

# Submission

to the

## Financial Advice Code Working Group

on the

## Consultation Paper: Code of Professional Conduct for Financial Advice Services

2 May 2018

## 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
  - Bank of Tokyo-Mitsubishi, UFJ
  - 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 its consultation paper: Code of Professional Conduct for Financial Advice Services (**Code**) and commends the work that has gone into developing the Consultation Paper.
4. If you would like to discuss any aspect of the submission further, please contact:

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## Introduction

5. We strongly support the underlying principles identified by the CWG for drafting the Code, in particular that the Code will take a principles-based approach that allows for 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.
7. If processes and controls are outlined in Code guidance, a realistic transitional period needs to be allowed for development and consultation on the guidance, and for FAPs to develop and implement processes and controls to comply.
8. Whilst the Financial Markets Authority (**FMA**) may need to outline the information it needs for a licensing assessment of any processes and controls outlined in the Code, there should not be duplication between minimum licensing standards and any Code organisational requirements.

## Principles for drafting the Code

9. NZBA supports CWG's overarching theme of 'good advice outcomes' and the general client-centricity of the Code.
10. We acknowledge CWG's comment that 'good advice outcome' will not necessarily mean that the product being advised on performs well. Nevertheless, we consider that 'good advice outcome' may be misleading to customers because of the use of the word 'outcome', which may be equated to performance. Accordingly, we suggest that the concept of 'good advice' is used instead.

## Ethical behaviour

11. NZBA agrees that all FAPs should be subject to the same minimum standards of ethical behaviour.
12. NZBA makes the following specific comments in respect of ethical behaviour:
  - (a) **Question C:** NZBA agrees with this requirement, however, we suggest that the wording of the requirement is aligned with other regimes to avoid inconsistency. For example:
    - (i) Under the Financial Markets Conduct Act 2013 (**FMCA**), the manager of a managed investment scheme is under general duties to act 'honestly', 'in the best interests' of the customer, and to treat customers 'equitably'.
    - (ii) Under the Financial Advisers Act 2008 (**FAA**), the general requirement is for the adviser to act with the 'care, diligence, and skill that a reasonable financial adviser would exercise...'

If the difference is intentional, it would be useful to understand why different regimes have different requirements.

- (b) **Question D:** NZBA considers that minimum standards for ethical behaviour should only reflect legally enforceable obligations (among other issues, it would be impractical to require FAPs to identify and monitor compliance against non-legal commitments). FAPs should then be permitted to operationalise those standards in the way that best suits them. That could mean adoption of the Code's ethical standards or inclusion of the standards into their own code of ethics/conduct.

- (c) **Question E:** Any requirement should be developed by reference to the FMA's guidance on Conduct and any other applicable ethical standards, including those set by industry bodies.
- (d) **Question F:** NZBA agrees that the Code should include a minimum standard on conflicts of interest. Code Standard 5 of the existing Code of Professional Conduct for Authorised Financial Advisers (**existing Code**) may be a good starting point for that standard.

A minimum standard on conflicts of interest should be suitably flexible, refer to the materiality threshold provided by legislation, and consistent with other obligations around disclosure of conflicts.

CWG may also consider issuing guidance on how advisors should manage situations where the best option for the customer will also lead to the best financial/non-financial outcome for the FAP and/or advisor.

- (e) **Question G:** NZBA agrees.
- (f) **Question H:** We do not consider an additional minimum standard is necessary.
- (g) **Question I:** We do not consider that the use of data should be subject to the Code. That is because, in NZBA's view, the Code should not impose obligations that are the subject of other legislative regimes (in this case, this would include the Privacy Act 1993).

Additionally, the Code requirement 'not to do anything, or make an omission that would or would be likely to bring the financial advice profession into disrepute' would also cover the scenario of use/sharing of anonymised bulk customer data.

- (h) **Question J:** We disagree – as above, the Code should not impose obligations that are the subject of other legislative regimes.
- (i) **Question K:** No comment.
- (j) **Question L:** NZBA agrees, however, this should be incorporated through the licensing process.
- (k) **Question M:** We do not have any particular issue with the proposed requirement to make publicly available a corporate code of ethics, however, we query whether the publication of such a document would add value as it is unlikely that most customers would read it. In addition, it may not be necessary if minimum standards for ethical behaviour are set out in the Code itself.

As an alternative, the Code could provide that, where an FAP has its own code of ethics, they make it known to the client as part of disclosure.

- (l) **Question N:** NZBA does not consider that additional standards are necessary.
- (m) **Question O:** No comment.

