we require clarification of any matters in submissions.

Release of information

The CWG intends to upload PDF copies of submissions received to MBIE's website at www.mbie.govt.nz. The CWG will consider you to have consented to publication of your submission, unless you clearly specify otherwise in your submission.

If your submission contains any information that is confidential or you otherwise wish us not to publish, please:

- indicate this on the front of the submission, with any confidential information clearly marked within the text
- provide a separate version excluding the relevant information for publication on our website.

Submissions remain subject to request under the Official Information Act 1982. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. The CWG will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

Private information

The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure of information about individuals. Any personal information you supply to the CWG in the course of making a submission will only be used for the purpose of assisting in the development of the draft code. Please clearly indicate in the cover letter or e-mail accompanying your submission if you do not wish your name, or any other personal information, to be included in any summary of submissions that the CWG may publish.

Information about you

<i>Share your details</i>	
i.	Please provide your name and (if relevant) the organisation you represent Paul Flood
ii.	Please provide your contact details Level 1, 318 Grey Street, Hamilton S 9 (2) (a)
iii.	Please provide any other information about you or your organisation that will help us understand your perspective (e.g. the financial advice situations you have experience with) I am an RFA, advising on Life, Health, and Disability insurances only.
iv.	Please indicate whether your submission contains any information that is confidential or whether you do not wish your name or any other personal information to be included in a summary of submissions. (See page 2 of this document) No confidential information or information I wish to be withheld.

Principles for drafting the Code

<i>Share your views</i>	
A.	<p>What comments do you have regarding the overarching theme of “good advice outcomes” and the underlying principles?</p> <p>I think that the phrase “good advice outcomes” has high potential to mislead retail clients. When we ordinarily talk of a “good outcome” we are talking of a good result.</p> <p>Point 52 of the Consultation Paper states that “It is important to emphasise that a good advice outcome does not necessarily mean that the product being advised on performs well. Our focus is on the outcome from the advice process, not from the overall financial decision.”</p> <p>If the phrase “good advice outcomes” is retained, then the retail client public would need to be educated that good advice outcome does not guarantee good product performance.</p> <p>I don’t have any suggestions for an alternative that has less likelihood of misleading retail clients.</p>

B.	<p>Are there any further principles that should be included, or existing principles that should be removed?</p> <p>No opinion on this matter.</p>
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Ethical behaviour

Act with honesty, fairness and integrity

<i>Share your views</i>	
C.	<p>Do you agree with a requirement to act with honesty, fairness and integrity? If not, please set out your reasoning.</p> <p>I agree</p>

Keep the commitments you make to your client

D.	<p>Should minimum standards for ethical behaviour for the provision of financial advice extend beyond strict legal obligations, to include meeting less formal understandings, impressions or expectations that do not necessarily amount to strictly legal obligations? If no, please give reasoning. If yes, please propose how a standard for such commitments might be framed.</p> <p>Ideally, minimum standards for ethical behaviour should extend beyond strict legal obligations, unless the strict legal obligations are sufficiently broad to capture what we expect of the ethical adviser.</p> <p>One advantage of strict legal obligations is that they have avenues for enforcement. If there are ethical obligations required of advisers, over and above what is legally required, then they will only be of use if there is some form of penalty if they are breached. It is very easy to pay lip service to toothless obligations.</p>
E.	<p>If there was a minimum standard requiring Financial Advice Providers – or Financial Advice Providers in some situations – to have their own code of ethics in addition to the Code, how would you frame the requirement for it to deal with keeping commitments?</p> <p>No opinion on this matter.</p>

F.

Should the Code include a minimum standard on conflicts of interest in addition to the legislation?

Yes. From what I can tell, Section 431J requires that a person giving regulated financial advice must give priority to the interests of the person whom they are advising, including taking all reasonable steps to ensure that their advice is not materially influenced by their own interests or the interests of any related persons or FAPs. This covers 3 of the 4 elements of professional conduct covered in section 94 of the Consultation paper, namely to Identify, Avoid, and Manage conflicts of interest.

Sections 431J does not appear to require that an adviser (FA or NR) Communicate those conflicts to the client, and so Section 94 of the consultation paper potentially goes beyond Section 431J in that regard. I think that this requirement is desirable

I think that the Code should have a minimum standard on conflicts of interest, including that an adviser provide the client with a written statement disclosing any conflicts of interest that apply in that advice situation. (Call this a “Conflict of Interest Disclosure”, or COID.)

