FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

28 June 2018

Kelly Fung
Lawyer
Financial Advisers
Australian Securities and Investments Commission
GPO Box 9827 Sydney NSW 2000 Email:

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Re. ***CONSULTATION PAPER 300: Approval and oversight of compliance schemes for financial advisers***

Dear Madam,

We welcome the opportunity to comment on the *Consultation Paper 300: Approval and oversight of compliance schemes for financial advisers.* Generally, we support ASIC's proposed approach to the approval and oversight of code monitoring schemes. This is because the approach provides flexibility for schemes to differ in the way they perform the functions where required functions can still be fulfilled at an appropriate standard.

We are concerned that some of ASIC's expectations will be particularly challenging, especially in the infancy of a scheme. We would like to work with ASIC in the construction of a scheme to address these concerns.

If you have any questions, please contact FPA's Head of Policy, Ben Marshan (ben.marshan@fpa.com.au) or myself (dante.degori@fpa.com.au) on 02 9220 4500.

Yours sincerely

Dante De Gori

Chief Executive Officer
Financial Planning Association of Australia[1]

[1] The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,700 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent conduct review panel, chaired by Graham McDonald, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the 175,000 CFP practitioners that make up the FPSB globally.

B - Compliance Scheme approval application process

B1 - Three-stage application process for initial applicants

ASIC

Proposal

B1 We propose to conduct a three-stage application process for initial applications. We have set out the proposed process in more detail at paragraphs 43–46.

Questions

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.

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

FPA Response

B1Q1

The FPA is concerned about the very tight timeframe for having schemes approved and up and running. While the deadlines are driven or dictated by statute, the application process should be designed to minimise delays in sharing information and views between applicants and the regulator. In this regard, we have concerns that the proposed process, being broken into discrete blocks, may not encourage ongoing communication between ASIC and applicants.

We recommend that regular informal communications also be part of the proposed process (for example, if potential concerns arise early on in an assessment phase, ASIC could flag the concern with the applicant). This will alert applicants to potential issues as soon as possible and allow them to consider their options.

This enhanced process can be facilitated by a case manager, who ideally, is able to provide ongoing guidance to applicants. The case manager should have appropriate authority so as to avoid excessive delays in updating or responding to applicants.

B1Q2

Because of the very short time between scheme approval and the date by which advisers need to be covered, there is a risk that schemes won't be able to launch in time to meet that need. This risk will be particularly pronounced if ASIC imposes conditions on schemes initially. If applicants aren't made aware of those conditions until approval, they have very little time to implement changes that may be unexpected.

- We have built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.

B2 - Content of application

ASIC

Proposal

B2 We propose to standardise the content of compliance scheme approval applications to require them to contain the information set out at paragraphs 50–53.

Questions

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

FPA Responses

B2Q1

FPA agrees with this requirement. However, for draft applications, it may be difficult to provide detailed documentation. We would expect the level of detail to improve as we go from draft to final application stage. We would ask ASIC to take a flexible approach by allowing applicants to proceed to the final application stage even if their draft application is missing significant detail that would be needed for approval.

We consider the following expectations to be demanding for a draft and may present a significant hurdle during the first stage of applications:

- It may be challenging to provide CVs for each proposed member of the proposed initial governing body -- especially in the draft application. By contrast, providing a description of the essential and desirable qualifications and experience of applicants is feasible. In the absence of CVs in the draft application, we'd ask ASIC to provide guidance on the applicant's proposed approach to placing suitable candidates.
- Determining resourcing requirements will be costly and demanding especially given the risk that clarification or additional information or analysis will be required following ASIC's assessment of the draft application. To help reduce the risk of unnecessary rework, we would ask ASIC to provide some further guidance (before the application process commences, and preferably in the form of examples) as to the resources different types of schemes would be expected to have and why.

B3 - Content of compliance scheme document

ASIC

Proposal

B3 We propose that a compliance scheme document should cover the matters set out in paragraph 55.

Questions

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.

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.

FPA Responses

B3Q1

We are not proposing that any additional matters should be included in the compliance scheme document.

B3Q2

We are not proposing that any matters in paragraph 55 should not be included in the compliance scheme document.

C - Compliance scheme governance and administration

C1 - Responsibilities of the Governing body and staff of monitoring body

ASIC

Proposal

C1 We propose that the governing body and the staff of the monitoring body should have the responsibilities outlined in Table 2 and that the governing body's responsibilities should be set out in a charter or terms of reference.

