



Records of advice in practice

How long is too long?

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From an advice perspective, how long can you rely on a Statement of Advice (SOA) to support your ongoing advice? To put it another way, how old and dated must an SOA be before you will stop using Records of Advice (ROAs) to streamline your advice process?

At what point must an adviser refresh an SOA? When does it become imprudent to continue to use ROAs?

If you ask your compliance people, the standard response you are likely to receive—if you receive one at all—is that there is no definitive answer, and it is a matter for your professional judgment.

This may be true, but it is hardly useful. As guidance, it is as helpful as being told that you can rely on the SOA until there is a significant difference between the client's current situation—circumstances and basis of advice—and the historic situation recorded in the SOA.

Ongoing advice

We have addressed ROAs previously, but before we address the practical issues, let us remember that an ROA is a regulated document designed to facilitate the streamlined provision of incremental, consistent and subsequent advice. It is particularly useful for the provision of ongoing advice and the *Corporations Act 2001* (Corporations Act) regulation 7.7.10AE confirms that an ROA can be used, instead of an SOA, if:

- the client has previously been provided with an SOA recording their relevant circumstances and the advice (the 'previous advice')
- the client's 'relevant circumstances'—objectives, financial situation and needs—are not significantly different from those recorded in the previous advice, and
- the basis of the subsequent advice given is not significantly different from the basis of the previous advice.

In practice, you can use an ROA to streamline your ongoing advice process if you have previously provided an SOA to a client and neither their 'relevant circumstances', nor the basis of the advice, are significantly different from those recorded in the SOA on which you are relying.

The previous advice, the SOA (or multiple SOAs) is the foundation that supports the ongoing advice and, unless there are significant changes, you can use ROAs instead of providing new SOAs.

In theory, this is a significant benefit for advisers, although because of licensee conservatism, some ROAs are as long and incomprehensible as the SOAs they replace. For some advisers, it is often faster and less problematic to simply produce an SOA for ongoing advice.

Assuming you are not still detained in the institutional advice sector, the ROA is a game-changer, but one with its own particular rules.

Significant differences

One of the most common questions we receive is, 'can I use an ROA on the back of an x-year-old SOA?'

This question often arises after advisers depart their previous Australian Financial Service (AFS) licensee, or when newly minted licensees try to understand the formal requirements and align these to their own risk appetites.

Some larger AFS licensees have internal standards that provide definitive, and immutable, requirements defined by their own risk governance and appetite. They may, for example, state that their representatives are unable to rely on an SOA which is more than five years old. This is a clear position but not a position that reflects the law or the intent of the regulations.

Even if you recognise that this position reflects the 'nature, scale and complexity' of their business, it is important to understand that their risk appetite will change from time to time, and so may their position on ROAs.

It is tempting to assume these changes are the result of either capriciousness, conservatism or mismanagement, but AFS licensee requirements can, and do, change for many reasons, including:

- professional indemnity guidance
- legislative requirements, guidance and changes
- incident/breaches learnings
- complaints learnings

ASIC's position

In the past, ASIC's pronouncements were positively Delphic and their regulatory guides were routinely condemned by some commentators for their ambiguity and equivocation.

This criticism, in our view, is neither fair nor reasonable.

It is not, and should not be, ASIC's role to advise AFS licensees on how to comply with the law. Licensees have management teams, lawyers, compliance and risk teams to assist them, but for many licensees, the complexity of the Corporations Act and other applicable laws creates conservatism, confusion and indecision.

While there is a longer-term plan to review and revise chapter 7 of the Corporations Act, ASIC has stepped up to assist licensees and advisers. While ASIC is unlikely to be thanked for its contribution, we are confident that ASIC's information sheets will help advisers and licensees manage ambiguity and better understand ASIC's interpretation, viewpoint and expectations.

Specifically, ASIC Information Sheet 266 *FAQs: Records of Advice (ROAs)* (Information Sheet 266) provides the clarity advisers need. Information Sheet 266, released in November 2021, clarifies the obligations that apply when providing further advice to retail clients.

We recommend the FAQ section to your attention but, before we get too far down the rabbit hole, let us return to the original question, 'can I use an ROA on the back of an x-year-old SOA?'

As unsatisfying as the answer may be, we can only advise you that 'maybe, it depends'.

We are not reluctant to declare a position but, because there is no regulatory requirement, the correct answer

depends on the specific circumstances of the client and the advice. Quite apart from suggesting that each client differs, there are many factors that need to be considered before assuming—or presuming—that you can use an ROA and rely on your previous advice. For example, you need to consider:

- Have the client's relevant circumstances changed significantly?
- Has the basis of the advice changed significantly?

