

PERSONAL ADVICE LICENSEES – ASIC CHANGES TO RECORD-KEEPING OBLIGATIONS

[Current as at 28 October 2016]

Overview

ASIC recently consulted on proposed guidance on and updating of record-keeping requirements of Australian financial services (AFS) licensees who provide personal advice to retail clients (**advice licensees**) - see [CP 247](#). *These requirements do not apply to personal advice on general insurance.*

As a result of this process ASIC has:

- released [Report 500](#) which highlights the key feedback received on CP 247 and ASIC's response to that feedback; and
- amended [CO 14/923](#) *Record-keeping obligations for Australian financial services licensees when giving personal advice* to clarify that, when an advice licensee or one of its representatives provides personal advice, the advice licensee must ensure not only that client records are kept, but also that the advice licensee continues to have access to these records during the period in which they are required to be retained.

What changes have been made

Class Order CO 14/923 imposes record keeping obligations in relation to personal advice provided to retail clients by way of a new section 912G.

ASIC describes the changes made by it to the Class Order as being focussed on “clarifying” the existing obligations.

The section as amended requires *licensees* to ensure the records required to be kept by section 912G (see below):

- are kept for 7 years after the day the personal advice was provided to the client; and
- are accessible by the licensee at all times during that period in a way that enables the licensee to produce the records.

This obligation continues to apply even if the financial services licensee ceases to be a licensee during the period that the records are required to be kept and accessible.

The section also now imposes a direct obligation on *authorised representatives* to:

- give the required records to the licensee if requested by the licensee, provided the request is made:
 - in connection with the obligations imposed on the licensee under Chapter 7; and
 - within 7 years after the day on which the personal advice was provided to the client; and
- unless the records have been given by the authorised representative to the licensee—keep the records for a period of 7 years after the day on which the personal advice was provided to the client.

This obligation continues to apply even if the authorised representative ceases to be an authorised representative of the licensee during the period that the records are required to be given or kept.

Importantly, this section does not apply to the provision of personal advice given in relation to general insurance by reason of a carve out.

The carve out has been modified to make clear that the intent behind this carve out is for the record-keeping obligations not to apply to the provision of personal advice where the modified best interests duty applies. The “modified best interests duty” applies to persons providing personal advice on general insurance. It also applies in relation to basic banking products in certain circumstances. Life insurance is not subject to the modified best interest duty.

The section also doesn’t apply (other than in relation to the conflict of interest record obligation noted below) where a Statement of Advice is not required to be given to the client or where a record of advice is kept in accordance with subsection 946B(3A). See the Class Order for full details.

What are the required records?

Where the section applies, the records required to be kept are:

- the information relied on and the action taken by the provider that indicates the provider has, in accordance with subsection 961B(1), acted in the best interests (the *best interests duty*) of the client in relation to the advice;
- if subsection 961B(2) is being relied on to prove that the best interests duty has been satisfied—the information relied on and the action taken by the provider that satisfies the steps in that subsection;

Note: The keeping of records that satisfy this second record-keeping obligation will satisfy the first record-keeping obligation.

- the advice given, including the reasons why, under section 961G, it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the best interests duty; and
- where the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of a person mentioned in any of the paragraphs in subsection 961J(1)—the information relied on and the action taken by the provider to indicate that the provider has given priority to the client’s interests when giving the advice.

When do the changes apply from?

ASIC recognises that some advice licensees may need to make changes to their systems (e.g to allow advisers to be able to upload records to their licensee) as a result of the class order and thus ASIC will take a facilitative compliance approach for the first six months in relation to the obligation on advice licensees to ensure that they have access to records.

Its facilitative compliance approach applies where advice licensees make a good-faith attempt to comply with the obligation but are unable to do so because of, for example, the need to make systems changes. This facilitative period will end on 26 April 2017.

ASIC has also made a minor amendment to CO 14/923 to restore the original policy intent of the class order so that the exemption to the record-keeping obligations only applies where the modified best interests duty applies.

IMPORTANT NOTICE

This document is designed to provide helpful general guidance on some key issues relevant to this topic. It should not be relied on as legal advice. It does not cover everything that may be relevant to you and does not take into account your particular circumstances. It is only current as at the date of release. You must ensure that you seek appropriate professional advice in relation to this topic as well as to the currency, accuracy and relevance of this material for you.

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