Guidance Note: Sale and Distribution of KiwiSaver

Consultation draft June 2012

About this guidance note

This guidance note is for people involved with the sale and distribution of KiwiSaver schemes.

It gives guidance on the Financial Market Authority's expectations for the sale of KiwiSaver schemes within the requirements and spirit of the Financial Advisers Act 2008 (the Act). It focuses on factors FMA will take into account in considering whether advice is given, and, if so, whether the advice is a class or personalised service.

Many of the general principles may apply to financial products other than KiwiSaver, though not all of the factors set out in this guidance note may be relevant to other financial products, given the unique nature of the incentives available to members joining KiwiSaver schemes.

This guidance note addresses Financial Advisers Act 2008 considerations. People involved in KiwiSaver provision and distribution should ensure that they comply with all their relevant legal obligations, including those under the Securities Act 1978 (the Securities Act) and the Securities Markets Act 1988 (the Securities Markets Act).

In this guidance note, we refer to the Financial Markets Authority as 'FMA' or 'we'.

Issuing guidance is just one of the ways we can be transparent and share our intended approach with the market. Guidance helps market participants to be confident they understand our approach and how we interpret, and intend to apply, the law relating to their responsibilities.

We have provided examples as part of the guidance to help explain our approach. These examples are not exhaustive.

Every distributor must comply with all relevant legal requirements. This guidance note is not intended to be a substitute for legal advice.

Overview

1. This guidance note focuses on factors FMA will take into account in considering whether advice is given on KiwiSaver, and, if so, whether the advice is a class or personalised service. It considers these services, and the boundaries between them. It focuses on a common sales model, where there is interactive communication between a sales person and a client (by phone or face to face) and where the sales person has only one KiwiSaver scheme available. Some of the principles discussed are also applicable to other KiwiSaver scheme distribution models.

2. When determining what type of service to provide, senior management should consider the needs and likely expectations of their target customers and the controls needed to ensure that the chosen service is delivered compliantly. This guidance note comments briefly on these areas.

Summary of FMA interpretations

The type of service provided will be judged within the context of the interaction with the client.

3. The key factor influencing FMA's approach to KiwiSaver distribution is the need to consider the service provided within the overall context of the distributor's interaction with the client. The context is key to interpretation of the legal requirements – to determining whether a 'no advice' or a financial advice service is provided, and whether the financial advice service is class advice or personalised advice. The context shapes the customer's expectations and understanding of the service. It will influence FMA's surveillance and monitoring of distribution practices for KiwiSaver schemes, and any enforcement action.

The provision of factual information may amount to financial advice, depending on the context.

4. The context of the services often leads to an implied recommendation or opinion being given to the client. In many circumstances where a sales person interacts with a potential customer a financial advice service will be provided. In only very limited circumstances will the service be a 'no advice' service. Section 'A: When is financial advice provided?' (and the examples in the Appendices) set out FMA's approach to whether advice services are provided.

5. If advice services are not provided, FMA will consider whether the service complies with the requirements of the Securities Act or Securities Markets Act. Section A and the appendices also address these Acts.

The client's expectation of the service is a key factor in determining whether advice is personalised.

6. In addition to the client's expectations, a number of other factors also affect the type of advice service provided. Section 'C: When is advice personalised?' sets out some factors that FMA will take into account when considering whether advice is class advice or personalised advice.

FMA's position is that there are limited circumstances in which a person presenting a particular KiwiSaver scheme to a client will not provide an advice service (either class or personalised).

7. As an example, we are likely to consider a financial advice service is provided where there is a detailed conversation with a client which is initiated or led by a sales person (rather than the client), and which relates to a specific KiwiSaver scheme which the sales person is offering and has a financial incentive to sell. In these circumstances, there is likely to be a recommendation or opinion (either implied or express) on the acquisition of the particular KiwiSaver scheme.

   Depending on the circumstances, the advice service may be either class advice or personalised advice. We consider class advice may be provided where a small number of questions are answered by the client to ascertain a risk profile, which allocates the client to one of a small number of pre-determined classes of person. Beyond this, applying the factors outlined in this guidance note, FMA is likely to conclude the advice service is personalised.

   This guidance note includes a number of scenarios illustrating the factors relevant to our position.

When determining its service approach, the distributor should consider the needs of its target clients.

8. KiwiSaver is a long term investment and many customers are likely to need advice. We set out brief comments in section 'D: What type of advice is needed?'.

Robust controls are required to ensure sales people operate within a chosen service approach

9. All businesses selling KiwiSaver schemes should have robust controls in place to ensure their sales people operate within their chosen service approach and the law. We set out brief comments on advice and controls. See section 'E: Compliance controls over the service'.

Monitoring and surveillance

10. FMA has indicated in its enforcement policy that KiwiSaver will be an area of focus for its monitoring, surveillance and enforcement activities. In considering distributors' sales processes against this guidance, FMA will also take into account the objectives and purpose of the Act to consider whether consumers are receiving an appropriate level of protection.

