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28 June 2018

Dear Ms Fung,

AFA Submission – Consultation Paper 300 – Approval and Oversight of Compliance Schemes for Financial Advisers

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for over 70 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The majority of the Board of the AFA is elected by the Membership and all current Directors are practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting wealth.

Introduction

The introduction of Compliance Schemes and Code Monitoring Bodies is one of the most fundamental changes to impact the financial advice profession since the start of the FSRA regime. This fundamentally changes the responsibilities for oversight of advisers and the responsibilities placed on both advisers and those bodies who choose to become a Code Monitoring Body ("Monitoring Body"). The responsibilities and the cost of becoming a Monitoring Body are substantial. This is an additional cost given that it is not replacing any existing arrangement and will need to be paid for by financial advisers and passed on to clients. As this is a new model, industry stakeholders are still coming to terms with

how it will work and are giving due consideration to the options that are available and how the broader industry can work together to come up with an effective solution that achieves consistency and fairness, transparency, and the desired behavioural change. Importantly the solution also need to deliver a cost-effective outcome.

An important piece of context in the design of Compliance Schemes and Monitoring Bodies is the expected outcome of a material reduction in the number of financial advisers as a result of the changes to Education Standards as proposed by FASEA. The solution will need to deliver flexibility to cater for the scale of change in the supply of financial advisers that the profession faces.

The AFA is willing to work with other stakeholders to find this solution. We are also very conscious that this reform requires a solution to be found for each of the 25,000 financial advisers who are currently on the Financial Adviser Register, taking in to consideration the diversity of advisers that make up the register.

It is our view that the development of Compliance Schemes and Monitoring Bodies is a process of building core infrastructure and should not be a point of competition. We believe that the best solution will be developed on the basis of a collaborative, learning based approach that includes the involvement of ASIC and all the applicants and key stakeholders.

Executive Summary

The development of a model for the effective build and operation of Compliance Schemes and Monitoring Bodies is both complex and challenging. ASIC has done a very thorough job in putting forward the initial proposal that addresses the key considerations.

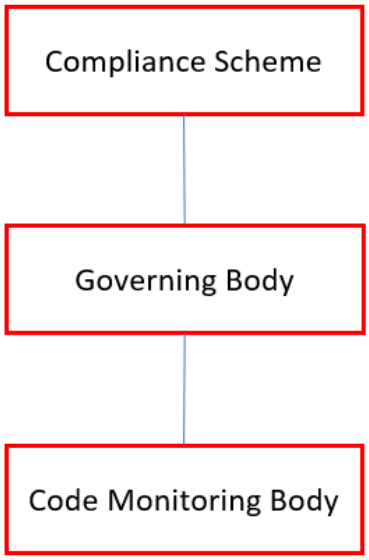
We believe, however, that a number of the requirements are excessive, particularly in terms of needing to submit an initial application more than 12 months before the scheme starts and before the number of covered financial advisers is known. This is also the case, but to a reduced extent, with the final submission that is due at least six months before commencement. We also believe that the requirements around monitoring are above that which we believe is necessary and that some of the timeframes are unnecessarily tight.

The timeframe for the development of Compliance Schemes and Monitoring Bodies was always going to be difficult. This is further complicated by the challenge that we must come up with a solution that brings the entire industry together. It is our view that a single solution or at least a few large Compliance Schemes is the best outcome. In our view the timeframe is impractical in the context of what we believe needs to happen. The role of Compliance Schemes is important and will have significant consequences for those who are investigated for a breach of the Code of Ethics. We do not believe that financial advisers should be subject to investigation for a breach of the code until they have had the opportunity to complete the mandated training on the FASEA Code of Ethics. As this will not be available before the commencement of the Code on 1 January 2020, we are seeking a delay in the commencement of Code Monitoring to align with the mandated training on the Code.

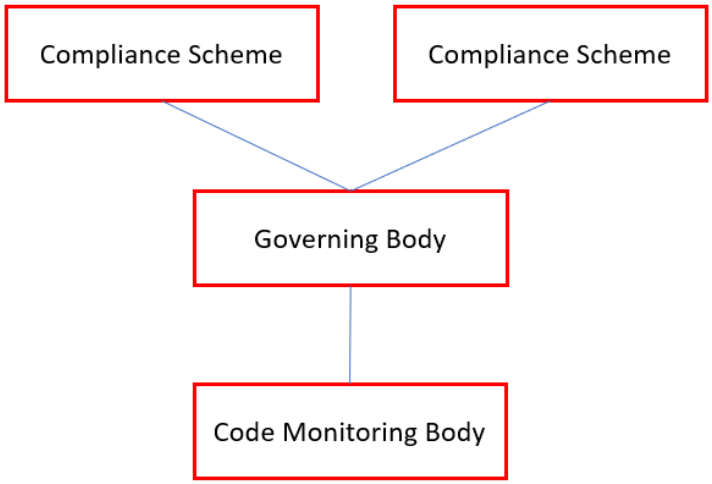
Possible Options

We note the discussion in paragraph 18 with respect to possible alternative approaches. This is something that we are keen to engage in. It is our view that the consultation paper does not adequately address the alternative models of how this is expected to actually work in order to enable a productive discussion. We note that the consultation paper in places talks about a Compliance Scheme and the Monitoring Body in terms that would imply they were separate and then in other places talks about them as thought they are interchangeable. We had certainly understood that they would be separate, which would open up a range of options.

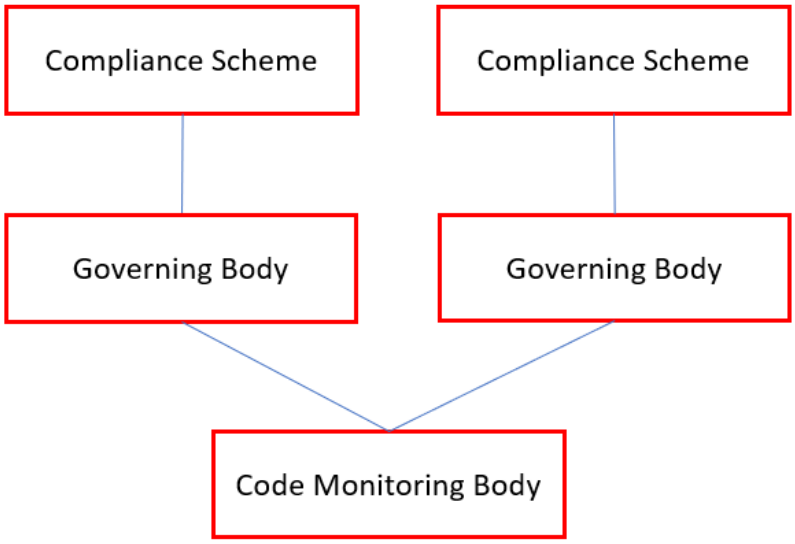
We have given significant thought to the various options that are available. This includes the basic option of having a single Compliance Scheme and Monitoring Body arrangement, as set out in the following diagram.



We also envisage that it would be possible to have multiple Compliance Schemes leveraging off the same Monitoring Body as per the following option, where the Compliance Schemes would be likely to be very similar:



Or alternatively it might be that there can be a greater level of variability in the Compliance Schemes if they have different Governing Bodies, but the one Monitoring Body, who might be an outsourced service provider:



The way in which ASIC have proposed Compliance Schemes and Monitoring Bodies would work, makes it particularly challenging for a single entity to pursue this on their own, making it likely that the best outcomes will come from multiple entities working together.

The ASIC Media Release and Consultation Paper 300 make it very clear that any entity interested in pursuing this must be willing to invest a significant amount of money and would need a sizeable national footprint. The other option is to use outsourced service providers for some or all of the monitoring activity, which might reduce the level of investment, but potentially increase the ongoing cost. Code Monitoring will inevitably be paid for by the financial advisers covered under the Compliance Schemes. In the context of increasing costs to financial advisers from a number of recent regulatory changes, it is essential to keep the cost impost of code implementation and monitoring as low as possible without jeopardising the aims of the legislation. The cost of Compliance Schemes will need to be paid for by financial advisers and as an additional cost of running a financial advice practice this will eventually impact upon the cost of advice for clients.

