INFORMATION SHEET 182

Super switching advice: Complying with your obligations

This information sheet provides general information and compliance tips for financial advisers who provide super switching advice. It provides specific examples of inadequate conduct in some of those areas where we frequently encounter compliance issues.

What is 'super switching advice'?

'Super switching advice' is not a technical or legal term. We use it here to refer to personal advice given to a retail client about either or both:

- the transfer (in whole or part) of an existing super account balance from one super fund to another super fund
- the redirection of future contributions away from one super fund to another super fund.

To work out whether your advice is super switching advice you need to think about the *substance* of your advice. What are you really telling your client? You should think about what you told your client:

- verbally
- in your Financial Services Guide (FSG)
- in your Statement of Advice (SOA)
- in any other written communication.

At the end of the day, it's the overall impression created by your advice that counts.

If you recommend a switch verbally to your client, then the substance of your advice will be super switching advice, even if you then give your client an SOA that doesn't reflect that recommendation.(The SOA should, however, always reflect your recommendations).

For example, if a disclaimer in an SOA states 'this does not include advice about the 'from' fund', the advice will still be super switching advice if it is really about switching funds.

Compliance tip

In our surveillance, we will look closely at the files of advisers who seem to have a number of clients who only want advice about the 'to' fund, although they are still eligible to remain in their 'from' fund.

Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

We will also look closely at the files of advisers who have a number of clients only wanting advice limited to specific comparative information (e.g. fees and costs).

How do I ensure my super switching advice satisfies the best interests duty?

As with all personal advice, your advice must satisfy each of the elements of the best interests duty, which means you need to:

- do a 'fact find' on your client (i.e. work out their situation, objectives and needs)
- do your 'homework' on the advice you give (i.e. know your product and the consequences of your advice)
- give advice that's in your client's best interests.

The fact find that you need to do will depend on the advice you give, but generally you will need to find out about things like your client's age, dependants, intended retirement age, future financial needs and goals, insurance needs, desire to minimise fees and costs, risk tolerance, financial literacy, existing investments (including super), and tax situation. If it is apparent that you don't have complete information about your client's relevant circumstances, you'll need to make reasonable inquiries to obtain complete and accurate information.

Super switching advice will generally be inappropriate if the adviser knew (or should have known) that:

- the overall benefits likely to result from the 'to' fund would be lower than under the 'from' fund, unless outweighed by overall cost savings
- the cost of the 'to' fund is higher than the 'from' fund, unless the 'to' fund better satisfies your client's needs.

Compliance tip

Where advisers recommend switching, but there is no obvious overall advantage to the client in making the switch, we are more likely to look closely at the disclosure given to the client about conflicts, fees and the basis for the advice.

What should the SOA say about the advice and the basis for the advice?

For all super switching advice, the SOA must explain, in clear and simple terms, the costs, benefits and significant consequences for your client if the advice is acted on.

There are specific disclosure obligations where switching advice recommends moving your client's existing super fund balance(s) from their current super fund(s) to a new fund. However, even where switching advice is limited to a recommendation to redirect future contributions away from the 'from' fund and to the 'to' fund, you must explain the basis for that recommendation. This would require disclosure of the costs, benefits and significant consequences of redirecting those contributions.

For example, if an SOA states that 'the fees in the new fund will be higher, but I think the extra features make it worthwhile', this would generally be inadequate because it doesn't:

- tell your client how much more they will pay in the new fund
- explain the features or benefits (including why they are relevant to your client).

If an SOA states that 'if you have insurance, you will lose it if you switch', this would also generally be inadequate. You would generally be required to provide information about the benefits that will be lost (including the level of cover).

Compliance tip

It might be misleading to describe a feature of the ‘to’ fund as a benefit of making the switch unless that feature satisfies a client’s needs or objectives and is not already available in the ‘from’ fund.

What are the practical factors I might have to consider before recommending a self-managed super fund (SMSF)?

