FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

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Dear Ms Uy and Mr Hackett

Consultation Paper 321: Whistleblower policies and draft Regulatory Guide 000

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback on ASIC's Consultation Paper 321: Whistleblower policies, and the associated draft Regulatory Guidance.

The FPA supports the introduction of improved protections that encourage whistleblowers to disclose information to help identify and address misconduct and wrongdoing in the financial services sector and more broadly. The introduction of the new regime goes a long way to improving the current system.

However, we are concerned about the use of both mandatory and non-mandatory requirements mixed through the guidance and that code monitoring bodies do not appear to be covered by the whistleblower regime.

We would welcome the opportunity to discuss the matters raised in our submission with you further. If you have any queries, please do not hesitate to contact me on 02 9220 4500 or heather.mcevoy@fpa.com.au.

Yours sincerely

Heather McEvoy
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[1] The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 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 super for our members – years ahead of FOFA.
- An independent conduct review panel, Chaired by Mark Vincent, deals 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 required of professional financial planning practices. This is being exported to 24 member countries and 150,000 CFP practitioners of the FPSB.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, 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 designations, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board

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Consultation paper 321: Whistleblower policies

Submission to ASIC

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Critical issue

Eligible recipients

The FPA notes that the requirement to have a whistlelbower policy applies to public companies, large proprietary companies, and proprietary companies that are trustees of registrable superannuation entities. And that the whistleblower protections are available to any discloser who makes a disclosure that qualifies for protection, regardless of whether the entity that is the subject of the disclosure must have a whistleblower policy.

However, misconduct and wrongdoing can occur in any organisation, no matter what size or the services it provides. The new regime recognises that whistleblowers may not always feel comfortable or be able to disclose information about suspected misconduct directly to the regulated entity the whistleblower is associated with, as it extends the new protections to include the disclosure of information by whistleblowers to ASIC, APRA or other prescribed Commonwealth Authorities. Section 1317AAC(3) permits persons or bodies that are eligible recipients in relation to all regulated entities, or in relation to a class or classes of regulated entities, to be prescribed in the regulations.

Code monitoring bodies are approved by ASIC under the Corporations Act and tasked with the oversight of relevant providers' adherence with the new legislated *Financial Planner and Financial Adviser Code of Ethics*. In this role, code monitoring bodies have the responsibility to scrutinise the manner in which services are provided to consumers to identify and investigate potential misconduct and wrongdoing in the provision of financial advice. Such bodies will have an ongoing relationship with their subscribers, who are required by law to belong to an ASIC approved compliance scheme. Licensees also have a legal obligation to cooperate with code monitoring bodies, including with investigations and the provision of information. Standard 1 of the Code requires relevant providers to act in accordance with all applicable laws. Code monitoring bodies are therefore highly skilled and appropriately structured to perform the role of 'eligible recipient' for whistleblowers who have reasonable grounds to suspect wrongdoing by the regulated entity they are associated with.

Making ASIC approved code monitoring bodies 'eligible recipients' under the law, would be particularly beneficial for 'relevant providers' associated with regulated entities who are not required to establish and implement a whistlelbower policy.

Section 1317AA(5)(c)(ix) of the Act defines disclosures qualifying for protection and includes "*an instrument made under an Act*". The new education and professional standards for financial planners in the Corporations Act are set by the Financial Adviser Standards and Ethics Authority (FASEA) by legislative instrument. This includes the Code of Ethics which is required by law to be monitored and enforced by an ASIC approved code monitoring body.

The fact that code monitoring bodies are not currently identified within the law creates a loophole in the whistleblower regime that could leave disclosers unknowingly unprotected and exposed to potential detriment. 'Relevant providers' who disclose information about suspected misconduct to their code monitoring body could assume the whistleblower protections would apply given the role the ASIC approved body plays in enforcing the legislated Code.

'Eligible recipients' are required by law to protect the confidentiality of the discloser's identity, including information that is likely to lead to the identification of the discloser (based on the information disclosed). The exception is when the identity is provided to ASIC, APRA, the AFP, legal

practitioner, to a person or body prescribed by regulations, or with the consent of the discloser (s1317AAE). As previously mentioned, licensees are required to provide information to code monitoring bodies under s921L. However, code monitoring bodies are not prescribed in the regulations for the purposes of s1317AAE, restricting licensees' ability to provide the required information for code monitoring bodies' investigations as required under s921L. This creates a significant inconsistency in the law.