It is not clear whether the Compliance Scheme needs to be a legal entity, nor whether the Monitoring Body needs to be a separate legal entity to the sponsoring entity. Neither is it clear if the Governing Body needs to be the Board for a legal entity or just a committee. It is our view that the Compliance Scheme and Monitoring Body should be in a separate entity to any sponsoring organisation (i.e. professional association). We have given consideration as to whether the Compliance Scheme and the Governing Body should represent one legal entity and the Monitoring Body represents another legal entity. Alternatively it would also be possible that the Compliance Scheme is part of the same legal entity as the Governing Body and the Monitoring Body. We do believe that the Governing Body should be the Board of the entity. We are also conscious of how this model may look if a large proportion of activity is outsourced. The solution needs to allow for the fact that there may be more than one sponsoring organisation. Issues with respect to the ownership of these entities also needs to be considered. We request that ASIC provide more guidance on all these structural issues.

We are conscious that the Financial Advice market is very broad and that every individual who is providing personal advice to retail clients will need to be covered by a Compliance Scheme. For members of associations that are much smaller than the AFA, in the context of the investment required, it is difficult to see how it is going to be practical for those bodies to operate their own scheme. Again, this adds weight to the argument for a collaborative industry-wide solution to be explored.

Timing Issues

We have closely considered the timeframe that has been set out in CP 300 for the establishment of Compliance Schemes. We believe that the timeframe is impractical. In particular, if ASIC are not making their decision on approved schemes until early October 2019, then it is not practical for advisers to be signed up by 15 November 2019. We also believe that in the context of the scale of the decision that

candidates for Compliance Schemes need to make, that applicants need more time from when they have been approved until they are live and ready to operate. It is quite possible that if there were multiple Compliance Schemes for financial advisers to choose from then they would need to wait to see how many advisers signed up to the scheme, before they could decide on their resourcing requirements and to undertake the recruitment exercise. We also make the point that the inability of financial advisers to complete the mandated training on the FASEA Code of Ethics before the commencement of the Code on 1 January 2020 justifies a delay in the commencement of Code Monitoring.

Response to Consultation Paper Questions

B. Compliance Scheme Approval Application Process

Three-stage application process for initial applicants

B1Q1. Are there better ways for ASIC to run the application process that will help to give certainty about resources required and enable all approvals to be announced at the same time? If so, please provide details.

We support the proposed three stage process, recognising that the investment increases as you proceed through the process and as the requirements are refined from feedback ASIC receives during the process and the most appropriate solutions start to emerge.

The requirements for the expression of interest stage need to be clearer. Is this just a matter of saying you are interested or do you need to provide some details of your application? If this is just the matter of a quick response to say that you are going to be a participant, we are not sure what the benefit is above and beyond ASIC and possibly the other applicants knowing who is seeking to become a Monitoring body. This of itself may encourage collaboration between interested parties. We believe that this expression of interest stage should require the applicant to set down their high-level plans. This would enable the dialogue to commence with ASIC to assess whether it is reasonable for them to continue through to the second stage. We would envisage that each step should involve a high level of collaboration and refinement.

Will ASIC automatically allow all interested parties to proceed to stage 2? If this is the case, then the number of parties that express interest at stage 1 may include any number of organisations that are unlikely to have the financial, technological, and human resources to ultimately lodge a successful application. We suggest the stage 1 expression of interest require some level of detail as to how an organisation is likely to meet basic criteria. Following that, ASIC should then be required to accept, or reject, the expression of interest.

We believe that stage 2 should be refined to display more detail about what is planned to be done to achieve stage 3 approval. The costs to build the detail at Stage 2, when it is unclear whether it will be approved by ASIC, places an unreasonable burden on applying organisations. Approval of the approach prior to building the detail will minimise wasted expense for each applying organisation.

Does ASIC anticipate any further negotiations on the final application after it has been submitted at the end of June 2019?

B1Q2. Does our proposed process create any particular risks that we will need to manage? If so, please provide details.

Yes, it does create problems and risks. Choosing to commence an investment in the project of becoming a Monitoring Body involves a substantial expense. Many of the likely parties who choose to seek approval as a Monitoring Body are not large institutions with significant amounts of capital but are member-based bodies that operate as not-for-profit entities with lean balance sheets.

The program needs to be scaled so that the investment is limited in the early stages and that an applicant does not need to lock in longer term costs until after they have obtained final approval. Please see our response to B2Q1 below for more detail.

It would make sense for ASIC to run briefing sessions for all interested parties prior to the commencement of each of the application stages to ensure interested parties fully understand the requirements.

Content of Application

B2Q1. Do you agree with the information we will require as part of the application? If not, why not?

As discussed above in B1Q1 we believe that the expression of interest stage should require an initial proposal. This would better enable applicants passing a gate as part of participation in stage 2. It would also better enable refinement of the proposal in stage 2.

Stage 2 should be an exercise where applicants present how they do, or do not, intend to meet the Expectations as outlined in Appendix 2, and to provide a preliminary outline of how they would seek to meet any gaps identified relative to the Expectations. They should also need to outline their financial capacity to complete the build if they proceed to Stage 3. In consultation with ASIC, remedies that will close the gaps need to be agreed and documented which thus form the Stage 3 application.

Stage 2 would contain the detailed scope of works to be completed by the applying body prior to them lodging a Stage 3 application. It is the Stage 3 application that contains detailed policies, processes, drafting, and legal frameworks.

In this way it would be possible to avoid incurring substantial unrecoverable costs well before knowing the likelihood of receiving final approval of an entity's approach.

In effect, this will make Stage 2 a collaborative stage between ASIC and the applying bodies to arrive at final submissions with a higher likelihood of successful approval at Stage 3.

We do not believe that initially at Stage 2 all critical elements would need to be locked in and that there should be greater flexibility to talk in terms of what is planned to be built, rather than having it built by the time of the initial Stage 2 submission. This would avoid unnecessary cost outlay that might be focussed in the wrong direction.

Content of Compliance scheme Document

B3Q1. Are there any matters other than those in paragraph 55 that should be included in the compliance scheme document? If so, please provide details.

The proposal in Paragraph 55 looks reasonable, although we believe that the scale of proactive monitoring activity needs to be reviewed. This is discussed further below in Question D3Q1.

B3Q2. Are there any matters in paragraph 55 that should not be included in the compliance scheme document? If so, please give details. Please also suggest alternative places for this information.

We agreed that the matters addressed in Paragraph 55 should all be included in the compliance scheme document.

C. Compliance Scheme Governance and Administration

Responsibilities of Governing Body and Staff of Monitoring Body

C1Q1. Do you agree that the governing body should be permitted to delegate all of its responsibilities described in Table 2, other than the responsibilities described in paragraphs 63(a)–63(b)? If not, please give details.

We agree that The Governing body for a Monitoring Body should be able to delegate or outsource all responsibilities except for oversight of the operations of the body and the making of determinations. We have however discussed an alternative model for determinations in Question C2Q1 below.

C1Q2. Are there any matters other than those set out in paragraph 64 that should be addressed in the charter or terms of reference for the governing body? Please give details.

We support the requirements for the terms of reference for a Governing Body as has been set down in Paragraph 64.

Independence and Impartiality

C2Q1. Do you agree that the governing body should be comprised only of non-executive members? If not, please give details and provide alternatives.

We support the proposal that members of the Governing Body should be non-executive members.