Questions

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.

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.

FPA Responses

C1Q1

We agree that the governing body should be able to delegate any of its responsibilities, other than those mentioned in paragraphs 63(a)-63(b), to staff of the monitoring body.

C1Q2

We have not identified any other matters to be addressed in the charter or terms of reference for the governing body.

C2 - Independence and impartiality

ASIC

Proposal

C2 We propose that monitoring bodies should have appropriate measures, as outlined in paragraphs 68–73, to ensure independence from the financial advice industry whose conduct they regulate.

Questions

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

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.

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.

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.

FPA Responses

C2Q1

Yes, we agree that the governing body should be comprised of non-executive members only. It is critical that the governing body, being responsible for the adjudicative function, has a high degree of independence from interests of monitoring body -- especially considering the monitoring body is responsible for carrying out the investigative function.

C2Q2

Yes, we agree that the governing body should include an independent chair and a balance of industry and consumer representatives. It is important that weight is given to both the values of the professional community as well as those of the community at large. The presence of an independent chair will help facilitate the balancing of professional and consumer interests, where those interests seem to conflict. Where those interests do actually conflict, the independent chair should be siding with the public interest.

C2Q3

In order to be classified as independent, the chair must not:

(a) be a member of any financial advice industry association; or
(b) currently be a financial adviser (i.e. an individual who is authorised to give personal advice to retail clients on relevant financial products).

We recommend that, in addition, the chair should not be (or be associated with) an individual or entity that provides financial advice or is involved in a related field.

C2Q4

We do 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. However, in addition the governing body should be allocated a budget, based on objective criteria rather than at the discretion of the monitoring body, out of fee revenue raised by the code monitoring body for the purposes of its running.

C3 - Expertise

ASIC

Proposal

C3 We propose to assess the expertise of monitoring bodies by reviewing:
(a) the expertise of the proposed initial governing body and the procedures for maintaining the expertise of the governing body; and
(b) the job descriptions for the broader staff of the monitoring body and the procedures for maintaining the expertise of the broader staff. We have outlined our expectations in more detail in paragraphs 76–83.

Questions

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.

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.

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.

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.

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.

FPA Responses

C3Q1

Yes, in principle.

C3Q2

We are unsure whether it will be practical to provide information about the members of the proposed initial governing body in the application. While informal talks seem highly likely to precede approval, the identity of who will be appointed may be unknown until close to the date the scheme commences.

Even if the individuals who would take up positions on the governing body could be ascertained at the time of application, such individuals may be sensitive about their personal information (including CV) being included in an initial application.

C3Q3

Yes, it is critical for professional values to be taken into account. Often the general community will not have a view about how advisers ought to behave in certain situations. These situations will include situations that are highly technical in nature. In addition, advisers are likely to be aware of assumptions, information and practices that will help consumer representatives form judgments about the propriety of adviser behaviour.

In addition to requiring that there 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, we recommend that such a member is a member in good standing of a reputable professional association that promotes ethical behaviour in the public interest.

C3Q4

Yes, it is important to ensure fair review and procedural fairness -- especially given the consequences of an adverse finding (e.g., reputational damage and potentially severe sanctions).

C3Q5

We are not proposing that any other aspects of a monitoring body's expertise should be assessed before granting approval for a compliance scheme.

C4 - Responsibility

ASIC

Proposal

C4 We propose that it will be the responsibility of the governing body to ensure that the monitoring body has the appropriate expertise to carry out its responsibilities on an ongoing basis. We have outlined our expectations in more detail in paragraphs 84–85.

Questions

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

FPA Responses

C4Q1

We agree with this proposal.

C5 - Resources

ASIC

Proposal

C5 We propose that: (a) we will make an initial assessment of the adequacy of the resources of the monitoring body, based on a statement that the monitoring body provides with its application; and (b) it will be the governing body's responsibility to ensure the monitoring body is adequately resourced on an ongoing basis. Our expectations are outlined in more detail in paragraphs 88–90.

Questions

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.

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.

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.

FPA Responses

C5Q1

We are not aware of other factors that would affect the human, financial or technological resources required for the monitoring body to carry out its role effectively.

C5Q2

We agree with the 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.

