



Financial Advisers Disciplinary Committee

PROCEDURE RULES UNDER THE FINANCIAL MARKETS CONDUCT ACT 2013

15 March 2021



INTRODUCTION AND GENERAL PROVISIONS

1 Title

These Rules are the Financial Advisers Disciplinary Committee Rules of Procedure for the purposes of clause 54(5) of Schedule 5 to the Financial Markets Conduct Act 2013 (the Act).

2 Commencement

These Rules come into force on 15 March 2021.

3 Purposes

The purposes of these Rules are to:

- (a) promote and further the purpose of the Act;
- (b) enable the Committee to carry out its functions under clause 50 of Schedule 5 to the Act; and
- (c) provide the rules by which the Committee will regulate its own procedure under clause 54 of Schedule 5 to the Act.

4 Overriding objective

- (1) The overriding objective of these Rules is to enable the Committee to secure the just and speedy determination of any proceeding in a cost effective manner.
- (2) The Committee must seek to give effect to the overriding objective when it:
 - (a) exercises any power under these Rules; or
 - (b) interprets any Rule.
- (3) In particular, the Committee must manage proceedings in accordance with the overriding objective.

5 Natural justice

- (1) The Committee must exercise and perform its duties, powers, and functions in a way that is fair and consistent with the rules of natural justice.
 - (2) The parties must be treated with equality and each party will be given a reasonable opportunity to present that party's case.
-

6 Freedom of Committee to regulate its procedure

Subject to the Act and any regulations made under the Act, and despite these Rules, the Committee may regulate its procedure in any case as it sees fit to achieve the overriding objective set out in Rule 4.

7 Interpretation

In these Rules, unless the context otherwise requires:

Act means the Financial Markets Conduct Act 2013 and the Code made under it.

Financial Adviser means a person defined as a financial adviser under s6(1) of the Act to whom a complaint relates.

Authority means the Financial Markets Authority established under the Financial Markets Authority Act 2011.

Chairperson means a member of the Committee appointed by the Minister as its chairperson, in accordance with clause 51(3) of Schedule 5 to the Act, but where the context requires includes the chairperson of a Panel, appointed under Rule 9(d).

Code means the Code of Professional Conduct for Financial Advice Services brought into force under Part 4 of Schedule 5 to the Act.

Committee means the disciplinary committee established under clause 49 of Schedule 5 to the Act and, unless referred to as “the whole Committee”, includes a Panel.

Complaint means a complaint referred to the Committee under clause 43 of Schedule 5 to the Act.

Conduct includes any acts and/or omissions, and (unless the context otherwise requires) refers to the acts and omissions of the Financial Adviser that is the subject of a complaint.

document means:

- (a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds from which symbols, images, or sounds can be derived, and includes:
 - (i) a label, marking, or other writing that identifies or describes a thing of which it forms part, or to which it is attached;
 - (ii) a book, map, plan, graph, or drawing;
 - (iii) a photograph, film, or negative; or
- (b) information electronically recorded or stored, and information derived from that information.

to file, in relation to any document, means to deliver to the Committee in accordance with Rule 13(1) to the address specified on the notice of complaint.

legal counsel means any person who is a Lawyer as defined in section 6 of the Lawyers and Conveyancers Act 2006.

oath means an oath or affirmation administered or taken in accordance with the Oaths and Declarations Act 1957.

oral hearing means any hearing which includes the making of oral submissions and/or the oral examination of witnesses.

Panel means a panel of the Committee appointed by the Chairperson under Rule 9(a).

to **serve**, in relation to any document, means to deliver to the party or parties specified, in accordance with Rule 12.

Registrar means the Registrar of Financial Service Providers appointed under section 35 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

Rule or **Rules** refers to the Disciplinary Committee Procedure Rules under the Financial Markets Conduct Act 2013.

working day means any day of the week other than:

- (a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign's birthday, Matariki and Waitangi Day; and
- (b) a day in the period commencing with 25 December in any year and ending with 15 January in the following year.

