



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 84

Super switching advice: Questions and answers

June 2005

What this guide is about

This guide for advisers answers some common questions about ‘super switching advice’ focusing on:

- ‘knowing your client’ in a super switching context;
- how the ‘reasonable basis for advice’ obligation applies; and
- what you should tell your client.

Whether you are a licensee or a representative, if you give super switching advice you should read this document. We’ve tried to make it ‘user-friendly’ by explaining provisions of the *Corporations Act 2001* and ASIC policy statements in simple language, using practical examples. We’ve also included some compliance tips.

This guide does not deal with all of the obligations that arise when giving super switching advice. It does not, for example, address the management or disclosure of conflicts of interest. We might update this document in future to address additional questions if the need arises.

You should also be aware that this document addresses acceptable practice and not best practice. We are seeking to explain, in simple terms, the basic legal requirements as opposed to best industry practice.

Remember that this is a guide only and not legal advice.

For more information on your legal obligations visit www.asic.gov.au/fsrpolicy.

You can find out more about super choice by visiting www.superchoice.gov.au.

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Super switching advice: Questions and answers

1. What is ‘super switching advice’?

‘Super switching advice’ is not a technical or legal term. We use it in this document to refer to personal advice given to a retail client relating to either or both:

- the transfer (in whole or part) of an existing super account balance from one super fund (the ‘from’ fund) to another super fund (the ‘to’ fund);
- the redirection of future contributions away from one super fund (the ‘from’ fund) to another super fund (the ‘to’ fund).

We recognise that this definition covers some situations where s947D¹ does not apply. We deliberately use ‘super switching advice’ broadly in this document because we believe that the basic personal advice rules that advisers need to follow (including having a reasonable basis for advice and the need to explain it in the Statement of Advice (SOA)) apply to all personal advice about changing super arrangements.

To work out whether your advice is super switching advice (and therefore subject to the guidance in this document) you need to think about the *substance* of your advice (ie what are you really telling your client?) You should think about what you told your client: orally; in your Financial Services Guide (FSG); in your SOA; and in any other written communication. Did you give them a Product Disclosure Statement (PDS)? At the end of the day, it’s the *overall impression* created by your advice that counts.

If you recommend a switch orally to your client, then the substance of your advice will be super switching advice, even if you then give your client an SOA that doesn’t reflect that recommendation.

If you include a disclaimer in an SOA that says, for example, “this does not include advice about the ‘from’ fund”, your advice will still be super switching advice if it is really about switching funds.

2. What is not ‘super switching advice’?

Advice that is only about choosing between various investment options or strategies within the one super fund is not super switching advice.

¹ A specific disclosure rule that applies when you recommend, expressly or impliedly, that your client replace one financial product with another.

'To' fund advice

Advice that only deals with your client's 'to' fund is not super switching advice. This is because it does *not* include any express or implied opinion or recommendation about your client's existing super. Two examples of 'to' fund advice are where a client:

- changes jobs and can no longer contribute to their existing fund and wants advice only about an appropriate 'to' fund; or
- has already made up their mind to move from their existing fund and wants advice only about an appropriate 'to' fund.

While 'to' fund advice is not super switching advice, you must still comply with all relevant personal advice obligations, including the 'know your client' and 'reasonable basis for advice' rule. You should also consider the following issues where you give 'to' fund advice:

- If your client tells you that they have already decided to switch funds, you should find out how they have made that decision. Have they made up their mind based on: the past performance of the fund; advice from a friend or relative; or other factors that are not necessarily reliable?
- The records you keep of your advice should show that your client asked for advice limited to the 'to' fund.
- In your SOA, you must clearly tell your client about the limitations of your advice, ie that you are only advising about the 'to' fund and you are not comparing the 'to' and 'from' funds.

Comparing specific features of the 'from' and 'to' funds

Advice limited solely to comparing specific features of the 'from' fund and 'to' fund (eg fees and costs) without any express or implied recommendation to switch is not super switching advice. However, if you give such advice, in your SOA you should say that:

- the advice is limited (in this example, to advice about comparative costs);
- the advice does *not* constitute a recommendation that your client should move to the 'to' fund; and
- your client should consider moving to the 'to' fund only after considering the consequences of the change, which would generally include insurance implications, such as whether there would be an insurance gap.