The FPA recommends code monitoring bodies approved by ASIC under s921K be prescribed in the regulations:

- as 'eligible recipients' under s1317AAC(3), to ensure disclosures of information to approved bodies qualify for the whistleblower protections, and
- under s1317AAE.

FPA feedback on Proposed Regulatory Guide 000

B1Q1 Do you agree with our proposed guidance in Section B of draft RG 000? If not, why not?

The FPA supports the intent of the proposed Regulatory Guide and suggest it will assist entities to encourage whistleblowers to disclose information to help identify and address misconduct and wrongdoing in the financial services sector and more broadly.

The FPA provides more specific feedback in response to the questions below.

B1Q2 Do you agree that the information that must be covered by a whistleblower policy, as set out in s1317AI(5), has been adequately addressed in our proposed guidance? If not, please provide details.

Yes.

B1Q3 Do you agree that the matters we have included in our proposed guidance will be useful in helping entities to establish, implement and maintain a robust and clear whistleblower policy? If not, please provide details.

Yes. The FPA also makes suggestions to improve the Regulatory Guide throughout this submission.

There is multi-faceted criteria a disclosure of information must meet for the discloser to qualify for protection. Therefore, there may be disclosures made where it could be unclear as to whether the whistleblower protections do or do not apply.

The FPA suggest the inclusion of examples in the Regulatory Guide (or case studies included as an attachment) may be helpful in explaining the boundaries of qualifying disclosures and those 'unclear' instances where the protections would not be afforded to a whistleblower. For example:

- If the disclosure includes information about more than one entity, would the whistleblower be protected if the disclosure was made to one of the regulated entities subject to the disclosure, and the discloser was not an 'eligible whistleblower' of the other entity? Or should the entity recommend the whistleblower disclose the information to ASIC for investigation to ensure the individual is fully protected for all the information disclosed?

- Are there instances when the disclosure of information may not qualify for protection if the disclosure is made to the regulated entity, but would qualify if the disclosure is made to ASIC?

The FPA also suggests entities should be required to give the discloser a warning prior to the disclosure of information to allow the discloser to make an informed decision about who to disclose the information to. The warning should include 'eligible recipient' options that may be available to the discloser, and whether different protections would apply if an alternative 'eligible recipient' was used based on the discloser's association in relation to the regulated entity and type of misconduct the discloser has reasonable grounds to suspect. It should also make clear that the discloser can still qualify for protection even if their disclosure turns out to be incorrect, as stated in RG000.43.

We note that RG000.57 states that the policy should highlight that *"a discloser qualifies for protection from the time they make their disclosure, regardless of whether the discloser or recipient recognises that the disclosure qualifies for the protection*". The FPA agrees the protections must still apply to the discloser. However, the entity is required by law to establish 'eligible recipients' to receive disclosures in relation to the entity. 'Eligible recipients' may perform other roles within and in relation to the entity. Therefore, the FPA suggests that the 'eligible recipient' should ascertain whether the discloser is disclosing information as a potential whistleblower. This will allow the 'eligible recipient' the opportunity to ensure the environment and time is appropriate to allow the whistleblower to disclose the information comfortably, and to protect the discloser and maintain vital confidentialities.

RG000.118 – RG000.119 – These provisions mandate an interaction between the 'whistleblower protection officer' and the discloser. While the FPA supports the intent of these requirements, they are misplaced in this Regulatory Guide as they are not related to the content of the whistleblower policy.

RG000-120(h) – the specific interventions an entity will take to protect a discloser if detriment has already occurred should be a decision between the business and the discloser based on the discloser's circumstances and wishes, actions that will not exacerbate the detriment, the entity's operations, and the options available to the entity. It is inappropriate to include actions in the Regulatory Guide (even suggestions) that may or may not be appropriate for, or available to the discloser or the entity.

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B1Q4 Do you agree with our proposed guidance that an entity's whistleblower policy should focus on disclosures of information that qualify for protection, rather than reports about all issues and concerns, in relation to the entity? If not, please provide details.

Yes. Requiring entities to establish a whistleblower policy that focuses on disclosures of information that qualify for protection is in line with the legal requirement in s1317AI(5). If the whistleblower policy applied to reports about all issues and concerns, it would be unclear for the discloser as to whether the whistleblower protections applied. This could confuse and mislead disclosers into believing they were covered by the whistleblower protections for all information they disclose, leaving them potentially exposed and unprotected.

The whistleblower policy should be restricted to disclosures of information that qualify for protection under the Corporations Act.

B1Q5 Do you agree with our proposed guidance that an entity's whistleblower policy should cover 'eligible whistleblowers' outside the entity? If not, please provide details.

