

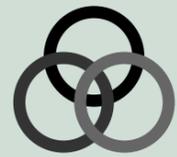


Personal  
Finance  
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# Agent as Client

## What you need to know

In association with



**Diminimis**

# About this guide



This is an interactive document with hyperlinks throughout

## Infrequently asked questions

There are different ways in which an adviser firm (Adviser) and a discretionary investment manager (DIM/DFM) can work together to provide a discretionary investment service to the end investor but confusion with the terminology, the different nuances and the answer to 'who is the client?' have significant implications for Advisers.

The act of an Adviser using the services of a third-party investment manager is often referred to as 'outsourcing' but in the FCA rule book only Advisers who have discretionary permissions can truly outsource to a DIM. So, if you are not outsourcing, what are you actually doing?

Diminimis has worked with the Personal Finance Society to help clarify who is responsible for what in the different operating frameworks. It is clear Advisers are unaware of the issues whilst many DIMs continue to promote their services with no clear understanding of the legal and regulatory requirements that need to be met.

Research and due diligence is flawed if these issues are not considered.

If you have signed an intermediary agreement with a DIM, based on the agent as client rule, but have not read and understood the terms and checked your client agreements meet with the requirements, you may have inadvertently left yourself vulnerable to future claims. This covers a lot of the MPS on platforms as well as some 'bespoke' solutions.

## Why might some Advisers have unintentionally over-stepped the mark?

You may have signed a legal document, the intermediary agreement, giving an undertaking to the DIM you have a level of authority from the end investor to;

- Act as agent, in a legal capacity, with the power to commit and bind the client to specific actions. This will include the authority to appoint a DIM.

If a standard advisory agreement is in place between you and your client, you are unlikely to have such a level of authority and have therefore exceeded your client's authority. As such this may lead to DIMs not being properly appointed by you as you do not have the legal power to do so.

We are very grateful for Diminimis working with the PFS to help clarify these issues. Diminimis created this reference document with the help of the following specialist regulatory lawyers:

- Philippa Hann Dip PFS, Partner, specialist financial services litigator at Clarke Willmott LLP Solicitors
- Alan Hughes, Partner, and Terence Dickens, Managing Associate, Foot Anstey
- Michael Lewis, Partner, Osborne Clarke LLP.

# Be careful what you ask for!

**Why do discretionary investment managers (DIMs/DFMs) offer their services by way of the ‘agent as client’ rule? The answer is often because ‘advisers are asking for it’.**

However, our work with adviser firms (Adviser) and DIMs suggest there is often a mismatch between what the Adviser understands by their request and what the actual situation is, often leaving the Adviser in an untenable situation.

The following document covers a range of questions Advisers should be asking before they request a solution based on the agent as client rule and understand the options available to them when they review the situation. Advisers are taking on far more risk than they probably understand when there are alternatives to be considered.

**It is important for you to understand:**

- Being an FCA regulated Adviser in itself does not meet the requirement to be categorised as agent in the context of ‘agent as client’
- Your standard advisory agreement with your client is unlikely to meet the requirements of appointment as agent
- Your agreement with your client needs to cover:
  - Your appointment as agent
  - Your authority to appoint the DIM
  - Compensation avenues in the event of client complaints
- The implications of being categorised as a per se professional client
- The need to explain to your client at outset they may not have the right to take the DIM to FOS

- Your additional fiduciary duties to your client
- The above needs to be accurately reflected in the agreement between yourself and the DIM – but if you and DIM agree the DIM will treat the end investor as its client then it undoes the whole arrangement.

There is an alternative arrangement based on the Reliance on Others rule which should be considered. It meets most advisers objectives of working with a DIM:

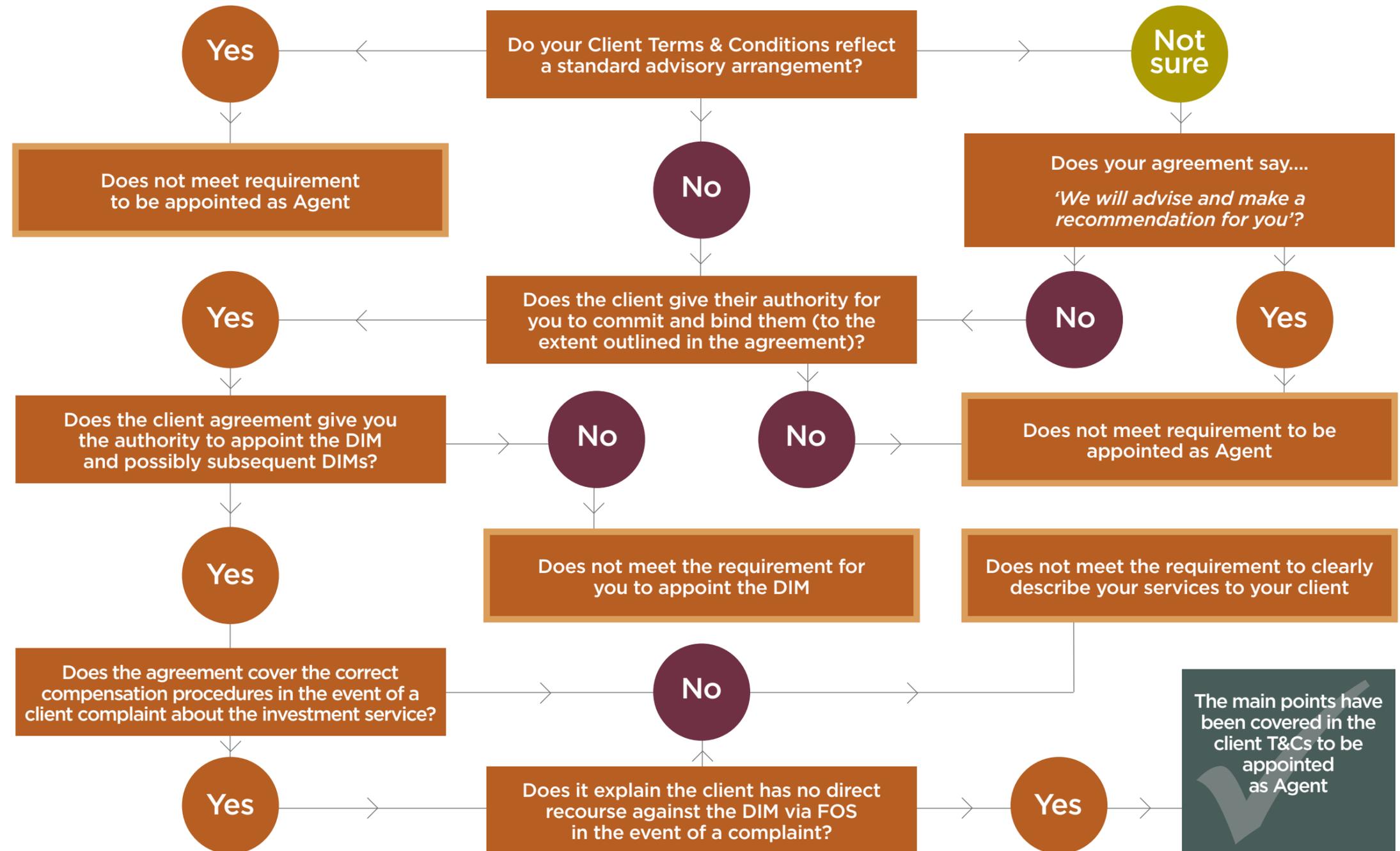
- Operationally the working practice is very similar to how services are delivered under the agent as client arrangement
- You can continue to operate with your current client T&Cs, as you continue to work in an advisory capacity
- In the event of a client complaint the client can take the DIM to FOS

- You are not treated as a per se professional client
- There is an equitable sharing of responsibility to the client between the DIM and yourself with both parties having a regulatory duty of care to the same client.

# Agent as Client

## Does your client agreement meet the requirements of being appointed the agent?

Being an FCA registered adviser is not sufficient to meet the requirements of being appointed Agent by your client nor does this give you the authority to appoint a DIM/DFM to manage your clients' investments. The agreement with your client is a critical document through which you receive the authority to act as Agent. The following is an overview to help check if yours meets the requirements.



# Infrequently asked questions - a reference guide.

**Agent as Client, how does this work?**

**I'm regulated by the FCA, is this sufficient?**

**What are the consequences to you of acting under Agent as Client?**

**What's the Alternative to Agent as Client?**

**What is the reliance on others rule?**

# Agent as Client, How does this work?

**1.** Are you normally operating as an agent *of the* client?

**2.** What is the difference between agent *as* client and agent *of the* client?

**3.** Who does the discretionary manager treat as their client under Agent as Client?

**4.** What is the relationship between the client (the end investor) and the discretionary manager under Agent as Client?

