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TPB Information Sheet

TPB(I) 29/2016

Code of Professional Conduct – Reasonable care to ensure taxation laws are applied correctly for tax (financial) advisers

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) D34/2016: Code of Professional Conduct – Reasonable care to ensure taxation laws are applied correctly 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 now publishes the following TPB(I).

Issued: 13 October 2016



Code of Professional Conduct – Reasonable care to ensure taxation laws are applied correctly for tax (financial) advisers

Introduction

1. This Information Sheet (TPB(I)) has been prepared by the Tax Practitioners Board (TPB) to assist registered tax (financial) advisers to understand their obligations under subsection 30-10(10) of the *Tax Agent Services Act 2009* (TASA) (Code of Professional Conduct (Code) Item 10).¹ While the focus of this TPB(I) is on Code item 10, 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 also be relevant.²
2. In this TPB(I), you will find information on:
 - what the obligation is under Code Item 10 (paragraphs 3 to 15)
 - consequences for failing to comply with Code Item 10 (paragraphs 16 to 20)
 - comparison with the *Corporations Act 2001* (Cth) (Corporations Act) (paragraphs 21 to 25)
 - practical examples (paragraph 26).

What is the obligation under Code Item 10?

3. Code Item 10 requires registered tax (financial) advisers (and tax agents and BAS agents) to take ‘reasonable care’ to ensure that taxation laws are applied correctly to the circumstances in relation to which advice is provided to a client. However, the Code does not apply to the conduct of a tax (financial) adviser when providing financial services (as opposed to tax (financial) advice services).

¹ [TPB\(I\) 18/2013 Code of Professional Conduct: Reasonable care to ensure taxation laws are applied correctly](#) sets out the TPB’s view on the application of Code Item 10 to tax agents and BAS agents. While TPB(I) 18/2013 was developed specifically for the purpose of assisting registered tax agents and BAS agents, it provides useful guidance for all registered tax practitioners.

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



What does 'reasonable care' mean?

4. The duty to take reasonable care is a well-established feature of the common law in Australia. While Code Item 10 requires registered tax (financial) advisers to take 'reasonable care' to ensure that taxation laws are applied correctly, the Code does not extend the common law duty of registered tax (financial) advisers to take reasonable care. However, the Code does establish an additional range of possible statutory consequences under the TASA (see paragraphs 16 to 18).
5. There is no set formula for determining what it means to take reasonable care in any given situation. Rather, whether a registered tax (financial) adviser has taken reasonable care in a given situation will depend on an examination of all the circumstances,³ including the nature and scope of the tax (financial) adviser service being provided and the client's level of professional knowledge and experience.
6. The starting point for determining what reasonable care is will involve a registered tax (financial) adviser exercising their own professional judgment taking into account relevant factors, such as the client's individual circumstances including their records and systems and the nature and complexity of the transaction.
7. The standard generally requires a registered tax (financial) adviser to act in a way consistent with how a competent and reasonable person, possessing the knowledge, skills, qualifications and experience of a registered tax (financial) adviser, objectively determined, would act in the circumstances. It does not mean care needs to be to the highest level of care possible; however, it does require a tax (financial) adviser to act diligently in accordance with applicable technical and professional standards and to maintain professional knowledge and skill at a level required to ensure that a client receives competent professional services.

What is 'reasonable care in ensuring that taxation laws are applied correctly'?

8. Reasonable care involves giving appropriate attention to complying with the obligations under a taxation law⁴ at a standard that is expected of a reasonable person, objectively determined. This will involve a registered tax (financial) adviser exercising their own professional skills and judgment.

³ See, for example, Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*.

⁴ Taxation laws include any Act of which the Commissioner has general administration of, or any regulations made under such an Act. Key Acts include, but are not limited to, the:

- *Income Tax Assessment Act 1936*;
- *Income Tax Assessment Act 1997*;
- *Superannuation Industry (Supervision) Act 1993*; and
- *Fringe Benefits Tax Assessment Act 1986*.

Taxation laws also include the TASA and regulations made under the TASA, for which the TPB has general administration.



