

QFS 153

I am a financial planner. What particular requirements apply to me under the Corporations Act when I give advice about the tax implications of financial products?

If you provide opinions about the tax implications of decisions about financial products, you are likely to be providing financial product advice, which is a financial service under the Corporations Act 2001 (the Act). For more information on what 'providing financial product advice' covers, see our guide Licensing: The scope of the licensing regime: Financial product advice and dealing.

In certain circumstances providing advice about the tax implications of financial products may be an 'exempt service' (i.e. not a financial service under the Act): see reg 7.1.29.

If you carry on a business of providing financial product advice then, unless an exemption applies, you must hold an AFS licence or act as the representative of an AFS licensee.

If you are an AFS licensee, you are subject to various obligations including:

- complying with the financial services laws and taking reasonable steps to ensure that your representatives (including your authorised representatives) comply;
- maintaining the competency to provide financial services under your licence, and ensuring your representatives (including your authorised representatives) are adequately trained and competent to provide those financial services; and
- providing appropriate advice when giving personal advice to a retail client.

Compliance with financial services law

The term 'financial services laws' is defined in s761A of the Act and includes provisions in other Commonwealth legislation that apply in relation to conduct relating to the provision of the financial services.

One provision relevant to advice on tax implications of financial products is s251L(1)(b) of the Income Tax Assessment Act 1936. That provision prohibits people other than registered tax agents, legal practitioners and BAS service providers from charging a fee for 'giving advice about a tax law on behalf of a taxpayer': see Draft Tax Determination TD 2004/D22 issued by the Commissioner of Taxation. Please refer to the Australian Taxation Office website.

Competence to provide financial services

Policy Statement 146 Licensing: Training of financial product advisers [PS 146] sets out minimum training standards for licensees and their representatives who provide financial product advice to retail clients. Advisers must meet the training standards by satisfactorily completing certain training courses. Alternatively, experienced advisers may be able to demonstrate their competence through an assessment process.

[PS 146] identifies a range of knowledge requirements that should be covered in training courses or when assessing an individual adviser. Whether you are an AFS licensee or a representative of an AFS

licensee, you will need to meet specialist knowledge requirements in relation to financial planning, as well as generic knowledge requirements in relation to other specified areas.

As outlined in [PS 146] at [PS 146.120], if you provide financial planning advice to retail clients you should be able to apply specialist knowledge of the following areas:

- the Australian tax and social security systems;
- relevant tax laws and regulations;
- effects of tax on particular financial products; and
- effects of tax on financial strategies of individuals and entities.

The competency requirements do not require you, as a financial planner, to have an expert knowledge of every aspect of tax law. However, they do require you to have adequate knowledge of the tax implications normally applicable to the products on which you advise or that need to be considered in providing your advice. You must also have a general knowledge of tax law and practice sufficient to enable you to identify any other material tax issues on which your client may require further advice. This is so that you avoid making a recommendation about financial products that is not based on the advice of a person competent to provide advice on those issues.

Appropriate advice

When advice is provided to a client, it is provided by a 'providing entity'. As explained in Policy Statement 175 Licensing: Financial product advisers – Conduct and disclosure [PS 175] at [PS 175.19], a providing entity may be a licensee or an authorised representative. A representative who is not an authorised representative (e.g. an employee) is not a providing entity because they are advising clients on behalf of a licensee.

Where you provide personal advice to a retail client as a providing entity, you must:

- make reasonable inquiries about the client's relevant personal circumstances;
- give such consideration to, and conduct such investigation of, the subject matter of the advice as is reasonable in all the circumstances; and
- provide advice that is 'appropriate' for the client: s945A.

[PS 175] includes guidance on the level of client inquiries and the level of consideration to be given to the subject matter of the advice, and what constitutes 'appropriate' advice. If you are a providing entity, you generally must consider and investigate the financial products, classes of financial product and strategies upon which advice is provided. ***This will include consideration of any material tax implications of the advice.***

The client's tax position may be relevant to assessment of the client's relevant personal circumstances. Complex advice involving complex tax strategies is likely to involve more inquiry about the client's tax position than relatively simple advice.