COMMENCEMENT OF PROCEEDINGS

8 Referral of complaint

Any complaint referred to the Committee under clause 43 of Schedule 5 to the Act will include:

- (a) a summary of facts in relation to the complaint;
- (b) the provision or provisions of subpart 5A of Part 6 to the Act which the Authority considers may have been contravened by the Financial Adviser to whom the complaint relates (for example, a contravention of the Code);
- (c) whether the Authority has taken or intends to take any step against the Financial Adviser pursuant to Part 6 of the Act, or otherwise, in relation to the conduct the subject of the complaint;
- (d) all relevant documents the Authority relies on, arranged in chronological order;
- (e) any witness statements relied upon by the Authority; and
- (f) any relevant material the Authority considers likely to undermine the Authority's opinion that the conduct complained of amounts to a breach of the Code.

9 Allocation of the complaint to a Panel and preliminary consideration of the complaint

- (a) Upon receiving a complaint referred to the Committee the Chairperson will appoint a Panel to deal with it.
 - (b) Subject to Rule 9(c), the Chairperson may at any time after appointing a Panel, add to or alter its membership.
 - (c) A Panel must comprise no fewer than 3 members of the Committee.
 - (d) If the Chairperson is not a member of the Panel, he or she will designate one of its members as chairperson of the Panel.
 - (e) The deliberations and proceedings of a Panel constitute a meeting of the Committee for the purposes of clause 54 of Schedule 5 to the Act and that section applies to the Panel as if it were the whole Committee.
 - (f) A Panel appointed to deal with a complaint will undertake a preliminary consideration of the complaint to determine whether a hearing is necessary.
 - (g) Subject to Rule 9(b), if a Panel determines that a hearing is necessary, then as far as is reasonably practicable that Panel should deal with all subsequent steps taken under these Rules in respect of the complaint.
-

10 Consideration of complaint to determine whether hearing necessary

Upon receipt of a referral of complaint from the Authority, the Committee will consider the complaint to determine whether a hearing is necessary.

11 Notice of complaint where Committee determines hearing necessary

- (1) If the Committee determines that a hearing is necessary under Rule 9, it will serve a Notice of Complaint in accordance with clause 45 of Schedule 5 to the Act on:
 - (a) the Authority; and
 - (b) the Financial Adviser to whom the complaint relates.
- (2) In addition to the requirements set out in clause 45 of Schedule 5 to the Act, the Notice of Complaint will:
 - (a) set out a summary of facts;
 - (b) specify the provision or provisions of subpart 5A of Part 6 of the Act which the Committee considers may have been contravened by the Financial Adviser;
 - (c) specify the date and time of the initial telephone conference, no sooner than 10 working days from the date of service of the Notice of Complaint; and
 - (d) specify the date that the Committee intends to hear the matter, in accordance with clause 45(c) of Schedule 5 to the Act.

12 Notice where Committee determines hearing not necessary

- (1) In any case where the Committee determines that a hearing is not necessary to deal with a complaint under Rule 10, the Committee will give written notice of that decision, with a brief statement of the reasons for it, to:
 - (a) the Financial Adviser to whom the complaint relates; and
 - (b) the Authority.
- (2) Notwithstanding Rule 11 or (1) above, at any stage the Authority may elect to withdraw a complaint referred to the Committee; or the Committee may elect to suspend proceedings.

13 Notices and communications

- (1) Any notice or other communication that may be or is required to be given by any party under these Rules must be in writing and may be delivered by post, facsimile, or e-mail, unless otherwise directed by the Committee.
- (2) The registered business address of the Financial Adviser or the address of the Financial Adviser's legal representative, must be valid addresses for the purpose of any notice or communication, in the absence of written notification of change of address by the Financial Adviser to the other parties and the Committee.

14 The Authority

In any disciplinary proceeding under these Rules, the Authority is the complainant and may present evidence and call and cross-examine witnesses in relation to the alleged breach or breaches of the Code by the Financial Adviser.

15 Representation

The Authority or the Financial Adviser may be represented or assisted by legal counsel, or such other person as the Committee is satisfied may assist that party. The names, addresses, telephone and e-mail addresses of each representative must be notified in writing to the Committee and the other parties.

