

ASIC disconnected from compliance reality, advisers say

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Recent efforts from the regulator to ease the compliance burden are being met with scepticism from advisers, who say the continuation of ‘lookback’ compliance requests is precluding advisers from writing the shorter, simpler statements of advice ASIC is touting.

Earlier this week *Professional Planner* reported on ASIC Commissioner Danielle Press’s comments at the Parliamentary Joint Committee’s hearing into ASIC oversight, where she revealed the regulator was [consulting with the industry on a project to lower the cost of advice delivery](#).

Press said that understanding the impediments advisers face in providing scalable and affordable advice is “probably the most critical thing” ASIC is doing in advice right now.

Many believe that while ASIC’s intention might be well placed, its promise to reduce the cost of advice doesn’t gel with the ongoing ‘lookback’ program, which involves auditing licensees for advice files up to ten years old.

“All that lookback stuff with ASIC has meant that advisers are looking over their shoulder,” says Story Wealth’s Anne Graham.

While broadly supportive of ASIC, Graham believes talk about reducing the cost of advice doesn’t hold water when ASIC’s regulatory process involves systematically raking advisers over the coals. Advisers won’t make their SOAs shorter and simpler when they are terrified of being investigated, she explains, so the cost to serve is going nowhere.

“The expensive part is documenting and creating file notes, you need to leave the breadcrumbs,” she says. “You probably do it in the extreme because if you can’t prove it, it never happened.”

According to Presidio Group principal adviser Jason Cook, there’s “a lot of fear” in advice.

“A lot of my peers are living in fear of the implications of these lookbacks, particularly those from larger licensees,” he says.

Cook says his firm recently had to increase their price 15 per cent “across the board” to accommodate bloated compliance costs, which not all their clients stuck around

for. “We’re just going to have less clients and the clients we have will be charged more,” he says.

The compliance issue extends beyond the Corporations Act, he believes, with FASEA’s Code of Ethics also bringing several grey areas into play that make it hard for advisers to provide compliant scaled advice. “My experience is that it’s next to impossible,” he says.

More lookbacks, more fear

According to Katie Johnston, a solicitor at The Fold Legal, ASIC’s lookback activity is still causing shockwaves and prohibiting advice in a number of ways.

“The ‘lookback’ is definitely top of mind for people purchasing businesses,” she says, adding that the number of lookback requests “seems to be increasing”.

Johnston – who works in advice business acquisitions – says buyers are concerned about lookback requests and increasingly asking for contractual protections for past compliance issues.

“It’s coming out in terms of people being risk averse with their acquisitions and doing more due diligence and bolstering contracts to try and provide the purchaser with better protection if there is a lookback request,” she says.

Too great a risk

Advisers say ASIC’s attempt to provide a prescriptive guide to compliance with their 2017 ‘example’ SOA (RG90) is more of an indication of how out of touch they are than anything else.

The guide is reasonably comprehensive and touches on the major requirements for a compliant SOA. According to Graham, however, it can’t be taken seriously. “Everyone laughed at it,” she says. “Sometimes ASIC just gets it wrong.”

Graham reckons the problem is that ASIC might call the example SOA compliant, but lawyers and compliance specialists within licensees will tell you that it is far from defensible. “The licensee says the legal guys need more,” she says.

“Got to any compliance guy and ask them if it would pass,” says PMM Group adviser Aaron Waters. “Lawyers know this won’t hold up in court, and that’s the disconnect.”

Walters says it’s just not worth making his SOAs any less comprehensive than they currently are. “There’s still too great a risk of not being compliant,” he adds.

Legislators or regulators?

During the PJC hearing Commissioner Press seemed to indicate that she is not wholly unaware that there is a disconnect between ASIC's view of compliance and that of advisers.

"We hear a lot that the cost is too high but we're not sure where those costs are coming from," she stated.

Indeed, the Assistant Minister for Superannuation, Financial Services and Financial Technology, Jane Hume, called 80-page SOAs "kind of crazy" during a recent fireside zoom chat with Conexus Institute CEO David Bell.

"We probably need to bring down the cost by making financial advice simpler," the Senator admitted.

The Commissioner said she wasn't sure whether the disconnect was a "regulatory issue or a legislative issue", but the regulator was trying to get to the bottom of it.

Press, who is appearing at [*Professional Planner's Best Practice Forum*](#) on August 4, went on to note that ASIC is consulting with the industry to ascertain if guidance is clear enough or whether licensees may be taking a different view to ASIC.