At a high level we would like to question the apparent thinking that the Governing Body would be responsible for all determinations. We would like to put forward the idea that the Governing Body is responsible for the oversight of the Monitoring Body, however a panel approach is employed for the determination of cases. We believe that it may be a better solution to have a group of experienced people on a panel to make the determinations and also to consider any appeals. This way there could be a broader group of people available to call upon to consider matters. Such a model is consistent with ASIC's Financial Services and Credit Panel. Such an approach would provide for multiple locations and different skill sets to better enable the construction of suitable panels to consider different matters. These panel members would be non-executive and could be paid on a case by case basis, rather than being permanent members of the entity. Those members of the Governing Body who were appropriately qualified could also participate in case determinations and appeals.

C2Q2. Do you agree that the governing body should include an independent chair and a balance of industry and consumer representatives? If not, please give details and provide alternatives.

We support the proposal that the Governing Body should comprise an independent chair and the inclusion of industry and consumer representatives. It will be important to have at least one consumer representative on the Governing Body to ensure that the operations of the Monitoring Body have the right focus upon consumer outcomes and have the input of consumer representatives in key decisions. We do not agree that an equal number of consumer and industry representatives are required as independence has been assured by the framework recommended, and expertise in the matters is regarded as more important than the background of the individual members of the Governing Body.

We have raised a question below in D9Q1 about the participation of Governing Body members in decisions and whether a completely different group of people need to participate in the decision making with respect to both decisions and appeals. Clarity on this requirement and the option for resourcing determinations raised above in C2Q1 may impact the thinking on the constitution of the Governing Body.

C2Q3. Do you agree that the criteria listed at paragraph 70 should be applied to determine the chair's independence? If not, please give details and provide alternatives.

We agree with the proposed criteria for determining the chair's independence, however we would suggest that the point should be that the person will not be a member of a financial advice association whilst they perform the role of Chair of the Governing Body. We feel that the requirements of Paragraph 70 might limit the number of candidates and that it might be an unreasonable position to exclude potential candidates from consideration, particularly if they have been a long-term member, or even a Life Member of a professional association. In the case of members of an association, we believe that it should be possible for them to suspend their membership of the professional association whilst they are performing the role of Chair of the Governing Body.

If people with experience in the industry are excluded due to their membership of an association, then this will limit the options and result in the selection of someone who lacks the necessary industry knowledge to do the job.

C2Q4. Do you think that the existence of an independent governing body and role separation will be effective to minimise the potential for conflicts of interest in the monitoring body? If not, please give details and provide alternatives.

We believe that these steps should serve to ensure that the risks of conflicts of interest are effectively managed, however we question the importance of a blanket ban on people involved in carrying out lobbying being involved in monitoring and enforcement. As an example, these are the people that are the closest to emerging issues in the sector and therefore should play a role in the development of the annual work plan. It may be that they are not involved in the day to day running of monitoring and investigative activity, but there is no reason to exclude them from the planning activity.

In terms of people involved in attracting and retaining members, we would see no reason for them not to be involved in administrative activity with respect to monitoring, even though they may be prevented from being involved in the actual monitoring and enforcement investigations.

In the early stages of the development of a Monitoring Body it would be appropriate to have greater flexibility in terms of the ability to utilise the staff of a sponsoring professional association in the operations of the Monitoring Body as new staff are recruited, and monitoring activity is undertaken for the first time. We would recommend that this requirement be refined.

Expertise

C3Q1. Do you agree with our proposed approach of assessing the expertise of monitoring bodies by assessing the matters outlined in paragraph 76? If not, please give details and provide alternatives.

Whilst we support the general intent of this approval process, we think that ASIC needs to modify the extent of detail that they intend to assess as set out in Paragraph 76, particularly during Stage 2. In responding to this question, we have assumed that the Monitoring Body will be a separate legal entity to any sponsoring organisation, although this should not preclude some level of cooperation and assistance. We support the requirements with respect to the proposed expertise of the Governing Body and the process for appointing new members to the Governing Body. In responding to the requirement on job descriptions and staffing procedures, it should be appreciated that it may not be entirely clear what the workload of the Monitoring Body will be until after they are up and running. Requiring them to over-resource before they have clarity of the demand may cause risks to the financial viability of the Monitoring Body. Importantly, it might not be practical to obtain job descriptions during the application process for people employed by a proposed outsourced service provider.

C3Q2. Will it be practical to provide information about the members of the proposed initial governing body in an application for approval of a compliance scheme? If not, please give details and provide alternative methods we may use to assess the expertise of the governing body.

We think this should not be required until Stage 3 of the application process.

In the context that the initial applications are required to be submitted more than 12 months before the Compliance Scheme regime is due to start, we don't believe that it is practical to provide information on who the proposed members of the Governing Body are at that early stage. For smaller organisations it may simply not be sensible or financially viable to sign these people up so far in advance of the role commencing, particularly where there is no certainty that their application will be approved. They may be offered other jobs in the meantime and no longer be available at the time it is proposed to start.

C3Q3. Do you agree that there should always be one member of the governing body who, at some point in the five years before being appointed to the governing body, met the training and competence standards that would have allowed them to give personal advice to retail clients on 'Tier 1' or relevant financial products? If not, please give details and provide alternatives.

We agree that there should always be someone who has previously been qualified to provide financial advice. We would also support a requirement for people with experience as a financial adviser. We would go further and suggest that a majority of the members of the Governing Body should have practical experience in financial advice. This would certainly be the case if the Governing Body was required to make all the determinations with respect to compliance with the Code of Ethics. To understand the issues that they are required to make determinations with respect to, then we believe that access to financial advice expertise is essential.

We believe that this requirement should be assessed in terms of "at some time over the last five years" at the time of appointment, although note that this may exclude certain people who might not have had that currency but still be very suitable for the role if they have remained active within the financial services industry. On this basis, we would support there being greater flexibility for people with the right experience.

The implications of the education standards for financial advisers increasing on 1 January 2019 for new advisers and 1 January 2024 for existing advisers need to be considered. This will make it much more difficult to fill this requirement.

C3Q4. Do you agree that there should always be one member of the governing body who has experience in and knowledge of the principles of procedural fairness and administrative law? If not, please give details and suggest alternative ways that the governing body may be able to access this expertise.

We believe that one member of the Governing Body should have knowledge of the principles of procedural fairness and administrative law. Lawyers appear to be the obvious fit with this capability, but in addition, we suggest there may well be courses and training that would make non-lawyers equally suited to fulfil the requirement.

C3Q5. Are there other aspects of a monitoring body's expertise that we should assess before granting approval for a compliance scheme? If so, please provide details.

We believe that the identified areas of expertise address the key requirements.

C4Q1. Do you agree with this proposal? If not, please provide details and alternatives.

We agree that the Governing Body should be responsible for ensuring that the Monitoring Body has the required level of expertise.

Resources

C5Q1. Are there factors, other than those listed at paragraph 88, that would affect the human, financial and technological resources required for the monitoring body to effectively carry out its role? If so, please provide details.

In terms of the five factors set out in paragraph 88, we agree with the number of covered financial advisers and the extent to which the Compliance Scheme or Monitoring Body outsources activities being key factors. We believe that the homogeneity of covered financial advisers may be an important consideration, although from a practical perspective this is not likely to apply in the financial advice space. The location of the advisers relative to the Monitoring Body is a factor that would have some influence, however we do not believe that this is a factor that would have a material impact. The relevance of whether the entity behind the Compliance Scheme also uses the Monitoring Body to monitor compliance with its own code of ethics or conduct would depend upon the extent of difference between the FASEA code and the sponsoring organisation's code. If the difference is minimal then we do not believe that it would have a material impact upon the requirement for resources. It would be the AFA's preference to adopt the FASEA Code of Ethics, if we felt that it addressed all the requirements that we have in our current Code of Conduct.

C5Q2. Do you agree with our proposed approach of asking the monitoring body to set out in a statement to ASIC the basis on which it considers its resources to be adequate? If not, please give details and provide alternatives.

We believe that it is appropriate for the applicant to set out what it proposes to have in terms of resources (human, financial and technological) and the key assumptions behind that plan. Where these assumption change, then it is reasonable for the plan to change as well. We do not believe that they should in any way be locked into this level of resourcing and should have a mechanism to modify their plan.

