

Client Alert



November 2012

Consultation Paper 191 - FOFA Codes of conduct and opt-in requirements

The Australian Securities and Investments Commission (ASIC) has released Consultation Paper 191 - *Future of Financial Advice: Approval of codes of conduct for exemption from opt-in requirement* (CP 191) establishing the consultation process to amend ASIC Regulatory Guide 183 *Approval of financial services sector codes of conduct* (RG 183). ASIC now invites feedback on the proposed amendments with submissions due by 4 December 2012. Submissions received by ASIC will shape its redrafting of RG 183.

Parties who are interested in responding to the consultation paper should read through RG 183 and the proposals contained at the back of CP 191. If you would like assistance in preparing your response, please contact one of our experienced lawyers listed in this Client Alert.

The Opt-in requirement

CP 191 contains ASIC's proposed guidance on when it will exempt financial advice providers (Adviser) from the obligation to provide clients with a written renewal notice every two years requiring the client to elect to continue an ongoing fee arrangement (Opt-in Requirement).

An ongoing fee is a fee charged to clients, where the Adviser provides the client with personal advice under an arrangement with the client, and the client is charged fees for more than a 12-month period.

ASIC may exempt an Adviser from the Opt-in Requirement if the Adviser is bound by a code of conduct which is approved by ASIC (Opt-in Code). The proposed amendments to RG 183 will outline ASIC's guidance on when it will use its power to approve Opt-In Codes.

ASIC has drafted the proposals in CP 191 on the basis that the policy incentive behind the Opt-in Requirements is to ensure that clients who are disengaged or receiving little to no service from their Adviser, are not paying ongoing financial advice fees.

Codes of conduct

Advisers who adhere to an approved code of conduct are exempt from the Opt-in Requirements. A code of conduct is a code, which regulates the conduct of participants in an industry towards other participants in the industry and/or towards consumers.

A code should be enforceable with remedies or sanctions for breach and monitoring of compliance, and should be developed in a consultative fashion to go beyond, or to clarify what is stated at law.

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ASIC proposes to amend the requirements for codes in RG 183 so that ASIC will consider a code for approval, even if the code is limited to dealing exclusively with provisions that dispense with the need for the Opt-in Requirement. Similarly, ASIC is considering if codes which apply to a single Australian Financial Services Licensee (AFS Licensee) or dealer group only, or a small number of licensees or dealer groups should or could be an Opt-in Code.

ASIC will approve an Opt-in Code only if the code will achieve substantially the same policy outcomes that the Opt-in Requirement was originally intended to achieve. As the Opt-in Requirement has been drafted to protect clients, the Opt-in Code should be capable of being understood by members of the public.

Compliance and the register

Under RG 183, for a code to be approved by ASIC, the person administering the code must be able to enforce compliance with the code. The code must be overseen by the person administering the code, and must be enforceable.

The administration of relevant codes should be conducted independently. In particular, code compliance and reporting must be conducted without interference from subscribers to the code and the code should be independently reviewed once in the first three years, and every five years after that.

ASIC proposes that for Opt-in Codes, a current, publicly available, online register stating which members of the code are adhering to that code is required to supplant the Opt-in Requirement. The code should also clearly set out when membership may be terminated, and that termination of membership will be reported to ASIC and the AFS Licensee.

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