11. As the market matures, we will increase our focus on sales and advice processes around transfer of funds, both between scheme providers and between investment portfolios within a scheme.

12. In carrying out our monitoring, we will continue to liaise with the Inland Revenue, including in respect of any matters relating to the requirements of KiwiSaver trademark licence agreements.

Background

The need for guidance

13. KiwiSaver is an important product for New Zealanders. For many people it will be their first investment and their decisions will impact on their future financial security. Promoting high standards in the sale of KiwiSaver, while taking into account the need for investors to have access to advice, will not only encourage New Zealanders to invest in KiwiSaver, but will also encourage the public's confidence in the professionalism of financial advisers (a key objective of the Act) and in the capital markets more generally.

14. FMA is aware there is concern in the industry about the extent of service which may be provided by people who are not AFAs or QFE advisers – that is, the extent to which personalised advice is required and to which 'no advice' or class advice sales are appropriate. FMA is also aware there is potentially a lack of consistency in the interpretation of the Act by distributors and their legal advisers. This guidance note considers these services and the boundaries between them.

Legal requirements

15. FMA is responsible for the monitoring and enforcement of the Financial Advisers Act 2008 (the Act). The Act has different requirements for different types of product, types of service and types of advisers. An overview of the types and the implications for KiwiSaver distribution are explained below. Further information is provided in the body of the guidance note.

16. **Product types** - KiwiSaver is classified as a Category 1 product under the Act (section 5), since it falls within the definition of a security.

17. **Service types** – Some services are not subject to the Act (referred to here as 'no advice' services). Sections 10 and 14 specifically exclude certain services from the Act, for example services that are regulated elsewhere or opinions about a class of products or the procedure for buying a product.

18. The Act regulates financial advice ('advice'), and recognises two types of service - personalised and class (section 15), so that:

    - Personalised advice – is provided to an individual client when the adviser takes into account the client's financial situation or goals (or the client would reasonably have expected the adviser to take these into account). (It may also be provided by advisers who do not have direct contact with the client - for example when a paraplanner writes advice 'in respect of' the client, which is presented by another adviser.)
    - Class advice – is advice that is not personalised. So it is generic to an audience eg in a brochure or seminar, or dealing with 'most people who' have certain characteristics.

19. In addition, the Act regulates investment planning services (section 11), which involve the design of a financial plan including opinions on how to reach financial goals, and which is based on an analysis of the client's overall financial situation and investment needs.

20. **Adviser types** - Entities can provide advice which is class advice, but only certain individual advisers can provide certain services to retail clients for category 1 products such as KiwiSaver:
    - Authorised Financial Advisers (AFAs) can provide personalised advice on Category 1 products or investment planning services; or
    - QFE advisers can provide personalised advice on a Category 1 product if a member of the QFE group is the product's provider[1] or promoter (as defined in the Securities Act).

21. **Implications** - As a result of the types above, services provided in connection with KiwiSaver sales fall within the following categories, and can be provided by the following people:

Service	Description	Within the Act?	Distributor status
No advice	provision of information only, or services not falling within the Act (eg as a result of sections 10(3) and 14(1)) (see section A paragraphs 22 and 23)	No	Need not be registered for financial adviser services
Class advice	advice is provided but it is not personalised to the client's circumstances (sections 10(1) and 15)[2] (see paragraph 28)	Yes	Must be registered for financial adviser services (entity or individual[3])
Personalised advice	advice tailored to a particular client (sections 10(1) and 15) (see paragraph 30)	Yes	AFA or QFE adviser only
Investment planning	advice within a plan based on an analysis of a client's overall financial situation (section 11)	Yes	AFA only

This guidance note does not deal specifically with KiwiSaver distribution as part of an investment planning service.

22. Services which are excluded from the Financial Advisers Act may be subject to other Acts. For example, advertisements must not be likely to deceive, mislead or confuse (Securities Act, section 38B) and conduct in relation to dealing in securities must not mislead or deceive, or be likely to mislead or deceive (Securities Markets Act, section 13).

[1] As defined in section 5 of the Act

[2] Note the difference between providing a **class service** (section 15), such as class advice, which is covered by the Act and giving a recommendation or opinion on a **class of products** which is excluded from the Act under section 10(3)(b)

[3] see 'Do I need to register as an individual if my employer is registered?' at http://www.fma.govt.nz/help-me-comply/financial-service-providers/who-needs-to-comply/

A: When is financial advice provided?

23. In the context of KiwiSaver schemes, financial advice is a recommendation or opinion (whether express or implied) to:

    - invest in a particular KiwiSaver scheme (or one of the investment portfolios available in the scheme)
    - transfer an investment to a different portfolio within the same KiwiSaver scheme[4]
    - transfer or withdraw funds from an existing KiwiSaver scheme (ie transfers to other schemes or taking advantage of the first home withdrawal facility).