It will be difficult for applicants to work out accurately how many resources they need and what type of resources until they know how many covered financial advisers that they will be responsible for. This might seem straight forward for a professional association; however we have a number of members who are also members of other associations and each of these members will need to decide which Compliance Scheme that they will sign up to.

It will also be difficult to assess in advance how much reactive monitoring activity will be required although previous complaint experience may be a guide.

We also make the point that the human resource requirement for proactive monitoring would be difficult to assess based upon the limited guidance that has been provided in paragraphs 108 – 118.

As a final point, the technology available with respect to monitoring of compliance of financial advice is rapidly evolving and it may not be appropriate to lock in the proposed solution too early.

C5Q3. Should we set a specific benchmark for the financial resources that monitoring bodies should have initially (e.g. that monitoring bodies should have at least 12 months cash against an outlined program of work)? If so, please provide details.

It is important for there to be specific benchmarks for financial resources, just as there are for AFSLs, however this should be measured more in terms of the access to capital of the sponsoring entity/entities and not the Monitoring Body. Twelve months cash seems both excessive and also an inefficient allocation of resources.

Outsourcing

C6Q1. Is the definition of 'core function of the compliance scheme' set out in paragraph 93 appropriate? If so, please provide details.

We agree with the proposed definition of core functions.

C6Q2. Are there key matters, other than those listed in paragraph 97, that monitoring bodies who outsource their activities should address in their contractual arrangements with outsourced service providers? If so, please provide details.

We support the three factors listed in Paragraph 97. We recommend that the outsourced service agreement specifically recognises the role of the Governing Body and the requirement of the outsourced service provider to be responsive to the requirements of the Governing Body. As an example, they may be required to attend Governing Body meetings on a regular basis. We also believe that the agreement should address a requirement for Professional Indemnity Insurance.

Clearly the agreement will also include the commercial terms involved in the outsourced arrangement.

D. Compliance Scheme Monitoring and Enforcement

Monitoring and Enforcement

D1Q1. Should monitoring bodies carry out both proactive and reactive monitoring? Please provide reasons for your response.

This is an important question as it will impact upon the nature of monitoring and the cost of monitoring. The legislation simply refers to monitoring activity undertaken by Monitoring Bodies. The Explanatory Memorandum does not refer to proactive monitoring. It is also noted that the legislation does not provide the powers for a Monitoring Body to demand information from a relevant provider or licensee when pursuing a proactive inquiry, however we acknowledge ASIC's comments that they expect this to be resolved through their legislative powers.

We recognise the value of having a proactive monitoring program, including that it is more likely to pick up issues that might not otherwise come to the surface, that can be used to identify examples of both best practice and failed practice. We also appreciate that licensees generally are already undertaking some form of proactive monitoring via the typical annual financial advice audit program.

We support the inclusion of some proactive monitoring, however. We support the inclusion of proactive monitoring however hasten to make the point that, as ASIC knows from its own surveillance activities, the amount of proactive monitoring will have a direct cost impost that will need to be passed on ultimately to consumers of financial advice. Therefore, striking an appropriate balance is likely to require a focus on advice-related projects to uncover changing trends and areas of likely concern. We believe that it should be less substantial in terms of activity and therefore more limited in terms of the cost impact. Please refer to our response to question D3Q1.

D1Q2. Would it be preferable to delay any aspect of the monitoring and enforcement requirements to facilitate transition to the new regime (e.g. should we delay the requirement that the monitoring body conduct proactive monitoring activities)? If so, please explain why and provide details.

We believe that proactive monitoring should be deferred until the second or third year. This will give the Monitoring Body time to build resources, data, capability and procedures, and better understand the type of effective proactive monitoring that needs to be implemented.

Our initial view was that reactive monitoring should commence straight away, however there is one important factor that is influencing our thinking on this. An essential part of the learning about the FASEA Code of Ethics is the dedicated AQF level 8 subject that FASEA have proposed all advisers will need to do as part of achieving degree equivalence. We also expect that the FASEA Code of Ethics will be an integral part of the registration exam. Given that these FASEA Code of Ethics courses are unlikely to be available until some time in 2020, holding financial advisers accountable to the Code from the start of 2020, before they have had the chance to undertake study on the Code, is unfair. It is also important to take into consideration the training of people who need to undertake the monitoring and investigation of compliance with the FASEA Code of Ethics. These people will need to complete the formal training as well. Given the need for the Monitoring Body to differentiate between breaches of the law and breaches of the FASEA Code of Ethics, the monitoring and investigating staff will need a greater level of training,

We have previously expressed a view that the timing for the establishment of Monitoring Bodies is impractical. We continue to hold this view, and in the context of the availability of study at the required AQF 8 level on the FASEA Code of Ethics, we believe that the commencement of Code Monitoring should be pushed back to 1 January 2022 to allow a more reasonable timeframe for the establishment of effective Monitoring Bodies and for financial advisers to complete the study on the FASEA Code of Ethics before being held accountable to it, remembering that the Code will impose ethical obligations that go above the legal requirements in the law. This is something that the Government would need to do.

D1Q3. Could monitoring bodies work together to develop a uniform approach to monitoring and enforcement, and would this be appropriate? If so, please explain why and provide details of how this could occur.

We support the idea of Monitoring Bodies working together to develop a consistent approach to monitoring and enforcement. We do not see any reason why this would not be appropriate as we believe this is a matter of best practice rather than being anti-competitive. We also believe that there is a broader benefit in having a high level of consistency between the approaches employed by different Monitoring Bodies.

We suggest that ASIC and FASEA could facilitate annual information exchange conferences between Monitoring Bodies.

D1Q4. Could a single body carry out these activities for all or a number of compliance schemes and would it be appropriate? If so, please provide details.

We believe that it should be possible for a single Monitoring Body to undertake the code monitoring for multiple Compliance Schemes. We have illustrated the options for how this could work in the Options section at the start of this document. A model based upon a single Monitoring Body would be very beneficial in delivering scales of economy benefits to each of the Compliance Schemes. This would help to avoid duplication of infrastructure and fixed costs. It would also enable a Monitoring Body to develop a national foot-print and be less reliant upon travel to undertake on-site monitoring of covered financial advisers.

In practice, we see this as the most practical model as it will minimise costs per adviser, ensure consistency in monitoring standards across various schemes, and provide easier monitoring for ASIC as to conduct of investigations and monitoring. The downside could be the loss of competition from having competing providers, if it were limited to one industry participant.

Annual Work Plan

D2Q1. Do you agree that a monitoring body should prepare a risk-based annual work plan? If not, please give details and provide alternatives.

We support the proposed requirement for Code Monitoring Bodies preparing a risk-based annual work plan. This will apply in the context of both proactive and reactive monitoring.

It is difficult to predict the amount of reactive monitoring activity with any level of reliability although previous complaint history could be a yard-stick.

Whilst the proactive monitoring activity can be planned in advance, we believe that it is appropriate that Monitoring Bodies have the ability to alter their annual plan to better focus upon any emerging issues. As has been suggested, it should be a risk-based annual work plan and since risks change, it would be important to update it as new risks emerge. We have seen exactly this as we have observed the proceedings at the Royal Commission.

As discussed above in Question D1Q1 we support a level of proactive monitoring, however we do not believe that it needs to be to the same scale or frequency as suggested in CP 300.

D2Q2. Do you agree that the annual work plan should be provided to ASIC each year, from 1 January 2020? If not, please give details.

We note that neither the legislation nor the Explanatory Memorandum refer to the requirement for an annual work plan or for this to be provided to ASIC each year. The Consultation Paper does not set out the basis for why it should be provided to ASIC prior to the commencement of the year.

We agree that the annual work plan should be prepared by the start of the year. In our view it would be likely that only limited proactive monitoring would be undertaken in January and it should therefore be reasonable to have the annual work plan signed off by the Governing Body by 31 January each year.

