

# ASIC PROPOSES NEW GUIDANCE ON ONGOING FEE ARRANGEMENTS

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Legal Briefings - By **Michael Vrisakis, Steven Rice and Hartley Spring**

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ASIC is proposing to issue guidance on how it will regulate ongoing fee arrangements (**OFAs**). Depending on the position it takes, these arrangements, which have been challenging for the advice industry to comply with since they were introduced as part of the Future of Financial Advice reforms, could be simplified or may become even more onerous.

ASIC has asked a series of questions about OFAs, which it proposes to answer in its guidance, and has asked for industry feedback by 7 April 2020.

On 10 March 2020 ASIC published a new consultation proposing new guidance on entering into ongoing fee arrangements (**OFAs**) for financial advice. The consultation also deals with technical matters for OFAs as part of implementing the reforms of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. The regulation of OFAs is also partly aimed at resolving the highly publicised issues surrounding “Fees for No Service”. OFAs are aimed at increasing consumer awareness about the fees consumers pay for financial advice and where those fees are paid from.

## WHAT DOES IT COVER?

The consultation proposes guidance to address areas of uncertainty with the regulation of OFAs. The guidance follows ASIC's previous work in Report 636: *Compliance with the fee disclosure statement and renewal notice obligations*. In Report 636 ASIC found that there was significant non-compliance with the OFA regime and customers were at risk of receiving incorrect information. Feedback from the industry on Report 636 was that the OFA provisions were challenging to comply with and unclear. To respond to this feedback ASIC is proposing more guidance.

ASIC has not released a draft of its proposed guidance. Instead, ASIC has released a series of questions on the areas it proposes to give guidance. In its guidance, ASIC is proposing to give information about the answers to each of these questions. ASIC asks participants if they agree with the proposal to issue guidance, and if there are any other areas ASIC should address. We agree with ASIC that they should publish guidance, but the guidance will need to be carefully considered so that it facilitates compliance, instead of raising the bar for compliance even further. In this alert we have set out the most relevant questions for OFA providers, and give our views on how these questions should be answered.

## ASIC'S QUESTIONS

*When a defect in an FDS or renewal notice will be such that the document is no longer an FDS or renewal notice?*

One of the biggest issues facing the advice industry is that fee disclosure statements (**FDSs**) are arguably required to be perfectly accurate. This is due to the very specific wording used in the Corporations Act about what is an FDS. On this view, any error, no matter how minor, means the provider has not provided an FDS, and incurs statutory penalties under the Corporations Act, and (for post-FOFA OFAs) has their OFA terminate. Having no express materiality threshold for an FDS has been unworkable in practice and has led to a large number of technical breaches where the error in the FDS was so minor it would not have any impact on a client.

ASIC could provide guidance as to what is an appropriate materiality threshold for an FDS. While ASIC cannot rewrite the Corporations Act of course, they could issue a "no-action" position. This would still however leave a risk of consumer action for compensation. ASIC has previously contemplated materiality thresholds before in the context of conflicted remuneration. A position from ASIC that errors below a certain threshold would not be considered breaches would create a workable position for OFA providers going forward. An alternative is to give guidance adopting elements of the defective Product Disclosure Statement provisions such that only FDSs with 'materially adverse' errors or commissions would be 'defective'.

*The scope of the definition of an ongoing fee arrangement—for example, whether the scope covers:*

- i. *agreements that have a period of longer than 12 months, but are cancelled before 12 months have elapsed; or*
- ii. *a series of substantially similar agreements that each have 12-month terms;*

Many large advice providers have found the OFA regime too difficult to comply with in practice and have moved to 12 month agreements. One of the reasons the OFA regime is so challenging to comply with in practice is the potential lack of FDS materiality as we have addressed above.

An OFA is defined (in summary) as an agreement under which fees are charged for a period of more than 12 months. When a client enters into a series of similar agreements each with 12 month terms, they never enter into an agreement of more than 12 months and so they never enter into an OFA.

We consider this is an important distinction, as the client needs to consider the new agreement as a whole every year, rather than just renewing their previous agreement, for example by ticking a box on a renewal form. Annual agreements are outside of the scope of the Corporations Act definition of an OFA. We would question any ASIC guidance which suggested they should be regulated as OFAs, and whether this is consistent with the Corporations Act, including anti-avoidance.

#### *Whether an ongoing fee arrangement must only be renewed through a renewal notice*

Despite the additional requirements in the Corporations Act, an OFA is still a contract between the client and the provider. We think the client and the provider should be able to agree to renew that contract in any manner which they both agree. Forcing an OFA to only be renewed through a renewal notice places an undue restriction on advice providers where a client may want to renew an OFA, but the provider cannot accept that renewal as it is not in the specific format required. ASIC issuing guidance on this point may create uncertainty where a customer has contractually agreed to a renewal, and may create doubt as to whether that renewal was actually valid.

#### *The fees that should be included in an FDS*

It is not immediately clear the area of guidance which ASIC seeks to issue on this point. To the extent that this guidance relates to the types of fees which should be included in an FDS then we consider that further ASIC guidance is not required on that point. The client and the provider can agree as part of the OFA the fees which are payable and these are the fees which should be included in the FDS. Changing this position could create uncertainty where a provider might have agreed a position with their client.

If ASIC intends this guidance to address the issues about system timing differences causing incorrect FDSs, as referred to at page 13 of ASIC Report 636, then our view is that a materiality threshold should be set in a way which makes allowance for incorrect FDSs due to such differences.

We note that this area for guidance may also be dealing with the date of payment of fees. There have been mixed opinions on this. Our strong view is that payment is made when it is received by the adviser and not when it is deducted from a client account.

*The services that should be identified in an FDS as services the client is entitled to*

We consider that the services that should be identified in an FDS are the services in the contract which the client has agreed to. When a client has agreed with their provider to have specific services included, this is the default position which should not be changed. As above, ASIC guidance on this point has the risk of changing the terms of the agreement which the client entered into.

## **OTHER QUESTIONS?**

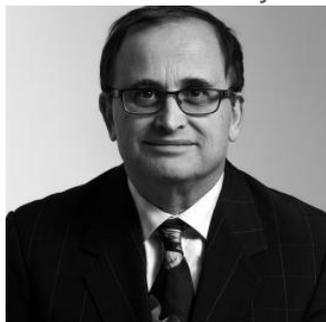
Do you have any other questions which you think should be addressed by ASIC? If so, please feel free to write to us and we will be happy to coordinate sending these to ASIC.

## **WHAT NEXT?**

ASIC's consultation is seeking feedback on the above questions. The final date for submissions is 7 April 2020. If you have any questions about ASIC's proposed guidance or would like assistance with preparing a submission on ASIC's consultation, please contact one of our experts.

## **KEY CONTACTS**

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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