Clients should be required to sign off on a COID whenever receiving regulated financial advice, acknowledging that they have been made aware of the actual and potential conflicts of interest, the steps taken to avoid or mitigate those conflicts, and that they are satisfied that the adviser is giving priority to their (the client’s) interests. This should be required even where there are no conflicts identified, stating simply that no conflict has been identified.

In my view, a key part of a COID should be disclosure of all remuneration and other incentives. These have the greatest potential for causing a conflict between a client’s interests and those of their adviser. For an insurance adviser, for example, that would include disclosure of any commissions (both upfront and ongoing) they stand to receive, and any other incentives (so called “soft dollars”). For a nominated representative, that would include disclosure of any targets, quotas, bonuses, any other measures they are required to satisfy as a condition of their employment, and any other incentives. For a “roboadvice” or automated digital advice platform, disclosure might look a little different – perhaps disclosure of the financial benefit that will accrue to the FAP utilising the roboadvice platform if the advice is implemented?

Further, in my view any disclosure obligations must apply equally across the different types of advice-giving scenarios (automated advice, human, A.I., and so on), just as the client care and conduct standards are proposed apply across those different scenarios. It would be unfair to some participants (say, human Financial Advisers) if they had to disclose remuneration in their COID if others (say, human Nominated Representatives, or an automated advice platform) were not required to do the same.

There are several practical difficulties with remuneration disclosure, but none of these are so problematic as to swing the balance in favour of the status quo in my opinion.

Finally, if a COID was required, I would prefer to see a standard form to be used across all advice situations. This would clearly prescribe the disclosure required from FAs and NRs, allowing retail clients to make choices based on sound information.

Do no harm to the client or the profession

G.	Do you agree that a person who gives financial advice must not do anything or make an omission that would or would be likely to bring the financial advice profession into disrepute? If not, please set out your reasoning. I agree.
H.	Is an additional minimum standard on doing no harm to the client necessary? If so, what standard do you propose? No opinion on this matter.

Keep your client's data confidential

I.	In which situations, if any, should the retention, use or sharing of anonymised bulk customer data be subject to Code standards? No opinion on this matter.
J.	Do you agree that the Code should cover the various aspects of maintaining client confidentiality discussed in this paper? No opinion on this matter.
K.	Are there other aspects of maintaining client confidentiality to consider? No opinion on this matter.

Ethical processes in Financial Advice Provider entities

L.	Do you agree that the Code should require the Financial Advice Provider to document and maintain its "ethical processes"? No opinion on this matter.
M.	Should the Financial Advice Provider be required to have a publicly available corporate code of ethics? Are there particular situations where a corporate code of ethics should be or should not be required? No opinion on this matter.
N.	Should Financial Advice Providers also be subject to additional standards in respect of leadership and culture? If so, how should these be framed? No opinion on this matter.
O.	Do you propose other additional standards of ethical behaviour that should apply to Financial Advice Providers? No opinion on this matter.

Ethics training

P.	Do you agree that Financial Advice Providers should be required to meet standards relating to ethics training? If not, please state your reasoning. No opinion on this matter.
Q.	Should ethics training requirements apply to all officers and employees of a Financial Advice Provider, as appropriate to their role and contribution to the process of financial advice provision? If not, please state your reasoning. No opinion on this matter.
R.	Should there be a requirement for ongoing refresher training on ethics? No opinion on this matter.

Resolving ethical dilemmas

S.	Do you agree that Financial Advice Providers should be required to have in place, and use, a framework for resolving ethical dilemmas that may arise in giving financial advice? If not, please set out your reasoning. No opinion on this matter.
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Compliance functions

T.	Should there be a requirement for explicit sign-off on the soundness of financial advice provided directly by a Financial Advice Provider? No opinion on this matter.
U.	Do you agree that Financial Advice Providers should be required to have in place a compliance function aimed at following up on concerns raised by employees and other stakeholders? If not, please set out your reasoning. No opinion on this matter.
V.	Should this extend further into an internal audit obligation, having in place processes to systematically test for and detect violations of ethical behaviour? No opinion on this matter.
W.	Are there any potential compliance costs for small and/or large Financial Advice Providers that need to be considered? No opinion on this matter.

