

Guidance Note:

Distinguishing the boundary between a financial planning service and advice

29 March 2010

About this Guidance Note

1. The Financial Advisers Act 2008 places obligations on advisers who provide a financial planning service, and requires them to be authorised by the Securities Commission.
2. This guide is designed to help those affected by the Act to meet their obligations when it comes into force. The Securities Commission is providing it in response to industry concerns about the boundary between advising on products that require registration (category 2 products and for QFEs some category 1 products) and providing a financial planning service (which requires registration *and* authorisation).
3. An important part of giving good advice is an adviser's consideration of the client's nature and requirements, and the nature of the service the adviser is performing. A financial planning service involves similar considerations of a client's current financial situation, goals and options.
4. This guide sets out the Securities Commission's interpretation of *nature and requirements* in the context of section 33 of the Act. It outlines how the Commission will assess whether a financial adviser's consideration of *nature and requirements* in a particular situation meets the definition of a *financial planning service*.
5. The guide applies to all financial advisers, including registered-only advisers, advisers working for a qualifying financial entity (QFE) and authorised financial advisers (AFAs).

The law

6. Section 33 of the Act requires an adviser to "exercise the care, diligence and skill that a reasonable financial adviser would exercise in the same circumstances, taking into account, but without limitation, the *nature and requirements* of the financial adviser's client and the *nature of the service* performed for the client".
7. Section 5 defines financial planning service as "a service that analyses an individual's current financial situation, identifies his or her financial goals, and develops financial options for realising those goals".

8. An adviser must be licensed as an AFA before providing a financial planning service. Registered-only advisers, and advisers (other than AFAs) working for a QFE are prohibited from providing a financial planning service.

Considering nature and requirements

9. Each time an adviser gives advice, consideration of their client's nature and requirements in the context of the service being provided will help them satisfy their legal obligation to exercise care, diligence and skill.
10. In any advice situation, the Commission expects an adviser to be able to demonstrate that at the time of providing the advice they:
 - a. had the appropriate level of skill for giving that advice, and
 - b. considered their client's nature and requirements in the context of the nature of the service to be performed.
11. The level of skill required depends on the situation, including the client's objective in seeking advice. The Commission will consider the relevance of an adviser's qualifications and experience in relation to the products, markets or services they are dealing with. The more comprehensive the service, the more the Commission will expect advisers to be able to demonstrate they have the breadth of skills and knowledge to consider alternative products or strategies for their client.
12. The extent to which an adviser should consider their client's nature and requirements depends on the circumstances: it should be greater when the advice is more complex or comprehensive.
13. For example, when advising on a standard car insurance product, an adviser is likely to need to ask only a few basic questions to determine the most suitable product. The client's nature and requirements are straightforward: the client wants good-value insurance for a single asset. The nature of the service being performed is to direct the client to the most appropriate product for their needs. The client's current financial situation and goals are unlikely to be relevant to their advice requirements or to the service being performed, particularly as the options are within a single product range.
14. In situations like this, where the significance of the advice does not warrant analysis of a client's current financial situation, a financial planning service is not, and does not need to be, provided.
15. The Commission will consider the significance of the advice to a client's current financial situation and goals when assessing whether a financial planning service has, or should have been, provided. It will also consider the nature of the service being performed for the client. Where the advice is significant to a client's current financial situation, or where the performance of the service necessarily involves an analysis of the client's current financial situation, it is likely to result in the provision of a financial planning service as defined by the Act.

16. For example, an adviser advising a client on a home equity release product as a way of structuring the client's post-retirement financial situation will generally be providing a financial planning service. In exercising care, diligence and skill in these circumstances, consideration of the client's nature and requirements must necessarily extend to an analysis of the client's current financial situation and goals. This is necessary in order to advise them properly, not only in relation to the product sought but also in terms of other options for realising those goals.
17. What skills and how extensive an analysis each particular circumstance requires is a matter for an adviser's professional judgement. The nature of the service being offered or that the client can reasonably expect is directly relevant here.
18. What is unacceptable is deliberately limiting the areas of inquiry required to meet the standard of care diligence and skill Section 33 demands in order to avoid crossing the boundary into providing a financial planning service.

Formalising considerations

19. Generally, it is good practice, each time an adviser gives advice, to formalise and document consideration of the client's nature and requirements in the context of the nature of the service; this is also referred to as a suitability analysis. There are two situations, below, where the Commission does not expect a suitability analysis to be conducted.
20. The Commission does not expect advisers to conduct suitability analyses when they make it clear to clients that they are providing only non-personalised financial advice which is not tailored to the clients' current financial situation or goals.
21. The Commission does not expect advisers to conduct a suitability analysis when a client declines to provide the information necessary for one. However, in situations like this, the Commission expects advisers to make clear to clients the risks of not providing that information, and keep a record of the clients' instructions.
22. For AFAs, these two exceptions will be subject to the standards set out in the AFA Code of Professional Conduct. QFE advisers will be subject to the terms and conditions of the QFE licence.

Status of this Guidance Note

23. This guide does not constitute legal advice. The Commission encourages advisers to seek their own professional advice on how the Act and other applicable laws apply to them – it is an advisers' responsibility to determine their obligations. The Commission will keep this guide under review and may publish further comments or guidelines.
24. Examples given here are purely illustrative. They are not exhaustive and not intended to impose or imply particular rules or requirements.