Self-managed super is not for every client, even if they do have a significant amount to invest in an SMSF. Factors such as their financial literacy, understanding of the legal, taxation and other requirements, available time and general interest are all things to be considered. Members of SMSFs need to understand their role as trustee and all the obligations that go with it.

It will also be critical to consider your client’s need for appropriate and affordable insurance cover. Unless the SMSF trustees specifically take out insurance for fund members, there will be no cover. Experience shows that SMSF insurance is generally more expensive and harder to get than in larger funds.

In addition, clients need to be aware that SMSFs are not subject to the same government protections that would be available in APRA-regulated funds, such as statutory compensation in the event of theft or fraud.

Practical tips to help improve the quality of advice for advisers providing financial advice on SMSFs can be found in Section C of Report 337 *SMSFs: Improving the quality of advice given to investors* (REP 337).

Compliance tip

In our surveillance, we will look for instances where an adviser has:

- advised a client to establish an SMSF when their current super savings are insufficient and their circumstances do not otherwise support the advice; or
- failed to advise a client properly about ongoing costs (at least in very broad terms, based on average costs) and the time and skill needed to administer an SMSF.

Can I use disclaimers?

There are legitimate areas for use of clear, concise and effective disclaimers in setting the boundaries of advice (e.g. an acknowledgment that you are not giving advice about the disposal of a property in order to invest in super or, perhaps, certain tax matters, or on aspects of a client’s financial affairs, including super, about which advice is not required).

However, you cannot disclaim your obligation to comply with your legal obligation to know your client, investigate the subject matter of the advice and to ensure the advice is appropriate for your client.

For example, even if a disclaimer says ‘this is not advice about the ‘from’ fund’, this disclaimer will not let you limit your consideration to the ‘to’ fund if the substance of your advice is or includes a recommendation to switch.

Where do I get information about the ‘from’ fund?

You will need to source and consider relevant information about the ‘from’ fund in formulating your super switching advice. Some of the product information you will need will be in the ‘from’ fund’s product dashboard (from 31 December 2013) and/or Product Disclosure Statement (PDS).

Another key information source will be documents held by your client, such as annual reports and member statements.

You might also get relevant information from the 'from' fund's website or by contacting the trustee directly. There might also be independent research data available about the 'from' fund.

Your client has a legal right to get information from their current fund. You can ask for this information on behalf of your client, but you will need to get your client's written authority to do so: see the next section.

You can complain to us if a trustee fails to respond (especially if this occurs on a systematic basis).

Look for ways of standardising how you ask for information so that you don't have to reinvent the wheel each time.

How hard do I need to try to get information about the 'from' fund?

There could be various reasons why you find it hard to get the information you need.

Your client might agree to get the information from the 'from' fund, but forgets or otherwise fails to do so. If this happens, you should either find the information yourself or decline to give switching advice. This is because you can't give switching advice unless you have information about the 'from' fund.

Your client might only be able to find out some things about the 'from' fund. What you should do in such a case will depend on what is missing. You can only give switching advice if you have enough information to give appropriate advice.

The 'from' fund might refuse to provide the information or delay providing it. If so, report this to us and in the meantime decline to give advice.

The 'from' fund might say that they can't provide the information to you because they need written authorisation from your client. This is justified under the *Privacy Act 1988* and it should be part of your standard procedures to require your client to give you this authority in writing. You can then give a copy to the 'from' fund.

In the end, the obligation revolves around whether the information can reasonably be found out and so a level of common sense is needed. Also, if you already know the information, you don't have to keep asking the 'from' fund about it.

Where can I get more information?

- Download Regulatory Guide 36 *Licensing: Financial product advice and dealing* (RG 36); Regulatory Guide 175 *Licensing: Financial product advisers – conduct and disclosure* (RG 175), in particular Section D; Regulatory Guide 244 *Giving information, general advice and scaled advice* (RG 244); and Report 337 *SMSFs: Improving the quality of advice given to investors* (REP 337), in particular Section C.
- Call ASIC on 1300 300 630.

Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your particular circumstances must be taken into account when determining how the law applies to you.