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9. Code Item 10 requires registered tax (financial) advisers to take 'reasonable care' to ensure the correct interpretation and application of the taxation law. An incorrect interpretation and application of the taxation law, therefore, may not necessarily amount to a failure to take reasonable care for the purpose of the TASA.

10. If, on the other hand, the registered tax (financial) adviser applied the taxation laws incorrectly to the circumstances of a client **and**, in doing so, did not take reasonable care to determine the correct taxation treatment in the circumstances, the registered tax (financial) adviser will likely be in breach of Code Item 10.

11. There is no set formula for what it means to take reasonable care in any given situation. However, it may include the registered tax (financial) adviser referring to some or all of the following material to seek clarification and ensure that they apply the taxation laws correctly to their client's circumstances:
 - legislation and related extrinsic material (for example, explanatory memoranda to Acts)
 - relevant case law
 - rulings and determinations issued by the Commissioner of Taxation (Commissioner) on the topic in question
 - the Commissioner's instructions in documents such as fact sheets and practice statements
 - any other guidance material published by the Australian Taxation Office (ATO), including on its website
 - information published or provided by a recognised professional association or other relevant regulatory agency, including the Australian Securities and Investments Commission and Australian Prudential Regulation Authority
 - relevant publications, information, advice or commentaries published by other experts, registered tax practitioners or specialists
 - another registered tax practitioner or a legal practitioner who has the ability and expertise to provide the advice on taxation laws and / or
 - relevant training material.



What does '... to the circumstances in relation to which the practitioner is providing advice to a client' mean?

12. The requirement to take reasonable care relates to the circumstances to which the registered tax (financial) adviser is providing a tax (financial) advice service to their client and is therefore subject to the agreed terms of the engagement with the client.⁵

13. The terms of the engagement with the client may arise from a variety of sources, which may include a signed letter of engagement,⁶ signed consent, or other communication with the client which may include, in certain circumstances:
 - a relevant Financial services guide and consent
 - a relevant Statement of advice (incorporating an 'authority to proceed') signed by the client
 - a relevant Record of advice (incorporating an 'authority to proceed') signed by the client, or
 - a relevant Product disclosure statement and consent.

14. These terms will determine the scope of the engagement between the registered tax (financial) adviser and their client and adherence to these terms will usually be the first step towards showing that reasonable care has been taken. The TPB considers that a written agreement between a registered tax (financial) adviser and their client, that sets out the terms and conditions of the arrangement between the parties and is appropriately reviewed when relevant circumstances change, is prudent.

15. In all cases, whether or not a registered tax (financial) adviser has taken reasonable care under Code Item 10 will be a question of fact to be determined by examining all of the circumstances of a particular situation. Various factors will need to be considered, including:
 - the terms of the engagement between a registered tax (financial) adviser and their client, including whether the client, or another entity, checks or reviews the work before purporting to rely on it
 - the complexity of the transaction that is subject to the advice
 - the client's circumstances, including their level of sophistication (such as education standard and level of tax knowledge or experience in the area which is the subject of advice)

⁵ 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\(I\) 20/2014: What is a tax \(financial\) advice service?](#)

⁶ For further information on engagement letters, refer to [TPB\(I\) 01/2011 Letters of engagement](#)



- the nature of any pre-existing relationship/dealings between the registered tax (financial) adviser and their client
- whether the provider of the service has provided an effective disclaimer against responsibility for the particular tax (financial) advice service. However, the existence of a disclaimer does not automatically absolve the entity from their obligations under the Code. Rather, the existence of an effective disclaimer is merely a relevant factor for consideration.

Consequences for failing to comply with Code Item 10

16. If a registered tax (financial) adviser does not take reasonable care to ensure that taxation laws are applied correctly under Code Item 10, the TPB may find that the registered tax (financial) adviser has breached the Code and may impose sanctions for that breach.
17. If a tax (financial) adviser breaches the Code, the TPB may impose one or more of the following sanctions:
 - a written caution
 - an order requiring the tax (financial) adviser to do something specified in the order
 - suspension of the tax (financial) adviser's registration
 - termination of the tax (financial) adviser's registration.
18. In addition, the same conduct which may amount to a failure to take reasonable care under Code item 10 could constitute a breach of another Code item.
19. 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) a civil penalty⁷ and / or
 - (b) an order for compensation for loss or damage suffered by the client.⁸
20. Ultimately, determining whether a tax (financial) adviser has complied with their obligations under Code Item 10 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.

