



GUIDANCE NOTE

Good character and criminal convictions: Financial Advisers Act 2008

About this guide

The Financial Advisers Act 2008 gives the Securities Commission the ability to authorise financial advisers. The sections of the Act enabling authorisations came into force in December 2010. This guide describes the Commission's process and policies for the assessment of the character of applicants for authorisation, from that date onwards. The guide is intended to answer some of the queries the Commission has received regarding the assessment of good character, as well as provide further guidance on the information applicants need to provide to the Commission in relation to criminal convictions.

Please note, the information provided in this document is for guidance only; it does not constitute legal advice. It signals the approach the Commission intends to take in its interpretation of the law. We encourage you to seek your own legal advice to find out how the FAA and other applicable laws apply to you as it is your responsibility to determine your obligations.

Abbreviations used in this guide

AFA	AFA
Code	Code of Professional Conduct for AFAs
Commission	Securities Commission
CRA	Criminal Records (Clean Slate) Act 2004
FAA	Financial Advisers Act 2008
FSPA	Financial Service Providers (Registration and Dispute Resolution) Act 2008
Section 54(b) conviction	a conviction within section 54(b) of the FAA

References in this guide to sections are references to sections of the FAA unless otherwise indicated.

A. Relevant provisions

Applications for authorisation

Section 54 of the FAA (set out in full in the Appendix) sets out the grounds of eligibility for a person to be authorised as an AFA.

Section 54 includes the following:

- good character assessment: the Commission must be satisfied that the person is of good character;
- review of criminal convictions and fitness:
 - after making appropriate inquiries, the Commission is not aware that the applicant has been convicted by a court in New Zealand or elsewhere of an offence punishable by imprisonment for a term of 6 months or more ('section 54(b) conviction'); or
 - if the Commission is aware of a section 54(b) conviction, it is satisfied that the commission of the offence does not reflect adversely on the applicant's fitness to act as an AFA.
- registration: the Commission must be satisfied that the person is registered under the FSPA or is eligible to be registered.

Specified criminal convictions and other matters relevant to the standing of the applicant will result in a person being disqualified under the FSPA (sections 13(a) and 14 of the FSPA, set out in full in the Appendix). The Companies Office is responsible for establishing the eligibility of financial service providers for registration under the FSPA.

Although some of the good character and fitness requirements of the FAA and the disqualification criteria of the FSPA overlap, the Commission is still required to inquire separately into the character and fitness of applicants for authorisation.

Renewals of authorisation

For renewal* of an adviser's authorisation, pursuant to section 58 of the FAA:

- the eligibility grounds set out in section 54 are applicable;
- the Commission must be satisfied the applicant has complied with the FAA, the terms and conditions of authorisation and the minimum professional standards under the Code. If there is any failure to comply the Commission must be satisfied it is not sufficiently serious or recent to preclude the renewal of the applicant's authorisation.

*The Commission will publish further information on the process and requirements for renewal of authorisation closer to the expiry of initial terms of authorisation.

B. The Commission's assessment of character and criminal convictions - overview

General

The Commission will assess each application for authorisation in terms of the purpose of the FAA which is set out in section 3:

to promote the sound and efficient delivery of financial adviser and broking services, and to encourage public confidence in the professionalism and integrity of financial advisers and brokers.

The FAA does not prescribe the matters that may reflect adversely on an adviser's character or what constitutes 'fitness to act'. The Commission has therefore, established principles and policies for assessing the character and fitness of all advisers wishing to become authorised.

If it has received adverse information relating to an adviser's character and/or criminal offending, the Commission will consider whether authorising that adviser is likely to contribute to achieving the FAA's purpose.

Assessments of character and consideration of applicants' criminal convictions will be made based on the information gathered or already held by the Commission, and will follow a defined process.

Character

In addition to all other considerations relevant to character, criminal convictions within section 54(b) **and** any convictions outside of section 54(b) may be relevant. Advisers should keep this in mind when applying for authorisation and making the adverse impact declaration (below).

