

Future of Financial Advice

The Best Interests Duty - Fact Sheet

What is the Best Interests Duty?

The three key elements of the best interests duty

1. act in the client's best interests;
2. provide advice that is appropriate; and
3. prioritise the client's interests over your own or the licensee's in the event of a conflict.

The best interests duty (and associated obligations) are contained in Division 2 of Part 7.7A of the *Corporations Act 2001* (Cth), and require advice providers when providing personal advice to retail clients to:

- act in the best interests of their clients (section 961B);
- provide appropriate advice (section 961G);
- warn the client if advice is based on incomplete or inaccurate information (section 961H); and
- prioritise the client's interests (section 961J).

But what does this mean?

The new obligations meld the mechanics and motivation of providing advice and prescribe how you should approach them.

- When providing the advice, you must act in the client's best interests.
- There is a "safe harbour" – that is, a set of requirements that, once met, mean that you have met your duty to act in the client's best interests. This introduces some mechanics to help prove the nobility of your motivation.
- Your advice must be appropriate.
- You must prioritise the client's interests if there is a conflict between those and the interests of you or parties related to you (such as your employer or your licensee).

- Conflicts cannot be managed simply by disclosing them. Nor can you contract out of these obligations.
- Finally, the buck stops with the actual adviser with potential administrative action by ASIC (eg banning) or civil penalties.

From a technical legal perspective, the way the FOFA legislation is drafted means that you actually have three separate duties:

1. a duty to act in the client's best interests;
2. a duty to provide advice that is appropriate; and
3. a duty to prioritise the client's interests in the event of a conflict.

How do I comply with the best interests duty?

The "how to" of fulfilling your duty to act in the client's best interests is found in the "safe harbour" provisions. This "how to" is similar to the way the law worked before but:

- the emphasis is wholly, instead of only partly, on the client's interests
- there is greater emphasis on gathering more information about the client and, if relevant, the product.

Safe harbour provisions:

- identify the objectives, financial situation and needs of the client that were identified through instructions
- identify the subject matter of the advice sought by the client (whether explicitly or implicitly)
- identify the objectives, financial situation and needs of the client that would reasonably be considered relevant to the advice sought on that subject matter

Future of Financial Advice - The Best Interests Duty - Fact Sheet

- if it is reasonably apparent that information relating to the client's relevant circumstances is incomplete or inaccurate, make reasonable enquiries to obtain complete and accurate information
- assess whether you have the expertise to provide the advice sought and, if not, decline to give the advice
- if it would be reasonable to consider recommending a financial product, conduct a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client that would reasonably be considered relevant to advice on the subject matter and assess the information gathered in the investigation
- base all judgments on the client's relevant circumstances
- take any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

Prioritise client interests:

In relation to the duty to prioritise the client's interests in the event of a conflict, ASIC has said in RG 175:

- the recommendation of the product of a related party must be supported by extra benefits for the client
- if your APL contains only products of a related party, you must not recommend one over a competitor's product unless a reasonable adviser would be satisfied it was in the client's interests to be recommended that product over a rival product with similar features and costs.

Your overall approach to the three new duties should be informed by ASIC's view that "a reasonable adviser should believe that the client is likely to be in a better position if the client follows the advice."

Reminders

1. Avoid "cookie cutter" advice.
2. Ask yourself:
 - a) Did I get to know the client?
 - b) Did I clearly define the advice task I was asked to do?
 - c) Am I competent to give the advice?
 - d) Did I gather all the information I need to carry out the advice task?
 - e) Did the advice address the goals and objectives of the client?
 - f) Did I put the client's interests first

These tips should be familiar after years of operating under the current regime.

But there are two more questions you should ask yourself to ensure that your advice meets the requirements of the best interests duty and its associated obligations:

1. Would a reasonable adviser believe that the client is likely to be in a better position by following my advice?
2. If this client was my son or daughter being influenced by my advice and trusting me to act in their best interests, is this what I would recommend.

Source: *Holley Nethercote Commercial & Financial Services Lawyers* -May 2013