

TPB Information Sheet

TPB(I) 27/2016

Code of Professional Conduct – Acting lawfully in the best interests of clients for tax agents with a tax (financial) advice services condition

DISCLAIMER

This is a Tax Practitioners Board (TPB) information sheet (TPB(I)). It is intended to be for information only. While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the TPB's powers in the *Tax Agent Services Act 2009* (TASA).

In addition, please note that the principles and examples in this TPB(I) do not constitute legal advice and do not create additional rights or legal obligations beyond those that are contained in the TASA or which may exist at law.

DOCUMENT HISTORY

The TPB released this document as a draft Information Sheet in the form of an Exposure draft *TPB(I) D32/2016: Code of Professional Conduct – Acting lawfully in the best interests of clients for tax (financial) advisers* on 25 May 2016. The closing date of the submissions was 11 July 2016.

The TPB considered the comments and submissions received and published this TPB(I) on 13 October 2016.

On 7 December 2023, the TPB updated this TPB(I) to replace references to a tax (financial) adviser to a tax agent with a tax (financial) advice services condition.

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Introduction

1. This Information Sheet (TPB(I)) has been prepared by the Tax Practitioners Board (TPB) to assist registered tax agents with a tax (financial) advice services condition to understand their obligations under subsection 30-10(4) of the *Tax Agent Services Act 2009* (TASA) (Code of Professional Conduct (Code) Item 4).¹ While the focus of this TPB(I) is on Code Item 4, it is also important to note that there are 13 other items in the Code and additional requirements in relation to being a 'fit and proper' person which may be relevant.²
2. In this TPB(I), you will find the following information:
 - what the obligation is under Code Item 4 (paragraphs 3 to 10)
 - consequences for failing to comply with Code Item 4 (paragraphs 11 to 15)
 - comparison with the *Corporations Act 2001* (Cth) (Corporations Act) (paragraphs 16 to 21)
 - practical examples (paragraph 22).

What is the obligation under Code Item 4?

3. Code Item 4 provides that tax agents with a tax (financial) advice services condition must act lawfully in the best interests of their client.

What does acting 'in the best interests of your client' mean?

4. Acting 'in the best interests of your client' has been held to mean acting in a representative character in the exercise of the tax agent's responsibility to the client. This requires a tax agent with a tax (financial) advice services condition to advance and protect their client's interests to the best of their ability, in all circumstances. However, the Code does not apply to the conduct of a tax agent with a tax (financial) advice services condition when providing financial services (as opposed to tax (financial) advice services).

¹ Although this TPB(I) has been prepared specifically for tax agents with a tax (financial) advice services condition, the principles regarding Code Item 4 apply to all registered tax practitioners (that is, tax agents and BAS agents). See also [TPB\(EP\) 01/2010 Code of Professional Conduct](#), noting that the TPB intends to release an updated version of this Explanatory paper in due course, incorporating relevant information in relation to the obligations of registered tax agents with a tax (financial) advice services condition under the Code of Professional Conduct in the *Tax Agent Services Act 2009* (TASA).

² For further information, see TPB Explanatory paper [TPB \(EP\) 02/2010 Fit and proper person](#).

5. The duty imposes the following obligations on tax agents with a tax (financial) advice services condition:
 - a duty to not promote the tax agent’s personal interest in circumstances in which there is an actual or potential conflict between the tax agent’s personal interests and those of the client³
 - a duty to not use the tax agent’s position to make a personal profit or gain unless authorised to do so by the client. Further, accounting for any unauthorised gain will not operate as an excuse for the initial breach that gave rise to the gain.
6. This duty is similar to the fiduciary duties owed by other professional advisors to clients, and its scope is shaped by the circumstances of the engagement (such as the letter of engagement and any relevant course of conduct between the tax agent with a tax (financial) advice services condition and the client). However, because the Code creates positive obligations that tax agents with a tax (financial) advice services condition must comply with in providing tax (financial) advice services to their clients, the duty owed by the tax agent with a tax (financial) advice services condition to the client is not wholly contractual.
7. Characteristics of the relationship between a tax agent with a tax (financial) advice services condition and their client that may be relevant to determining the scope of the duty are:
 - the existence of ‘a relationship of confidence’ and the tax agent’s duty to maintain client confidence (Code Item 6)
 - an undertaking by the tax agent to perform a task or fulfil a duty in the interests of the client
 - dependency or vulnerability on the part of the client that causes them to rely on the tax agent for the tax (financial) advice services provided
 - a reasonable expectation that the tax agent will act in the client’s best interests.

What does acting ‘lawfully’ in the best interests of your client mean?

8. Acting ‘lawfully’ in the best interests of a client requires a tax agent with a tax (financial) advice services condition to act in a client’s best interests but only to the extent that their actions are consistent with the law. That is, ‘acting in the best interests of clients’ is not a justification for a tax agent with a tax (financial) advice services condition to contravene or disregard the law.

³ For further information on obligations under the Code in relation to managing conflicts of interest (Code Item 5), see TPB Information sheet [TPB\(I\) 19/2014 Code of Professional Conduct – Managing conflicts of interest](#).

9. When acting for, or on behalf of, a client, a tax agent with a tax (financial) advice services condition must only act where authorised to do so.
10. There may also be examples of where the law overrides the duty of a tax agent with a tax (financial) advice services condition to their client, for example the requirement to provide information to statutory authorities such as the TPB or the Australian Securities and Investments Commission (ASIC) pursuant to notices issued under relevant legislation such as the TASA or the Corporations Act.