- (n) **Question P:** NZBA agrees. The new requirement could be modelled on the requirement in the existing Code (Financial Advisers are required to undertake ethics training as part of their continuing professional development (CPD)).
- (o) **Question Q:** NZBA agrees, however, we emphasise that there should be flexibility to tailor the training to the employee's role and contribution to the process of the financial advice provision.
- (p) **Question R:** We agree, and consider that this requirement could be part of any CPD requirement.
- (q) **Question S:** NZBA agrees.
- (r) **Question T:** NZBA disagrees. Instead, Quality Assurance should be undertaken in order to assure that quality financial advice has been given.
- (s) **Question U:** NZBA agrees, however, this should be incorporated through the licensing process.
- (t) **Question V:** NZBA agrees that there should be testing to detect violations of ethical behaviour. However, we consider that FAPs should be left to determine how they implement that in practice.
- (u) **Question W:** No comment.
- (v) **Question X:** NZBA agrees, however, we also note that FAPs provide advice based on the information given to them by, or on behalf of, the customer. Often that information is provided by third parties. An FAP should be able to rely on the information/services provided by third parties when providing advice, and not be required to demonstrate standards of ethical behaviour as if the FAP had itself generated or compiled that information or provided that service.
- (w) **Question Y:** We believe that any requirement to regularly reinforce good ethical behaviour should not be prescriptive. Processes and controls should be designed to support and reinforce Code standards of ethical behaviour.

For example, we do not think it is necessary to have staff acknowledge that the Code applies each time they provide advice. We do not believe that would achieve the Code's objectives, as it would become invisible to users over time (ie it would become a 'tick box' exercise). In addition, such a requirement would be unlikely to influence those individuals who are prepared to behave unethically.

## Conduct and client care

13. NZBA makes the following specific comments in respect of conduct and client care:
  - (a) **Question Z:** NZBA agrees that the standards need to be 'delivery agnostic' and that all scenarios on the advice spectrum are captured. Care should be taken to ensure the Code is agile and future-proofed.

- (b) **Question AA:** In general, we consider that the current client care standards work well in practice and should work well in the broader range of advice giving situations not covered by the existing Code. However, some modifications will be necessary:

*Code standard 6:* This provides that an AFA must “make recommendations only in relation to financial products that have been assessed or reviewed by the AFA to a level that provides the AFA with a reasonable basis for any such recommendation, or by another person if it is reasonable in all the circumstances for the AFA to rely upon that other person’s assessment or review”. To fit with the design of the new regime, this provision should be amended to make clear that the Financial Adviser or Nominated Representative is not required to assess or review the relevant products, or conduct their own assessment of whether it is reasonable to rely upon a review of the product conducted by the FAP. Rather, this Code Standard should permit the assessment or review of the financial product to be conducted by the FAP, and a Financial Adviser or Nominated Representative should be able to rely on that assessment. The same considerations apply when an AFA transmits the advice of another person; the AFA must take reasonable care to ensure the person who provided the advice has an appropriate level of competence, knowledge and skill.

*Code Standard 7:* We query whether there is a need for a specific Code Standard covering disclosure as the disclosure regulations will cover this topic. This Code Standard is therefore likely to be duplicative and may cause confusion.

*Code Standard 12:* We note that Code Standard 12 currently requires that, where personalised advice is provided to a retail client, a written record is kept. Requiring written records of all advice provided would significantly increase the scope of this requirement. In our view, this does not fit with the Code’s aim of increasing access to advice. We also consider that the requirement to record advice in writing is not necessary in all situations (for example, where advice is given over the telephone on a recorded line) and is inconsistent with the underlying principle of taking a “principles-based approach that allows for flexible application a wide range of situations.”

In our view, this Code Standard should be amended to provide that FAPs must ensure that they have in place adequate processes and controls which demonstrate compliance with the other client care standards. This could include written records, telephone or other recordings, or other controls and processes suitable to meet the required standard.

- (c) NZBA makes no comment on questions BB-FF.
- (d) **Question GG:** NZBA agrees that guidance would be beneficial, as long as it is not prescriptive.
- (e) **Question HH:** As in the existing Code, the advice process should clearly set out the nature and scope of the service being provided, and the limitations (if any) of that service.

The timing of the advice should be clearly communicated, for example, how long the advice remains ‘live’, whether it ‘expires’ or under what conditions

it may 'expire'. That may be implicit in the requirement that the client understands the basis upon which the advice is being given.

The Code should also require that information is given to the client in terms that they understand. The Code should recognise the importance of clients providing accurate information to FAPs.

- (f) **Question II:** No comment.

**Question JJ:** NZBA considers that the requirement to comply with the advice process should not apply when another regime regulates the behaviour. For example, when meeting the lender responsibility principles under the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) and suitability assessment requirements under the FMCA.

