

## SHEDDING LIGHT ON CLIENT CONTACT

**We are a financial planning practice that has developed from the old style insurance company. Because of this, we have about 4,000 clients spread all over Australia.**

**Under Financial Services Reform (FSR), we understand that we have to contact these clients to offer an annual review. If that contact is unsuccessful in gaining a review appointment (either through no response from the client or the client indicates they see no need for a review):**

- 1. Can we automatically send an Opt Out/No Review letter which acknowledges a review has been offered and declined, acknowledging the importance of a review, and putting the onus back on the client to contact our practice in the future if they want a review?**
- 2. Once/if this signed Opt Out/No Review letter is received, do we still have to contact the client annually to ensure their circumstances haven't changed – 'making proper enquiries'? Can we rely on the client to contact us if they want a review?**
- 3. If we have a client that we do not care for and do not want to deal with, what scope is there for us to stop servicing them?**

FSR can be confusing, but what a lot of people do not realise is that FSR has not brought about a great deal of change (in some respects) to the industry. A lot of procedural requirements remain in place, but are named differently and have some modifications. This has clouded some understanding of the new law.

There is no specific requirement under the post-FSR Corporations Act ('the Act') for you to offer an annual review to your client. However, whilst legislation may not spell it out in black and white, the manner in which you or another conducts the financial services business may cause the need for one.

For instance, section 945A of the Corporations Act, more commonly known as the 'know your client rule', requires you to have a reasonable basis for giving personal advice to retail clients. This alone does not mean that you must give annual reviews, you should ask yourself the question: is the nature of the client's relevant personal circumstances in relation to the advice that I am providing such as to imply a need to provide at least an annual review, maybe even more regularly?

Whether or not you have created a duty and burden upon yourself to provide the client with an annual review (or at least the option to have an annual review), is dependent on your client/adviser circumstances.

Your question tells us that you have mainly dealt with life insurance products. Assuming that at the initial engagement/interview with the client you took into consideration all of the client's relevant circumstances in order to recommend a particular life insurance product, it is unlikely you would need to provide an annual review.

However, this is also assuming that at your initial interview you warned them that the product is only suitable at that time and will only remain suitable provided their relevant circumstances do not

change. This is further assuming that you did not inform the client that you would provide an annual or even semi-annual review to confirm their circumstances remain the same.

Did you do any of this? If yes, the annual review requirement is of your own making.

When considering industry issues in light of FSR you must be aware that the answers do not always purely rest with the Act. FSR does not operate in an FSR vacuum; the workings of the industry are dependent on common law, tort law, contract law and are impacted by ASIC policy statements. Therefore, when considering any issues in respect of the industry and FSR you must always look to the wider scope and not merely the Act.

You must look at what the expectation of your client is. The mere fact that you represent yourself as a financial planning business (and by this we assume more than life insurance) may of itself cause your client to expect that it is an industry 'norm' or 'standard' that you will provide an annual review. This is dependent upon the relationship you currently hold with each of your clients.

A way in which you may identify whether you have created this obligation and expectation could be by looking directly at your terms of engagement correspondence; have you indicated what the usual process is? You can also examine what has been verbally represented to your clients – you can even look at your marketing material. What have you represented to clients generally?

In determining whether to provide your clients with annual reviews, consider what the standard of the industry is and whether such a standard would require you to provide such service. But always keep the personal circumstances and needs of each client at the forefront of your mind.

It is also important to look to your position as it may relate to others that you deal with. You need to ask, has someone else caused you to have an annual review obligation?

Your most obvious starting point is with your Australian Financial Services Licence (AFSL) but it may be that your understanding of the requirement to provide an annual review to your client is a result of a requirement placed upon you by a product issuer or platform provider. It may be that through your contract with a product issuer the contract obligates you to provide regular reviews to your client.

Section 1017D of the Act requires the product issuer to provide periodic statements to retail clients in respect of financial products. This section of the Act provides that an annual periodic statement must include relevant information in respect of the financial product, such as opening and closing balances, summary of all transactions in relation to the product during the reporting period, termination value of the investment at the end of the reporting period, any increases in contributions in relation to the financial product by the holder or another person during the reporting period, and return on investment during the reporting period.

Has the product issuer, in their annual material to clients, created an annual review expectation of you?

It may well be that the AFSL holder is obligated through its contract with the product issuer to provide annual reviews to clients. As a result of the product issuer pushing such obligation on to your AFSL, it may then apply to you.

There is one area where a mandatory annual review is currently being considered – the Australian Securities and Investments Commission's (ASIC) proposed policy statement, Managed Discretionary Account Services.

In basic terms, this proposed policy statement deals with the issues that arise when a client provides monies to another person who has the authority to use those monies at their discretion in buying and

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selling financial products. It also covers the situation where a person authorises another person to manage their assets in their portfolio at the other person's discretion.

Should this relate to your business then you should be aware that this proposed policy statement suggests a licensing condition that will require the investment program for each client to be reviewed at least once every 12 months.

If, because of a proper review of the expectation that you and others have created and after considering all relevant personal circumstances of each client, you have resolved that you do not need to provide an annual review, we would suggest that you do not need to send an Opt Out/No Review letter. If there is not already such an obligation, by doing this you may in fact create the expectation, otherwise why would you send such a letter if your client does not expect it?

You should always be careful, when dealing with FSR issues, that you do not create onerous obligations upon yourself that are not required at law.

If you have reviewed the client relationship and determined that there is an annual review requirement, can you send an Opt Out/No Review Letter?

Once again this must be assessed in all the circumstances. The Opt Out/No Review Letter implies that you want to maintain an adviser/client relationship. Can you do this and not have an annual review? We are certain that you already know the answer to this question.

As to whether or not you can stop servicing clients in which "you do not care for or do not want to deal with", this raises a range of issues that are too long for this Argyle Advocate. We aim to revisit this part of your question in the future.

When faced with an FSR issue or question, first look at your circumstances and then those of the client, consider what the industry standard is, then look at the law, consider the regulator's views, look to your contract between you and the client, you and your AFSL, and also at any contract that exists with the product issuer. If you do this, you will arrive at your answer.