We consider that there are two possible ways that a providing entity can give appropriate advice when there are material tax implications that the client should consider that go beyond the licensee's competency:

- ***the advice can be based on competent tax advice given to the client by someone else; or***
- ***the advice can be limited to those matters on which the licensee is competent to advise.***

If you are a providing entity providing advice in these circumstances, you must be aware of the limitations on your competency. If you are a licensee you must, however, in all cases ensure that you and your authorised representatives maintain the degree of competency required by [PS 146].

1. Advice by providing entity based on existing tax advice

As a providing entity you can make a recommendation about financial products (e.g. to buy, sell or hold financial products) on the basis of advice on taxation issues given to the client by another person who is competent to provide that advice.

Unless the client has arranged for that advice themselves, you need to arrange for tax advice on those issues to be given to the client by a person that you reasonably believe to be competent to consider the issues and have no reason to believe is acting unlawfully in providing the advice. For information about when an AFS licence is required to provide tax advice see QFS 149 Do I need an AFS licence to provide tax advice?

If you base a recommendation on that advice and are yourself not competent to provide that advice, you must make it clear that you are not providing the taxation advice. ***To do this you need to ensure that the tax advice is provided to the client*** and make it clear in your Statement of Advice (SOA) and discussion with the client that you are assuming the tax advice is appropriate, rather than endorsing it.

If you are providing the advice to the client about taxation issues, you must be competent to do so. This obligation is not satisfied by you receiving and acting in accordance with tax advice on those issues provided to you (rather than the client) by another adviser.

2. Advice by providing entity subject to the client subsequently obtaining tax advice

Alternatively, as a providing entity you may provide advice about aspects of the financial products other than some or all taxation implications if you make clear to the client the limitations of your advice.

If you are providing advice on this basis you must:

- comply with the requirement in s945A for a reasonable basis for personal advice and, in particular, have adequate knowledge about the products and associated tax implications for the client's personal circumstances as is relevant to the opinions and any recommendation you give;
- ensure that any personal advice you give is appropriate for the retail client;
- reasonably believe, and take reasonable steps to ensure, that the client will understand that a decision about the financial products should not be made on the basis of the advice unless the client obtains taxation advice confirming that the products satisfy their taxation objectives (assuming the client does not reasonably profess to have the relevant tax expertise).

Reasonable steps to ensure a client understands they should seek competent taxation advice include:

- making it clear in any SOA, and in any discussions with the client, including by prominent statements, that you are not providing advice on the tax implications and so are unable to make an unqualified recommendation about a decision about financial products; and
- ***recommending to the client that they seek tax advice from someone competent to provide it. The recommendation may, but need not, be a recommendation to use a named competent adviser.*** If you may receive a benefit for referring a client for taxation advice, you must comply with any requirements under Part 7.7 of the Act for disclosure of the benefit to the

client. You should not recommend a tax adviser unless that adviser appears to be providing taxation advice lawfully.

If you are providing personal advice you must comply with the appropriate advice rule in s945A. The advice will not be appropriate if you do not reasonably believe that the client will understand that tax advice should be obtained **before** making any investment decision.

For example, for some retirement income stream products, taxation issues are both complex and central to the investment decision. For such products it may be of limited value to a client to receive advice on other aspects of the products, such as the investment expertise of the issuer, before the suitability of a product for the client's taxation objectives is resolved. In those circumstances, if you were to provide personal advice on other aspects of the product to the client, ***you would have to take particular care to ensure that you have a reasonable basis to believe that the client understands they should not acquire a financial product unless they obtain competent taxation advice.***

For more information see:

Policy Statement 146 Licensing: Training of financial product advisers [PS 146] and

Policy Statement 175 Licensing: Financial product advisers – Conduct and disclosure [PS 175].

Published 15/12/2004

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