Remember, your advice about comparative features will still be super switching advice if it is, in substance, a recommendation to switch super funds.

Compliance tip

In our surveillance, we will look closely at the files of advisers who seem to have a number of clients who only want advice about the 'to' fund, although they are still eligible to remain in their 'from' fund.

We will also look closely at the files of advisers who have a number of clients only wanting advice limited to specific comparative information (eg fees and costs).

3. Are there any new rules coming in with super choice that will change the way I have to give advice?

No. Basically, the 'know your client', 'reasonable basis for advice' and SOA rules apply. All advisers should know these rules.

4. How do the 'know your client' and 'reasonable basis for advice' rules apply to super switching advice?

As with all personal advice, you can give your client super switching advice only if it satisfies each of the three elements of the 'reasonable basis for advice' rule, which are:

- you must do a 'fact find' on your client (ie work out their situation, objectives and needs);
- you must do your 'homework' on the advice you give (ie know your product and the consequences of your advice); and
- the advice you give must be appropriate for your client.

What you need to do will depend on:

- the potential impact of inappropriate advice on your client;
- the complexity of the advice; and
- the financial literacy of your client.

For example, you might need to do less research and investigation if your advice is limited to redirecting future super contributions than for a recommendation to switch an existing balance to another fund. However, you will still need to do reasonable research and investigation for advice about redirecting contributions.

The fact find that you need to do will depend on the advice you give, but generally you will need to find out about things like your client's age, dependants, intended retirement age, future financial needs and goals, desire to minimise fees and costs, risk tolerance, financial literacy, existing investments (including super) and tax situation.

Whether super switching advice is 'appropriate' really comes down to whether or not it suits your client. You do not have to say that your recommended product is 'best', but it must be 'appropriate' and you must have a basis for saying so. So, for example, if your client was relying on super for their life insurance, a recommendation to switch to a product that had inadequate or no life insurance would clearly not be appropriate.

Super switching advice will generally be inappropriate if the adviser knew (or should have known) that:

- the overall benefits likely to result from the 'to' fund would be lower than under the 'from' fund, unless outweighed by overall cost savings; or
- the cost of the 'to' fund is higher than the 'from' fund, unless the 'to' fund better satisfies your client's needs.

Compliance tip

Where advisers recommend switching, but there is no obvious overall advantage to the client in making the switch, we are more likely to look closely at the disclosure given to the client about conflicts, fees and the basis for the advice.

5. Can I give super switching advice without considering the 'from' fund?

No. Super switching advice requires you to consider both the 'to' and 'from' funds.

6. What should the SOA say about the advice and the basis for the advice?

The SOA must clearly set out your advice and its basis (ie why you are saying that XYZ Superannuation Fund is appropriate for your client). Your client's financial literacy will be relevant here and you should strive to use language and concepts they will understand. This is what the 'clear, concise and effective' disclosure rule is all about.

For all super switching advice, the SOA must explain, in clear and simple terms, the costs, benefits and significant consequences for your client if the advice is acted on.

There are specific disclosure obligations² where switching advice recommends moving your client's existing super fund balance/s from their current super fund/s to a new fund. However, even where switching advice is limited to a recommendation to redirect future contributions away from the 'from' fund and to the 'to' fund, you must explain the basis for that recommendation. This would require disclosure of the costs, benefits and significant consequences of redirecting those contributions.

It would generally be inadequate to say in the SOA "the fees in the new fund will be higher, but I think the extra features make it worthwhile". This is because it doesn't tell your client how much more they will pay in the new fund and doesn't explain the features or benefits (including why they are relevant to your client).

It would generally be inadequate to say "if you have insurance, you will lose it if you switch". You would generally be required to provide information about the benefits that will be lost (including the level of cover).

Compliance tip

It might be misleading to describe a feature of the 'to' fund as a benefit of making the switch unless that feature satisfies a client's needs or objectives and is not already available in the 'from' fund.

7. Can I tailor my advice about super switching so that I can offer a cheaper service to my clients?

While some tailoring is permitted, there are still some minimum standards that you must meet. Decisions about super are usually very important to your clients and are likely to have a significant long-term effect on them.

Therefore, the corners that can be cut in giving switching advice are limited.

There is room for advisers to use various efficiency tools to reduce the cost of providing advice, such as:

- approved product lists;
- standard forms for requesting information from the 'from' fund;

² See s947D.