MANAGEMENT OF PROCEEDINGS

16 Memorandum prior to initial telephone conference

- (1) Every party must file a memorandum no later than two working days prior to the initial telephone conference, addressing the following:
 - (a) whether the Financial Adviser intends to dispute the Notice of Complaint;
 - (b) the names and contact details of any persons representing the parties in accordance with Rule 15;
 - (c) the proposed timetabling for procedural issues; and
 - (d) the availability of parties and intended witnesses for the hearing date set out in the Notice of Complaint.
- (2) The memorandum in (1) above may be filed jointly by the parties.

17 Initial telephone conference

- (1) At the initial telephone conference, after hearing from the parties, the Chairperson may make any timetabling or procedural directions he or she thinks fit.
- (2) At any time before the hearing, the Chairperson may convene a further conference of the parties or counsel representing the parties, which may be conducted by teleconference or video link, as determined appropriate by the Chairperson.

18 Further powers of the Committee to manage proceedings

The Committee may do any or all of the following things in relation to proceedings or the parties to them:

- (a) request a party to provide to the Committee, within a specified period, any documents, things, or information that are in the possession or control of the party and that are relevant to the proceedings;
- (b) request further written evidence or submissions from any party, as long as it gives the relevant parties an opportunity to comment on those submissions; and
- (c) set deadlines for further submissions and comments by the parties.

19 Disclosure by Authority

In any case where the Financial Adviser has advised the Committee in writing of an intention to dispute the Notice of Complaint, the Authority must provide copies of all relevant material in its possession relating to the complaint to the Financial Adviser to whom the complaint relates, unless it is legally privileged or there is otherwise good reason for withholding it.

20 Statement of Response

Within ten working days after the Authority makes disclosure under Rule 19, or where disclosure is not made within such time as the Chairperson orders, the Financial Adviser must file a Statement of Response that includes:

- (a) the identification of any facts in dispute; and
- (b) any additional documents and witness statements to be relied upon by the Financial Adviser.

EVIDENCE

21 Application to the Committee to summons witnesses

Where a party wishes to summons a witness it may ask the Committee under clause 57(1) of Schedule 5 to the Act to make such an application where:

- (a) the evidence of the witness is or may be material to the hearing; and
- (b) it is necessary or desirable that the summons be issued to compel the attendance of the witness at the hearing.

22 Witness statements

- (1) Every witness statement must be signed by the person making the statement and contain a statement at the end that:
 - (a) everything in the statement is true to the best of that person's knowledge and belief;
 - (b) the person made the statement knowing that it might be admitted as evidence for the purposes of a Financial Adviser Disciplinary Committee Proceeding; and
 - (c) he or she could be prosecuted for perjury if the statement is known by him or her to be false and/or is intended by him or her to mislead.
 - (2) A witness giving oral evidence at a hearing may, with the permission of the Committee, give evidence as to new matters which have arisen since the witness statement was filed.
 - (3) If a party who has filed a witness statement does not call the witness to give evidence at the hearing or put the statement in evidence, any other party may put the witness statement in evidence without calling the witness to give oral evidence.
-

23 Rules of evidence

- (1) The Committee may receive as evidence any statement, document, information, or matters that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law.
 - (2) The Committee may receive evidence on oath, and, for that purpose, any member of the Committee may administer an oath.
 - (3) The Committee may permit a person appearing as a witness before it to give evidence by tendering his or her written witness statement and verifying that statement by oath, statutory declaration, or otherwise.
 - (4) The Committee may receive evidence given by audio-visual communication, or by any other means of communication, if the Committee and the person giving the evidence agree.
 - (5) Subject to (1) to (4) above, the Evidence Act 2006 applies to the Committee and its members, and to all proceedings before the Committee in the same manner as if the Committee were a Court within the meaning of that act.
-