Yes. This is in line with the legal definition of 'eligible whistleblower' in s1317AAA of the Corporations Act, which includes a current or former:

- officer or employee of the entity
- a supplier of goods or services to the entity, or an employee of a supplier
- an associate of the entity
- a relative of such individuals
- a dependent of such individuals or a dependent of the spouse of such individuals.

Section 1317AI(5) requires the whistleblower policy to include information about the protections available to whistleblowers including in relation to "*disclosures that qualify for protection*". One criteria for a disclosure to qualify for protection is that it must be made by an 'eligible whistleblower', the definition of which includes individuals outside of the entity. Hence, the whistleblower policy should cover 'eligible whistleblowers' outside the entity.

B1Q6 Is the proposed good practice guidance useful and appropriate? If not, please provide details.

No. The inclusion of non-mandatory information in a Regulatory Guide will only serve to confuse all stakeholders' party to the whistleblower regime. This is exacerbated by the inconsistent use of the term 'good practice' by ASIC.

For example, *RG 234: Advertising financial products and services (including credit): Good practice guidance* is a guide for *"promoters of financial products, financial advice services, credit products and credit services, and publishers of advertising for these products and services…..It contains good practice guidance to help promoters comply with their legal obligations not to make false or misleading statements or engage in misleading or deceptive conduct*."

However, at no stage in RG234 does it state that the requirements in the guide are non-mandatory. Rather, RG 234.156 states: "*We may take a greater interest in advertisements that do not meet our good practice guidance when considering whether to make further inquiries or to exercise our regulatory powers"*. This implies that ASIC 'good practice' guidance is mandatory and the Regulator expects it be adhered to.

While the draft Regulatory Guide for whistleblower policies states that 'good practice' guidance is non-mandatory, this is inconsistent with existing regulatory guidance applicable to the financial services sector.

The FPA suggest it is confusing and inappropriate to include non-mandatory guidance in a Regulatory Guide. The Regulatory Guide is ASIC's formal document for setting the requirements it expects regulated entities to follow in order to meet their obligations under the law. Including 'good practice' suggestions in a Regulatory Guide will just serve to confuse entities about how they should behave in order to meet their legal obligations.

The FPA suggests non-mandatory 'good practice' information should be included either as an attachment to the formal Regulatory Guide, or in a separate 'non-formal' document. Alternatively, ASIC could work with Professional Associations to establish best practice guidance for their members.

It is also unclear in some parts of Section B as to which provisions are mandatory and which are 'good practice guidance'. In particular, RG000.72 - RG000.83 has inconsistent use of headings and the words 'could' (indicating if the entity chooses to) and 'should' (as in the entity must) are used intermittently for related paragraphs, confusing the mandatory nature of the statements.

However, the FPA would support the inclusion of the following proposed 'good practice guidance' as mandatory requirements in the final Regulatory Guide:

- The purpose of the whistleblower policy (RG000.27 and RG000.30). While entities should be permitted to decide to include additional information, such as that mentioned in RG000.28 and RG000.29, this should not be mandated.
- Listing the types of disclosers who are covered by the policy based on the entity's business operations, practices and organisational structure (RG00035 – RG000.36). This should include dependents and spouse.
- Examples of disclosers that relate specifically to an entity's business operations and practices (RG000.45)
- While it could improve transparency of the application of the protections under the whistleblowing regime to include information about deliberate false reporting, care should be taken to ensure the language used is non-threatening and does not discourage the disclosure of genuine suspicion of misconduct (see RG000.46 – RG000.48).
- Criteria for making a public interest or emergency disclosure that qualifies for protection (RG000.71)
- Anonymous disclosures (RG000.95)

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The FPA opposes the proposed 'good practice guidance' in RG000.62 and RG000.63. In particular the suggestion that: "*It is good practice for an entity's policy to encourage its employees and external disclosers to make a disclosure to the entity in the first instance.*"

This is inconsistent with the Act.

The establishment of the whistlblower regime resulted from the poor treatment of whistleblowers by entities and the detrimental impact their disclosure has had on their lives. While this new regime is a positive step forward, the new laws are reasonably restricted as they specifically relate to defined misconduct and wrongdoing, require disclosers to have 'reasonable grounds to suspect such behaviour within an entity, and only apply the protections if the disclosure is made by particular individuals and to defined persons.

The clear intent of the law is to encourage the disclosure of information to identify and address misconduct and wrongdoing by entities or individual's within entities. This intent is made clear in the Explanatory Memorandum and throughout ASIC's proposed guidance – to encourage disclosure.