Consequences for failing to comply with Code Item 4

11. If a registered tax agent with a tax (financial) advice services condition fails to act lawfully in the best interests of their client, the TPB may find that the tax agent has breached the Code and may impose sanctions for that breach.
12. If a tax agent with a tax (financial) advice services condition breaches the Code, the TPB may impose one or more of the following sanctions:
 - a written caution
 - an order requiring the registered tax agent to do something specified in the order
 - suspension of the tax agent's registration
 - termination of the tax agent's registration.
13. In addition, the same conduct which may amount to a failure to act lawfully in the best interests of the client, under Code Item 4, could constitute a breach of another Code Item.
14. In contrast, it is noted that if an Australian financial services (AFS) licensee or an authorised representative of an AFS licensee fails to comply with the Corporations Act (including the best interests duty), they may be liable for:
 - a civil penalty⁴, and/or
 - an order for compensation for loss or damage suffered by the client.⁵
15. Ultimately, determining whether a tax agent with a tax (financial) advice services condition has complied with their obligations under Code Item 4 will be a question of fact. This means that each situation will need to be considered on a case-by-case basis having regard to the particular facts and circumstances.

⁴ See sections 961K and 961Q of the Corporations Act.

⁵ See section 961M of the Corporations Act.

Comparison with the Corporations Act

16. The TPB recognises that the obligations of some Australian financial services (AFS) licensees and their representatives under the Corporations Act are similar to some obligations under the TASA (in relation to the activities that a practitioner undertakes in their capacity as a tax practitioner).⁶
17. Ultimately, while compliance with relevant Corporations Act and ASIC requirements will be a relevant factor, it is not conclusive in relation to whether obligations under Code Item 4 in the TASA have been satisfied.
18. In particular, it is noted that subsection 961B(1) of the Corporations Act requires that, in the provision of personal advice to a person as a retail client, the provider 'must act in the best interests of the client in relation to the advice' (the best interests duty).
19. It is also noted that compliance with the best interests duty under the Corporations Act is met generally by following the safe harbour steps set out in subsection 961B(2) of the Corporations Act, which include:
 - identifying the objectives, financial situation and needs of the clients that were disclosed through instructions
 - identifying the subject matter of the advice that has been sought by the client (whether explicitly or implicitly) and the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter
 - making reasonable enquiries to obtain complete and accurate information where it is reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate
 - assessing whether the provider has the expertise required to provide the client with advice on the subject matter sought, and if not then decline to provide the advice
 - where it would be reasonable to consider recommending a financial product:
 - conducting a reasonable investigation into financial products that might achieve the financial objectives and needs of the client
 - assessing the information gathered in the investigation
 - basing all judgments in advising the client on the client's relevant circumstances
 - taking any other step(s) that would be reasonably regarded as being in the best interests of the client, given the client's relevant circumstances.⁷

⁶ For further information on what constitutes a tax (financial) advice service, including facts and circumstances considered in determining whether a client can reasonably be expected to rely on a service being provided, refer to [TPB\(t\) 20/2014: What is a tax \(financial\) advice service?](#)

⁷ For further information, see ASIC Regulatory Guides *RG 175: Licensing: Financial product advisers - conduct and disclosure* and *RG 244: Giving information, general advice and scaled advice*.

20. The primary distinction between the obligation under Code Item 4 and the best interests duty under the Corporations Act is that Code Item 4 expressly requires that a tax agent with a tax (financial) advice services condition consider the lawfulness of acting in accordance with client instructions and to decline to so act if it would be unlawful.
21. Code Item 4 can therefore be seen to place a tax practitioner (including a tax agent with a tax (financial) advice services condition in a position that is analogous to a legal practitioner – imposing an obligation on the practitioner to uphold the law in acting for clients rather than merely seeking to facilitate the client’s wishes/interests.

Practical examples involving Code Item 4

22. Outlined further below are possible indicative examples for the purpose of illustrating the general application of Code Item 4. In all cases, consideration will need to be given to the specific facts and circumstances.

Example 1

Scenario

Drew engages Kylie, a registered tax agent with a tax (financial) advice services condition, to withdraw money from his self-managed superannuation fund (SMSF) cash account. Kylie is aware that Drew cannot lawfully withdraw money from his SMSF cash account.

Code of Professional Conduct requirements

Kylie must advise Drew in accordance with the relevant laws and must not act in accordance with Drew’s instructions.⁸

Example 2

Scenario

Michael provides advice to his clients Mr and Mrs Brown about retirement options. Michael recommends that his clients invest in a particular property through a unit trust. Michael correctly advises his clients on the superannuation and other taxation implications for the investment. However, Michael grossly fails to assess and inform his clients of the financial risks involved in the investment.

⁸ For further information on what is a tax (financial) advice service, see TPB Information Sheet [TPB\(I\) 20/2014: What is a tax \(financial\) advice service?](#)

Code of Professional Conduct requirements

Michael has reasonably ascertained the liabilities, obligations and entitlements of his clients that could arise under a taxation law with respect to the investment and advised his clients accordingly. As such, Michael has acted lawfully in the best interests of his clients in relation to the tax (financial) advice service, and therefore has not contravened the Code.

While the Code has not been breached in this scenario, the TPB may find that Michael's conduct impinges on his fitness and propriety to be a registered tax agent with a tax (financial) advice services condition.

Further, it is noted that the ASIC is responsible for the regulation of financial services and Michael's conduct may impact on his obligations under the Corporations Act.