⁷ See sections 961K and 961Q in the Corporations Act.

⁸ See section 961M in the Corporations Act.



Comparison with the Corporations Act 2001 (Cth)

21. The TPB recognises that the obligations of some Australian financial services (AFS) licensees and their representatives under the *Corporations Act 2001* (Cth) (Corporations Act) are similar to some obligations under the TASA.
22. 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 10 in the TASA have been satisfied.
23. Having regard to the principles and elements of Code item 10 in the TASA, the following sections in the Corporations Act are highlighted:
 - Section 912A - General obligations of AFSLs
 - Section 961B - Provider must act in the best interests of the client
 - Section 961G - Resulting advice must be appropriate to the client
 - Section 961H - Resulting advice still based on incomplete or inaccurate information.
24. In particular, the following requirements are noted:
 - A licensee must comply with financial services laws and take reasonable steps to ensure that its representatives comply with financial services laws.
 - The person providing personal advice to a retail client is required to act in the best interests of the client in relation to the advice, and the resulting advice must also be appropriate to the client (including, among other things, making reasonable enquiries to obtain complete and accurate information, and assessing whether the provider has requisite expertise to provide the client with advice on the subject matter sought).
 - The provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under section 961B to act in the best interests of the client.
 - It would reasonably be regarded as in the best interests of the client to take a step, if a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, exercising care and objectively assessing the client's relevant circumstances, would regard it as in the best interests of the client, given the client's relevant circumstances, to take that step.



25. Further, although not specifically related to taxation advice, the TPB notes that there are Australian Securities and Investments Commission (ASIC) requirements outlined in relevant ASIC Regulatory guides (RGs), including:

- RG 175 Licensing: Financial product advisers – Conduct and disclosure⁹
- RG 244: Giving information, general advice and scaled advice.

Practical examples involving Code Item 10

26. Outlined further below are possible indicative examples illustrating the general application of Code Item 10. In all cases, consideration will need to be given to the specific facts and circumstances as well as to the taxation laws as applied to those facts.

Example 1 (advising on laws outside area of expertise)

Terms of engagement

Len engages Barry, a tax (financial) adviser, to provide advice on the tax implications of an inheritance Len is entitled to receive.

Scenario

Barry does not have any expertise to advise on the tax implications of receiving an inheritance.

Reasonable care steps

As Barry is unfamiliar with the tax implications of receiving an inheritance, he declines the engagement and refers Len to another appropriately skilled tax (financial) adviser, registered tax agent or legal practitioner. In this case, Barry has satisfied his obligations under Code Item 10.

Alternative scenario

If Barry decided to proceed with the engagement and provide advice on the tax implications of the inheritance based on his limited and inadequate knowledge of the relevant taxation laws, he will have breached his obligations under Code Item 10.

⁹ See, in particular, the following paragraphs:

- RG 175.340 to 175.358, including RG 175.356 to 175.358 in relation to requirements where there are material tax implications outside of an advice provider's competence; and
- RG 175.359 to 175.362, in relation to warning the client if advice is based on incomplete or inaccurate information.



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Example 2

Terms of engagement

Tony engages Rick, a registered tax (financial) adviser, to provide tax (financial) advice services, including in relation to superannuation. Tony specifically tells Rick that one of his goals is to maximise his superannuation contributions without exceeding the super contributions cap.

Scenario

As part of the tax (financial) advice services provided, Rick advises Tony to make a sizeable concessional superannuation contribution through a salary sacrifice arrangement. However, in doing so, Rick fails to identify that Tony has an existing salary sacrificing arrangement in place. Consequently, Tony exceeds the super contributions cap and is required to pay excess contributions tax.

Reasonable care steps

By failing to properly identify all the relevant facts and circumstances applicable to Tony (in particular, that Tony had an existing salary sacrificing arrangement in place), Rick has failed to take reasonable care in relation to the application of the super contribution cap rules. Accordingly, Rick has breached his obligations under Code item 10.