    Financial advice also includes a recommendation or opinion not to take one of these actions or to suspend contributions.

    This guidance note does not specifically address advice provided when a member becomes entitled to receive payment from a KiwiSaver scheme on retirement.

24. There are limited situations where we consider KiwiSaver can be sold without providing financial advice. For example, if an investor has already made a decision to sign up to KiwiSaver and selects a scheme provider based on their own analysis or personal preference. In these circumstances, (if no other questions are asked) ,no advice is being sought or given, the Act will not apply.

25. Consumers have less protection available to them when receiving services that are 'no advice' services. For example:
    - the client may not have access to a dispute resolution scheme (but will have less specific protections such as those under the Fair Trading Act)
    - the seller is not accountable under the Act for their practices. (The seller and the seller's employer or the issuer may be accountable under other provisions such as the Securities Markets Act or Securities Act.)

26. The Act sets out a number of exceptions and exemptions, specifically setting out circumstances which are not within its scope. Exceptions in section 10(3) set out circumstances where financial advice is <u>not</u> provided. For example: simple provision of information; assistance with the procedures for joining KiwiSaver; discussion of KiwiSaver generally; merely transmitting someone else's advice. The examples in **Appendix A** set out FMA's approach to the limited practical application of these exceptions to the provision of advice on KiwiSaver.

27. A further exception ensures that provision of investment statements[5] and other documents regulated by securities laws are not also subject to requirements under the Financial Advisers Act (section 14(1)(o)). The exception also applies to advertisements (as defined in section 2A of the Securities Act). This includes communications that are reasonably likely to induce a client to join a particular KiwiSaver scheme. The exception

[4] an opinion on such a transfer is advice on the 'renewal or variation of the terms of an existing category 1 product' which is within the definition of a category 1 product (section 5 of the Act). In contrast, such a transfer is excluded from the requirements of the Securities Act by the definition of security in section 2D.
[5] as defined in section 38C of the Securities Act

extends to a risk questionnaire within an authorised advertisement[6] or investment statement.

28. Distributors other than the issuer can also be covered by this exception, for example if the interaction with the client is prepared by arrangement with the issuer and so constitutes an advertisement for the purposes of the Securities Act. It must then satisfy the requirements of the Securities Act, and the issuer will carry the responsibility under the Securities Act for statements made by the distributor. So the advertisement must have been authorised or instigated by, or on behalf of, the issuer of the securities.

29. However, although a salesperson may seek to rely on a 'no advice' exception, the provision of factual information may amount to financial advice depending on the context. Where a person is presenting a particular KiwiSaver scheme to a client in a face to face or telephone context, we consider that in most cases the conversation with a client is likely to go beyond the exception and become an advice service. Recommendations or opinions to buy the product, which may be express or implied by the context, will be given. The client's reasonable view will be important. Depending on the circumstances, the advice may be considered class or personalised advice.

30. If the salesperson is acting for a third party distributor (who is not the issuer or promoter), then any interaction not covered by an exception could result in liability for the KiwiSaver issuer under the Securities Act. See **Appendix A** for our approach.

31. In considering whether an advice service is provided, FMA will take into account the overall context of the communication with the client. This will include consideration of the following factors:

    a) **The nature of the interaction with a client**. Was a discussion about KiwiSaver prompted by the client or did the distributor approach the client about a particular KiwiSaver scheme? It is a stronger indicator that an implied recommendation was provided about the available product, if a client had no intention to enquire about or interest in the product without prompting.

    b) **The length of time spent with a client**. Providing information only would generally involve limited interaction with a client. Spending more time with a client talking about a particular scheme is likely to lead to:
       - deviation from any approved script
       - an implied recommendation – an impression on the client that the scheme is being recommended to them.

    c) **The client's expectation** of the particular meeting, the overall service being provided and the impression that the client is left with. What sort of service would a reasonable person expect to receive in the circumstances?

    d) **The basis on which the information is provided**. What representations are made by a distributor? Is it made clear to clients that advice services are not provided? Is any 'no

[6] as defined in sections 2A and 38 of the Securities Act

advice' statement sufficiently prominent? How are the services described in advertising? Are the representations made consistent with what actually takes place?