- standard wording for insertion in SOAs, eg summarising the key features of the ‘to’ fund that would be relevant to all your clients;
- guidelines for dealing with ‘low value’ situations, such as your client consolidating a few small super funds or wanting to switch a fund balance of low value. We propose consulting further with industry to develop such guidelines (see question 21); and
- your client undertaking to get relevant information about their ‘from’ fund and giving it to you.

8. What are the practical factors I might have to consider before recommending a self-managed super fund (SMSF)?

Self-managed super is not for every client, even if they do have a significant amount to invest in an SMSF. Factors such as their financial literacy, understanding of the legal, taxation and other requirements, available time and general interest are all things to be considered. It will also be critical to consider your client’s need for appropriate and affordable insurance cover. Unless the SMSF trustees specifically take out insurance for fund members, there will be no cover. Experience shows that SMSF insurance is generally more expensive and harder to get than in larger funds.

You should not advise a client with insufficient super savings to set up an SMSF. It is generally accepted that for a fund balance below around \$200,000, an SMSF is usually not cost-competitive with other available super options. Some clients will be willing to accept this additional cost on the basis that an SMSF allows them to make their own investment decisions. However, you need to make sure that you do not mislead clients into thinking that an SMSF will always put them ahead. These issues need to be dealt with in the SOA.

Compliance tip

In our surveillance, we will look for instances where an adviser:

- has advised a client to establish an SMSF when their current super savings are insufficient and their circumstances do not otherwise support the advice; or
- has failed to advise a client properly about ongoing costs (at least in very broad terms, based on average costs) and the time and skill needed to administer an SMSF.

9. What about disclaimers?

There are legitimate areas for use of clear, concise and effective disclaimers in setting the boundaries of advice (eg an acknowledgment that you are not giving advice about the disposal of a property in order to invest in super or, perhaps, certain tax matters, or on aspects of a client's financial affairs, including super, about which advice is not required).

However, you cannot disclaim your obligation to comply with your legal obligation to know your client, investigate the subject matter of the advice and to ensure the advice is appropriate for your client.

A disclaimer that says "this is not advice about the 'from' fund" will not let you limit your consideration to the 'to' fund if the substance of your advice is or includes a recommendation to switch.

10. Can I recommend a switch after doing only limited client inquiries, as long as I give a warning that the advice might not suit them?

No. The rule about incomplete information³ doesn't allow you to bypass the normal obligation to know your client and have a reasonable basis for your advice. Our view is that the rule about incomplete information allows you to give properly researched advice where there is some missing information that you have asked the client for, but they haven't given you. It does not reduce your obligation to ask relevant questions and does not shift the responsibility for the advice being appropriate from you to your client.

Compliance tip

In our surveillance, we will look closely at the files of advisers who regularly give limited advice warnings to ensure that they are complying with their obligations.

11. What do I need to look at when considering the 'from' fund?

There is no universal answer here. The obligation to consider the subject matter of the advice is 'scaleable'. This means that what you need to do will vary depending on the substance of the advice you give and all surrounding

³ See s945B.

circumstances, including the potential impact of inappropriate advice on your client and the complexity of the advice.

Where you recommend switching funds, you will always have to make reasonable inquiries about the costs and charges involved, benefits that might be lost and other significant consequences involved.

It might help if you had a standard list of questions, either to give to your client to complete from their own records or to send to the 'from' fund, seeking information about the 'from' fund and your client's interest in it. We have offered to help relevant industry associations in creating a standard list to assist in this process.

12. Can I charge my client for getting information about the 'from' fund and what if my client doesn't pay?

This is something between you and your client. Unless there is unconscionable conduct or other consumer protection issues are involved, the fees you charge, including for getting 'from' fund information, are of no concern to us, provided they are properly disclosed.

Payment problems will not give you a reason to avoid your obligation to consider the 'from' fund before giving switching advice.

13. What advice can I give if I am not satisfied that the 'to' product is at least as good for my client as the 'from' product?

An example of this might be where you do not have a reasonable basis to say that the 'to' fund provides additional benefits that your client needs, but you know that the 'to' fund is more expensive.

In such a case, either advise your client to stay where they are or decline to give any advice.

14. I am an authorised representative. Can I give super switching advice if the 'from' fund is not on my licensee's approved product list?