Criminal convictions

Criminal offending within section 54(b) also requires the Commission to be satisfied the offending does not reflect adversely on the adviser's fitness to act as an AFA. This means the Commission has discretion to consider each such application by having regard to the particular circumstances of the applicant and the offence. When assessing fitness to act the Commission will consider whether an adviser will properly discharge his or her duties as an AFA, and whether he or she is fit for the role of AFA.

The requirement to disclose information relating to either section 54(a) or (b) of the FAA does not affect applicants' rights under the Criminal Records (Clean Slate) Act 2004 ('CRA'). The 'clean slate' law helps people put their past behind them by giving them the right, in some circumstances, to withhold information about their convictions. Applicants must be eligible individuals under sections [7](#) and [8](#) of the CRA before convictions can be withheld. The CRA should be consulted for full information.

C. Principles, criteria and information

General principles

When assessing the character of applicants for authorisation and their fitness to act (if section 54(b) convictions exist), the Commission's decision-making process will embody the following principles of fairness:

- **Natural justice** – under section [55\(5\)](#) of the FAA the Commission must notify an applicant in writing of a decision to deny authorisation providing reasons; and notify the applicant of his or her right of appeal. The Commission may where it considers it appropriate invite an applicant to give written submissions where it is inclined to deny authorisation, prior to the Commission making its decision.
- **Transparency** – the Commission will make clear its processes for deciding whether it is satisfied an applicant is of good character and fit to act; provide reasons if it is not satisfied an applicant is not of good character or fit to act; and will be able to justify its decisions in the light of its policy on good character and criminal convictions.
- **Consistency of decisions** – the Commission may refer to previous decisions concerning character and fitness to act to ensure consistency of approach, but will ensure the merits of each application are considered carefully
- **Reliability of information used in assessing character** – the Commission will take reasonable steps to ensure information used in assessing character and fitness to act is reliable and adequate.

Case by case consideration

The Commission will consider applications case-by-case from candidates who have a history of criminal convictions or other adverse information about their character taking into account:

- the relevance of any conviction or information to the role of a financial adviser;
- the seriousness and the circumstances surrounding an offence or conduct;
- the passage of time since the convictions or conduct; and
- evidence of rehabilitation of the candidate;

along with any other factors the Commission in its discretion believes to be relevant. The Commission will consider as a whole all the information it holds about applicants' character and convictions before reaching a view on their eligibility.

Penalties for misrepresentation to the Commission

The FAA includes strong disincentives against misrepresentation by those applying for authorisation. Under section [136](#) of the FAA a person commits

an offence and is liable on summary conviction to a fine not exceeding \$100,000, if he or she knowingly makes a false or misleading declaration or representation in support of an application for authorisation.

Sources of information

The Commission will take into account information from the following sources in deciding whether an applicant for authorisation is of good character:

1. Adverse impact declaration. During the process of applying for authorisation, applicants are asked:

Are you aware of any matters that may have an adverse impact on the Securities Commission's view of your character?

Applicants should respond to this question by providing information which the Commission might wish to know before granting authorisation. Applicants should include all such relevant information in their applications. The Commission will not be satisfied that full disclosure has been made unless applicants disclose all relevant information themselves even if the applicant knows the Commission might obtain the information from another source.

If an applicant is uncertain whether a matter should be disclosed, they should either disclose the information or take legal advice on whether or not to disclose the information.

The [AFA Authorisation Guide](#) provides a non-exhaustive list of information advisers should disclose when responding to the question above including information about:

- having been dismissed from employment or asked to resign from a position of trust, fiduciary responsibility or similar;
- having been investigated, charged, disciplined, censured, suspended or criticised by a regulatory or professional body, court or tribunal;
- any current or pending disciplinary or criminal charges, or dispute resolution matters in New Zealand or overseas;
- holding certain positions in a business which has gone into liquidation or receivership while the applicant was connected with that business or within one year of that connection;

and information suggesting:

- a lack of willingness to comply with legal obligations, regulatory requirements or professional standards;
- obstructive, misleading or untruthful dealings with others;
- a breach of fiduciary obligation or other obligation involving trust;
- a failure to deal appropriately with conflicts of interest;
- involvement in negligent, deceitful or otherwise discreditable business or professional practices including being involved in the management

- or being a major shareholder of a company employing discreditable practices;
- failure to manage business or personal debts or financial affairs satisfactorily.