We also make the point that it may be appropriate to modify the annual work plan as the year progresses to reflect emerging issues or to enable more flexibility in resource allocation. As an example, if reactive monitoring is less than or greater than expected, then it is likely that more, or less, resources will be available for proactive monitoring. We believe that flexibility in the work plan is important and that if the annual work plan is to be provided to ASIC, that this may make it more difficult to keep the plan relevant to changing trends. A mechanism would be needed to discuss with ASIC alterations to the work plan during the year. We would recommend that rather than submitting an annual work plan, that the ongoing work plan of the Monitoring Body is discussed with ASIC at regular meetings, rather than formally submitted and locked in stone for an annual period.

We also suggest that the requirements for work planning by the Monitoring Body would be at a lower level of detail as compared with the requirements of ASIC. If this is to be provided to ASIC then they should only need a high-level summary of the plan.

D2Q3. Do you agree that the annual work plan should be made public? If not, please give details.

The legislation and the Explanatory Memorandum do not mention a requirement for a work plan to be made public.

We do not believe that the annual work plan should be made public. This would signal in advance the proactive monitoring activity that the Monitoring Body intends to undertake and could perhaps reduce the effectiveness of proactive monitoring in uncovering behaviour that needs improvement.

Also, as discussed above, we believe that it is important for the Monitoring Body to have flexibility to update the plan as new risks or issues emerge, and the need to alter public expectations by changing a publicly released plan can increase distractions to the real issues we are all seeking to address. We do not believe this will materially impact the objective of transparency as reporting on activity undertaken will be the public proof-point of the Monitoring Body activity.

Proactive Monitoring Activity

D3Q1. Will a minimum of one thematic own-motion inquiry and one compliance statement process each year, with associated verification activities, be sufficient proactive monitoring activities to ensure that compliance with the code is appropriately monitored and enforced under a compliance scheme? If not, please give details and provide alternatives.

In the absence of knowing the full requirements of a "thematic own motion inquiry" it is somewhat difficult to answer this question. A thematic own-motion inquiry has not been defined or explained in the Consultation Paper. What is also unclear is the sample size that might be required as part of this inquiry.

It would certainly appear that this requirement across a large sample would be particularly challenging for a Monitoring Body and would incur significant expense. We recommend that it would be reasonable to undertake the inquiry on no more than 1% of the covered financial advisers or in order to ensure that it is statistically valid a minimum of 30 financial advisers. We note that ASIC report 413 comprised a sample of 79 advisers, and 202 client files, to determine an industry wide finding. This represented approximately 0.35% of the number of advisers at that time. ASIC Report 575 on SMSFs involved a review of 250 advice files, representing less than 1% of financial advisers. The SMSF project has extended from March 2017 to June 2018, which is beyond a year and has crossed over years.

The very nature of a proactive monitoring inquiry is that it could extend over a longer period, and it would therefore not always fit neatly within an annual work plan

We support the idea of a compliance statement, however question the need to do this on an annual basis. We recommend that the thematic own-motion inquiry and the compliance statement exercise should happen on alternate years, rather than both each year. Thus, we recommend that the compliance statement exercise be undertaken every second year. This will enable a high level of proactive monitoring without being excessive.

We note the reference to shadow shopping as a sampling and integrity testing activity. As ASIC is aware, shadow shopping is a particularly complex, and expensive, activity and it seems excessive as a verification activity. It would seem to be more appropriate to do a small sample as either desk-based or on-site reviews.

We note the point about proactive monitoring being used for the purposes of identifying both failures to comply with the code and to identify examples of good practice. However, we believe that it is more likely that the identification of good practice is an incidental outcome of the monitoring process rather than being a primary focus.

D3Q2. Are the proposed proactive monitoring activities appropriate for monitoring compliance with the standards set out in the draft code? If not, please give details and provide alternatives.

We have provided feedback to FASEA about the challenges involved in monitoring compliance with their draft code. It is our view that it will be very difficult for a Monitoring Body to monitor compliance with the values and many of the standards in the FASEA draft Code of Ethics.

In our submission to FASEA on their draft Code of Ethics we have raised a range of issues including the following:

- The lack of clarity on some of the key terms that they have used, such as "inappropriate personal advantage", "independently minded", and "the broad effects".
- The difficulty of monitoring Standard 1 – "Act in accordance with the spirit – and not only the letter – of all relevant laws and regulations (including his code)."
- The difficulty of monitoring Standard 6 – "Take into account the broad effects arising from a client acting on their advice."
- We also identified uncertainty with respect to the potential implications of actions or inactions that might be in breach of standard 12 – "Individually and in cooperation with peers, uphold and promote the ethical standards of the profession, and hold each other accountable for the protection of the public interest."
- We raised a number of other questions with respect to potential issues with other proposed standards, including matters with respect to interpretation.

In our view, based upon the current draft of the Code of Ethics, it will be very difficult in a number of situations, for a Monitoring Body to assess breaches of the FASEA Code of Ethics. It will be essential that staff of the Monitoring Body are adequately trained in terms of the expectations of behaviour under the FASEA Code of Ethics. It is difficult to provide a comprehensive response to this question whilst so many questions remain with respect to the FASEA Code of Ethics and the challenges of monitoring activity against this code.

Receipt and Initial Assessment of Reports

D4Q1. Is it reasonable for monitoring body staff to complete their initial assessment of the report within 28 days of receiving a report? If not, what other timeframe would be appropriate?

We do not believe that it is necessarily reasonable to complete an initial assessment within 28 days as it is very dependent upon the complexity of the matter, the extent of information that needs to be obtained, and the potential for delays in getting information, or the fact that issues may emerge as the investigation progresses.

In our view a deadline of 28 days would mean that the Monitoring Body would need to appoint additional resources to ensure that this deadline could be met every time, and this is likely to be an inefficient use of resources and capital.

We suggest that two months is a reasonable deadline for the completion of the initial investigation.

In terms of initial assessment, we believe that there needs to be discussion of the referral of matters of breach of the law to ASIC and licensees.

D5Q1. Do you agree with the proposal for monitoring bodies to have a communications strategy? If not, please give details and provide alternatives.

We believe that the requirements set out in Paragraph 124 are appropriate, however we would not classify this as a communications strategy. This is simply a matter of Compliance Scheme disclosure requirements.

Investigation Process

D6Q1. Is it reasonable for investigations to be completed within 90 days of the initial assessment recommending that further investigations should take place? If not, what other timeframe would be appropriate?

As discussed above, the timeframe depends upon the complexity of the matter under investigation, the information that is required to be collected to make the assessment and fact that new issues may emerge as the investigation progresses.

We note that the legislation requires that where a covered financial adviser is seeking to be covered under a new scheme, where they are under investigation, the investigation needs to be completed within 160 days. On this basis, we believe that a similar deadline should apply to a Monitoring Body to complete an investigation.

We would also consider the timeframes achieved by EDR schemes as a useful benchmark for this exercise and it is our understanding that they are taking much longer than 90 days.

We note the reference in Paragraph 136 that the 90 day period is a soft benchmark only. We would therefore like to know what a "soft benchmark" is? What is the point of having a set timeframe if it is only a soft benchmark?

We are not suggesting that longer timeframes should be the typical outcome, but rather making the point that a Monitoring Body does not have the ability to control every element of the process. There will be many examples of reasons for a delay, including complications with the cooperation of covered financial advisers, illness on the part of the advisers or a key source of information, or difficulty getting external information or advice.

We would support a guideline that for simple matters they should be resolved within 90 days. We would also suggest that matters should be prioritised where the matter is more serious and client detriment is at stake.

D6Q2. Should the governing body regularly review a random sample of matters that were investigated but not referred to it, as proposed in paragraph 134? If not, please give details and suggest alternative measures that can be used to ensure consistency and quality in the investigation and referral process.