HEARING PROCEDURES

24 Hearings

- (1) After considering the views of the parties the Chairperson will determine whether any hearing should proceed:
 - (a) On the papers;
 - (b) As a summary hearing; or
 - (c) As a full hearing,and may change that determination at any time prior to the commencement of the relevant hearing.
- (2) Hearings are conducted as follows:
 - (a) A hearing on the papers proceeds solely on the basis of the documents and evidence filed by the parties.
 - (b) A summary hearing proceeds on the basis that, in addition to documents and evidence filed by the parties:
 - (i) Any party may make oral submissions; but
 - (ii) Witness statements filed by the parties will be deemed to be the evidence submitted by the witness and there is no oral examination of witnesses.
 - (c) A full hearing proceeds on the basis that, in addition to documents and evidence filed by the parties:
 - (i) Any party may make oral submissions;
 - (ii) Any party may lead oral evidence;
 - (iii) Any party who has filed a witness statement must make that witness available for cross examination unless excused by the Committee; and
 - (iv) A party may cross examine any witness for another party.

DECISION OF THE COMMITTEE

25 Parties' failures to act do not affect Committee's powers to decide matter

The Committee's power to decide a matter is not affected by the failure of any party to:

- (a) make a submission or comment within the time allowed;
- (b) give specified information within the time allowed;
- (c) attend, or participate in, a conference of the parties called by the Committee;
- (d) attend, or participate in, any hearing; or
- (e) do any other thing the Committee asks for or directs.

26 Committee may draw inference from parties' failures to act and decide matter based on available information

- (1) A determination will not be made solely on the default of a party.
- (2) Subject to (1) above, if any failure of the kind referred to in Rule 25 occurs in proceedings, the Committee may:
 - (a) draw from the failure any reasonable inferences it thinks fit;
 - (b) decide the matter concerned on the basis of the information available to it; and
 - (c) give any weight it thinks fit to information that:
 - (i) it asked for, or directed to be provided; but
 - (ii) was provided later than requested or directed.

27 Decision on whether conduct complained of amounts to a contravention of the Act

Following any hearing the Committee will decide whether or not the Financial Adviser has contravened the Act and will provide to the parties a statement in writing of that decision with reasons.

28 If Committee determines contravention of the Act

If the Committee decides there has been a contravention of the Act, when it issues its decision it will:

- (a) Notify the Financial Adviser that it may, for the reasons set out in that decision, take any of the actions specified in clauses 46(3) and 47(2) of Schedule 5 to the Act;
- (b) Seek submissions from the parties on what if any action the Committee should take; and
- (b) Request confirmation whether any party wishes to be heard or to call evidence in relation to such submissions.

PENALTIES AND COSTS

29 Factors to take into account if a contravention has been established

In determining what actions, if any, to impose on the Financial Adviser under clauses 46(3) and 47(2) of Schedule 5 to the Act, the Committee may take into account:

- (a) the nature of the charge;
- (b) the nature of the conduct of the Financial Adviser;
- (c) whether the Financial Adviser accepted a contravention of the Act without the need for a hearing;
- (d) any other penalties imposed on the Financial Adviser for the same conduct;
- (e) the conduct of the Financial Adviser during the investigation;
- (f) any offer of amends; and
- (g) any previous findings of misconduct against the Financial Adviser.

30 Committee's decision on costs and penalties

- (1) The Committee must give reasons in writing for any decision or order under clauses 46(3) and 47(2) of Schedule 5 to the Act, and provide copies of its decision to the Authority and the Financial Adviser.
 - (2) Where the Committee makes any decision or order under clauses 46(3) and 47(2) of Schedule 5 to the Act, it must advise the Financial Adviser in writing of his or her right of appeal under s532A of the Act.
-

PUBLICATION

31 Hearings to be in public

- (1) Except as provided in (2) and (3) below, every hearing of the Committee dealing with any proceedings in respect of a breach of the Code will be open to the public.
- (2) If the Committee is of the opinion that exceptional circumstances apply, it may direct non-publication of:
 - (a) any evidence or submissions received in the course of a proceeding;
 - (b) all or part of any proceeding.
- (3) The Committee may direct non-publication of the name or particulars of the affairs of a financial adviser or any other person.
- (4) In deciding whether to direct non-publication under (3), the Committee will have regard to:
 - (a) the interests of any person (including, without limitation, the privacy of any complainant); and
 - (b) the public interest.
- (5) If the Committee is of the opinion that exceptional circumstances apply it may hold any hearing or part of any hearing in private.