The difficulty of these requirements is that 'significance' is both an objective and subjective consideration. The benefit of these requirements is that advisers are best placed to assess 'significance' based on their knowledge of, and relationship with their clients. It is also a contextual determination. For example, an additional investment of \$100,000 might be significant for some clients but insignificant for others.

So, subject to an AFS licensee's position, an adviser can make this determination on the basis of an objective assessment, leveraging their judgment, education and experience. The key is to consider these questions in line with the advice that the adviser is about to provide.

Example 1. Incremental changes in circumstances

Ms Coolidge has been a client for four years. She was provided with an SOA when her career was taking off. At that time she was single, had no dependents but was saving for the purchase of her first home. The adviser has met with her annually, adjusting the savings plan to suit her needs and each year providing her with an ROA to increase her savings. While none of those changes was significant, Ms Coolidge's situation has now changed as follows:

- her salary has increased significantly
- she has a partner
- she has purchased a house
- she is expecting a child

The significant increase in the salary has been gradual, so that, by itself may not trigger the significance test on the annual review. However, the adviser might—and probably should—consider that the changes in Ms Coolidge's relevant personal circumstances are now too significant for the previous advice to still be sufficiently appropriate to satisfy the adviser's best interests and related obligations under sections 961B and 961G of the Corporations Act. The previous advice may be generally appropriate, but this is insufficient and clearly inadequate given the material changes to her circumstances, which include:

- savings contributions
- mortgage repayments
- debt reduction
- superannuation
- child costs
- insurance needs

This example may be an obvious one, but it does demonstrate how almost imperceptible changes can, over



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time, trigger the need to reconsider the client's needs and financial goals. Advice does not have a 'use-by date' that, on expiry, triggers the need for a new SOA. Instead, it is a matter of context and an objective and subjective assessment of appropriateness. Consider the following example:

Example 2. No significant change in circumstances

An ongoing client, Mr Wilson, is in pension phase and has been for over six years. The adviser meets with him annually, reviews his investment strategy, minimum pension amounts and his cash funding requirements. The adviser was happy to use an ROA, but standard industry practice is to issue a new SOA after five years.

In this example, there is probably no regulatory requirement to issue a new SOA. There is no significant change to Mr Wilson's circumstances or the original basis of advice which recommended he move from accumulation to pension phase. His circumstances have not changed and there is no compelling need to make any changes to his products or strategy.

Mandating expiry dates

This complexity is perhaps the reason some AFS licensees put an expiry date—for want of a better word—on the validity of an SOA.

To be clear, we are not advocating for expiration dates on SOAs—they are already too long and disengaging—but we do urge advisers to actively exercise their professional judgment instead of relying on habitual responses or Pavlovian conditioning.

However, mandating expiry dates is a common response to these issues. Although it is not required, are there circumstances where an SOA expiration of five years may be helpful? While the relevant law does not specify a time limit, laws and regulatory expectations do change over time, and these external factors may compromise the value of the previous advice.

If you consider what has happened over the last 10 years, you will understand the tension. July 2013 saw the best interests duty and related obligations come into effect, along with the *Corporations Amendment (Future of Financial Advice) Act 2012* (FOFA) and these changes mean that advice, produced prior to 2013, will be significantly different to advice produced today. With this in mind, one might reach the conclusion that nine years is too long.

Reviews and record keeping

We have repeatedly warned licensees not to rely on assumptions or presumptions when determining whether an adviser can use an ROA. Too often we review an ROA that, despite the adviser's confidence, contains advice that is materially different to the original advice or reflects client circumstances that are significantly, and obviously, different from the original advice.

It is not enough that an SOA was previously provided, the subsequent advice must be materially consistent with that advice. If their circumstances have materially changed, or the adviser wants to introduce a new strategy or address new needs and objectives, a new SOA must be given. Likewise, if the previous advice cannot be located or produced, then the adviser will need to give an SOA and use that new document to support future ROAs. This is an important point for advisers to understand. Although an ROA is a defined regulated document, it needs to be considered in conjunction with the previous advice on which it relies.

When we review files, we do not review the ROA in isolation but consider it in the context of the entire client file, including the original advice document and all the supporting information. ASIC has confirmed in Information Sheet 266 that it takes a similar approach.

What does this mean beyond taking additional care to ensure consistency?

In our view, this may create a requirement to retain the original advice document on which the ROA relies, even if there are more than seven years between the SOA and the ROA.

As advice professionals, ASIC acknowledges the critical role in determining significance and deciding when, and under what circumstances, advisers use ROAs. We recommend that advisers exercise their professional judgment and base their decision and approach on the answers to the following questions:

- How long is too long in terms of the adviser's risk appetite?
- Do staff/representatives clearly understand the obligations?
- Do record keeping guidelines include retaining advice documents for ROA purposes? **FS**