



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 246

# Conflicted remuneration

March 2013

### **About this guide**

This guide is for Australian financial services (AFS) licensees and their representatives and other entities that need to comply with the provisions on conflicted remuneration and other banned remuneration in Divs 4 and 5 of Pt 7.7A of the *Corporations Act 2001* (Corporations Act).

It sets out our guidance on complying with these provisions and how we will administer them.

The provisions apply to financial product advice given to retail clients.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This guide was issued in March 2013 and is based on legislation and regulations as at the date of issue.

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

The provisions on conflicted remuneration and other banned remuneration in Divs 4 and 5 of Pt 7.7A of the Corporations Act (conflicted remuneration provisions) aim to more closely align the interests of those who provide financial product advice to retail clients with the interests of their clients.

The conflicted remuneration provisions ban many benefits given to those persons who provide financial product advice to retail clients that could reasonably be expected to influence the financial product advice they give.

This guide sets out our expectations for how AFS licensees and representatives can comply with the conflicted remuneration provisions and how we will administer these provisions.

### The conflicted remuneration provisions

- RG 246.1 The provisions on conflicted remuneration and other banned remuneration in Divs 4 and 5 of the *Corporations Act 2001* (Corporations Act)—referred to in this guide as the ‘conflicted remuneration provisions’—aim to more closely align the interests of those who provide financial product advice to retail clients with the interests of their clients, and improve the quality of advice these clients receive.

Note: In this guide, references to sections (s), chapters (Chs), parts (Pts), divisions (Divs) and subdivisions (Subdivs) are to the Corporations Act, unless otherwise specified.

- RG 246.2 These provisions are part of the Future of Financial Advice (FOFA) reforms. The FOFA reforms represent the Australian Government’s response to the *Inquiry into financial products and services in Australia* by the Parliamentary Joint Committee on Corporations and Financial Services (PJC) in 2009.

- RG 246.3 In its report on the inquiry, the PJC commented that:

A significant conflict of interest for financial advisers occurs when they are remunerated by product manufacturers for a client acting on a recommendation to invest in their financial product ... These payments place financial advisers in the role of both broker and expert adviser, with the potentially competing objectives of maximising remuneration via product sales and providing professional, strategic financial advice that serves clients’ interests ...

Evidence to the committee strongly suggested that the current disclosure requirements had not been an effective tool for managing conflicts of interest (paragraphs 5.29–5.30 and 5.53).

## How the provisions apply

RG 246.4 Compliance with the conflicted remuneration provisions is mandatory from 1 July 2013. The conflicted remuneration provisions generally apply to benefits given or accepted under arrangements entered into on or after 1 July 2013.

Note: At the date of issue of this guide, the Australian Government is consulting on regulations that will modify the scope of the transitional provisions for conflicted remuneration. We will update this guide to take into account the effect of the regulations after they have been finalised: see RG 246.57 and Section G.

RG 246.5 From 1 July 2012, Australian financial services (AFS) licensees can elect to comply with the obligations in Pt 7.7A of the Corporations Act, including the conflicted remuneration provisions, by lodging a notice with ASIC.

Note: Form FS92 *Notification of intention comply with Future of Financial Advice provisions* is available at [www.asic.gov.au/forms](http://www.asic.gov.au/forms).

RG 246.6 The conflicted remuneration provisions affect how AFS licensees and their representatives are paid for the financial product advice they give and the other benefits they receive. They do not affect how financial product advice is provided.

### The ban on conflicted remuneration

RG 246.7 The Corporations Act prohibits:

- (a) AFS licensees and their representatives (including authorised representatives) from accepting conflicted remuneration (s963E, 963G and 963H);
- (b) product issuers and sellers from giving conflicted remuneration to AFS licensees and their representatives (s963K); and
- (c) employers from giving their AFS licensee or representative employees conflicted remuneration for work they carry out as an employee (s963J).

RG 246.8 Conflicted remuneration is any benefit given to an AFS licensee, or its representative, who provides financial product advice to retail clients that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence:

- (a) the choice of financial product recommended to clients by the AFS licensee or representative; or
- (b) the financial product advice given to clients by the AFS licensee or representative: s963A.

Note: In this guide, references to:

- ‘client’ mean ‘retail client’ as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of Ch 7 of the Corporations Regulations 2001 (Corporations Regulations); and
- ‘advice’ mean ‘financial product advice’ as defined in s766B of the Corporations Act.

- RG 246.9 A benefit is not conflicted remuneration if it only influences financial product advice provided to wholesale clients.
- RG 246.10 There is a presumption that volume-based benefits are conflicted remuneration: s963L. Some performance benefits may also be conflicted remuneration.
- RG 246.11 For a general discussion of the ban on conflicted remuneration, see Section B. For specific guidance on volume-based benefits and performance benefits, see Sections C–D.
- RG 246.12 There are a number of benefits that are not conflicted remuneration. These are set out in the appendix to this guide.