It is unclear from paragraph 131 whether investigations, that do not proceed to a determination are reported to the Governing Body or not. We would think that the Governing Body should get a summary report of these matters. It would seem reasonable that they would then have the opportunity to review a sample of these matters.

In order to enable the Governing Body to operate as a non-executive oversight committee we believe that the Monitoring Body should only issue them with a sensible amount of material to review as part of their formal meetings. It should not be necessary for them to see everything; however they should have the ability to access all the information they require and the opportunity to do some sensible random sampling of matters where an investigation resulted in a decision not to proceed to a determination.

Decision-Making Process

D7Q1. Do you agree that the governing body should be responsible for making the final determination about whether a financial adviser has failed to comply with the code? If not, please give details and provide alternatives that address the need to ensure that the decision maker is impartial.

We are happy to support the proposal that the Governing Body is the ultimate decision maker, however we believe that ASIC should consider proposing a panel approach for determination hearings similar to that employed by ASIC's Financial Services and Credit Panel. Governing Body members could also sit on this panel if they had the appropriate skills. Whilst it would be possible for the Governing Body to make the final decision based upon the recommendation of a panel, we are conscious that this may not be the most efficient process. A delegation power to a suitable panel is the preferred option.

We are certainly conscious that some of the non-executive members of the proposed Governing Body may not have a huge amount of awareness of the financial advice profession, particularly at the early point in their involvement in this role. It may therefore be more appropriate to have a separate panel to hear determinations and appeals.

D7Q2. Is it reasonable to expect the governing body to make a determination within 45 days of a matter being referred to it? If not, what other timeframe would be appropriate?

We believe that the Governing Body meetings will be most effective if they are face to face. Where the members of the Governing Body are not all from the one location and it is necessary for some to travel then it will not be possible to have ad-hoc meetings. Please note our discussion above about the utilisation of panels to make determinations. We will respond to this question on the basis of determinations being made by the Governing Body.

A 45 day deadline necessarily implies that Governing Body meetings will be held once a month. It is also recognised that it would be possible for a Governing Body to conclude at the end of their deliberation on a particular matter that they need additional information to finalise their assessment. This would result in the decision being delayed until the next meeting.

The volume of matters that are identified may not necessitate a monthly meeting. Many Boards for small to medium enterprises only meet on a quarterly or bi-monthly basis. We note that ASIC have suggested in Paragraph 144 that you expect Governing Bodies to meet on at least a monthly basis, however this may not be necessary based upon the volume of matters and may therefore simply add to cost, with little actual benefit.

For all the reasons discussed above, we think that it would be problematic to stipulate a 45 day period. We would recommend greater flexibility to allow for the situations where more time is required. In our view a deadline of 75 days would allow greater flexibility in the case of something unusual. This would of course not preclude a target of a shorter timeframe to apply in most cases. We would also believe that determinations should be made more quickly for serious matters and cases where there is a risk of ongoing client detriment.

D7Q3. Do you agree that the governing body should comply with the principles set out in Table 4 in carrying out its decision-making activities? If not, please give details and provide alternatives.

We agree with the principles set out in Table 4. We believe that this is appropriate in the context of the severity of the potential consequences. This aligns with the concepts of natural justice and procedural fairness.

We do however make the point that a hearing type process as set out in Table 4 would most likely complicate the proposed timeframe set out in D7. Our reason for this is that if a hearing is going to be held where the covered financial adviser has the opportunity to present their case, then the Governing Body is likely to want to firstly meet to consider the matter before choosing to proceed with holding a hearing. If this was the case then more time would be required, even if Governing Body meetings were scheduled every month.

Sanctions

D8Q1. Does the list at paragraph 145 capture all of the sanctions that might be appropriate to impose? If not, please give details.

We have reviewed the list of sanctions set out in Paragraph 145 and offer the following feedback:

- We believe that the Monitoring Body needs to have powers to impose sanctions on the covered financial adviser. We are less certain that Monitoring Bodies should expect to have powers to impose penalties on licensees.
- We are conscious that the requirement for corrective action may result in a penalty being applied to a licensee.
- In the case of additional supervision, where this is being provided by the licensee (as opposed to the Monitoring body) then this is a penalty on the licensee.
- Where the sanction is the requirement for a compliance audit of the financial adviser, this might also appear to be a penalty on the licensee or Corporate Authorised Representative where the adviser is a salaried adviser.
- Ordering the financial adviser to provide the services to the consumer again at no cost or to reduce or waive the costs for its work may also be a penalty on the licensee.
- We would suggest that consideration be given to the option of a suspension, that could mean the adviser was prevented from providing advice for a certain period of time, which might be in order for them to undertake further training or to address other issues.

Some consideration would need to be given to how some of the sanctions would apply in a salaried adviser context and whether employment agreements would need to be modified. We do not oppose the sanctions mentioned above, however believe that consideration needs to be given as to whether the Monitoring Body has the ability to apply sanctions that end up the responsibility of either a licensee or a Corporate Authorised Representative.

We certainly support the options with respect to a warning or reprimand, additional training or revocation of the adviser's membership of the Compliance Scheme.

D8Q2. Are the matters other than those listed in Table 5 that a governing body should take into account when determining which sanctions to apply? If so, please provide details.

We believe that the factors set out in Table 5 are appropriate and should be important in considering the sanction. We make the point that it is difficult for the Governing Body to genuinely assess whether there is a likelihood of behavioural change.

We believe that it is appropriate to consider mitigating factors, noting that the consideration of mitigating factors will not in any way affect the decision of whether the adviser has failed to comply with the Code of Ethics, but rather may influence the sanction. We believe that it is important for the Monitoring Body to demonstrate fairness and consistency, so the consideration of mitigating factors will need to be applied in a manner where a record of precedent is carefully recorded.

Appeal and Dispute Resolution

D9Q1. Are there matters, other than those listed in paragraph 152, that should be covered in a monitoring body's documented appeals process? If so, please provide details.

One critical issue that we do not believe has been addressed in paragraph 152 is whether a different group of people should consider the appeal as opposed to the original group (either the Governing Body or alternatively the panel idea as discussed previously). It is the convention that appeals are considered by a different court. In the case of the AFA disciplinary process, any review of a decision is considered by a different panel.

The thinking about the constitution of an appeal panel has deeper implications in terms of how the Governing Body operates. It had been assumed that it was ASIC's intention that the full Governing Body would consider each matter that was brought to them for a determination. However, if it is necessary to have the ability for a different group of people to consider an appeal, then the Governing Body would need more people and operate on a panel basis when considering determinations. This is an important consideration and clarification on this is important.

D9Q2. Should there be another party, aside from the governing body, that can hear appeals from covered financial advisers? If so, please give details.

As discussed above in D9Q1, we believe that a separate group of people should consider an appeal. As discussed above this might mean that the Governing Body has to be designed to operate with the capacity to resource two forums, being the original determination and then a separate forum to consider any appeal. It might be that the Appeals Forum could be a separate committee that was appointed only for the purpose of considering appeals and did not have any broader responsibilities in terms of the oversight of the Monitoring Body, as per our panel proposal discussed above.

As discussed above, this is an important consideration that needs to be clarified.

D9Q3. Is it reasonable for a final response to be provided to a covered financial adviser about their dispute within 45 days? If not, what other timeframe would be appropriate?

As discussed above, we question the practicality of a 45 day deadline for making final decisions, particularly in the context that it might be a different group of people who consider this matter and there is still the possibility that the new body may request additional information or take more than one meeting to reach a decision.

As discussed above in Question D7Q2 in the context of possible delays, we think that a deadline of 75 days would be more appropriate.

Enforceability

D10Q1. Is a legally binding agreement an appropriate way to make the compliance scheme enforceable between the monitoring body and financial advisers? If not, please give details and provide alternatives.

The AFA is happy to support a legally binding agreement between the Monitoring Body and the covered financial advisers in order to make the Compliance Scheme enforceable.

