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## COUNTDOWN TO FINANCIAL SERVICES REFORM

**Q. Under the FSR, what is the scope of advice we can provide during an initial client meeting before a Statement of Advice is provided? My understanding is that if we mention a financial product like superannuation or allocated pensions, we must provide a Statement.**

This question is a bit like the chicken and the egg. What comes first: the advice or the Statement of Advice (“SOA”)?

Before we look at the law, we should understand what is the purpose of the SOA? The key function of it is to provide the client the personal advice in a written form, to enable the client to understand the advice and to decide whether to rely on it, including whether to take up the planner’s recommendations. It is the mechanism whereby the client can make an informed decision.

You should also recognise it as the first line of defence against a negligence claim. This is because it captures not only the advice but also what the advice was based upon and whether there are any relevant shortcomings such as not enough information from the client or the fact that the advisor has only a limited range of products and advice capabilities.

Looked at in this context the question shouldn’t be *when do I need to send it* but *when shouldn’t I send an SOA, even a modified SOA?* The point is that it can make for good legal risk management practice to confirm discussions with a client (or a prospective client) if your business is of the type to give initial consultations.

Nevertheless it is important to understand the law. Firstly when you say “client” we assume you are referring to a “retail client” as different measures apply to a “client” that is not a retail client.

The SOA must be given at the same time as the advice is given, or as soon as practicable after the advice is given. Importantly, it must be given to the client before the recommendations that feature in the advice are implemented, such as purchasing the financial products, or if we use FSR speak, before the planner “provides the client with any further financial service that arises out of or is connected with that advice” (section 946C of the Corporations Act).

What is the position in relation to “general advice” (which, in an unhelpful way, is defined in FSR as “advice that is not personal advice”)? Here an SOA is not necessary although a Financial Services Guide is necessary. General advice does not take into account the client’s objectives, financial situation or needs. FSR requires a prescribed warning to be given but not a SOA.

The question raises what happens if you mention financial products, such as superannuation or allocated pensions. Is it necessary to provide an SOA? Merely mentioning these products by exploring opportunities for the client does not mean that the planner has to provide a SOA. If you have merely mentioned a financial product, like superannuation, to a client and you have mentioned the product in such a way that will not influence the client nor have you recommended the financial product to the client, then the short answer is NO you do not need to provide a Statement of Advice “SOA”.

But question whether you should provide a summary of what was discussed anyway. After all, if there is nothing in writing it will be the client's word against yours in any future fight with the client.

The key to the above comment (and to the need to send a SOA) was not the fact that you have merely mentioned these products, nor is it your intention was when you did so. The key lies in what the client took away from your comments, it is how they interpret your comments that is relevant. Even the simple mention of a superannuation concept in a initial meeting can be enough to constitute personal advice to a retail client that requires a SOA, if the circumstances of the client suggest this. For example, it is reasonable that a client that is totally invested in cash at the bank and is retired and 58 years of age, may act on a comment by you that super is likely to be a more effective form of investment to them. To another client this may be part of the fact finding process, or at best it may represent general advice, but to the client circumstances just described it could be personal advice that requires a SOA.

What is ASIC's view? Much comfort can be taken from the common sense approach of ASIC found in Policy Statement 175 (PS 175). This indicates that ASIC will consider all of the relevant circumstances when considering whether a SOA should have been provided by the planner to the client. Clearly, all of the circumstances will also include whether it is an initial meeting and what was the agreed scope and client expectation of the initial meeting.

You should become familiar with PS 175, it applies to your business. And read it several times, it is not a harsh as it might otherwise first appear. On a careful reading you will see that ASIC is being quite reasonable.

As a rule of thumb, and as a matter of prudent practice, a SOA should be provided in **all** circumstances where there is a possibility that the client, whether an existing or a potential client, may rely upon and act on the comments of the planner, whether or not intended by the planner to influence the client. A SOA should always be provided where a planner has *recommended* a product to a client whether they are an existing client or a potential client.

Anyway, it makes good for good legal risk management of the business.