

Submissions to Code Committee on draft Code of Professional Conduct for Authorised Financial Advisers

1. By way of general comment, the draft Code in its current form is in parts overly complex and unnecessarily wordy, and would benefit from a degree of simplification. The Code standards ought to be expressed as general principles and then the specific aspects underlying each general principle should then be set out in the explanatory provisions of the Code standard.
2. If the Code standards were extracted from the current draft and set out in a list, this would clearly illustrate that the Code standards require simplification. When undertaking this task, one does not need to go beyond the principles which are the basis of the client care requirements for lawyers in New Zealand. This is a very useful reference point because both endeavour to establish a code of conduct for its particular profession. It is submitted that notwithstanding the different specific fields of practice, there are certain almost refutable principles that a profession must be based upon. There are a number of aspects of the draft Code standards that do not give appropriate weight to acting for clients without being compromised by any conflict of interest and a clear direction as to the behaviour expected when conflicts do arise, protecting confidentiality of client information, clear guidelines on provision of information about the scope of the work to be done, the way in which the advice or services will be provided, and that the resulting advice is clear to the client.
3. **Code Standard 1:** It is not clear what difference if any exists between the phrase "*must place the interests of the client first*" and the more commonly used "*must act in the best interests of the client*". It is of concern that the proposed former formulation may be a dilution of the latter phrase. It is also of some concern that the Code standard omits a reference to the AFA acting with honesty.
4. **Code Standard 2:** It is submitted that the elevation of this particular principle to the second Code standard is somewhat incongruous. It would have been expected that this Code standard would be of less priority, or at least in terms of its emphasis by way of its order of appearance. Noticeable by its absence is any clear statement on dealing with other AFAs.
5. **Code Standard 3:** It is submitted that this Code standard does not go far enough to emphasize the underlying principle that independence is a fundamental issue for AFAs. What is vitally important is independence in the mind of the client. Therefore, to permit the principle to be diluted by a simple recognition that there may be benefits which are remote or insignificant without any guidance on the level of materiality does not relate this back to the most important aspect of independence, and that is how this is perceived by the client. It is also problematic to identify that salary or wages that are not determined whole or in part by reference to volume or other targets is an exception to the benefits that would affect an AFA's ability to assert independence. That particular criteria would appear to be extremely problematic and likely to cause many issues in practice. The Code Committee ought to set a very high standard and one which is not easily capable of being subjectively misinterpreted or misapplied.

6. **Code Standard 4:** It is vitally important that AFAs should have formal engagement terms with clients before commencing work. There should also be emphasis on providing timely advice. Moreover, it is of concern that conflicts of interest are relegated to the final subparagraph in the explanatory part of the standard. Conflicts of interest are a central issue for all professions and it is disappointing that the Code standard does not elevate this to the level of importance that it ought to enjoy. A simple disclosure of conflicts of interest is not sufficient. There must be an ethical obligation imposed on the AFA to do more than this and to be obligated not to act where a conflict of interest would arise than would prevent the AFA acting in the best interests of that client. Anything less would be undesirable from a client perspective and would result in a less than professional approach by AFAs.
7. **Code Standard 5:** This relates to the underlying principle that it is important that an AFA is not prevented in any way from acting in the best interests of the client. In the explanatory section, the second exception should be expanded to provide that the Code standard does not apply where the client's principal business is the borrowing or lending of money or valuable property.
8. **Code Standard 6:** In relation to the Code standard exceptions, the recommendation that the client takes financial advice from another AFA who is a non-related person of the provider should be provided at the earliest opportunity or otherwise in a timely manner so that the client has a reasonable opportunity to seek and obtain advice.
9. **Code Standard 7:** It is submitted that the basis on which an AFA must report another AFA is likely to be problematic because the phrase "*has reasonable grounds to suspect*" has in fact been interpreted by the Courts. It is likely that this or any similar standard will provide fertile grounds for AFAs to challenge any whistle blowing or complaints. That should not be an indirect goal of the Code standards. No property rights are immediately affected by the existence of a complaint, so a standard such as that proposed would be unnecessarily onerous. The complaint still remains to be investigated. The profession, like any other industry, must rely upon its participants to ensure that all participants maintain their standards and it is vital that each AFA is able to raise a complaint so long as the AFA is not acting in a manner that is frivolous or vexatious. The regulations relating to the complaints procedures can deal with any frivolous or vexatious claims by way of costs or other remedies. The ideal situation would be that complaints ought to be encouraged to lift the standards of behaviour, rather than to give the impression to the public that the profession is a closed shop.
10. **Code Standard 8:** This Code standard is somewhat circuitous because the use of the words "*behave professionally*" do not themselves give any indication of the expected behaviour of AFAs. The standard in its current form is merely a bland statement. In relation to competence, it is important that the AFA has the knowledge, skills and experience to provide the services. The key elements set out in the explanatory material to the Code standard ought to be distilled and inserted into the Code standard itself so that the AFA must only provide services that the AFA is confident to provide, the services are provided in a timely way, and that the AFA communicates clearly, concisely and effectively with a client. It is submitted that the final paragraph ought to be dealt with separately in a Code standard in relation to the important duty of confidentiality.

11. **Code Standard 9:** In relation the application of this Code standard, it is important that the exception under which within the previous 12 months the client has either instructed the AFA or confirmed a prior instruction then an explanation under this Code standard is not required, should expressly require the Code standard to be explicitly disclosed to the client. The client must waive the client's rights in relation to the Code standard, rather merely given a statement which may without context mean nothing to the client.
12. **Code Standard 10:** It is submitted that the word "*reasonable*" in this Code standard should be used very carefully. We note that the use of the word "*reasonable*" in the Code standards generally is not consistent. It would be matter of general interpretation that the word "*reasonable*" would be read into most if not all of the obligations. It therefore begs the question why under this particular Code standard the word "*reasonable*" is used.
13. **Code Standard 12:** The Code standard should expressly recognise that an AFA must advise clients of the complaints procedures and how to access those procedures. In its present form, the Code standard does not go far enough.
14. **Code Standard 14:** It would appear that there needs to be explicit recognition of the need to report in writing to the client on a regular basis on the status of the client's money and any client property.
15. **Code Standard 20:** It is not clear under this Code standard how any gaps in the AFA's competence, knowledge and skills would be identified and by whom. There needs to be a clear reference point, otherwise this Code standard would lack any objectivity and its application in practice would not add any value.
16. **Code Standard 21:** There appears to be a lack of a time dimension in relation to the number of hours of training (i.e. over what period) and how recently those hours of training have been completed.

It is hoped that these submissions are useful in the process of developing the draft Code into a final Code. We would be happy to answer any questions or to further assist in the process. Thank you for the opportunity to make these submissions.