**5.** Does the client need to sign a discretionary mandate to give discretion under agent as client?

**6.** Can discretionary managers contact the end client under Agent as Client? i.e. 10% drop notifications.

**7.** Does this only apply when I am working with a discretionary investment manager or do the same issues apply when I am using a unitised multi-asset fund (product)?

**8.** How do I know which operating framework I am subject to?

# 1.

**Are you normally operating as an agent *of the client*?**

Yes. You are likely to have an advisory agreement with your client.

# 2.

## What is the difference between agent as client and agent of the client?

### Quick Answer:

Who is the client for discretionary investment management services?

**Agent of the client** - the end investor is the client of the DIM; you are acting in an advisory capacity with your client.

**Agent as Client** - you are the client of the DIM.

To act as Agent you must be acting in a genuine agency capacity and have the authority of the client to commit and bind them....to the extent of the agreement.

### Full answer:

When you act as agent, you may act on behalf of the client within the scope of the authority given to you by the client. You owe fiduciary duties to the client. If a deal results from the activities of the agent, there is an agreement between the agent's client (as principal) and the counterparty which can be enforced so long as the agent has acted within the scope of its authority and has made clear to the counterparty that it acts for the principal (regardless of whether it has named the principal). **If the agent has acted outside its authority, the client and the counterparty (in this case the DIM) would each have a claim against the agent.**

Normally you will act as agent for the client. The scope of your authority is typically set out in an advisory agreement between yourself and the client. You will usually give investment advice to the client and the client will make the investment decision. You then assist in the implementation of that investment decision.

To act as agent means the agent is acting as if it is the client. This requires the client to appoint you and to give you authority to bind the client e.g. to an investment mandate and to appoint a DIM.

If a DIM is appointed by you, the DIM is required to categorise you as its client. As you will be an authorised person (or an appointed representative of an authorised person), the DIM will by default categorise you as a 'per se professional client' (unless otherwise categorised).

The consequence of this categorisation is that the DIM needs only to treat the agent (i.e. you) as its client for regulatory purposes without regard to the underlying client. So, the regulatory protections that would otherwise apply to the underlying client if there were a direct regulatory relationship between the DIM and the underlying client do not apply.

# 3.

## **Who does the discretionary manager treat as their client under Agent as Client?**

The DIM treats the Adviser as their client.

# 4.

## **What is the relationship between the client (the end investor) & the discretionary manager under Agent as Client?**

The DIM often has no knowledge of the end investor and there is no direct contractual relationship with the end investor, albeit the agent binds the investor client into a mandate with the DIM.

This is hard to reconcile with the Adviser and DIM's responsibilities under RPPD and now PROD.

# 5.

## **Does the client need to sign a discretionary mandate to give discretion under agent as client?**

No. The client must give you the authority to act as agent and thereby it is you who is giving the DIM the authority to act with discretion. An agent cannot delegate discretion unless specifically authorised to do so by the client. (In this regard, see all the difficulties about Powers of Attorney appointing a DIM).

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# 6.

## **Can discretionary managers contact the end client under Agent as Client? i.e. 10% drop notifications.**

The DIM may have no knowledge of the end investor so will inform you as their client. In the spirit of the rule, the end client must know about the 10% fall within the working day the breach occurs, so this obligation will fall onto you to fulfil but it may well be fulfilled by the platform. One for you to check.

# 7.

**Does this 10% drop issue only apply when I am working with a discretionary investment manager or do the same issues apply when I am using a unitised multi-asset fund (product)?**

The rule applies to the provision of a portfolio management service. As such a product-based solution is not subject to this additional periodic reporting.

# 8.

## **How do I know which operating framework I am subject to?**

This will be outlined in the intermediary agreement provided to you by the DIM. If it is on an agent as client basis it will state the DIM will treat you as their client. However, look out for the DIM confirming they will treat the underlying client as their client as this undoes the agent as client rule.

# I'm regulated by the FCA, is this sufficient?

**1.** I'm a regulated Adviser. Is this sufficient to be categorised as agent in the agent as client arrangement?

**2.** When acting as Client, can the DIM treat me as a professional client?

**3.** What does being treated as a 'per se professional client' mean in practice?

**4.** Where can I see if the DIM is treating me as a per se professional client?

**5.** Is there a mis-match between what can be invested in if I am treated as a professional, but the end client is a retail investor?