In terms of the contents of the legally binding agreement, we note that Section 921L(3) provides the power for the Monitoring Body to request information from the licensee and financial adviser, although it is potentially limited to reactive monitoring or investigations. It makes sense to also address it through a legally binding agreement to provide power with respect to proactive monitoring.

We agree with the other items listing in Paragraph 160, however we recommend that there is an additional item with respect to meeting the costs of any investigation that is undertaken into their conduct. CP 300 has not addressed the funding model for a Compliance Scheme and this is no doubt the responsibility of the Compliance Scheme, however provision should be made in the agreement to establish and vary a funding model and provide the flexibility to recover costs where applicable.

One important question that we raise is the timing of having these legally binding agreements in place. If ASIC is going to confirm which Compliance Schemes are formally approved in early October 2019, and advisers need to have signed up with a Compliance Scheme by 15 November 2019, then this will be a particularly challenging process to get all agreements in place. We would suggest that there is some level of flexibility to finalise the completion of these agreements. This needs to take into account that some advisers could be away at that time or might be unwell during that period. We have previously raised our reservations about the unreasonable timeframe for the implementation of Compliance Schemes.

D10Q2. Do you agree with the proposed process for dealing with non-compliance by a covered financial adviser outlined in paragraph 161? If not, please give details and provide alternatives.

We support the proposed process in paragraph 161. We believe that this addresses the procedural fairness that you would expect in such a situation. For the purposes of the effectiveness of the overall regime, it is critical that Monitoring Bodies have the ability to take action in the event of non-compliance with determinations. A failure to take appropriate action will undermine the entire scheme.

E. Compliance Schemes' Ongoing Operation

Data Collection Analysis and Reporting

E1Q1. Do you agree that monitoring bodies should produce public annual reports covering the matters outlined in paragraph 167? If not, please give details (e.g. about which data in particular should not be made public) and provide alternatives.

We note that the legislation only addresses the requirement for the Compliance Scheme to be publicly available, which the Explanatory Memorandum explains in terms of ensuring advisers are aware of the monitoring and enforcement procedures and clients have access to information about the process for lodging complaints. It is further noted that the Monitoring Body would publish the FASEA Code of Ethics.

The requirements set out in the legislation are relatively straight forward and undemanding. There is no mention of a requirement for a Monitoring Body to produce an annual report in the legislation or in the Explanatory Memorandum. It is noted that the legislation includes a specific requirement for FASEA to produce an annual report, which suggests that the issue of annual reports has been directly considered. We therefore note that there is no legal requirement to produce an annual report.

In the interests of transparency, and consumer trust, we agree that it would be appropriate for the Monitoring Body to produce a report on it's activity on an annual basis. We believe that this should be a report at a reasonably high level, rather than a low level detailed report. It should be a summary level report. Whilst a high-level report might be the intention, this is not as clear as we believe is necessary.

E1Q2. Do you agree that monitoring bodies should produce quarterly reports for ASIC and meet with ASIC on a quarterly basis to discuss the matters outlined in paragraph 167? If not, please give details and provide alternatives.

We recognise the obligation in Section 921Q for a Monitoring Body to provide ASIC with specified information or documents as requested. Thus, ASIC clearly has the power to request reports from a Monitoring Body. Accordingly, we support the requirement to provide regular reports, however we believe that it is more appropriate to do this on a six-monthly basis and that the reports should be at a summary level.

It is appropriate for ASIC to have oversight of the activity of a Monitoring Body, however it is not necessary for this to go to the extent of micro-managing individual matters. It is our view that these regular reports should take the form of a specified template with clear instructions with respect to the requirements. In our view the Monitoring Body should only spend a sensible amount of time in the preparation of reports for ASIC.

We also support the requirement to have a regular meeting with ASIC and suggest that six monthly should be an appropriate frequency.

E1Q3. Do you agree with our proposed 45-day timeframe for monitoring bodies to report serious contraventions or systemic issues to ASIC? If not, please give details and provide alternatives.

We support this requirement, however note that the obligation should commence from the point that the Governing Body has made a determination that the matter is a serious contravention or a systemic issue. We certainly expect that it may take longer from initial notification for a decision to be made with respect to whether something is a serious contravention or a systemic issue. Nonetheless, if it is a serious matter then a timely response is appropriate.

E1Q4. Would it be preferable to delay the commencement of some or all of the data collection, analysis and reporting expectations? If so, please explain why and provide details.

We would agree that it was appropriate to delay the requirement for data analysis and reporting, however data collection needs to commence from the beginning of the regime. As discussed above, we believe that a six-monthly reporting and meetings frequency would be appropriate. As discussed above in Question E1Q2, we believe that Monitoring Body reporting to ASIC and meetings with ASIC should be on a six-monthly basis rather than quarterly. Thus, in the first year this would involve a report and meeting following the 6 months mark and the 12 months mark.

E1Q5. Would it be appropriate to reduce, or consider reducing, the proposed requirements for reporting to ASIC over time? If so, please explain why and provide details.

As discussed above, we have proposed six-monthly reporting and meetings with ASIC. As time progresses it may be appropriate to drop this back to annually, however we would expect that this might take a few years of experience to reach that level of confidence and stability in the trends affecting financial advice.

E1Q6. Would it be feasible for monitoring bodies to work together to develop a reporting standard and would this be appropriate? If so, please explain why and provide details of how this could occur.

As discussed above, we believe that a standard reporting template would be appropriate.

Whilst one option would be for the Monitoring Bodies to work together on this, it may also be possible for ASIC to prepare a draft and then seek feedback from Monitoring Bodies. Given our expectation that there will be very few Monitoring Bodies, we would anticipate that this would be a relatively straight forward consultation process.

Independent Review

E2Q1. Do you agree with this proposal? If not, please provide details.

We support the proposal that Monitoring Bodies consult with ASIC on the scope of an independent review and the appointment of an independent reviewer. It makes sense that the scope of such reviews are harmonised.

Consultation

E3Q1. Do you agree with our proposed expectations for consulting about the compliance scheme? If not, please provide details.

We note that the legislation does not place an obligation on the Monitoring Body to undertake consultation in the establishment of the Compliance Scheme, however the Explanatory Memorandum does refer to ASIC, in their decision making process, giving consideration to the consultation process that the Monitoring Body intends to use before making any changes to the scheme.

Consultation Paper 300 more specifically refers to an expectation of Monitoring Bodies consulting with a range of stakeholders when they are both developing their Compliance Scheme and also when proposing to make changes to their Compliance Scheme. Whilst we note this expectation to undertake the consultation when developing the scheme, what is less clear is exactly when in the three-stage process that the applicant for being a Monitoring Body was expected to undertake this consultation. We believe that it would be most appropriate to undertake it as part of Stage 3, rather than as part of Stage 2 (Draft Application). In this way it would be based upon a version of the application that had benefited from feedback from ASIC as an outcome of Stage 2.

We would also make the point that Consultation Paper 300 does not provide sufficient specificity in terms of what is required as part of the consultation process and what proof might need to be provided.

E3Q2. Are our expectations for consultation and information sharing between monitoring bodies appropriate? If not, please give details and suggest alternatives.

We support the proposal with respect to Monitoring Bodies sharing information when a financial adviser moves from one Compliance Scheme to another. Clearly it is essential that they know whether they are currently under investigation, although it must be noted that they are prevented from moving whilst under investigation (Section 921L(4)).

It would also be beneficial for a Compliance Scheme that is taking on a new financial adviser to have knowledge of any previous matters that were the subject of a report or an investigation by their previous Compliance Scheme.

We ask the question about how Monitoring Bodies could access information from ASIC or a licensee at the time that an adviser is seeking to move from one Compliance Scheme to another. This information would be particularly relevant to a Compliance Scheme considering taking on a new adviser.

Ongoing Support and Education for Financial Advisers

E4Q1. Do you agree that monitoring bodies should offer support to covered financial advisers to help them comply with their ethical obligations? If not, please give details.