If a client has previously been given a financial adviser disclosure statement (for personalised services), what steps have been taken to explain that advice will not be provided on KiwiSaver. (If the client requests a disclosure statement it could indicate the client is expecting a personalised advice service).

e) **How much assistance is provided**. Assisting a person to complete an application form where an investment profile will determine the choice of fund within the scheme could be perceived by a client as financial advice. The salesperson needs to consider what the client is expecting from the service and clarify this with the client.

f) **The way a distributor is remunerated**. An incentive to sell the product such as commission based on actual sales encourages a distributor to recommend or give an opinion rather than simply provide information. Also, a fee charged to the client may create an expectation of advice, if the service is not clearly explained.

g) **Whether the client has an existing KiwiSaver scheme**. Where an adviser facilitates a transfer to the scheme s/he distributes, unless the decision is purely client driven, it is likely that advice as to the merits of the new scheme has been provided.

h) **The nature of the information provided.** Information should be factual and balanced. Telling a customer only about the benefits of KiwiSaver without referring to the lock-in period, for example, may convey an opinion or imply a recommendation to invest. Selecting only some product features or costs for comparison across different schemes may imply an opinion.

i) **Any pressure applied to the client.** Pressure is likely to result in opinions about the acquisition of the product. For example: if the adviser initiated the KiwiSaver discussion, and the client is expected to sign an application form on the spot; or if incentives (other than the government incentives) were offered to the client to secure a quick sale.

32. If financial advice is not provided, then the requirements of the Securities Markets Act are likely to apply to the distributor. A person's conduct must not be likely to mislead or deceive (section 13)[7] when dealing in securities.

[7] Dealing includes matters preparatory or related to acquiring or disposing of securities.

B: When is class advice provided?

33. As noted above, we consider there are very limited circumstances in which KiwiSaver can be sold without providing advice. However, there are broader circumstances where KiwiSaver can be sold by giving class advice. In this way, consumers have the protections provided by the Act such as access to a dispute resolution scheme and the adviser's duty to comply with certain conduct obligations.

34. Class advice is advice which is not personalised, see paragraph 37.

Practical scenario analysis – Scenario 1a: When is class advice provided?

- The distributor ('D') has asked client C to meet with her to discuss KiwiSaver. D is not an AFA or QFE adviser.
- D spends about an hour with C, explaining the benefits of KiwiSaver generally, including answering questions raised by C.
- At the end of the meeting, D provides C with a copy of the XYZ KiwiSaver scheme investment statement and application form, and asks whether C would like to apply.

FMA approach

On initial analysis, we consider that D has provided advice to C. That advice is class advice. D has created the impression for C that D believes KiwiSaver is a great investment, and therefore in the context given the implied opinion that C should join the XYZ KiwiSaver scheme.

If D goes further, for example discussing C's financial circumstances and recommends the appropriate investment portfolio to invest in, it is likely that personalised advice has been provided. See section C- When is financial advice personalised?

Practical scenario analysis - Scenario 1b: When is class advice provided?

A more detailed analysis of scenario 1a reveals:

- The distributor ('D') has an arrangement with XYZ (provider) to distribute the XYZ KiwiSaver scheme. D is not an AFA or QFE adviser.
- D is remunerated on a trail commission basis for each person she signs up.
- XYZ has trained D in the sales process so that D follows a script prepared by XYZ. The script starts with a statement that D cannot give any financial advice. D has been trained not to use the words "recommend" or "in my opinion".
- D has arranged a meeting with investor C to discuss KiwiSaver.
- D spends about half an hour with C, explains the benefits of KiwiSaver generally and provides what she considers to be information on the XYZ KiwiSaver scheme, including answering questions raised by C. D takes C through the XYZ KiwiSaver scheme investment statement. At the risk profile questionnaire, D answers questions about the meaning of the words, but does not comment on C's risk profile.
- D provides C with an application form, and asks whether C would like to apply.
- C's impression from the meeting is that D believes KiwiSaver is a great investment, that XYZ offers a product D considers worthwhile and that D believes the risk profile is a useful decision-making tool.

FMA approach

We consider D has provided advice to C. The advice is still class advice. The factors below are relevant to FMA's analysis:

- The discussion was prompted by D and D has remuneration incentives to sign up C
- C's perception of the service received from D, created partly by the length of time spent with C and the assistance provided. This is despite any warnings given and regardless of whether the words "opinion" or "recommendation" have been used.
- The likelihood of D deviating from the precise script as D and C have an interactive discussion, (so that the whole conversation is not an approved advertisement under the Securities Act).
- The conversation uses information from the investment statement, but is not covered by the exception for documents required under Securities laws as it goes beyond merely making available the document (see Appendix A).

If D goes further, for example discussing C's financial circumstances and recommends the appropriate investment portfolio to invest in, it is likely that personalised advice has been provided. See section C- When is financial advice personalised?

As the Act is applicable, D must demonstrate she is meeting her obligations under the Act, including acting with care, diligence and skill in providing advice. XYZ must meet its obligations under the Securities Act and Financial Advisers Act in respect of its own activities. We expect XYZ to support its distributors in meeting their obligations under the Act.

C: When is financial advice personalised?

35. Class advice, delivered within the parameters of the Act, can be a cost-effective way for providers to ensure KiwiSaver investors have access to a level of advice appropriate for their requirements.