As explained above, when assessing whether an adviser is of good character, the Commission may take into account any criminal convictions held, including those falling outside the parameters set out in section 54(b). Advisers should have this in mind when applying for authorisation and making the adverse impact declaration.

In addition to the above, applicants should disclose information about criminal convictions:

- involving dishonesty, deceit, theft or fraud;
- suggesting a lack of competence, diligence, judgement, honesty or integrity;
- that relate to types of information set out in the AFA Authorisation Guide (see bullet points above).

The Commission would not, however, expect applicants to disclose minor traffic offences (such as parking infringements) unless the overall history of offending suggests a lack of willingness to comply with the law. For example, if the applicant had been involved in a large number of minor offences (such as a large number of parking infringements and/or failure to pay the associated fines), then the applicant should disclose this so the Commission can assess whether and how that behaviour might reflect adversely on the applicant's character.

2. Criminal convictions:

Ministry of Justice: The Ministry of Justice checks all applicants for histories of criminal convictions, and provides the Commission with any conviction information relating to the applicant.

Disclosure by applicant: The applicant must declare any criminal convictions falling within section 54(b) namely convictions by a court in New Zealand or elsewhere of an offence punishable by imprisonment for a term of six months or more

In addition, as discussed above, applicants should disclose any criminal convictions in their adverse impact declaration including those falling outside the parameters of section 54(b) convictions if that information may be relevant to the Commission's view of the adviser's character.

If an applicant is uncertain whether a conviction should be disclosed, he or she should either disclose it or take legal advice on whether or not to disclose it. The requirement to disclose information relating to either section 54(a) or (b) of the FAA does not affect applicants' rights under the Criminal Records (Clean Slate) Act 2004.

The Commission may also contact overseas agencies to check whether applicants have had criminal convictions.

3. Testimonials as specified in the AFA Authorisation Guide. Testimonials from clients and industry peers will provide information relating to whether an applicant has acted with due care and diligence, professionalism, integrity, objectivity and has acted ethically on matters such as disclosure.

Testimonials from professional bodies will provide information relating to whether the applicant's conduct has ever been the subject of any disciplinary action by the body, a regulator, court, tribunal or employer.

Applicants should not rely on the disclosure of adverse information about themselves in their testimonials, but should make full disclosure themselves in response to the adverse impact declaration.

4. Intelligence. Where the Commission holds information that may relate to the character of participants in the financial adviser industry, the Commission may use this information when assessing whether advisers are of good character. It may also use this information in targeting its checking of information provided in applications.

In section [45A](#) of the FAA, AFAs who report breaches of the FAA or the Code to the Commission are given whistle-blower protection, and the Commission anticipates that this will encourage the communication of information about unsatisfactory behaviour to the Commission.

On-going disclosure

The standard conditions for AFAs contain provisions requiring advisers to notify the Commission of any significant matter concerning their authorisation within five days, including a variety of breaches and adverse findings. There is also a general requirement to notify any matter arising after authorisation that would have been required to be disclosed at the time of the AFA's application to be authorised.

Where any such notifications are received, the Commission will assess the information according to its policy described here.

Under section [55A](#), the Commission may propose a variation of the terms and conditions of authorisation or the period of authorisation of a person currently authorised if the adviser has been involved in market practices that are, in material respects, inconsistent with the purpose of the FAA.

Other law affecting the Commission's consideration of information about applicants

The Commission will be mindful of its obligations under the [Bill of Rights Act 1990](#), the [Human Rights Act 1993](#), the [Privacy Act 1993](#), the [Criminal Records \(Clean Slate\) Act 2004](#), and the [Official Information Act 1982](#) in relation to obtaining, holding and assessing information relating to advisers' character.

D. The Commission's process of evaluation

General

The Commission will apply a risk-based analysis to data concerning character and fitness to act. It will assess evidence of poor character or criminal convictions in terms of the future likelihood and impact of adverse behaviour in relation to any particular adviser.

The Commission's licensing assessors will review all relevant material before making their recommendations on whether or not to grant authorisation and on what terms.