### **Other banned remuneration**

- RG 246.13 In addition to the ban on conflicted remuneration, the Corporations Act prohibits other forms of remuneration that have the potential to influence the financial product advice received by retail clients.
- RG 246.14 The other forms of remuneration that are generally prohibited are:
- (a) a platform operator accepting a volume-based shelf-space fee from a funds manager (see Section E); and
  - (b) an AFS licensee, or its representative, who provides financial product advice to a retail client charging asset-based fees on borrowed amounts used to acquire financial products by, or on behalf of, the client (see Section F).

### **Transitional provisions**

- RG 246.15 The conflicted remuneration provisions do not apply to a benefit given to an AFS licensee or representative if the benefit is given under an arrangement entered into before the date on which the conflicted remuneration provisions apply to that individual or entity: s1528(1) and reg 7.7A.16. This is generally 1 July 2013. Benefits to which the transitional provisions in s1528(1) and reg 7.7A.16 apply are ‘grandfathered’: see Section G.
- RG 246.16 At the date of issue of this guide, the Australian Government is consulting on regulations that will modify the scope of the transitional provisions. We will update this guide to take into account the effect of the regulations after they have been finalised: see Section G.

### **The anti-avoidance provision**

- RG 246.17 There is also a ban on entering into or carrying out a scheme that is designed to avoid the application of the provisions in Pt 7.7A of the Corporations Act, including the conflicted remuneration provisions: see s965 and Section H.

The anti-avoidance provision is designed to ensure that the policy intent of Pt 7.7A is not avoided through industry or transaction structuring.

## Related obligations

- RG 246.18 The ban on conflicted remuneration operates alongside other provisions in the Corporations Act that affect how financial product advice is provided to retail clients. These include other obligations in Pt 7.7A, such as those set out in Table 1.
- RG 246.19 In addition, a condition of a contract, or other arrangement, is void if it seeks to waive any of the obligations under the conflicted remuneration provisions: s960A. Disclosure, including notices and disclaimers, cannot be used by an AFS licensee or representative to avoid their obligations under the conflicted remuneration provisions.

Note: For more information on some of the obligations that apply when financial product advice is provided to retail clients, see Regulatory Guide 36 *Licensing: Financial product advice and dealing* (RG 36), Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175) and Regulatory Guide 244 *Giving information, general advice and scaled advice* (RG 244).

**Table 1: Other obligations in Pt 7.7A**

Best interests duty and related obligations	Charging ongoing fees to clients
<p>These obligations apply when personal advice is provided to a retail client (see Div 2 of Pt 7.7A).</p> <p>Note: The person to whom these obligations apply is generally the individual who provides the personal advice. We refer to this person as the 'advice provider'.</p>	<p>These obligations apply when personal advice is provided to a retail client by an AFS licensee or representative and there is an ongoing fee arrangement between the client and the licensee or representative (see Div 3 of Pt 7.7A).</p>
<p>Advice providers must:</p> <ul style="list-style-type: none"> <li>• act in the best interests of their clients in relation to the advice;</li> <li>• only provide advice if, in light of the actions the advice provider should have taken to comply with the best interests duty, it is reasonable to conclude that the resulting advice is appropriate for the client;</li> <li>• give a warning to the client if it is reasonably apparent that the advice is based on incomplete or inaccurate information about the client's objectives, financial situation or needs; and</li> <li>• generally prioritise the interests of the client over their own interests and those of some of their related parties.</li> </ul> <p>Complying with the best interests duty and related obligations does not affect whether the conflicted remuneration provisions have been complied with. The best interests duty and related obligations and</p>	<p>AFS licensees or representatives must:</p> <ul style="list-style-type: none"> <li>• give their client an annual fee disclosure statement outlining information about the fees paid and the services received by the client over the previous year; and</li> <li>• only charge an ongoing fee if the client 'opts in' to continue the ongoing fee arrangement every two years. This opt-in requirement applies unless ASIC is satisfied that the licensee or representative is bound by a code of conduct that, among other things, obviates the need for complying with the opt-in requirement in the Corporations Act.</li> </ul> <p>For more information, see Regulatory Guide 245 <i>Fee disclosure statements</i> (RG 245) and Regulatory Guide 183 <i>Approval of financial services sector codes of conduct</i> (RG 183).</p>

**Best interests duty and related obligations****Charging ongoing fees to clients**

conflicted remuneration provisions impose separate obligations on AFS licensees and representatives that advise retail clients.

For more information, see RG 175 and RG 244.