C5Q3

While it may be prudent to set benchmarks for resources (e.g. having enough cash upfront to achieve the scheme's work plan for 12 months), this may create challenges. Typically funds would need to be raised by charging a fee to members of the scheme and are unlikely to cover the full startup costs. Imposing an upfront financial resourcing requirement would make it even harder for applicants to raise sufficient initial funding. A better alternative may be to require applicants to have a plan that demonstrates that they will be able to meet their financial resourcing requirements for say the next 12 months.

C6 - Outsourcing

ASIC

Proposal

C6 We propose to set the expectations regarding outsourcing by monitoring bodies outlined in paragraphs 93–97.

Questions

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

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.

FPA Responses

C6Q1

We agree with the proposed definition of 'core function of the compliance scheme'.

C6Q2

We are not proposing that monitoring bodies who outsource their activities should address any matters, other than those listed in paragraph 97, in their contractual arrangements with outsourced service providers.

D - Compliance scheme monitoring and enforcement

D1 - Monitoring and enforcement

ASIC

Proposal

D1 We propose that monitoring bodies should carry out monitoring and enforcement activities in accordance with proposals D2–D10 from 1 January 2020.

Questions

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

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.

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.

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.

FPA Responses

D1Q1

Reactive monitoring deters unethical behaviour if expected sanctions reflect the cost of the harm done (e.g. damage to consumer trust). However, if the sanctions don't reflect the full cost of the harm or the sanction isn't enforced, deterrence by itself won't be efficient. In addition, if consumers aren't aware of what is expected of advisers, the efficiency of the reactive approach is further compromised.

Proactive monitoring can address these inefficiencies. However, such monitoring raises additional inefficiencies because those who wouldn't engage in unethical conduct bear a cost for proactive enforcement.

Our view is that if sanctions are suitably graduated and covered advisers are required to have resources or insurance to meet the costs of sanctions, unethical behaviour can be more or less efficiently deterred.

Proactive monitoring should complement reactive monitoring to provide an extra level of assurance for consumers who don't know what is expected of advisers.

D1Q2

Processes for proactive monitoring may take time to implement and may require significant investment in systems, technology and people before they can be launched. For these reasons, we would ask ASIC to accept the introduction of proactive monitoring by schemes by a reasonable time (say 12 months) from the commencement of code monitoring, rather than requiring such monitoring from day 1.

D1Q3

Cooperation might be useful to promote efficiency (e.g. uniform approaches may allow relevant providers to move between schemes without incurring high costs of changing their processes to align with the new scheme). We'd expect standardisation gains would be achieved by, for example, setting

uniform requirements for layout of relevant documents and the format in which they're stored and retrieved.

D1Q4

In our view, because of the likely scale benefits of such an arrangement, having only one provider of monitoring and enforcement services could be appropriate, providing that provider was able to accept all financial advisers.

D2 - Annual Work Plan

ASIC

Proposal

D2 We propose that monitoring bodies should, each year, develop a risk-based annual work plan, provide it to ASIC and make it public, as outlined in paragraphs 102–104.

Questions

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

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.

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

FPA Responses

D2Q1

Yes, we agree with an annual risk-based work plan. However, there should be flexibility to deviate from the plan if there is a significant change in compliance risks. While ASIC's proposal would allow the monitoring body to do work in addition to the work plan, it is unclear whether the work plan can be changed part-way through the year to which it applies. We would recommend that a work plan should be able to be adjusted part-way through the year to which it applies, to reflect material changes in compliance risks.

D2Q2

Yes, we agree that the annual work plan should be provided to ASIC each year.

D2Q3

Our only concern is that the publication of the annual work plan will alert covered advisers to the area of focus, potentially undermining compliance in areas outside the focus. It may be in the public interest that the monitoring body release details of focus areas without making it's detailed work plan public, minimising the ability of advisers to manipulate the system.

D3 - Proactive monitoring activities

ASIC

Proposal

D3 We propose that the following proactive monitoring activities should be carried out under a compliance scheme each year, at a minimum: (a) one thematic 'own-motion' inquiry; and (b) one

compliance statement process, with associated verification activities. We set out our expectations for these activities in more detail in paragraphs 108–115.

Questions

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 (paragraph 110).

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.

FPA Responses

D3Q1

Our view is that the own-motion inquiry and the compliance statement process, with associated verification activities, will be sufficient. This is because we believe that reactive monitoring with graduated and sufficiently serious sanctions will efficiently deter unethical conduct if consumers are made aware of the ethical obligations of advisers, and covered advisers are required to have resources or insurance to ensure they can satisfy sanctions.