Responsibility for the whole advice process

X.	<p>Do you agree that Financial Advice Providers should be required to be able to demonstrate that they meet the standards of ethical behaviour as if the Financial Advice Provider carried out the whole advice process directly itself? If not, please set out your reasoning.</p> <p>No opinion on this matter.</p>
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Reinforcing good ethical behaviour

Y.	<p>What principle or mechanism do you propose the Code could include to reinforce good ethical behaviour on a day-to-day basis?</p> <p>I think that requiring financial advisers and nominated representatives to complete a COID (as discussed above) for each advice transaction is one straightforward mechanism that will help reinforce ethical behaviour on a day-to-day basis. This will cause FAs and NRs to reflect on the particular advice situation and any conflicts that arise.</p>
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Conduct and client care

Advice situations

<i>Share your views</i>	
Z.	<p>Are there other delivery methods that should be considered when testing our thinking?</p> <p>No opinion on this matter.</p>

Advice-giving standards

AA.	<p>How do the current client care standards work in practice, especially in advice-giving situations not previously covered by the AFA Code? In answering this question, please ignore “scope of advice” (CS-8) and “suitability” (CS-9 and part of CS-10).</p> <p>No opinion on this matter.</p>
BB.	<p>Could any aspect of the current client care standards be worded better? (For example, we are aware that the definition of “complaint” could be improved.)</p> <p>No opinion on this matter.</p>
CC.	<p>Are there any aspects of the current client care standards that could be expanded or clarified (for example, in light of the published findings of the Disciplinary Committee)?</p> <p>No opinion on this matter.</p>

DD.	Are there any potential compliance costs for small and/or large Financial Advice Providers that need to be considered? No opinion on this matter.
EE.	Are there any additional matters that should be addressed in the advice-giving standards? Those listed above? Others? No opinion on this matter.

Advice process

FF.	Do you think there are any other components that should be included in the design considerations of an advice process? No opinion on this matter.
GG.	Should the Code include guidance material to help determine what needs to be considered when designing an advice process? No opinion on this matter.
HH.	Are there any other important aspects you think should be included in the advice process for all types of financial advice activities under the new regime? No opinion on this matter.
II.	Should any of the key aspects that we have listed above be removed? If so, why? No opinion on this matter.
JJ.	Are there any situations in which an advice process need not be followed? No opinion on this matter.

Personalised suitability

KK.	What comments do you have about a proposed minimum standard on personalised suitability analysis? What are your views on the example above? No opinion on this matter.
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Organisational standards

LL.	What are the practical advantages and disadvantages of including organisational standards as described? What explanatory material or examples could we provide in the Code that might help to make these standards easier to comply with in practice? No opinion on this matter.
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MM.	<p>Would implementing these organisational conduct and client care standards create a particular compliance burden for your firm? If yes, please explain why.</p> <p>No opinion on this matter.</p>
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General competence, knowledge and skills

<i>Share your views</i>	
NN.	<p>Do you agree with our interpretation of the meaning of “competence, knowledge, and skills”? If not, why not?</p> <p>No opinion on this matter.</p>
OO.	<p>Are there other factors, which contribute to combined expertise, that we have not listed? We are particularly interested in factors that are relevant to financial advice that is given by a Financial Advice Provider directly, including by digital means.</p> <p>No opinion on this matter.</p>
PP.	<p>What do you think are the advantages of this approach to general competence, knowledge and skills?</p> <p>No opinion on this matter.</p>
QQ.	<p>What do you think are the disadvantages of this approach to general competence, knowledge and skills?</p> <p>No opinion on this matter.</p>
RR.	<p>In what ways do you think this proposed standard contributes to, or detracts from, the legislative purposes (for example ensuring the quality and availability of advice, avoiding unnecessary compliance costs, and promoting innovation and flexibility)?</p> <p>No opinion on this matter.</p>
SS.	<p>What factors should we consider in determining whether to make the proposed unit standard a renewing obligation?</p> <p>No opinion on this matter.</p>

Particular competence, knowledge and skills

Share your views

TT.

What are the advantages and disadvantages of our approach of identifying two types of financial advice? What impact would it have on the type of advice you give and on your compliance costs?

I don't think that there is any advantage to identifying 2 types of financial advice, at least in the way proposed. The Consultation Paper fails to clearly distinguish between Product Advice and Financial Planning. We are told that simple product advice situations are those where a recommendation or opinion is given about acquiring or disposing of a financial product. However, "as the advice situation becomes more complex, more variables must be assimilated in order to give the advice and an understanding of the client's broader financial situation becomes necessary." Similarly, "The design of a financial plan typically involves the consideration of many variables. Consequently it may necessitate the exercise of significant discretion, judgement, and balancing of factors."

As a practical matter, then, how is an adviser to know (in a particular client situation) whether they are operating in the Product Advice space or the Financial Planning space? Is there a magic number of variables, or a certain level of complexity, that tips the scales one way or the other? If so, how many variables, or what level of complexity.

