

Ongoing or fixed term? Advice polarised by fee consent regime

6 July 2021

<https://www.professionalplanner.com.au/2021/07/ongoing-or-fixed-term-advice-polarised-by-fee-consent-regime/>

New fee consent rules have polarised the advice community, with principles-based oversight forcing groups to choose between ongoing service agreements (OSAs) or fixed-term agreements (FTAs).

Muddying the waters is confusion about the very nature of an OSA, and whether FTAs are really just ongoing contracts in disguise.

When ASIC finally released its guidance on the new ongoing fee arrangements in mid-June, most eyes focussed on the section explaining the characteristics of an OSA and how it would be distinguished from an FTA.

"We recognise that licensees and advisers frequently enter into fixed-term agreements for charging a client fees for a period of 12 months or less," ASIC stated. "There are a range of factors that ASIC will consider in determining whether or not such an agreement is an ongoing fee arrangement."

ASIC tempered the ambiguity by saying it would judge FTAs on whether systems and processes enabled fees to switch off at the end of that period, and whether there was a demonstrable "understanding" between the client and the adviser.

In truth, many advice groups had already decided on FTAs before the guidance came out. IOOF, for example, started transitioning advice clients onto FTAs as early as March 2020.

According to IOOF general manager of advice standards and governance David Flynn, the move was centred around the principles of transparency, consent and accountability.

"Even before ASIC's guidance was released IOOF had considered and built its written agreements, back-office and admin systems to cater for the same factors that ASIC provided in its guidance," Flynn says.

Guillotine date or leeway?

So why would the biggest advice group in the country deliberately avoid the safety and surety of ongoing contracts?

For one thing, IOOF aren't alone in doing so.

"Fixed term agreements have become really popular," says The Fold Legal partner Simon Carrodus. "It might almost be running at 50/50 in the marketplace."

"Many want FTAs because it's contract law instead of regulation, whereas OSAs and financial disclosure are governed by the Corporations Act," explains Encore Advisory CEO Tom Reddacliff. "FDS regulation can be quite convoluted, whereas FTA contracts are clean and simple."

According to Assured Support's Sean Graham, FTAs are "arguably a better outcome" for clients.

"You actually have to be able to deliver the service to justify the ongoing fees," he says. "And the clients are always in control. It's essentially what Hayne recommended."

FTAs are more demanding from a practice perspective and well-suited to groups that have high levels of governance. Go one day over on fees and groups could find themselves in hot water. If fees come via product providers, switching them off is even more problematic.

"Those guillotine dates can get tricky," Reddacliff says. "Your compliance team needs to be top-notch." Highly templated FTAs could also draw ASIC's ire. "The language is important," Graham says. "You don't want the contract to be exactly the same as the last one."

On the flip side, using OSAs lessens the risk of a breach and adds the comfort of keeping clients on-contract.

Sticking to OSAs also effectively gives advisers a 150-day window to get new service agreements signed – 120 for the review period and 30 days before the consent expires.

A bit of tolerance

While some have questioned whether switching to FTAs constitutes an anti-avoidance measure, most give it the all-clear.

"As long as it's done properly I don't have a problem with FTAs," Carrodus says.

Groups like IOOF took a slight risk by jumping the gun well before ASIC's guidance came out, he adds, but the regulator's eventual line on the matter was softer than some feared.

"Early on ASIC seemed to be doubting the nature of FTAs but their latest guidance points to a bit of tolerance," he says.

Carrodus reckons FTAs can work just as well as OSAs if you've got the systems in place to handle the termination of payments. More importantly they maintain the spirit of the fee consent reforms, which came as a response to the fee-for-no-service scandals uncovered at the Hayne royal commission.

"In some ways FTAs are even better than OSAs because the client needs to re-sign within 12 months without the 150-day grace period," Carrodus says. "They're not avoiding anything, they still achieve the broader policy objective of making sure clients don't continue paying fees ad nauseam."

Feet in both camps

According to Reddacliff, firms will end up using a mix of OSAs and FTAs eventually – just like they always have.

"Clients are now telling me they'll use some FTAs but generally stick to the FDS/OSA regime," he says. Graham agrees, predicting a trend towards FTAs for high-net-worth clients and OSAs for clients on the low to medium end of books.

"They might use FTAs for the top-end clients and OSAs for the regular mums and dads," he says. "With your platinum clients, it's a bespoke service so you might want to make sure it's done properly."

Like most things in advice, then, it's horses for courses. Advisers and licensees will do what works best for them and their clients.

"I think it's actually easier to do OSAs because there's substantively more time," Graham says. "But it depends on the type of business. If you're extremely well-governed with sharp processes, FTAs work really well. And there's nothing wrong with FTA's from a regulatory standpoint – ASIC, to their credit, have been very commercial about it."