D3Q2

In regards to the compliance statement process each year, we agree with the purpose of the process should be to identify risk and share good practice engagements in areas covered. However, we are concerned about the effectiveness of the self-reporting mechanism because the publication of non-compliance on the financial adviser register may provide a disincentive to self-report.

D4 - Receipt of initial assessment of reports

ASIC

Proposal

D4 We propose that monitoring bodies should have a process for receiving and conducting an initial assessment of reports of failures to comply with the code, as described in paragraphs 120–123.

Questions

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?

FPA Responses

D4Q1

It may be appropriate to set this timeframe as an aspiration and to report on performance. However, given the potential complexities of even preliminary assessment, we believe it would be inappropriate for consumers or regulators to expect adherence to this timeframe.

Practically client complaints are often incomplete and even correct identification of the provider can be challenging for consumers. Given current turnaround times for IDR, FOS and the legal system these seem like very short periods to make a meaningful initial assessment.

D5 - Communications strategy

ASIC

Proposal

D5 We also propose that monitoring bodies should have a communications strategy, as described in paragraph 124.

Questions

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

FPA Responses

D5Q1

The FPA agrees that a communications strategy is required to enhance consumer awareness of adviser obligations. This will increase the likelihood that unethical conduct will be reported, which will, in turn, strengthen deterrence. In addition, the communication strategy may also reduce the incidence of unethical practice as members of the scheme are aware how the code is being applied.

D6 - Investigation process

ASIC

Proposal

D6 We propose that compliance schemes should have a process for investigating possible failures to comply with the code, as described in paragraphs 127–134.

Questions

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?

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.

FPA Responses

D6Q1

We recommend different timeframes for standard and non-standard disputes. Non-standard disputes are any disputes that involve a novel or highly complex factual matrix. Standard disputes are all other disputes.

It may be reasonable for investigations in relation to standard disputes to be completed within 90 days of the initial assessment recommending that further investigations should take place. The timeframe for non-standard disputes should either be prescribed in the scheme rules after appropriate consultation; or decided case-by-case, based on objective criteria contained in the scheme's rules.

D6Q2

It may be preferable for the governing body to be able to grant leave, at the request of a complainant, for a complaint to be heard by the governing body even though the monitoring body has declined to

refer the case. This approach, if combined with an effective public communications strategy for raising awareness for what is expected of advisers, may be more efficient than random sampling of cases that the monitoring body has declined to refer to the governing body. This is because if clients are aware of adviser obligations, such requests for the governing body to grant leave are more likely than a random sample to be disputes that should have been referred to the governing body.

On the other hand, there is an incentive for clients to initiate a request (regardless of its merits) in the hope that the case will be determined favourably by the governing body or at the very least cause inconvenience to the adviser. The governing body will need a way of disincentivising requests to determine cases that have no arguable case. While inconvenience and other challenges to the client of assisting with a complaint made to the governing body may be a sufficient disincentive against frivolous or vexatious cases (or cases that are otherwise without substance), it may be appropriate for the governing body to charge a fee to the client that is refunded if the governing body grants the request to hear the matter that the monitoring body declined to refer to it.

D7 Decisions-Making Process

ASIC

Proposal

D7 We propose that monitoring bodies should have a process for making determinations about whether a financial adviser has failed to comply with the code, which is consistent with the principles in paragraphs 137–139 and Table 4.

Questions

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.

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?

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.

FPA Responses

D7Q1

Yes, however given the serious potential consequences, such as expulsion from the scheme, of a determination of breach of the code, it is important that where the governing body makes a determination about a covered adviser, the adviser can have the decision reviewed by the body through the use of an appeals panel. The argument for a review process using an appeals panel is strengthened if there is only one compliance scheme.

The grounds for review should be limited to:

- denial of natural justice;
- procedural *ultra vires*;
- substantive *ultra vires*;
- improper use of power;
- error of law affecting the decision;
- fraud inducing or affecting the decision;
- absence of any evidence to support the decision;
- other errors of law[2].

[2] Forbes, Justice in Tribunals

Where the review finds a failure on any of those grounds, the case could be reheard to be re-decided on its merits. Appeal panel determinations should however be final.