**6.** Who is on the hook if the discretionary manager does invest in assets only appropriate for professional clients and the client complains?

# 1.

**I'm a regulated Adviser. Is this sufficient to be categorised as agent in the agent as client?**

No! This is a common misconception. The agreement with the client is the important document whereby the client must give you the appropriate authority.

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# 2.

**When acting as Client, can the DIM treat me as a professional client?**

Yes.

# 3.

## What does being treated as a 'per se professional client' mean in practice?

If the DIM treats you as a per se professional client, it is entitled to assume that you have the necessary knowledge and experience to understand the risks involved and are able to bear any related investment risks. Given that any investment risks will sit with the underlying clients if you have acted within the scope of your authority, the underlying clients do not receive the regulatory protections designed for retail clients.

In particular:

- the DIM may utilise products which are potentially suitable only for professional clients;
- there are no cancellation rights; and
- there is a likely to be a loss of access to the FOS.

However, it is likely that the underlying clients could claim compensation through you as their agent against the FSCS in the event the DIM fails owing the client money.

# 4.

**Where can I see if the DIM is treating me as a per se professional client?**

The categorisation of the Adviser by the DIM is set out in the intermediary agreement between you and the DIM.

# 5.

## **Is there a mis-match between what can be invested in if I am treated as a professional, but the end client is a retail investor?**

There is a risk that the DIM will invest in assets that are suitable for professional clients creating a potential mismatch on suitability.

There is also the risk that the type of products which are considered to be in the best interests of professional clients under the product governance rules will not be in the best interests of the underlying retail clients.

# 6.

## **Who is on the hook if the discretionary manager does invest in assets only appropriate for professional clients & the client complains?**

If the DIM categorises you as a per se professional client and invests in assets suitable for per se professional clients, it may be regarded as complying with the rules because the agent as client rule does not require the DIM to look behind the agent.

If you permit the DIM to treat you as its client with no regard to whether the assets are suitable to its underlying clients, there is an argument that you do not comply with your duty to act in the best interests of your client.

# What are the consequences to you of acting under Agent as Client?

**1.** Have I set up my arrangements with my client correctly?

**2.** Who is “on the hook” if there is a client complaint about the investments?

**3.** Who is “on the hook” if the discretionary manager doesn’t manage the portfolio to the mandate i.e. a cautious risk mandate was invested 100% in emerging markets?

**4.** Do I need to monitor the discretionary manager’s investment decisions?

**5.** What controls and oversight should I have in place?

**6.** How does acting as Agent in this way affect my:

- a) Client T&Cs?
- b) My arrangement with my PI insurer?
- c) My liabilities?

**7.** Is there a more equitable way to divide responsibilities between myself and the DIM?

# 1.

## **Have I set up my arrangements with my client correctly?**

Unlikely, unless you have specifically addressed all the issues in your client agreement & T&Cs and have explained this to your client. If you are only working with a standard advisory agreement you will not have met the requirements.

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# 2.

## Who is “on the hook” if there is a client complaint about the investments?

As with any complaint, who is “on the hook” depends on how the regulatory and contractual obligations are set up. The regulatory requirement is that a recommendation or decision to trade is suitable for the client. Where there is a direct contractual relationship between you and client or the DIM and client, the responsible party is easy to identify. Entering into an agreement to act as agent for the client muddies this water.

The regulatory obligation regarding suitability relates specifically to retail clients (and not to professional clients). Therefore where you agree to become the agent and the Agent as Client rules permits yourself to be treated as the client, this regulatory obligation arguably falls away removing the mainstay of any complaint. It also takes away any arguments over the risks of an investment, type of transaction or the frequency of trading.

With the DIM effectively “off the hook” it leaves the client with only you to pursue and heaps the contractual and regulatory obligations squarely on your shoulders. You are responsible for not only advising the client as to the suitability of a DIM managed portfolio but also the selection of that portfolio and monitoring that the portfolio is suitable for the client and the client is suitable for the portfolio, at all times.

In the event of a complaint and an award of compensation, where there is no direct contract between the client and the DIM or direct complaint against the DIM, the client may only have your resources to pursue. Spreading the responsibilities and risk must be in the client’s best interest.

