

‘Woolly’ ethics guidance casts further doubt on referral fees

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Referral fees for advisers are still under a cloud after FASEA released its preliminary response to submissions received as part of its industry consultations late last year.

The document, which largely flew under the radar when it was released on December 20, attempts to clarify rules around referral fees by making a distinction between advisers, who the Code of Ethics applies to, and both their licensees and Corporate Authorised Representatives (CARs), which it does not.

In essence, FASEA explain that referral fees can be paid to licensees and CARs but not directly to the adviser.

FASEA acknowledge that there is scope for referral remuneration to be funnelled through from either of these entities to the adviser, but only if all other elements of the code are satisfied.

“Where the adviser’s remuneration is related to the referral fee received via the Licensee structure or CAR and is paid directly to the adviser, the adviser will need to demonstrate compliance with the Code in the same manner as any other form of remuneration received,” the document states.

In an instructional video for education provider Kaplan, BT Financial Group’s Bryan Ashendon says his understanding is that referral payments can be paid to advisers via the licensee or CAR.

“The important thing it says is that referral fees are not necessarily banned,” Ashendon says. “You need to look at the way it’s been paid, who it’s been paid to, and whether it influences the advice.”

Ashleigh Swayne from Absolute Advice believes if the payment goes through the corporate entity and satisfies the other standards it seems permissible.

“Our take when it first came out was that [referral fees] are off limits, but now then we started reading it we thought ‘hang on, the licensee can receive them and so can the corporate entity’.”

Swayne notes, however, that the practice will need to rely on the input of compliance specialists. “We’re still trying to get our head around it,” he says.

Getting an understanding from compliance experts can be problematic, according to David Page, managing director of mid-sized firm Financial Affairs in south-west Victoria. Page says they rely on information from both a compliance firm in Adelaide as well as their licensee. “Even with those two there’s conflicting information about this,” he says.

The Financial Adviser Standards and Ethics Authority has followed the lead of other regulators and indicated they will give advisers some room to understand and implement any changes – at least while there is no code monitoring body to police adherence and the role sits with licensees.

“FASEA considers the approach outlined by ASIC and AFCA while the single disciplinary body is being brought into operation is appropriate and will allow implementation to occur in a considered and consultative manner,” the submission states.

“FASEA suggests that advisers may wish to use this period to step back and assess how they stand against the Code Values and Standards.”

Not that easy

According to The Fold Legal solicitor director, Jaime Lumsden, the continuation of referral fee arrangements isn’t as simple as making sure the payment goes via the licensee or corporate entity.

Referral payments are essentially conflicted, she explains, which marks them as a breach under the legislation.

“At the moment I’m seeing [referral fee payments] as difficult to achieve,” Lumsden says. “As time goes on there might be some way for it to happen in the future, but it seems fairly clear that if you get paid to do something there’s a conflict.”

While the referral fee debate has primarily focused on Standard 7 of the Code of Ethics, which states that advisers can’t receive benefits “that derive from a third party other than your principal,” Lumsden believes most referral issues will stem from Standard 3, which states that advisers must not “advise, refer or act” where there is a conflict of interest or duty.

“Under Standard 3, it is likely that receipt of a referral fee would create a conflict, and therefore advisers cannot receive fees for making referrals as it may influence the choice of who to refer the client to in a way that is not in the client’s interests,” Lumsden states.

Asked if there is scope for the payment to reach the adviser in some other form, such as via an ‘activity bonus’ based on referrals and other metrics, Lumsden says it may be possible using a genuine balanced scorecard approach. “This is likely what would be required to meet conflicted remuneration rules anyway,” she adds.

For advisers looking at this approach as a way to get referral payments through, Lumsden warns against trying to skirt the new rules and suggests advisers refer to ASIC's regulatory guidance on conflicted remuneration. "It would be difficult to fudge effectively," she says.

Lumsden says she sympathises with advisers trying to navigate the standards, and herself finds the Ethics Code guidance document "a bit woolly".

"Advisers need more guidance because it's going to capture commercial arrangements which are a natural part of their business," she says.