D7Q2

No, this timeframe seems very tight, especially for cases involving complex facts or novel legal issues. We would note that FOS has a 12-week service standard it attempts to resolve disputes within[3], but for standard cases averages 93 days to resolve disputes, and for complex cases averages 154 days (noting these time frames have halved over a 7 year process of iterative process refinement)[4]. It is important to note that some disputes can take up to two years to resolve[5]. For this reason, we believe the resolution time frames need to be reconsidered, particularly in the case of complex or novel legal issues, which are more likely in code of ethics determinations dealing with ethical principles rather than FOS disputes which deal with pure consumer loss. Setting artificially short or restrictive time frames will ultimately lead to unfair and inappropriate outcomes for consumers, covered advisers and the profession. We recommend that ASIC work with the code monitoring body to determine appropriate service timeframes for deciding cases which should either be prescribed in the scheme rules after appropriate consultation; or be determined by the governing body based on objective criteria contained in the scheme's rules.

D7Q3

We agree that in making its decisions the governing body should comply with the principles of procedural fairness mentioned in Table 4.

D8 - Sanctions

ASIC

Proposal

D8 We propose that monitoring bodies should have access to a range of sanctions and should have guiding principles about when each will be applied. We have set out our expectations for these sanctions and associated guiding principles in paragraphs 145–147 and Table 5.

Questions

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

D8Q2 Are there 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.

FPA Responses

D8Q1

Financial sanctions would be useful because they can be more easily graduated, Further, the funds can be used to restore consumer trust and offset the costs of the scheme. We note that paragraph 3.51 of the Explanatory Memorandum to *Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016* says:

> The sanctions for a relevant provider who fails to comply with the Code will be set out in the Code and/or the scheme. The sanctions may involve *soft sanctions*, such as a warning,

[3] Financial Ombudsman Service, Annual Review 2016-17, p. 58

[4] Final report of the EDR Review Panel, Chaired by Professor Ian Ramsay: 'Review of the financial system external dispute resolution and complaints framework', 3 April 2017, p. 50-51

[5] Financial Ombudsman Service, Annual Review 2016-17, p. 64

> additional training, additional supervision, or revoking the relevant provider's membership of the professional association and/or compliance scheme. [our emphasis]

However, other sanctions are not excluded. This view is supported by paragraph 3.58 of the EM:

> The same course of conduct may amount to a failure to comply with the Code and a breach of another substantive requirement in the Corporations Act or the criminal law. In these situations, the monitoring body *may only* make findings about the failure to comply with the ethical aspects in the Code and *apply* 'soft sanctions'. [our emphasis]

Given the prescriptive language in paragraph 3.58, it seems reasonable to interpret paragraph 3.51's reference to soft sanctions as not being exhaustive of the types of sanctions that can generally be imposed. At any rate, there seems to be no reason why a scheme could not administer soft sanctions in performing its functions under the statutory scheme and impose other sanctions in its general capacity.

D8Q2

We are not proposing that a governing body should take into account any factors, other than those listed in Table 5, when determining which sanctions to apply.

D9 - Appeals and dispute resolution

ASIC

Proposal

D9 We propose that a monitoring body must have a documented process, consistent with paragraphs 151–156, for dealing with appeals and other disputes from covered financial advisers.

Questions

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.

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

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?

FPA Responses

D9Q1

In our view, there are no matters, other than those listed in paragraph 152, that should be covered in a monitoring body's documented appeals process.

D9Q2

We refer to our response at D7Q1. Given the potential seriousness of sanctions, a right of appeal appears reasonable. The FPA disagrees however that an external appeals party is required as governing rules, practices, precedence and guidance used in determining cases may vary significantly where there are multiple bodies. Further, the benefit of an external appeals body needs to be balanced against the extra resources, cost and approval process that would be expended in dealing with an external appeal body. In our view, internal appeal arrangements should provide a low-cost way for advisers to appeal decisions and sanctions where procedural fairness can be shown to have failed.

D9Q3

We reiterate our response to D7Q2 that more consideration needs to be given to determining service standards for the body to respond to different scenarios and cases.

D10 - Enforceability

ASIC

Proposal

D10 We propose that financial advisers should be contractually bound to share materials with the monitoring body and to comply with the terms of the compliance scheme and the decisions made under it. We have set out our expectations in more detail in paragraphs 159–162.

Questions

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.

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.