# 3.

## **Who is “on the hook” if the discretionary manager doesn’t manage the portfolio to the mandate i.e. a cautious risk mandate was invested 100% in emerging markets?**

This is clearly an extreme example. History shows that some common sense investments at the time have proved to be not so sensible with the benefit of hindsight. Split capital investment trusts, commercial property as a non-correlating asset to the equity market are examples where it has gone wrong for investors, both of which were ‘normal’ investments within discretionary portfolios at the time but have been judged years later. What are the unknown unknowns of the future investment market? Would you want to have the liabilities for these investment decisions to sit within your business?

The Client (investor) may not have access to the FOS to pursue the DIM in the event of a complaint therefore his/her route to complain would be against you (who would, in turn, need to take separate action against the DIM, if appropriate and indeed possible given the lack of protection under the professional client relationship - although there is likely to be a contractual route to pursue) which increases the chances of the Client seeking to pursue you for the decisions made by the DIM.

# 4.

## **Do I need to monitor the discretionary manager's investment decisions?**

Yes. You will need to monitor a range of issues on behalf of your client. As agent you have a duty of care to your client to ensure the portfolio is suitable at outset and remains suitable for the time your client holds the portfolio.

You won't have passed that responsibility to the DIM. The discretionary service is dynamic and as such the moving parts need to be monitored. You will be responsible to the investor client for ensuring the DIM stays within mandate. In the event of a future complaint you may need to justify investment decisions that were made by the DIM, not you.

# 5.

## What controls and oversight should I have in place?

Understanding the contractual obligations will assist in identifying what controls and oversight requirements will need to be met.

This will include frequency of portfolio reviews, what happens if you are not comfortable with the DIMs decisions, does the DIM still meet the criteria for selection as the provider of the service and if no longer suitable what do they do?

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**a. Client T&Cs?****b. My arrangement with my PI insurer?****c. My liabilities?**

# 6.

## How does acting as Agent in this way affect my:

**a. Client T&Cs?**

If you have a standard advisory arrangement it will need to be amended in order to meet the requirements;

For you to be appointed by the client as its agent for the purposes of you procuring and entering into an agreement for a DIM to provide services to the Client, then your Client T&Cs should explicitly deal with this scenario and be clear about the obligations that you are assuming (and not assuming) in carrying out that role. This must specifically include an authority to engage the DIM on a discretionary basis.

The Client T&Cs should make the following things clear:

- That the Client may appoint you as its agent only for the purposes of you procuring and entering into an agreement for a DIM to provide services to the Client.
- How responsibility for suitability of the DIM portfolio for the Client is allocated between you and the DIM. This is crucial to ensure that the responsibilities of each

party are clear and that there is no “suitability gap”. This allocation should also be consistent with what is stated on the same issue in the agreement between yourself and the DIM – if it is not consistent then there is ambiguity and therefore potential for both dispute(s) and client detriment.

- Complaints procedure and access to FOS; the DIM has no direct relationship with the Client then the Client has no direct recourse against the DIM via the FOS. If that is the case and you accept that arrangement, this needs to be made entirely clear to the Client.
- You must explain this complaints procedure to the Client at the outset and more sophisticated Clients may therefore question why you are recommending a solution and a structure which leaves the Client with no access to the FOS for a crucial part of the overall package of services being recommended by yourself.

The key issue is consistency between the Client T&Cs and the Adviser/DIM Agreement – whilst you may understand that the DIM takes responsibility for managing each model portfolio in accordance with its mandate, the Adviser/DIM Agreement may not always reflect this. We have seen, for example, an Adviser/DIM Agreement which stated that Adviser takes responsibility for all investment decisions made by the DIM “as if it had made them itself”.

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a. Client T&Cs?

**b. My arrangement with my PI insurer?**

c. My liabilities?

# 6.

## How does acting as Agent in this way affect my:

**b. My arrangement with my PI insurer?**

It is important that you disclose, fully and accurately, to your PI insurers the nature of your activities (both during the life of any policy of insurance and, in particular, at the point of inception/renewal on the basis that it is material information which PI insurers would expect to know when writing the risk and, in particular, setting policy premiums). It is also, of course, important to ensure that those activities fall within the ambit of the regulatory permissions held by yourself.

If you are not entirely clear and unambiguous in your Client T&Cs that you will recommend a DIM and, if the Client accepts that recommendation, the Client will then appoint you as agent to enter into an agreement with the DIM on its behalf, then you could be exceeding your agreed authority from the client by acting as the Client's agent in appointing a DIM. Once again, this could cause unintended PI coverage issues.