36. However, in many situations an investor may need (and might ask for) more advice. For example, whether a particular KiwiSaver scheme is right for them, which scheme or investment portfolio to choose, how much to contribute or whether to take advantage of the first-home withdrawal facility. In these circumstances it is likely that the investor needs a personalised service from an AFA or a QFE adviser.

37. Personalised advice is an advice service in which (section 15):

    - the client is named or readily identifiable and
    - <u>either</u>
        - the adviser has taken into account the client's particular financial situation or goals (or any one or more of them) <u>or</u>
        - the client had a reasonable expectation that this was the case in the circumstances.

    However, an advice service is not personalised just because an adviser has taken into account the fact the client comes within a class of people with predefined characteristics (section 15).

38. In addition, possessing information about a client's personal circumstances on its own does not result in personalised advice. However, if the adviser takes this information into account or the client reasonably expects this, then the advice is personalised.

39. For the services considered in this guidance note, where there is an interactive communication between a sales person and a client (by phone or face to face), the client is readily identifiable. The client's reasonable expectation will therefore be a key factor in determining whether personalised financial advice is provided.

40. FMA will take into account the following factors when determining whether or not a service is personalised (including some which are also factors in determining whether advice is provided):

    a) **The basis on which the advice is provided**, i.e. the representations made by the adviser. In an interactive conversation, the client is likely to expect his/her circumstances will be taken into account, unless this expectation is managed. A clear written or oral warning to the client that any advice is given on a class basis may be a good indicator that the client should not expect their personal circumstances to be taken into account. However, a warning will not be in itself determinative, and other factors will also be considered.

       FMA will look closely at any warnings to ensure the limitations are clear to clients and the warning is sufficiently prominent. This will include consideration of the language used and explanations given , whether the warning is purely documented or also stated, and whether the warning is given at a point which is likely to influence the client's reasonable expectation. (AFAs are subject to this requirement under Code Standard 10.)

b) **Whether the client is being advised to change schemes or investment portfolios**. This may raise a reasonable expectation for the client that the adviser is taking their personal circumstances into account by making a comparison with their existing scheme. If this is not the case the adviser should make this very clear to the client. A clear and prominent warning that advice is only provided in relation to the new scheme and that no advice is provided as to the relative merits of the two schemes is required.

c) **The relationship with the client**. If the client usually receives personalised advice on other products it is more likely the client expects personalised advice on KiwiSaver too.

d) **Appearance of tailoring to the client**. Often a client completes and scores a simple questionnaire, asking one or two age or basic risk appetite questions. The client compares the score to bands which correspond to KiwiSaver investment portfolio recommendations in a pre-prepared document. It is likely to be apparent to the client the result is not personally tailored – the questionnaire merely allocates an identified individual to a predefined class of person. However, where the adviser goes beyond the basic questions in the questionnaire or responds to 'what do you think?', this is likely to create a perception of tailoring.

   To recommend the percentage of contributions that would be appropriate for the client is also an indication of a personalised service unless the information is provided statistically eg '70% of New Zealanders contribute 2% of their salary'.

e) **The level of analysis**. The more questions asked or information collected about the customer, the more likely it is that the customer will expect advice to be tailored. FMA will therefore consider the complexity of risk profiling questionnaires, the degree of assistance given to the customer in completing the questionnaire, and the influence of the questions and analysis on any opinion and the customer's decision.

f) **The focus of the questions**. Similarly, questions which appear to go beyond basic KiwiSaver information will create an impression of a more personalised service. For example, information about the client's retirement goals or assets, liabilities, income and expenditure. The customer is unlikely to distinguish between information collected for the purpose of KiwiSaver scheme sales and for other purposes, eg to facilitate the sale of other financial products.

g) **The process if a client indicates they may need personal advice**. For example, where an adviser does not provide a personalised service, whether there is a referral mechanism to an AFA (or QFE adviser, if relevant), or if not, how the adviser deals with the client's needs.

Practical scenario analysis - Scenario 2: When is personalised advice provided?

The facts are the same as Scenario 1b, with the following addition:

- C notes that she may be out of work shortly and asks how this would affect the amount she invests. D comments that she should only contribute the minimum.

FMA approach

We consider that notwithstanding the disclaimers and warnings that have been given, D has given personalised advice to C. This takes into account:

- C's reasonable expectation that D has taken into account C's particular financial situation, given the information C has provided.

See **Appendix B** for further examples.

D: What type of advice is needed?

41. In initially signing up to KiwiSaver, a client makes important decisions, including:

    - the fact that they will invest money which will be inaccessible to them for the long term (or in the limited circumstance of their purchase of their first home)
    - the amount of risk they are prepared to take, and therefore the fund they will invest in.

    The client then benefits from government and employer contributions to the scheme.