FPA Responses

D10Q1

We agree that a legally binding agreement is an appropriate way to make the compliance scheme enforceable between the monitoring body and financial advisers. As discussed in our responses to D7Q1 and D9Q2, these arrangements should provide for review and appeal on appropriately limited grounds by a body separate to and independent of the compliance scheme.

D10Q2

We agree with the proposed process for dealing with non-compliance by a covered financial adviser outlined in paragraph 161.

E - Compliance schemes’ ongoing operation

E1 - Data collection, analysis and reporting

ASIC

Proposal

E1 We propose that monitoring bodies must report on the data they collect and analyse, as set out in paragraphs 166–172.

Questions

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.

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.

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.

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.

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.

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.

FPA Responses

E1Q1

We agree that monitoring bodies should produce public annual reports covering the matters outlined in paragraph 167. Such public reporting will provide benefits such as raising awareness among covered advisers and the community at large as to what is acceptable and what is not acceptable behaviour under the Code. Enhanced consumer awareness will increase and better target the risk that unethical advisers are called to account, thereby increasing deterrence. Enhanced adviser awareness of how the code is being applied will help advisers confirm to professional and community expectations.

E1Q2

We agree that this will be appropriate.

E1Q3

Noting the RG 139 and the proposed clarification of “serious contravention”, we agree that monitoring bodies should be required to report to ASIC serious contraventions of, and systemic issues in relation to compliance with, the code by covered financial advisers, within 45 days of becoming aware that the issue is serious or systemic. We further note that given the open-textured nature of both “serious contravention” and “systemic issue”, compliance schemes will err on the side of caution and report a broader range of matters than ASIC might intend.

E1Q4

Given the enormous task of setting up a compliance scheme, it may be appropriate to delay analysis and reporting requirements until setup activities have come to an end (e.g., one year from

commencement of the scheme). Delaying reporting would also give schemes time to develop a common reporting standard and implement systems (e.g., technology-based systems)..

E1Q5

The degree of oversight required will change as ASIC's trust and confidence in compliance schemes increases over time. With this in mind, the level and frequency of reporting to ASIC by compliance scheme and meetings between them should be adjusted periodically as a compliance scheme earns greater trust and confidence.

E1Q6

Compliance schemes working together to develop a common reporting standard would seem appropriate considering the likely efficiency gains from regulators and consumers being able to more readily assess and compare reports from different schemes.

E2 - Independent review

ASIC

Proposal

E2 We propose to give guidance that we expect monitoring bodies to consult with us about the terms of the independent review they propose to commission and the appointment of the independent reviewer.

Questions

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

FPA Response

E2Q1

In principle, we agree with this proposal. However, we would prefer that ASIC issue detailed guidance prior to the code monitoring application process begins (or as close to this time as possible), about what they expect (or at least the criteria they will use to determine what is required) from the independent review. This will help avoid any shocks to the resourcing requirements of compliance schemes.

E3 - Consultation

ASIC

Proposal

E3 We propose to give guidance on our expectations for consultation by monitoring bodies, as set out in paragraphs 180–185.

Questions

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

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

FPA Response

E3Q1

We agree with the proposed expectations for consulting about the compliance scheme.

E3Q2

We agree with the proposed expectations for consultation and information sharing between monitoring bodies appropriate.

E4 - Ongoing support and education for advisers

ASIC

Proposal

E4 We propose that monitoring bodies should offer support, as set out in paragraphs 189–190, to covered financial advisers to help them comply with the code.

Questions

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.

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

FPA Response

E4Q1

We agree that monitoring bodies should offer support to covered financial advisers to help them comply with ethical obligations.

E4Q2

We consider that seminars for covered advisers about ethical practice, and confidential phone or online support about ethical dilemmas, combined with covered advisers being required to complete an ethics course and a minimum amount of CPD in ethics, will be sufficient for the purposes of enhancing covered advisers' ethical reasoning skills. The ethics course and CPD requirement should be aligned with FASEA''s education and CPD standard.

F Revocation of and conditions on compliance scheme approval

F1 - Information we will use to make a decision

ASIC

Proposal

F1 We propose to provide guidance about the information we will look at to decide whether to revoke approval of a compliance scheme, or vary or impose a condition on approval, as set out in paragraph 193.

Questions

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.

FPA Response

F1Q1

We are not proposing that there be any information other than that set out in paragraph 193, that ASIC should take into account when deciding whether to exercise its powers to revoke approval of a compliance scheme or vary or impose a condition on approval.