- (g) **Question KK:** NZBA agrees that a personalised suitability assessment will not always be required in the circumstances. In those cases, a generic determination in relation to a type of client in a particular situation should be adequate. Guidance on when personalised suitability assessments are not required would be helpful (eg where the financial product is relatively simple, carries little/low risk, the customer has specifically sought advice on a particular product). We consider that this will enable providers to confidently and efficiently provide the kind of simple, day-to-day advice that customers need, but which providers are currently wary about providing.

We would also welcome any guidance on dealing with customers in arrears, so that lenders can be confident in trying to assist a borrower in difficulties by discussing variations in the operation of the lending product. In these cases, the personal circumstances of the borrower are likely to be known, and the lender will seek to assist the borrower, but will ultimately seek to recover the debt.

- (h) **Question LL:** We agree that organisational standards are required. However, we believe that these standards would be better dealt with as part of licensing when transitioning to the new regime. Additionally, we note that the organisational standards appear to overlap with ethical standards.

- (i) **Question MM:** We expect this will be likely to create a compliance burden, particularly for large, complex FAPs, as they will need to design processes to ensure that the appropriate standards are being met across the organisation.

## General competence, knowledge and skill

14. NZBA makes the following specific comments in respect of general competence, knowledge and skill:

- (a) **Question NN:** NZBA seeks clarification of the difference between 'competence' and 'skill'.
- (b) **Question OO:** No comment.

- (c) **Question PP:** NZBA considers that this approach provides flexibility for FAPs to structure their businesses in a way that best suits them, and supports good advice outcomes in aggregate.
- (d) **Question QQ:** The second minimum standard – an up to date and clear understanding of the general legal, Code, and consumer protection obligations relevant to giving the financial advice – requires an understanding of obligations to Level 5 Unit standard (ie 26360).

Whilst we accept that a general understanding will be useful in most cases, we do not think it is necessary for all individuals providing advice to have the level of knowledge envisaged, nor that this should be standardised across the industry (as for AFAs).

As the Code notes, the impact of the regime on an individual will depend on the complexity of the advice and the level of the aggregate competence that is provided by the process. The FAP should therefore be able to determine the level of awareness of the law, Code, etc that is adequate for a particular role, and be able to provide that through internal training.

The Code should also provide guidance on how Level 5 knowledge can be achieved through combined expertise where the individual is not required to meet Level 5 or equivalent, and the evidence required.

- (e) **Question RR:** Allowing FAPs to aggregate their capability will make advice more accessible, consistent with the intention of the Financial Services Legislation Amendment Bill (**FSLAB**).
- (f) **Question SS:** Providers should be permitted to develop training in-house to suit their business needs. This may reduce the cost of compliance.

## Particular competence, knowledge and skill

15. NZBA makes the following specific comments in respect of particular competence, knowledge and skill:
  - (a) **Question TT:** The main disadvantage of identifying two types of financial advice is that there is, practically speaking, an overlap between the two in many circumstances. It may not be clear when product advice transitions into financial planning or vice versa. Clear guidance on the difference between product advice and financial planning is therefore required. Additionally, clients do not usually distinguish between the different types of advice.
  - (b) **Question UU:** NZBA considers that RFAs should be required to evidence how they meet the minimum standards under the new regime (some will already hold qualifications). We agree that those previously qualified as AFAs should be recognised as meeting the minimum standard.
  - (c) **Question VV:** We believe this approach will provide flexibility for providers so that they can structure their business in a way that is suitable.
  - (d) **Question WW:** This approach may require significant changes to organisational structure, roles and responsibilities to ensure the ongoing



compliance with the obligations. There may also be significant upskilling required for new job applicants.

- (e) **Question XX:** NZBA considers that, so long as the proposed standard retains flexibility, it will contribute to the legislative purposes of FSLAB.
- (f) **Question YY:** NZBA considers that the Level 5 minimum competency requirement applying to all products and situations is too onerous and unnecessary. Competence requirements should depend on product complexity.

Selling of simple products (eg bank accounts, credit cards, general insurance) should not require the same level of knowledge and competence as an individual selling more complex products. We consider that Level 4 knowledge would be a good baseline for all products, with more complex products requiring additional competence, knowledge and skill.

## General comments

- 16. Whilst the Code aims to be channel agnostic, as digital tools develop customer interactions will become more complex. Individual customers may obtain information from a number of channels and sources on the path to acquiring a product. The paths that determine aggregate competence within an FAP may therefore be many and varied. The Code (and any guidance) should take account of the complexity of judging aggregated competence in practice.
- 17. As part of the next consultation, it would be useful if the CWG could also seek feedback on the time needed to implement proposals, given that changes to advice suitability requirements and record keeping may require IT changes which have long lead times. Quality implementation will be key to delivering the benefits of the new regime.