This depends on the scope of your authorisation. You will need to clarify this with your licensee. It is an important part of giving switching advice to understand what you can and can't advise on.

Suppose your authorisation says you can advise on super generally, but that you can only recommend a product that is on your licensee's approved

product list. The fact that the 'from' product is not on your licensee's approved product list will not generally stop you giving super switching advice but you should discuss the issue with your licensee because there might be professional indemnity insurance or other issues to consider.

15. Where do I get information about the 'from' fund?

Some of the product information you will need will be in the 'from' fund's PDS.

Another key information source will be documents held by your client, such as annual reports and member statements.

You might also get relevant information from the 'from' fund's website or by contacting the trustee directly. There might also be independent research data available about the 'from' fund.

Your client has a legal right to get information from their current fund. You can ask for this information on behalf of your client, but you will need to get your client's written authority to do so: see question 16.

You can complain to us if a trustee fails to respond (especially if this occurs on a systematic basis).

Look for ways of standardising how you ask for information so that you don't have to reinvent the wheel each time.

16. How hard do I need to try to get information about the 'from' fund?

There could be various reasons why you find it hard to get the information you need:

- Your client might agree to get the information from the 'from' fund, but forgets or otherwise fails to do so. If this happens, you should either find the information out yourself or decline to give switching advice. This is because you can't give switching advice unless you have information about the 'from' fund. A variation is where your client only finds out some things about the 'from' fund. What you should do in such a case will depend on what is missing. You can only give switching advice if you have enough information to give appropriate advice.
- The 'from' fund refuses to provide the information or delays. If so, report this to us and in the meantime decline to give advice.
- The 'from' fund says that they can't provide the information to you because they need written authorisation from your client. This is justified

under the *Privacy Act 1988* (Cth) and it should be part of your standard procedures to require your client to give you this authority in writing. You can then give a copy to the ‘from’ fund.

In the end, the obligation revolves around whether the information can reasonably be found out and so a level of common sense is needed. Also, if you already know the information, you don’t have to keep asking the ‘from’ fund about it.

17. What if I can’t make proper fee comparisons because of rebates?

This is likely to happen where your client was not paying the fees applicable to a product shown in the PDS or elsewhere because they were getting rebates. This is further complicated where rebates might be applicable to the new product as well. You only need to find out information about matters, such as rebates, if the information can reasonably be found out, eg by asking your client. Often, it will not be possible to find out all information about rebates. In some cases, you might need to provide the required warning.⁴

18. What if the ‘from’ fund doesn’t have a PDS?

This is likely to make the job of finding out about the ‘from’ fund more difficult, but you can deal with this to some extent by sending standardised requests for information to ‘from’ funds. Absence of a PDS does not change your obligation to make reasonable inquiries, but it might make it more likely that you will not have enough information to give switching advice.

19. What if the ‘from’ fund wants to charge for providing information or gives my client advertising material urging them not to switch?

This does not affect your obligation to make reasonable inquiries of the ‘from’ fund. If you think that the ‘from’ fund is acting unfairly to hinder a client’s access to information (eg by charging an unreasonable fee) you should consider making a complaint to us.

⁴ See s947D(3).

20. Do I have to look at the performance of the ‘from’ fund and form a view about whether the ‘to’ fund will perform better?

Given the long-term nature of super savings, you need to ask yourself whether data about past performance (in particular, short-term performance) will help clients make an informed decision about whether to switch. That is not to say that you should never talk about performance.

If you do talk about performance, you should provide a reasonable basis for your views. You must be careful that you are disclosing information and not speculation. Disclosure of this type of information would ordinarily include disclosure of your assumptions and any other supporting information (eg a combination of portfolio structure, investment strategy, investment ratings and any other industry expertise that would enable clients to assess the reliability of the performance information).

In your SOA, you need to make it clear whether or not your advice is based on an assessment of performance and, if it is, your conclusions should be clearly stated.

21. How much investigation and research do I need to do in the following ‘low value’ situations?

My client wants to consolidate a few small super accounts

There is no clear answer here. It will all depend on the personal circumstances of your client, the amount of money involved, their age and so on. We propose consulting with industry further to see whether there are some general principles that could simplify the job of advisers in this area.

My client wants to do a low value switch (say \$1,500)

Again, we would like to work with industry on setting some appropriate standards for this type of situation.