F2 - Threshold for making decision

ASIC

Proposal

F2 We propose to provide the guidance, set out in paragraph 197–199, about when we will revoke approval of a compliance scheme, or vary or impose conditions on that approval.

Questions

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.

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?

FPA Response

F2Q1

In our view, there are no matters other than those set out in paragraphs 197 and 198 that ASIC should take into account when deciding whether to exercise its powers to revoke approval of a compliance scheme or vary or impose a condition on approval.

F2Q2

An approval should only be revoked as a last resort. This is because there will be significant cost and inconvenience if advisers cease to be covered by a code monitoring scheme. This problem could be especially challenging if there is only one monitoring scheme.

We would suggest that approval should only be revoked if a scheme has failed in a serious or systemic way to meet ASIC's expectations and there is no reasonable condition (such as change in management or procedures of the scheme) that could be imposed on the scheme that could reasonably give ASIC confidence that the scheme will permanently meet ASIC's expectations from a time in the near term.

ASIC should consider applying conditions on a scheme only if there are reasonable grounds for believing that the scheme will otherwise fail meet ASIC's expectations. The conditions should be proportionate to the seriousness and likelihood of the failure.

G - Requiring AFS licensees and authorised representatives to provide information to monitoring bodies

G1 - Declaration to require AFS licensees and authorised representatives to provide information to monitoring bodies

ASIC

Proposal

G1 We propose to amend the law to declare that: (a) monitoring bodies may request information, documents or other reasonable assistance from an AFS licensee or authorised representative to help the bodies carry out their proactive monitoring activities; and (b) AFS licensees and authorised representatives must comply with these requests. We have set out our proposed amendments in more detail in paragraph 202.

Questions

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

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.

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.

FPA Response

G1Q1

We agree in principle with ASIC's proposed amendments to:

- s 921L(3) to confer a power on a monitoring body to request the information, documents or other reasonable assistance from AFS licensees and authorised representatives the body needs to carry out its proactive monitoring activities; and
- s 921M(2) with the consequence that failure by an AFS licensee or authorised representative to comply with the request is a criminal offence

Given the public interest being served by proactive monitoring activities and the risk that the threat of contractual remedies provide an inefficient or insufficient incentive to complying with the monitoring body's requests, it is important that the body's powers are backed by threat of criminal sanctions. Further, the amendment will help address concerns that licensees or authorised representatives might have, from a privacy perspective, about providing information, document and other assistance to monitoring bodies.

G1Q2

We believe that the proposed amendments will be sufficient to enable monitoring bodies to carry out the activities ASIC is proposing to expect. However, unless the proposed sanctions are enforced, the desired deterrent effect will be weakened. We therefore propose that ASIC support the proposed sanctions by being prepared to take legal action to have the proposed criminal sanctions applied.

G1Q3

Our response to this question will depend on what the monitoring body needs to do to enliven the power to request information under the modified provisions. If, for example, the body needs to go through a process to satisfy itself that the request is reasonable and is rationally related to a legitimate

purpose of the body, the mechanism associated with the modified provisions is unlikely to be burdensome. On the other hand, licensees and authorised representatives are more likely to suffer intrusions on their interests or rights.

If however the body is also required to balance competing concerns (e.g. privacy of consumers and authorised representatives, versus the public interest in knowing how advisers are behaving), the process might be burdensome for monitoring bodies. This more rigorous process may nevertheless be desirable. We simply note that it could be costly. We are not aware of a better alternative process.

H - Notifications to ASIC

H1 - Significant reductions in resources and expertise

ASIC

Proposal

H1 We propose to provide guidance, as set out in paragraphs 207–212, on a monitoring body's obligation to notify ASIC of a 'significant' reduction in the resources or expertise it uses to monitor and enforce compliance with the code.

Questions

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?

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.

FPA Response

H1Q1

We believe it is reasonable for a monitoring body to notify ASIC of a significant reduction in resources or expertise within 45 days of becoming aware of the reduction.

H1Q2

In our view there are no other matters that should be considered when deciding whether a reduction is significant.

H2 - Notifications about proposed modifications to a compliance scheme

ASIC

Proposal

H2 We propose to provide guidance, as set out in paragraphs 216–219, on notifications about proposed modifications to a compliance scheme.

Questions

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

FPA Response

H2Q1

We agree with ASIC's proposed guidance.