Where necessary, further information or clarification may be sought from the applicant by Commission staff. Licensing assessors will review all relevant information and will form a view on an applicant's eligibility to be authorised. The application and the initial assessment will be peer reviewed and will then be referred to the licensing manager for approval. Applicants who present with criminal convictions or information suggesting they are not of good character are likely to have their applications escalated internally to director or commissioner level for a decision.

In cases where the Commission holds adverse information about an adviser's character or where the applicant has criminal convictions, but the Commission considers the person is eligible to be authorised, the Commission might consider it appropriate to grant authorisation subject to terms and conditions such as a restriction on the types of services able to be provided and/or a shorter period of authorisation.

Procedural fairness

In cases where the Commission is not inclined to grant authorisation, or is inclined to grant authorisation with variations to the financial adviser service scopes or standard terms and conditions, the Commission may, where it considers it appropriate, invite an applicant to give written submissions before the Commission makes its decision.

In accordance with section 55(5) of the FAA the Commission will notify an applicant in writing of a decision to deny authorisation providing reasons, and notify the applicant of his or her right of appeal.

Where the Commission proposes a variation of the terms and conditions of authorisation or the period of authorisation of an AFA under section 55A the Commission will specify in the notice a reasonable period for the adviser to respond in writing, and will then consider any response received before confirming the variation or proposing further variations.

E. Who to contact for more information?

For any enquiries regarding authorisation email afaapplications@fma.govt.nz or call the FMA helpline on **0800 434 567** (+64 3 962 2698 for overseas callers).

Appendix

Financial Advisers Act 2008

54 Eligibility to be authorised

A person (**A**) is eligible to be authorised if—

- (a) the Commission is satisfied that—
 - (i) A is registered or complies with [section 13\(a\) and \(b\)](#) of the FSP Act; and
 - (ii) A is a person of good character; and
 - (iii) A meets the levels of competency, knowledge, and skills specified in the code for an authorised financial adviser; and
 - (iv) A is not debarred from applying for authorisation; and
- (b) the Commission—
 - (i) is not aware, after making any inquiries that it considers appropriate, that A has been convicted by a court in New Zealand or elsewhere of an offence punishable by imprisonment for a term of 6 months or more; or
 - (ii) if the Commission is so aware, is satisfied that the commission of the offence does not reflect adversely on A's fitness to act as an authorised financial adviser.

Financial Service Providers (Registration and Dispute Resolution) Act 2008

13 Qualifications for registration as financial service provider

A person is qualified to be registered as a financial service provider if—

- (a) the person is not disqualified under [section 14](#); and
- (b) the person is a member of an approved dispute resolution scheme, or the reserve scheme, if required by [section 48](#); and
- (c) if a licensing enactment requires the person to be a licensed provider, the person is, or will be (on and from commencing to be in the relevant business), a licensed provider.

14 Disqualified person

- (1) A person is disqualified if,—
 - (a) in the case of an individual, the individual is disqualified under subsection (2); or
 - (b) in the case of a person who is not an individual, the person has a controlling owner, director, or senior manager who is disqualified under subsection (2).
- (2) The following persons are disqualified:
 - (a) an undischarged bankrupt;
 - (b) a person prohibited from being a director or promoter of, or concerned in the management of, an incorporated or unincorporated body under the Companies Act 1993, the Securities

Act 1978, the Securities Markets Act 1988, or the Takeovers Act 1993:

(c) a person subject to a management banning order under the Securities Act 1978, the Securities Markets Act 1988, the Takeovers Act 1993, or subject to an order under [section 108](#) of the Credit Contracts and Consumer Finance Act 2003:

(d) a person who has been convicted of an offence against [section 11](#), [12](#), or [41](#) within the past 5 years:

(e) a person who has been convicted of an offence under [sections 217 to 266](#) of the Crimes Act 1961 within the past 5 years:

(f) a person who has been convicted of a money laundering offence or an offence relating to the financing of terrorism:

(g) a person who is subject to a confiscation order under the Proceeds of Crime Act 1991.

(3) A member of a local authority must be treated as if he or she is not disqualified.