In my own case, as a life insurance adviser (life, health, and disability insurances), how complex does a client situation need to be before I am required to meet the higher minimum standards of particular competence, knowledge, and skill for financial planning? Suppose I want to run my practice to only operate in the product advice space: How many variables can I take into account, and how complex can an advice situation be, before I cross the "financial planning" threshold? Are there certain questions I should avoid asking in order to stay on the "right side" of the advice/planning divide? I suggest that questions like these cannot be answered within the proposed framework, lacking as it does in precision and clarity.

If adopted in its current state, then this will likely have a large impact on my compliance costs going forward. The insurance planning I do, which takes into account many variables of a client's situation, would likely be considered "financial planning" under the proposed framework. Just to be safe, this would appear to require me to upskill with a Level 7 qualification, or at least a Level 6 qualification on top of the Level 5 qualification I am currently working towards.

I believe that the above problems can be rectified by returning to the distinction between Product Advice and Investment Planning as defined in 431C(1) of the Financial Services Legislation Amendment Bill.

That section also identifies 2 types of financial advice, (Product Advice and Investment Planning) but does so in a way that makes the distinction much clearer. Specifically, the definition of "Investment Planning" makes it very clear that (i) this activity goes beyond (mere) product advice, and (ii) relates specifically to a client's investment needs and goals, and how to realise those. This still allows for product advice on investment products, but makes it clear that the likes of insurance planning – while "financial planning" in a broad sense – are very different in kind from investment planning.

UU.	<p>How should RFA’s experience be recognised?</p> <p>Existing RFAs should be required to attain a minimum of Level 5, given a sufficient period of time (2 years? 3 years? 4 years?) I don’t think that there is any other workable way of recognising their experience in a measurable, quantifiable way that would ensure a level playing field.</p>
VV.	<p>What do you think are the advantages of this approach to particular competence, knowledge, and skill?</p>
WW.	<p>What do you think are the disadvantages of this approach to particular competence, knowledge, and skill?</p> <p>The proposed minimum standards of particular competence, knowledge, and skill for Product Advice are NZCFS Level 5. The proposed minimum standards of competence, knowledge, and skill for Financial Planning are a Level 7 degree (majoring in financial planning, accountancy, business, commerce, economics, finance, or management), and also a Level 6 certificate in financial planning and advice process.</p> <p>The difference between these two tiers of minimum standard (Level 5 vs Level 7 + Level 6) is too great, especially given the lack of a clear distinction between Product Advice and Financial Planning.</p> <p>If the Code instead distinguishes between Product Advice and Investment Planning, as discussed above, then the different proposed standards of particular competence, knowledge, and skill might be more appropriate (Level 5 for Product Advice, Level 7 + 6 for Investment Planning).</p> <p>A separate point: The rationale for requiring a Level 7 qualification for “financial planning” is that “a financial plan typically involves the consideration of many variables. Consequently it may necessitate the exercise of significant discretion, judgement, and balancing of factors.” I submit that all Bachelors degrees (e.g., Law, Humanities, STEM disciplines, Social Sciences, Education, Management) indicate that the holder is capable of exercising the level of discretion and balancing of complex variables that is desirable in a broad financial planning context, and so restricting the list to majors in financial planning, accountancy, business, commerce, economics, finance, or management, is unduly restrictive. This is especially the case given that a further Level 6 vocational qualification is proposed in addition to the Level 7 qualification.</p>
XX.	<p>In what ways do you think this proposed standard contributes to, or detracts from, the legislative purposes (for example ensuring the quality and availability of advice, avoiding unnecessary compliance costs, and promoting innovation and flexibility)?</p> <p>I think that requiring Level 7 + Level 6 qualifications for financial planning, where that does not involve investment planning and products, will impose massive compliance costs on small and medium advice businesses. A Bachelors degree is 3 years full time study – I’m not sure many advisers could take 3 years out of their business to meet such a standard. Many would likely leave the industry. If they do stay and choose to meet the (unnecessary) higher standards, then this will bring unnecessary compliance costs.</p>

YY.	<p>What alterations, if any, would you suggest to the baselines we have nominated: specialist strand for product capability, Level 5 for discipline capability, and relevant degree (or other degree plus Level 6) for planning capability?</p> <p>As above, I suggest the following alterations:</p> <p>Specialist strand for product capability (same as proposed)</p> <p>Level 5 for discipline capability (same as proposed)</p> <p>Relevant degree (or other degree plus Level 6) for <u>Investment Planning</u> capability (different from proposed)</p>
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Other comments

<i>Share your views</i>	
ZZ.	<p>Are there any other comments you would like to make to assist us in developing the Code?</p> <p>No.</p>