42. Given these incentives, at least class advice on whether to join KiwiSaver and on choosing an appropriate investment portfolio is likely to be appropriate. When providing advice, to meet the obligation to exercise care, diligence and skill and not to engage in misleading or deceptive conduct, FMA expects advisers to address both the risk profile and the inaccessibility of funds in a member's account.

43. However, once the client has invested in KiwiSaver, the government and employer incentives are not part of the decision about whether to transfer from a particular portfolio or scheme to another portfolio or KiwiSaver scheme. The decision is more complex and is more likely to depend on the client's personal circumstances, and therefore to need personalised advice.

44. Personalised advice is also more likely to be required where a client has transferred out of a KiwiSaver scheme and is now being encouraged to rejoin their original scheme (sometimes referred to as 'reinstating scheme membership'). FMA expects this client to be treated as if they were a new applicant.

E: Compliance controls over the service

45. FMA expects compliance controls to be in place to ensure KiwiSaver scheme providers and salespersons are meeting their legal obligations. The scenarios in this guidance note illustrate the type of service provided. Similarly, the comments below indicate some matters to consider in respect of compliance with the 'care, diligence and skill' obligation, but are not exhaustive.

46. If sales are not on a personalised advice basis, controls should ensure services are provided with appropriate care, diligence and skill, and no personalised services are inadvertently provided.

47. Where providing class advice, the advising entity (or individual) must exercise care, diligence and skill (section 33 of the Act). This includes being satisfied that any risk profile tool used results in appropriate advice, even when the tool is provided by an issuer in a KiwiSaver investment statement or authorised advertisement.

48. For personalised advice, controls should ensure opinions given take into account the client's particular situation or needs to a degree appropriate to the nature of the service. AFAs and QFE advisers will need to consider a number of factors. For example, FMA will focus on:

    - Whether the long term nature of the commitment and investment are appropriate for the customer
    - Establishing the customer's risk profile. If the customer has used a risk questionnaire, the adviser should assist the customer in understanding the questionnaire and the implications of the results, and ensure the profile appears reasonable for the client and his/her circumstances.
    - The degree of reliance on past fund performance and any explanation for the customer of the variability of performance
    - When considering transfers, the basis for the opinion to transfer <u>from</u> the old scheme, as well as into the new scheme. We expect advice to include at least a consideration of the relative costs of the schemes or funds and transfer costs. If a comparison is not made, this should be drawn to the client's attention, including that specific consequences of the transfer have not been considered. The client's attention should be drawn to the types of consequences that can occur (eg exit fees).

49. Personalised advice about KiwiSaver does not require the same level of analysis of all of the client's circumstances as an investment planning service. The analysis can focus on information relevant to a KiwiSaver scheme's suitability for the client. AFAs and QFE advisers should consider the degree of analysis that is reasonable in the circumstances and ensure this is documented accordingly.

50. For each distribution model, compliance controls are likely to include the ongoing training and competence of staff, supervision of staff and wider compliance monitoring. Entities should have well documented procedures. Client complaints should be considered and used in staff performance management.

51. FMA does not expect to see sales practices which are high pressure or coercive, or misleading and confusing. In the past, we have seen practices including:

- door to door sales techniques. Section 35 of the Securities Act prohibits the offer of securities on a door to door basis
- sales approaches from suppliers of other household services
- inclusion of KiwiSaver membership with unrelated household arrangements. In some cases investors were unaware that they were committing to KiwiSaver membership, rather than purchasing household products.

Other examples might include:

- offering reduced fees for other financial services if the KiwiSaver scheme balance is moved, without addressing issues around the transfer
- offering to provide a consolidated view of the customer's financial position, without explaining that this involves a transfer to a new KiwiSaver scheme provider and addressing the issues involved.

Provider responsibilities

52. Where KiwiSaver scheme issuers utilise third party distributors or agents, FMA expects that before an application for membership is accepted, the issuer will take reasonable steps to satisfy itself the client is aware of the nature and extent of the obligations they are incurring, and has made the investment decision freely and on a properly informed basis.

53. The extent of the steps needed is likely to depend on the incentive structure the issuer has in place for its agents, any knowledge of the distributor's sales practices, and any assurance of the distributor's compliance, for example through complaints or compliance reviews.

54. We expect issuers to support their distributors in meeting their obligations under the Act. For example, this is likely to include making product training available. We also expect an issuer to take appropriate action when it becomes aware that an adviser may not be compliant. This might be, for example, as a result of complaints or where management information shows an unusual sales or commission profile.

Appendix A

No advice services – practical examples

Section 10(3) of the Act sets out the circumstances where financial advice is not provided for the purposes of the Act. The exception at section 14(1)(o) may also be applicable in limited circumstances to KiwiSaver scheme distributors.

The following examples of acceptable practice help to explain FMA's view on how these legal exclusions should practically apply to the sale of KiwiSaver. These exclusions only apply in limited circumstances.