We support the requirement for a Monitoring Body to provide support and training to their financial advisers on complying with the ethical obligations under the Code of Ethics. We do note that this support and training might be provided by the aligned professional association as opposed to the actual Monitoring Body. We would like to see that there is flexibility in how this might be done.

E4Q2. Are there any forms of support not listed in paragraph 189 that we should suggest? If so, please provide details.

We support the proposal with respect to ethics assistance via a telephone or online support and face to face options. We would also highlight other options such as the inclusion of the topic at Conferences,

Roadshows and Professional Development events, via webinars and through access to written articles, whether this be part of a regular magazine or through on-line delivery mechanisms.

F. Revocation of and Conditions on Compliance Scheme Approval

Information We Will Use to Make a Decision

F1Q1. Is there information other than that set out in paragraph 193, that we should take into account when deciding whether to exercise ASIC's powers to revoke approval of a compliance scheme or vary or impose a condition on approval? If so, please provide details.

The list of information sources set out in Paragraph 193 is comprehensive. The only addition that we would suggest is a catch-all provision for any other information that comes to the attention of ASIC which reflects upon the ability of the Monitoring Body to meet it's obligations.

Thresholds for Making Decisions

F2Q1. Are there matters other than those set out in paragraphs 197 and 198 that we should take into account when deciding whether to exercise ASIC's powers to revoke approval of a compliance scheme or vary or impose a condition on approval? If so, please provide details.

We believe that paragraph 197 can be enhanced by including a reference to whether there is a history of any previous matters which ASIC addressed with respect to concerns about the capacity of the Monitoring Body to meet its obligations. If this is the first issue of concern identified, then we believe it appropriate for the Monitoring Body to be given greater opportunity to address the deficiency. We also recognise that Monitoring Bodies may face greater challenges in their early years as processes and procedures are first implemented and any problems are addressed.

We would also like to draw attention to the asymmetry of information between that which ASIC may have access to with regards to licensees and or particular advisers, and the information available and accessible to a Monitoring Body.

We see a great many benefits in a supportive and educative stance being taken by ASIC toward both Governing Bodies and Monitoring Bodies. To the extent legally possible, ASIC's use of information to inform these bodies will strengthen their effectiveness in the medium to long term.

F2Q2. In what circumstances should we exercise ASIC's power to revoke a compliance scheme's approval or impose conditions on our approval? What conditions should be imposed?

In terms of the options to revoke a Compliance Scheme, it is important to take into account the potential implications for all the financial advisers who are covered under the Compliance Scheme. Any revocation action should not be taken lightly and should only be acted upon when a comprehensive effort has been made to address the issues. We would also think that the imposition of conditions should be a first step before revocation action is considered.

We note that ASIC is required to provide reasons for taking any action and that the Monitoring Body has 90 days to respond. We consider that action should only be taken where there is a fundamental flaw in the ability of the Monitoring Body to meet it's obligations or alternatively where there is evidence of a complete lack of intent to comply.

G. Requiring AFS Licensee and Authorised Representatives to Provide Information to Monitoring Bodies

Declaration to Require AFS Licensees and Authorised Representatives to Provide Information to Monitoring Bodies

G1Q1. Do you agree with our proposed amendments to s921L(3) and s921M(2)? If not, why not?

We support the additional powers proposed to enable Monitoring Bodies to obtain information required to undertake proactive monitoring, however we raise the question whether a failure to comply with this obligation should be a criminal or civil offence.

We have raised questions about the required level of proactive monitoring, however as we support a certain level of proactive monitoring, we support these additional powers to enable the collection of information in order to facilitate proactive monitoring.

G1Q2. Will our proposed amendments be sufficient to enable monitoring bodies to carry out the activities we are proposing to expect? If not, please give details and provide alternatives.

The additional power provided through amendments to Section 921L(3) and Section 921M(2) along with the proposed legally binding agreement with the financial advisers should enable the Monitoring Body to undertake proactive monitoring activity.

We also recognise the importance of addressing the obligations under the Privacy Law, which this measure will resolve.

G1Q3. Please give details of any additional costs to AFS licensees, authorised representatives or monitoring bodies associated with monitoring bodies gathering information in reliance on a modified s921L(3) and s921M(2), as opposed to some other mechanism. If possible, please quantify these costs.

We are not aware of any basis to suggest that there would be a different level of costs in complying with modified Sections 921L(3) and Section 921M(2) as opposed to any other mechanism to enable Monitoring Bodies to collect this information.

H. Notifications to ASIC

Significant Reduction in Resources

H1Q1. Is it reasonable for the monitoring body to notify ASIC of a 'significant' reduction in the resources or expertise it uses to monitor and enforce compliance with the code within 45 days of becoming aware of the reduction? If not, what other timeframe would be appropriate?

We agree with this proposal and support the 45 day time limit. We would recommend that a Monitoring Body who is making a notification of a significant reduction in the resources or expertise should also be asked to provide an explanation of why this reduction has arisen and what they are doing to address it. It might be possible that a number of people resign at a similar time and that they cannot be replaced within the 45 day time limit to report. In this case, it would seem appropriate that they have the opportunity to provide an explanation.

H1Q2. Are there any matters, other than those set out in paragraphs 209–210, that monitoring bodies should be required to consider when deciding whether a reduction is significant? If so, please provide details.

We do not believe that the coverage in paragraphs 207 – 212 provides enough guidance on when a Monitoring Body is required to notify ASIC of a significant reduction in resources or expertise. We also found the Explanatory Memorandum unhelpful as it provided an example at each end of the spectrum. A reduction of 5 headcount from a base of 200 is clearly immaterial. A reduction of 5 from a base of 7 is clearly significant. A reduction of 5 from a headcount of 25 might be a more relevant example.

We also note that the membership base of the scheme can change over time and a reduction in headcount at the same time as a reduction in the number of financial advisers might not be significant, however a reduction in headcount at the same time as an increase in financial advisers is more likely to generate concern with respect to whether it is a significant reduction.

One issue that has not been addressed is what the reduction is measured against. Should the reduction be based relative to the figure included in the original application or should it be measured in terms of a reduction relative to the figure included in the latest annual report? How will a reduction in resources get picked up when it is gradual over time?

Whilst we believe that it is appropriate for a Monitoring Body to notify ASIC of a decision to outsource a material core function, we do not believe that this should be classified in the same context as a significant reduction in resources. Outsourced resources should count as much as internal resources.

Notifications about a Proposed Modification to a Compliance Scheme

H2Q1. Do you agree with our proposed guidance? If not, please provide details.

We agree that the Monitoring Body should liaise with ASIC at an early stage in the deliberation with respect to a change to the Compliance Scheme. We also support the requirements for notification of a proposed modification to a Compliance Scheme. The guidance reflects the requirement of Section 921R, although it goes further in terms of seeking an explanation of the consultation undertaken.

We express the view that minor changes to a scheme of an immaterial nature should be possible via the means of communication with stakeholders rather than an active consultation process. In the circumstances this would seem to be reasonable and would reduce the cost of such a change. We envisage this could simply be an email exchange with relevant stakeholders and confirmation that there is no disagreement. In other cases, such as members of the scheme, a direct communication to members with the ability to express opposition should suffice. We believe that this requirement should be reflective of the scale of the change. Further guidance on the scale of activity for consultation would be beneficial.

Concluding Remarks

The AFA welcomes the opportunity to provide feedback on Consultation Paper 300. The changes through the introduction of Compliance Schemes and Monitoring Bodies are substantial changes to the Financial Adviser market and they have deep consequences. The process of implementing this new regime will be very demanding on all stakeholders. It will be important to ensure that the final solution delivers a sensible, pragmatic outcome that is beneficial for both the consumers, and providers, of financial advice.

Should ASIC require any further clarification on anything in this submission then, please contact us on 02 9267 4003.

Yours sincerely,

Phil Anderson
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Association of Financial Advisers Ltd