FSC FINANCIAL SERVICES COUNCIL

6 July 2018

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

BY EMAIL: policy.submissions@asic.gov.au

Dear Ms. Fung,

RE: ASIC CONSULTATION PAPER 300 – APPROVAL AND OVERSIGHT OF COMPLIANCE SCHEMES FOR FINANCIAL ADVISERS

The Financial Services Council ("**FSC**") is the peak industry body representing financial services businesses in Australia. We welcome the opportunity to make a submission to the Australian Securities & Investments Commission **("ASIC")** Consultation Paper 300 *Approval and Oversight of Compliance Schemes for Financial Advisers* (**"CP-300**").

The FSC has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees. The industry is responsible for investing more than $3 trillion on behalf of 14.8 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the third largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Should you wish to discuss this submission further please do not hesitate to contact me on (02) 9299 3022.

Yours sincerely

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FINANCIAL SERVICES COUNCIL – SUBMISSION ON ASIC CONSULTATION PAPER 300

INTRODUCTORY COMMENTS

The FSC and its members have long been supportive of raising the professional, ethical and educational standards of the financial advice industry. As part of this process, in early June 2018 the FSC made a submission to the Financial Adviser Standards and Ethics Authority **("FASEA")** consultation paper on the proposed Code of Ethics **("the Code")**. The submission outlined the position of FSC members in relation to the Code and what they believed was required to be implemented and amended in the Code for it to be practically effective.

The Code is a key element of the reforms to the industry which will become applicable to financial advisers from 1 January 2020. Further to this, the establishment of bodies to monitor financial advisers' compliance with the Code in accordance with ASIC approved compliance schemes is a reasonable step in further ensuring that the Code is complied with and that professionalization of financial advisers occurs and consumer confidence in the financial advice industry increases as a result.

GENERAL COMMENTS ON THE CONSULTATION PAPER

As set out in its Media Release 18-138MR, ASIC notes that the CP-300 is primarily for applicants for compliance scheme approval. However, our members have observed there are also impacts to financial advisers and Australian Financial Service licensees **("AFSL")** who authorise financial advisers.

Effective compliance schemes to ensure financial advisers comply with the Code are a key component of improving the professional standards of financial advisers, and it is essential that they are robust, transparent, fair and consistent.

FSC MEMBER CONCERNS

Whilst supportive of the Code and the monitoring of financial advisers' compliance with same, our members have concerns ASIC's proposal goes beyond the original intent of the *Corporation Amendment (Professional Standards of Financial Advisers) Act 2017* **("the legislation")**.

The main concerns held by members are:

a. The short timeframe between when ASIC will announce initial compliance scheme approvals and the date AFSLs are required to ensure their representatives are covered by an approved compliance scheme.

b. The potential challenges presented by multiple scheme operators given the potential for duplication of activities by the schemes, ASIC and AFSL will lead to an increase in costs and increased compliance burden on financial advisers and AFSLs; and

c. The duplicative requirement for compliance bodies to perform proactive monitoring activities for thematic reviews, which ASIC already undertakes, would also lead to an increase in costs and an increased compliance burden on financial advisers and AFSLs, at a time where the advice industry is responsible for funding ASIC for these activities. As is the case with (b.) above, the consumer will ultimately bear these costs through more expensive advice.

Timeframe for AFSLs to ensure representatives are covered by a scheme

ASIC has indicated they will announce all initial compliance scheme approvals at the same time to avoid giving competitive advantage to any compliance scheme. The indicative date for these initial approvals is early October 2019.

Our members are supportive of the intention, however are concerned that it will leave very little time to meet the 15 November 2019 deadline to ensure all representatives are covered by an approved compliance scheme. To illustrate the scope of the challenge, some of our members have several hundred representatives while others have over 1000.

We encourage ASIC to announce the initial compliance scheme approvals earlier to allow AFSLs to determine which compliance schemes are best suited to their population of representatives and work through the administrative tasks required to subscribe each representative.

Complexities of Multiple Compliance Scheme Operators

Our members have raised concerns regarding the possibility of ASIC appointing multiple scheme operators which financial advisers and AFSLs can subscribe to. These concerns include:

a. Various operators adopting different approaches in their interpretations and applications of the Code. This approach may result in inconsistent and unfair oversight of financial advisers' compliance with the Code depending on which scheme they subscribe to which may then translate to discrepancies in sanctions, penalties and notifications to ASIC. It may also lead to "forum shopping" by advisers;

b. Responding to multiple operators is likely to impose a significant administrative and financial impact on an AFSL's resources. This would be in addition to the administrative and financial impact an AFSL already has in responding to ASIC oversight in relation for both their own AFSL and the advisers authorised under it.

A solution to these concerns would be to establish a single governing body to carry out monitoring, sanctions and appeals activities for all approved schemes. This framework would provide efficiencies and ensure consistency – consistent approaches are also more likely to mitigate regulatory arbitrage. It also has the potential to reduce a number of thematic reviews Licensees will need to respond to. Importantly, one governing body will also assist to manage conflicts that may arise where a professional association is a code monitoring body whilst simultaneously seeking to grow and retain their membership base.