The law permits the disclosure of information to 'eligible recipients' both inside and external to the entity. This approach recognises that disclosers may not feel comfortable or secure disclosing to a representative internal to the entity, information about suspected misconduct occurring inside the entity. Therefore, the focus of the whistleblower policy must be to provide clear information to the discloser about who they can disclose information to in order for the protections to apply. This will enable the individual to make an informed decision about who they feel most comfortable and secure in making the disclosure to. This will encouraging disclosures and must be the focus of the whistleblower policy.

Similarly, the FPA opposes RG000.66:

> *"It is good practice for an entity's policy to provide advice about how an employee can make a disclosure outside the entity and qualify for protection, if an employee believes it is necessary to contact regulatory bodies or other external parties."*

Advice about how an employee can make a disclosure outside the entity and qualify for protection, should be provided regardless of whether the employee believes it is necessary to contact regulatory bodies or other external parties. An employee is entitled under the law to disclose information to both 'eligible recipients' inside and external to the organisation.

The following 'good practice guidance' offers useful suggestions for establishing a strong corporate governance framework for an entity's whistleblower policy and procedures.

- Monitoring and reporting on the effectiveness of the policy (RG000.166 – RG000.177)
- Reviewing and updating the policy (RG000.178 – RG000.182)

However, the extremely detailed requirements in these provisions may not be applicable or appropriate for all entities. It is unclear also how these suggestions interact with similar information in RG000-72 – RG000-83, and which provisions are mandatory or non-mandatory. The FPA would support reasonable mandated whistleblower governance and reporting requirements particularly for large entities, however, depending on their flexibility, such obligations may not be applicable to or suitable for all regulated entities.

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RG000.122 – RG000.129 – The FPA acknowledges the intent of 'good practice guidance' on how to establish a risk assessment framework and procedures, however this is unnecessary information as entities are already required to have such corporate governance which would have been put in place based on the size, scale and operations of the entity. There is therefore a risk that this information may contradict the systems already adopted by entities, which could be expanded for the purposes of establishing a whistleblower framework.

B1Q7 Do you agree with our proposed good practice guidance that entities' whistleblower policies could include a statement discouraging deliberate false reporting? If not, please provide reasons.

While it could improve transparency of the application of the protections under the whistleblowing regime to include information about deliberate false reporting, care should be taken to ensure the language used is non-threatening and does not discourage the disclosure of genuine suspicion of misconduct.

B1Q8 Do you agree with our proposed good practice guidance that smaller entities (particularly those with a limited number of employees) should consider authorising an independent whistleblower service provider to receive disclosures and consider engaging third-party service providers to help investigate disclosures? If not, please provide details.

The FPA supports the intent of the suggested 'good practice guidance' that smaller entities should consider authorising an independent whistleblower service provider to receive disclosures and consider engaging third party service providers to help investigate disclosures.

However, consideration must be given to whether this would create an additional cost for smaller entities that would not also be incurred by their larger competitors. This would impact competition in the financial services industry. Therefore, this suggestion should not be a regulated requirement.

It is also important to achieve an appropriate balance in the regulatory environment and recognise that 'eligible recipients' are not limited to individuals internal to the entity. ASIC, APRA, legal practitioners and, under s1317AAC, the entity's auditor and actuary may also receive disclosures of information that qualify for protection.

Making ASIC approved code monitoring bodies 'eligible recipients' under the law, would be particularly beneficial for smaller financial advice entities. As mentioned above, s1317AAC(3) permits persons or bodies that are eligible recipients in relation to all regulated entities, or in relation to a class or classes of regulated entities, to be prescribed in the regulations. Code monitoring bodies approved by ASIC under s921K should be prescribed in the regulations as 'eligible recipients', to ensure disclosures of information to approved bodies qualify for the whistleblower protections and to assist smaller financial advice entities.

Professional bodies who have enforceable codes, professional standards and obligations their members must adhere to, such as the FPA, are also well placed to perform this role.

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B1Q9 Do you have any suggestions on how the guidance in Section B of draft RG 000 can be improved? Please provide details.

B1Q10 Are there any practical problems associated with our guidance? Please provide details.

The FPA suggests the following points may present practical problems with the understanding and implementation of the proposed ASIC Regulatory Guide:

- The FPA is concerned about the requirement for entities to establish a "robust and clear whistleblower policy" as proposed in RG000.13. As we have experienced with similar requirements for financial advice documentation, the use of subjective adjectives (such as "robust and clear") creates a complex and inconsistent regulatory environment and leads to lengthy legalised documents.