As always with PI insurance, it is essential to consider the proposal form very carefully in order to ensure that you provide accurate and complete answers to insurers, and disclose everything that is relevant to the PI insurer - especially on renewal when PI insurers (re)assess the risk and set premiums commensurate with the risk they are agreeing to cover. In addition to late notifications, insurance coverage disputes frequently arise due to failure(s) by insured firms to disclose issues accurately and fully to insurers at the proposal/renewal stage. If you don't understand your own business model properly, you are likely to mis-represent the position to your insurers.

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a. Client T&Cs?

b. My arrangement with my PI insurer?

**c. My liabilities?**

# 6.

## How does acting as Agent in this way affect my:

**c. My liabilities?**

The nature of your liabilities will flow from the arrangements entered into, and their clarity. If you understand the arrangements that you are entering into with the DIM, it should be clear what you are and are not responsible for in terms of suitability, and you can then communicate that clearly to the Client, thereby reducing the scope for disputes to arise.

It should however be noted that even if roles and responsibilities are clearly documented with the Client, it is not possible to entirely rule out/prevent a Client from pursuing you if something goes wrong with a DIM investment. As you are the main Client contact, the Client will often look to you as a first port of call if there is a problem. If, however, you have clearly documented your arrangements with the DIM and the Client, and have made the nature of the arrangements (including issues of access to the FOS) entirely clear to the client,

it will be more straightforward for you to point a disgruntled Client in the direction of the DIM, where appropriate.

The other issue that should be borne in mind is the selection of the DIM by yourself. The FOS makes decisions based on what is “fair and reasonable” and so if you do not do sufficient due diligence on the DIM and the model portfolios which you are recommending, then you could still be liable for losses suffered by the Client and caused by the DIM. It is therefore also vital for you to be in a position to show/evidence: what due diligence was conducted on the DIM; how and why a DIM was considered to be suitable for the client; and what other considerations were taken into account before making your recommendation(s) to the Client.

# 7.

## Is there a more equitable way to divide responsibilities between myself and the DIM?

“Agent as Client” is not (at least not necessarily) inherently unfair if the arrangements are documented very clearly and all parties fully understand their rights and obligations at the outset. However, the main areas of concern for Advisers are:

The additional work and different processes required:

- a. This may be a very different way of working to what you are used to
- b. The need for different client agreements
- c. The need for additional controls and oversight including ensuring, where required, that the DIM service remains suitable on an ongoing basis
- d. Potential PI insurance issues
- e. The lack of access to FOS in relation to the DIM, which may increase the chance of a complaint being made by clients to you directly where there is a loss or general dissatisfaction with the service provided by the DIM
- f. Explaining the complaints procedure to the Client at outset who may therefore question why you are recommending such a solution for a crucial part of their investment.

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# 1.

## What's the Alternative to Agent as Client?

You should be clear on what you are trying to achieve by working with a DIM. From our research the main objectives of Adviser firms are:

- Protection of client base i.e. no poaching by the DIM
- Consistency of investment outcomes for clients
- Efficiency
  - In use of internal resource
  - In investment administration (discretionary solutions are more efficient)
- Acceptable cost
- Reducing business risk.

# What is the reliance on others rule?

**1.** How does the reliance on others rule work?

**2.** Does it meet my objectives?

**3.** Summary of differences

**4.** How do I meet my obligations if I have been operating under Agent as Client for a while?

**5.** Can I compare discretionary manager charges if they operate under different frameworks?

# 1.

## How does the reliance on others rule work?

The working practice is very similar to how services are delivered under the agent as client model. The main operating difference is ensuring a strong interface between yourself and DIM at outset as both firms have a legal and regulatory duty of care to the same client.

As such it is in the interests of both parties to ensure the solution provided to the client is suitable and that everyone, including the client, is clear about who does what.

You and the DIM have the same regulatory responsibilities when taking on a new client and ongoing. As they are both regulated entities the DIM can rely upon your work to conduct all the client facing work and assessments.

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# 2.

## Does it meet my objectives?

- Protection of client base – Yes - DIM personnel never meet the client unless specifically requested by you. In addition, the intermediary agreement should confirm the sanctity of your client base.
- Consistency of outcomes for clients – Yes
- Efficiency - Yes
  - a. In use of internal resource
  - b. In investment administration (discretionary solutions are more efficient)
- Acceptable cost - Yes
- Reducing business risk – Yes, you continue to operate on an advisory basis.

The client agreements do not need to address the specific Agent issues outlined above.