In considering whether or not financial advice has been provided, we will take into account the overall context of the communication with the recipient rather than considering in isolation whether exceptions might apply to particular statements or documents which are provided.

Section 10 provisions

Financial advice is not provided by merely:

- **section 10(1)** - providing information about a financial product. Information must be factual and able to be independently verified and must not include any opinions or recommendations in relation to acquiring or disposing of the product.

Example 1

In response to specific client enquiries, a bank teller supplies a client with information about the fees of their KiwiSaver scheme and the lock-in period for a particular portfolio within the scheme.

Example 2

A mortgage broker tells a client that there are facilities under KiwiSaver to take a contribution holiday and to use your contributions to buy your first home. The mortgage broker is clear that s/he cannot give a view on whether this is right for the individual.

- **section 10(2)** - recommending KiwiSaver generally as an investment product. This would not cover a person recommending a particular KiwiSaver scheme. It is unlikely that a distributor who sells only one scheme could rely on this to avoid triggering adviser obligations under the Act.

Example

A presenter at a seminar talks to a group of people and makes a statement like "KiwiSaver is a good idea because it will help you save for your retirement".

- **section 10(3)** - providing an opinion or recommendation about *<u>the procedure</u>* for signing up to KiwiSaver or for ‘disposing’ of KiwiSaver- for example, using KiwiSaver funds to buy a first home. This opinion must be limited to process only rather than the merits of signing up to or transferring from a scheme.

Example

A financial services employee responds to a question about how to complete an application form and says ‘sign it here, use block capital letters and hand it to me once you have fully completed all the sections’.

- **section 10(4)** - a person (A) transmitting another person’s (B) financial advice - unless A gives their own advice or holds B’s advice out as their own.

Example

A salesperson provides a copy of a report on a particular KiwiSaver Scheme prepared by an adviser, but doesn't comment on the content at all and does not represent the advice as their own.

A financial services employee hands over a written explanation of advice prepared by a sick colleague, without comment on the content.

- **section 10(5)** - recommending to someone that they consult an AFA.

Example

A financial services employee says “XYZ has a KiwiSaver scheme, you should talk to one of our AFAs if you want advice about whether it is right for you.”

Section 14(1)(o) exception

Investment statement and prospectus

Section 14(1)(o) allows the provision to a client of a KiwiSaver scheme investment statement or prospectus document by any person, without this being treated as advice.

Example
At the request of a client, a financial services employee hands over their scheme provider's KiwiSaver scheme investment statement, application form and any supplemental marketing material.

An investment statement or a prospectus is a document (as defined in sections 38C and 2 of the Securities Act). The Securities Act requires that these documents must not be misleading or deceptive, must not contain untrue statements, and for an investment statement, must not be confusing. This exception relating to these documents does not cover the reading of selected information from the document or explanation of any part of it, for example the risk questionnaire.

The example above shows the usual scenario where this exception is applicable. We will look closely at other instances where reliance is placed on this exception.

Advertisements

In addition, the section covers the provision of advertisements, as defined in the Securities Act (section 2A) – including communications that are reasonably likely to induce a client to join a particular KiwiSaver scheme and are prepared by arrangement with the issuer. Advertisements include communications that are not in writing.

FMA's view is it would be difficult to rely on this exception where a salesperson meets with a potential applicant and reads from an advertisement. In practice, the client will wish to influence a conversation, rather than listen to a speech – and the salesperson will wish to respond to this. A salesperson might use only parts of the advertisement and still be within the exception. However any deviation from the advertisement wording could result in the communication (and possibly the whole of the communication) falling outside of the exception.

If any element of the advertisement is omitted, FMA will consider whether the resulting advertisement breaches Securities Act requirements (for example sections 38B and Regulation 30 of the Securities Regulations 2009) because it:

- is misleading
- is inconsistent with the investment statement or prospectus, including in the overall picture presented
- has deviated from the director's certificate.

Even if the communication remains within the exception, it may be considered misleading if it is delivered in a context that might be construed as financial advice. It may create a false impression if the client is unaware the communication is an advertisement under the Securities Act, rather than advice under the Financial Advisers Act.

The exception can extend to a person other than the KiwiSaver scheme provider. So a third party could rely on the exception when presenting an advertisement, with the approval of the issuer (in accordance with section 2A of the Securities Act). We consider it misleading for an issuer to authorise a third party to deliver a scripted advertisement in a one to one meeting with a client, unless the advertisement makes it clear that the client is only receiving a scripted advertisement.

In considering whether an advertisement is misleading under the Securities Act, factors that FMA will consider include whether:

- it is clear to the client that the sales person is only able to relay a set communication (pre-approved by directors of the issuer in accordance with section 30 of the Securities Regulations 2009)
- the advertisement makes it clear to the client that they may wish to seek investment advice, for example by drawing the client's attention to the 'important information' in the investment statement.