As noted above, amending the law to require information to be provided by AFSLs to monitoring bodies before a failure to comply with the Code or possible failure to comply with the Code has been identified (i.e. proactive monitoring) will likely result in additional costs. This would be compounded if information required by proactive monitoring is to be provided to multiple schemes. While we don't agree that proactive monitoring be conducted by the monitoring body, should ASIC still proceed with this approach, the costs associated with having

to provide information based on proactive monitoring could be minimised by having a single rather than multiple schemes.

Conversely a strategy may need to be designed in the event a single governing body is unable to meet all requirements of a monitoring body.

SPECIFIC FEEDBACK SOUGHT

Likely Compliance Costs

If implemented, some of the proposals in CP 300, would result in a significant overlap between activities that are currently undertaken by advice licensees today and monitoring bodies. These include the types of investigations and sanctions that an adviser may already be subject to under an AFSL's issues and consequences framework. Given that a number of both the sanctions and investigative processes that ASIC are proposing monitoring bodies use are similar to what an adviser may already be subject to under their AFSL, advisers will be subject to a dual investigatory and disciplinary process. In addition, advisers may be subject to a monitoring and sanctions process from ASIC which would mean that an adviser may have to respond to three different investigations at one time.

The proposed guidance from ASIC expands monitoring activities beyond reactive to also include proactive monitoring activities. Our members would also be required to comply with verification activities to facilitate the annual compliance statement. Proactive and reactive monitoring will significantly impact on AFSLs and advisers who will be required to comply with a variety of requests throughout the year. This will be further exacerbated for AFSLs if there are multiple scheme operators. The implementation of these processes would create significant administrative, financial and resource impacts on an AFSL and advisers.

For example, there would be:

(a) Additional costs should a monitoring body make recommendations to an AFSL to improve their financial advisers' compliance with the Code (as is suggested at CP300 110e); and

(b) Costs associated with any additional activity involved for an AFSL in determining whether to report and then reporting any relevant adviser misconduct to a monitoring body (e.g. operational, process or systems changes); and

(c) Any costs where an ASFL's cooperation is required in relation to a sanction made by a monitoring body against an adviser (see CP300 147(b)).

Further, the CP-300 is unclear on whether monitoring bodies must first report the findings from its monitoring and enforcement activities to the relevant AFSLs, and whether AFSLs will be given an opportunity to respond, or whether the findings will only be reported to ASIC directly.

Further clarification from ASIC is required regarding the process for monitoring bodies to notify AFSLs of any adverse findings, whether there will be opportunities for AFSLs and/or financial advisers to respond, and the relevant timeframes in which these actions will occur.

It also isn't clear whether AFSLs will need to report the misconduct of financial advisers to the monitoring body as there is no clear framework set out in CP300 of how any such reporting may operate in practice. If there is an expectation that an AFSL does need to report advisers to the

monitoring body, this creates a dual reporting obligation for an AFSL (i.e. to both ASIC and the monitoring body). We note that monitoring and supervision requirements are already imposed by law on licensees pursuant to section 912A of the Corporations Act.

Given the significant overlap and duplication between a licensee's role and a monitoring body's role should the proposals in CP300 proceed, we query whether this duplication is simply an unintended consequence or whether ASIC is supportive of moving to a single licensing regime. We believe that clarification on this point would be beneficial to both licensees and advisers.

There is potential that the costs of compliance with the proposals for both AFSLs and advisers will to lead to increased costs to consumers. The roles, responsibilities and activities expected to be provided by scheme operators as well as the fees associated with the service (i.e. membership fees) are likely to represent a significant cost to financial advisers and AFSLs. A possible solution to this is for membership fees to be regulated by ASIC to ensure they do not increase the cost of advice. We note that the CP 300 is currently silent on the fees that may be associated with an AFSL or financial adviser subscribing to a monitoring body.

Responsibility for Proactive Monitoring

Our members are concerned that ASIC's proposed proactive monitoring activities for compliance bodies seem to overlap with ASIC's regulatory responsibilities.

The role of monitoring bodies should not overlap with those of the regulator. We contend thematic reviews are clearly within the remit of ASIC. Any additional responsibilities compliance scheme providers are required to undertake may lead to increases to the cost of, and reduced accessibility to, advice.

We note that ASIC currently has the power to request information, documents and other reasonable assistance from AFSLs in relation to the advisers authorised by the AFSL and that these powers assist ASIC in carrying out its proactive monitoring activities.

We query whether it is the intention of the Legislation that AFSLs and advisers be subject to another body which has similar powers to those of, or to undertake similar activities to, ASIC. In our view, it is more appropriate that ASIC (which has the appropriately skilled and experienced level of staff) conducts proactive monitoring activities and that monitoring bodies' activities be limited to an adviser's compliance with the Code.

In our view, ASIC has not made a clear case as to why the legislation, which has gone through a lengthy legislative process to finalisation, should now be amended to extend to the activities of monitoring bodies. Proactive monitoring activities should remain in the domain of ASIC.

Despite our view that monitoring bodies should not conduct proactive monitoring activities for the reasons set out above, were ASIC to proceed with that approach, we believe that there would be benefit in delaying the proactive requirements of a monitoring body to ensure that any uncertainties can be mitigated. The monitoring body framework should be given a chance to operate in a reactive monitoring capacity in the first instance and then once this framework is functioning with clarity and certainty, the proactive monitoring could be introduced. An appropriate transition period should therefore be provided, the required length of which may not become apparent until the commencement of the monitoring body framework in 2020.