- Table 1 is a summary of the Section B guidance, presented in the order as they appear in the Regulatory Guide. This includes both information a whistleblower policy 'must include' and 'good practice guidance'. This makes it unclear as to the mandatory versus non-mandatory requirements. As stated in our response to B1Q6, the FPA suggests the formal ASIC Regulatory Guide should include mandatory requirements only. If the final Regulatory Guide does include 'good practice guidance', the FPA recommends Table 1 contain a summary of mandatory requirements only, with non-mandatory 'good practice guidance' summarised in a separate table or restricted to the text.

Please see further comments in this submission regarding the integration of mandated requirements and 'good practice guidance'.

B2Q1 Do you agree with our proposed additional good practice guidance in Section C of draft RG 000? If not, please provide details.

B2Q2 Do you have any suggestions on how the additional good practice guidance can be improved? Please provide details.

B2Q3 Are there any practical problems associated with our additional good practice guidance? Please provide details.

The draft Regulatory Guide includes 'good practice guidance' throughout *Section B – Matters to be addressed by an entity's whistleblower policy*, and in *Section C – Additional good practice guidance on establishing, implementing and maintaining a whistleblower policy*. As discussed above, the drafting approach integrating mandatory and non-mandatory requirements is very confusing and inconsistent with existing ASIC guidance and the Regulator's use of the term 'good practice', and hence entities understanding of their regulatory requirements.

All 'good practice guidance' should be included in a separate document or, at a minimum, a separate section of the Regulatory Guide.

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The FPA supports the intent of Section C, and agrees with the importance of fostering a whistleblowing culture. However, we note that RG000.183 – RG000.186 diverges from the information and requirements usually contained in a Regulatory Guide. It also speaks to the subject of ethical corporate culture, which is not defined in the law or referred to in the whistleblowing legislation. The information presented indicates that this is ASIC's views on culture and how to instil a certain type of culture in an organisation. However, what is considered good or ethical culture is hotly debated and, from our observation, is usually subject to change. How to instil a particular kind of culture can also vary depending on the entity's size, scale, operations, and the services it offers. While we do not necessarily disagree with the views presented, we question the appropriateness for ASIC, as the Regulator, of including such information in a Regulatory Guide.

C1Q1 Do you consider that the requirement for public companies to have a whistleblower policy would impose a disproportionate regulatory burden on public companies that are small not-for-profits or charities, such that the benefits would be outweighed by the costs that these companies would incur to establish, implement and maintain a whistleblower policy? Please provide reasons.

C1Q2 If you consider public companies that are small not-for-profits or charities should be exempted from the requirement to have a whistleblower policy, do you have any views about:

- **the most appropriate type of size threshold (e.g. total revenue, total employees or total assets);**
- **the most appropriate threshold value; and**
- **whether more than one type of size threshold should apply?**

Please provide details.

The FPA is a not-for-profit public company limited by guarantee. The requirement to have a whistleblower policy includes infrastructure, either internal or external, to support the implementation and maintenance of the policy – such as monitoring and reporting obligations, staff training and awareness, the means to undertake investigations, and review of the effectiveness of the policy, for example. We understand and can appreciate that the requirements to have such a system in place could impose a significant additional burden on the limited resources and funds of some small not-for-profits and charities, such that the benefits would be outweighed by the costs that these companies would incur.

As a professional body, the FPA firmly believes it is appropriate to have a whistleblower policy in place for our organisation. However, this is based on our own values, vision, role, and the FPA's capacity to effectively establish, implement and monitor such a policy. We have well established resources and infrastructure specifically designed to implement, monitor and enforce our professional standards.

We feel it would be inappropriate for the FPA to provide feedback on whether this should be required of other not-for-profit or charity organisations, or the appropriate size thresholds to apply to potential relief from this requirement.

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The FPA suggests a balance is required between much needed protections for whistleblowers to encourage the disclosure of information, and the sizeable regulatory burden the whistleblower policy requirements may create for some entities. Alternatives could be considered such as a requirement to train employees and associates of regulated entities that are exempt from the requirement to have a policy, of the whistleblower protections, when such protections do and do not apply, and where disclosures can be made, particularly the 'eligible recipients' external to the regulated entity. Consideration could also be given to other Commonwealth Authorities who could be prescribed as 'eligible recipients' for whistleblowers associated with small not-for-profit and charity organisations, such as the Australian Charities and Not-for-profits Commission (ACNC).