A misleading advertisement could result in liability under the Securities Act. This liability extends to directors of the issuer and the promoter of the securities (if the promoter is referred to in the advertisement).

Appendix B

Advice services – practical examples

Scenario 3: Class advice

- A branch based deposit taker is a QFE and a KiwiSaver scheme promoter and its sales staff comprise:
  - ’front desk’and teller staff who are the initial point of contact for customers
  - personal service staff trained on a range of products, including the KiwiSaver scheme. They meet customers referred by the front desk staff or tellers, help the customer complete application forms and provide other assistance
  - financial adviser staff, who have attained AFA status/training equivalent and provide full advisory services to customers
- C comes into the branch to ask about life insurance and is referred by the front desk staff to S, a member of the personal service staff.
- C is given a QFE disclosure statement outlining that S may provide advice, but cannot provide personalised advice on investments. S goes on to advise C on life insurance.
- During the discussion, S notes the entity’s records show that C is not an investor in the entity’s KiwiSaver scheme and asks if he is interested in information on the scheme
- C confirms he doesn’t know much about KiwiSaver. S notes that he can’t give personal financial advice, but points out there are a lot of benefits, including the government contribution which makes KiwiSaver worthwhile.
- S gives C the Bank’s KiwiSaver scheme Investment Statement and leaves C to complete the investor profile
- When S returns, C has almost completed the investor profile, which contains 3 questions relating to age, salary and risk appetite. He asks S if he thinks that C has selected the appropriate investment portfolio. S gives some explanation of the risk appetite question, but says that he can’t give any personalised financial advice, and if C would like to discuss this further this can be arranged with one of the AFA staff.
- S does not receive a commission for any KiwiSaver scheme sales. However the entity does keep track of sales by each member of staff for performance purposes.

FMA approach

This example is similar to scenario 1b. We consider S has provided class advice to C to invest in the entity’s KiwiSaver scheme. The following factors are relevant:

  - S is presented as a person who can provide advice and opinions on the entity’s products.
- S is a member of the personal service staff, as opposed to a teller. The suggestion S has greater expertise and knowledge is likely to affect C’s expectation of the services S provides.
- S has suggested discussing the product to C. C is likely to perceive an implied opinion to join the KiwiSaver scheme as a result of the conversation
- S and C have had a free-flowing discussion of KiwiSaver and the scheme (which is not an advertisement for the purposes of the Securities Act)
- The risk profile questions determine if the client comes within a class of persons with predefined characteristics (of a general nature) and is therefore not personalised.
- In addition, S needs to be careful that any disclaimers that the service is not personalised financial advice on KiwiSaver are clear and understood by C.

Scenario 4: Personalised advice

The facts are the same as Scenario 3, but with the following factors:

- S checks through the investor profile section with C and answers the following questions from his own view:
  - How much should C be contributing, as he is considering buying a house? S suggests probably the minimum amount is appropriate
  - Why is the KiwiSaver Scheme promoted by the entity better than others? S notes the entity's scheme provider has excellent service, including call centres and the fees compare favourably.

FMA approach

S has given personalised advice based on the following analysis:

- S has provided an opinion on the benefits of the entity's KiwiSaver scheme. (In some contexts, a comparison of benefits might be class advice).
- C has provided information on his particular financial situation. S has taken this into account in making a recommendation on how much to invest.
- S must be clear that he cannot give an opinion on the existing scheme which addresses C's situation. S must also ensure C understands that he has not provided a full comparison. If the client needs an opinion on the relative merits of the schemes for C, S must refer C to an AFA.

As a QFE we would expect the entity to have appropriate training and procedures to ensure that its personal service staff cannot provide these sorts of recommendations unless they are appropriately qualified.

Scenario 5: Personalised advice

The facts are the same as Scenario 1, except with the following additional factors:

- C tells D that she is a member of a default KiwiSaver scheme not provided by XYZ
- C mentions she hasn't given much thought to the appropriate sort of KiwiSaver fund. D spends more time on the risk profile questionnaire
- D does not discuss C's existing scheme, or make a comparison of the XYZ KiwiSaver scheme with the existing scheme
- C's impression from the meeting is that, as D expects C to transfer to the XYZ KiwiSaver scheme, this scheme must be better than C's existing scheme.

FMA approach

We consider that notwithstanding the disclaimers and warnings that have been given, D has given personalised advice to C. This takes into account:

- C's questions about the risk questionnaire arise from her personal circumstances, and D is aware of this in providing answers
- by encouraging C to transfer to the XYZ KiwiSaver scheme, D has implied that C should 'dispose' of the existing scheme. C's existing scheme is part of C's personal financial situation
- C's reasonable expectation that the fact that she is already a member of a particular scheme will be taken into account. (D has not provided any clear warning that she is considering only the XYZ KiwiSaver scheme, and cannot provide information or advice on the existing scheme.)