## How we administer the provisions

- RG 246.20 The following principles guide our approach to administering the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A:
- (a) the provisions are designed to more closely align the interests of those who provide financial product advice to retail clients with the interests of their clients; and
  - (b) this alignment of interests depends on the substance of a benefit over its form—that is, whether the benefit is one that could reasonably be expected to influence the financial product advice or financial product recommendations is relevant rather than how the benefit has been labelled or presented to the client.
- RG 246.21 We are less likely to scrutinise benefits that are designed to more closely align the interests of those who provide financial product advice to retail clients with the interests of their clients.
- RG 246.22 Complying with the conflicted remuneration provisions means that payment structures used in some business models or delivery channels will need to be changed.
- RG 246.23 In this guide, we have included a number of examples. These examples are purely for illustration and are confined to their particular facts.

## B The ban on conflicted remuneration

### Key points

This section provides an overview of the ban on conflicted remuneration, including:

- what is conflicted remuneration;
- what is covered by the ban;
- what happens when the ban is breached;
- examples of conflicted remuneration; and
- benefits that are not conflicted remuneration.

We provide guidance that:

- when a benefit that is excluded from the conflicted remuneration provisions is passed on or reflected in a benefit given to another AFS licensee or representative, this is a separate benefit. This separate benefit is only excluded if it satisfies the conditions of an exclusion, or could not reasonably be expected to influence the advice provided by the AFS licensee or representative that received the benefit; and
- in deciding whether a benefit is conflicted remuneration, we will focus on the substance of a benefit over its form, and consider the overall circumstances in which the benefit is given.

This section also considers:

- when a buyer of last resort arrangement may be conflicted remuneration; and
- when we are likely to scrutinise monetary and non-monetary benefits to determine whether they are conflicted remuneration.

### What is conflicted remuneration?

RG 246.24 Conflicted remuneration is any benefit given to an AFS licensee, or its representative, that provides financial product advice to retail clients that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence:

- (a) the choice of financial product recommended to clients by the AFS licensee or representative; or
- (b) the financial product advice given to clients by the AFS licensee or representative: s963A.

RG 246.25 In this guide, we will use the phrase ‘influence the advice’ to refer to something that because of its nature or the circumstances in which it is given, could be expected to influence the matters listed in RG 246.24(a)–RG 246.24(b).

- RG 246.26 Financial product advice is a recommendation or a statement of opinion, or a report of either of those things that is, or could reasonably be regarded as being, intended to influence a person or persons in making a decision about a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products: s766B.
- RG 246.27 The Corporations Act contains a general definition of what a financial product is (s763A), followed by a list of specific inclusions (s764A) and a list of overriding exclusions (s765A).
- RG 246.28 Platforms are financial products under the Corporations Act. This includes investor directed portfolio services (IDPSs) and IDPS-like schemes, which we treat as financial products because they are managed investment schemes, as well as superannuation master trusts and other superannuation funds and managed discretionary account services.
- RG 246.29 The provisions in the Corporations Act relating to financial product advice, including the conflicted remuneration provisions, therefore apply when giving advice about:
- (a) using platforms; and
  - (b) acquiring financial products through platforms.

Note: For more information on the regulation of platforms that are managed investment schemes, see Regulatory Guide 148 *Investor directed portfolio services* (RG 148).

## What is covered by the ban?

### Prohibited conduct

- RG 246.30 The Corporations Act prohibits:
- (a) AFS licensees and their representatives (including authorised representatives) from accepting conflicted remuneration (s963E, 963G and 963H);
  - (b) product issuers and sellers from giving conflicted remuneration to AFS licensees and their representatives (s963K); and
  - (c) employers of an AFS licensee or representative from giving their AFS licensee or representative employees conflicted remuneration for work they carry out as an employee (s963J).
- RG 246.31 An AFS licensee will breach s963E if one of its representatives other than an authorised representative accepts conflicted remuneration and it is the responsible licensee.
- RG 246.32 An AFS licensee must also take reasonable steps to ensure that its representatives do not accept conflicted remuneration: s963F. We expect that an AFS licensee's processes and procedures for monitoring and supervising its representatives will allow the licensee to determine whether its

representatives are accepting conflicted remuneration and take appropriate action if this occurs.

Note: AFS licensees have an obligation to take reasonable steps to ensure that their representatives comply with the financial services laws: s912A(1)(ca). For more information, see Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104).

## Financial product advice to retail clients

RG 246.33 The conflicted remuneration provisions apply to both personal and general financial product advice, regardless of the channel used to communicate the advice. For example, the provisions apply to financial product advice that is provided verbally, in paper-based format, or online.

Note: For a discussion of the distinction between general advice and personal advice, see RG 36, RG 175 and RG 244.

RG 246.34 The conflicted remuneration provisions and this guide do not apply to benefits that only influence financial product advice provided to wholesale clients.