Unlike the agent as client model, both the DIM and yourself have a regulatory duty of care to the end client which should ensure a robust working relationship with a strong interface between yourself and the DIM. This will make it easier for both to comply with RPPD and PROD.

In contrast to the “agent as client” model if you have discharged your duties correctly but the DIM has not managed a portfolio in accordance with the agreed mandate, then the client will have recourse to the FOS against the DIM.

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# 3.

## Summary of differences

Summary of issues	Adviser/DIM – Operating Frameworks	
	Agent as Client	Reliance on Others
Are you operating on an advisory basis?	No	Yes
Who is “on the hook” if there is a client complaint about the investments?	Adviser for the suitability of the mandate and the investment management to the mandate	Adviser for the suitability of the mandate DIM for the investment management to the mandate
Do I need to monitor the discretionary manager’s individual investment decisions?	Yes	No
What controls and oversight should I have in place?	Sufficient to meet the terms of the agreements I have with my client and the DIM	Enough to make sure the DIM remains fit for purpose
Can the client bring a case with FOS against the DIM?	No	Yes
Do my T&Cs with a client need to specifically address a number of issues to allow me to operate under this framework?	Yes	No
Does the end client need to sign the DIM’s mandate to give them discretion?	No	Yes

# 4.

## **How do I meet my obligations if I have been operating under Agent as Client for a while?**

If you realise you are operating under the Agent as Client arrangement but are not set up correctly the following options are open to you; please note it will entail re-papering all agreements with clients who are using this service whatever option is chosen.

1. Establish correct paperwork and processes to continue with the agent as client arrangement.
2. Negotiate with the DIMs to change the basis of the service from agent as client to the ‘Reliance on Others’ arrangement.
3. If you do not want to act as Agent consider a provider who already offers “Reliance on Others” as standard.

# 5.

## **Can I compare discretionary manager charges if they operate under different frameworks?**

As can be seen from the previous answers, only when you understand the roles and responsibilities under the different operating frameworks can you start to make comparisons on charges and assess the value of working with a DIM.

# Contributors to this guide

## Clarke Willmott

Clarke Willmott has a dedicated team of lawyers specialising in assisting Financial Advisers from pursuing or defending claims of professional negligence, to acting for Financial Advisers in other commercial disputes, advising on contracts between adviser and client or other third parties, regulatory advice, employments advice and corporate advice (restructuring, M&A, incorporation).

## Foot Anstey

We are genuine experts in the FS sector and use our expertise to work in partnership with our financial adviser clients, delivering pragmatic and commercial advice in the regulated space. We don't sit on the fence and pride ourselves on being participators not commentators.

## Osborne Clark

Osborne Clarke is an international practice with a leading reputation in financial services and fintech. It has a dedicated financial regulatory team who advise on the requirements of authorisation, new product launches, the application of the FCA rules and the implementation of EC Directives. Its clients include banks, investment platforms, fund managers, SIPP operators and investment advisers.

## About Diminimis

Diminimis helps advisers safeguard their business when reviewing an existing panel or undertaking research and due diligence on discretionary investment managers (DIM/DFM) for the first time. Due to confusion over who is responsible for what when the adviser and a DIM provide services to the same client, and often a mismatch between what the Adviser understands and what the

actual situation is, this often leaves the Adviser in an untenable situation. Diminimis can help bring clarity to ensure there are no surprises for the adviser. Diminimis has established a virtual team to support this work, covering areas of legal and regulatory expertise. Where required this can be taken to a more detailed level to include engaging with our recommended lawyers and regulatory consultants.

Diminimis is The Personal Finance Society's subject matter expert on the qualitative research and due diligence on DIMs/DFMs, with a specific focus on the legal and regulatory aspects of the relationship.

Prior to creating this guide Diminimis has authored the following documents and good practice guidance, which has been published by the Personal Finance Society:

- A Good Practice Guide to Adviser Research & Due Diligence on Discretionary Investment Managers (Feb 2015)
- A range of research and due diligence question sets, published in May 2016, to help both the adviser ask the right questions of the DIM and to allow the DIM to respond to a consistent template.
- In May 2017, an addendum to the Good Practice Guide was published to clarify the position of the adviser in the 'Agent as Client' operating framework.

For further information please visit [www.diminimis.com](http://www.diminimis.com) or contact David Gurr on **07977 474873**

# Case Study – WPS Advisory

## Diminimis delivered a presentation about adviser research and due diligence on discretionary investment managers (DIM/DFM).

Simon Chrystal, CEO of UKWPS and Tim Harries, Head of Risk, Governance and Compliance at WPS Advisory attended and decided the subject required urgent review as the deadline for regulatory permission to allow a change in control was imminent.

It was going to be important that when the two companies merged there needed to be clear accountability with the DIM relationships in order to protect client interests. They reviewed the DIM panel and found there was a strong possibility they could be operating under the agent as client arrangement, leaving them exposed to unnecessary business risks.

Understanding they were not set up correctly to meet the requirements of 'agent', the management team informed the board and decided the relationship with the DIMs needed to change and change quickly. Tim undertook to review the existing panel in detail and ensure any arrangement with a DIM was based upon WPS Advisory acting in an advisory capacity, with the DIM taking appropriate responsibility for the investment service it provided.

In practice, this meant having an arrangement that reflected the Model B arrangement as outlined in the Diminimis Suitability Matrix which is based on the Reliance on Others rule. This gives clear delineation of responsibilities; the adviser conducting all client facing work and assessments, with the DIM relying on this information to provide their portfolio management services. This would also ensure a consistency of arrangements with all DIM - those on the panel and any subsequent DIM that joined the panel.

## Having gone through the intermediary agreements it appeared:

**DIM 1** had clearly understood the question and confirmed they did not use the agent as client arrangements and already operated on the Model B style of agreement.

**DIM 2** confirmed they had a tri-partite agreement. The operating framework appeared to reflect this, but the terms of agreement appeared to reflect the unwanted 'agent as client' relationship.

**DIM 3** confirmed they operated under the agent as client arrangement.

Recognising it would be helpful to get an external expert to review the documents, WPS Advisory engaged David Gurr of Diminimis who was able to confirm:

**DIM 1** terms of business agreement was very clear and understood the issues. They were working with WPS on the basis the advisor undertook all client facing work and the DIM relied upon their work and

assessments in order to construct and run the client portfolios.

**DIM 2** was stating in their intermediary agreement they were operating under the agent as client rule but in practice they were not.

**DIM 3** was stating they were operating under agent as client but had undone this by agreeing in writing to treat the underlying client as their retail client.

Therefore Tim, with assistance from David, contacted DIM 2 and 3 to discuss how the issues could be resolved.

# Case Study – WPS Advisory

**DIM 2** went back to their legal resource to clarify the points raised by David. They recognised their intermediary agreement did not reflect the correct position and indeed they were actually working on a version of the Model B arrangement. This required amendments to the intermediary agreement and some of the client documentation. This has now been addressed and WPS Advisory are comfortable to continue with them.

**DIM 3** arranged for a conference call to take place with Tim and David. They included senior sales management and their lawyer. The lawyer explained how they were using a specific section of the rules that allowed them to operate by treating the adviser as their client. When it was pointed out they had undone this arrangement, as explained in another section of the rules, the lawyer recognised they were not applying the agent as client rules correctly. As such, their bespoke solution was much closer to the

Model B arrangement and they were able to quickly confirm they would make the necessary changes.

However, they now understand many of their supporting advisers are not operating with the legal authority of ‘agent’ when supporting their MPS solution. Consequently DIM 3 is currently exploring the challenges this has created for them. It is fair to say the information they have provided to their supporting advisers has not been clear and may lead to difficulties in the future. WPS Advisory is monitoring progress very closely. If a solution cannot be found soon WPS Advisory will have to move their client’s assets away to another provider in order to protect client interests and to ensure all parties are clear on their responsibilities.

The importance of this issue was raised with Tim by Richard Turnbull, Underwriting Director at Collegiate. He was concerned that some DIMs/DFMs

***“were absolving themselves of some of their responsibilities by getting IFAs to agree to this [agent as client] and IFAs were doing so without giving proper consideration to the potential implications. It seems to be a common misconception amongst many IFAs that by referring investment management out to DFM firms they are de-risking their businesses. My concern is they are then taking their eye off the ball and not fulfilling their duty of care to monitor what goes on in some of these portfolios whilst simultaneously signing TOBAs that place further responsibilities on themselves.”***

Tim and the management team of WPS Advisory, are continuing to review their DIM panel. They now have a clear understanding of what they want in terms of the operating framework and the consistency of how they work with DIMs. This has significant benefits to their controls and oversight requirements and how this is conducted within their Investment Committee.

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COH\_J012552 06/19