## Monetary and non-monetary benefits

RG 246.35 The conflicted remuneration provisions apply to a range of benefits, including those that are received by:

- (a) an AFS licensee; and
- (b) an authorised representative or other representative. This includes benefits passed on by:
  - (i) an AFS licensee on whose behalf the representative acts; or
  - (ii) an authorised representative employing a representative, where they both act on behalf of the same AFS licensee.

RG 246.36 This guide applies to all forms of conflicted remuneration prohibited by the Corporations Act regardless of who gives or receives the benefit.

RG 246.37 Benefits covered by the conflicted remuneration provisions may be monetary or non-monetary. Non-monetary benefits could take a number of forms, including some forms of the following:

- (a) free or subsidised business equipment or services (e.g. computers and other hardware, software, information technology support and stationery);
- (b) hospitality-related benefits (e.g. tickets to sporting events or concerts and subsidised travel);
- (c) shares or other interests in a product issuer or licensed dealer group;
- (d) marketing assistance; and

- (e) promotion or other ways of recognising an employee based on product recommendations or sales.

Note 1: This is not intended to be an exhaustive list.

Note 2: Whether shares or other interests in a product issuer or licensed dealer group are conflicted remuneration are discussed at RG 246.106–RG 246.111.

- RG 246.38 These benefits will not always be conflicted remuneration. Whether a benefit, including a non-monetary benefit, is conflicted remuneration is discussed further in this section and in Sections C–D.

Note: The Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Revised Explanatory Memorandum) states that ‘goods that are purchased for market value (such as investment research) will not generally fall within the definition of conflicted remuneration because while such goods could be said to influence advice, there is no benefit because the good has been paid for’: paragraph 2.32.

- RG 246.39 There is a presumption that volume-based benefits are conflicted remuneration: s963L and see Section C.
- RG 246.40 We are less likely to scrutinise benefits that are designed to more closely align the interests of those who provide financial product advice to retail clients with the interests of their clients.

### Passing on excluded benefits

- RG 246.41 There are a number of benefits that are excluded from being conflicted remuneration. These are set out in the appendix to this guide.
- RG 246.42 When an excluded benefit is passed on or reflected in a benefit given to another AFS licensee or representative that provides financial product advice to retail clients, this is a separate benefit. This is because the circumstances in which the separate benefit is given are different to the circumstances in which the excluded benefit was given.
- RG 246.43 The separate benefit does not automatically continue to be excluded from the conflicted remuneration provisions. It is only excluded if it satisfies the conditions of an exclusion, or could not reasonably be expected to influence the advice provided by the AFS licensee or representative that received the benefit.
- RG 246.44 For example, asset-based fees paid by clients to an AFS licensee for financial product advice provided by a representative on behalf of the AFS licensee are excluded from being conflicted remuneration: s963B(1)(d)(ii). However, this does not necessarily mean that a performance benefit or other benefit paid by the AFS licensee to the representative based on the increase in asset-based fees paid by the representative’s clients is excluded from the conflicted remuneration provisions.

RG 246.45 If no exclusion applies, the performance benefit or other benefit will not be conflicted remuneration if it could not reasonably be expected to influence the advice provided by the representative: see Example 11.

### Onus of proof

RG 246.46 Under the conflicted remuneration provisions, generally the party claiming that the conflicted remuneration provisions have been breached bears the onus of proving that a benefit is conflicted remuneration. However, where the presumption that volume-based benefits are conflicted remuneration applies, the onus is on the person who is responding to a claim that they have breached the conflicted remuneration provisions to show why giving or accepting a benefit is not conflicted remuneration.

Note: For more information on volume-based benefits, see Section C.

## What happens if the ban is breached?

RG 246.47 The consequences of breaching the conflicted remuneration prohibitions are set out in Table 2.

**Table 2: Consequences of breaching the conflicted remuneration provisions in Div 4 of Pt 7.7A**

Person	Consequence of breach
AFS licensee	Civil penalty or administrative sanctions (e.g. an AFS licence suspension or cancellation)
Authorised representative	<p>Civil penalty, except where:</p> <ul style="list-style-type: none"> <li>the AFS licensee provides the authorised representative with information about the nature of the benefit to be accepted by the authorised representative;</li> <li>at the time the authorised representative accepts the benefit, it is not aware that the benefit is conflicted remuneration because the representative is acting in reliance on that information; and</li> <li>the representative's reliance on that information is reasonable: s963G(2).</li> </ul> <p>Administrative sanctions (e.g. a banning order)</p>
Other representatives	<p>Administrative sanctions (e.g. a banning order)</p> <p>Note: Section 963H does not prohibit a representative that is not an authorised representative from accepting conflicted remuneration from their employer. However, the employer will be liable for a civil penalty if it gives an employee conflicted remuneration for the work they carry out: s963J.</p>
Employer of an AFS licensee or representative	Civil penalty or administrative sanctions
Product issuers and sellers that do not hold an AFS licence	Civil penalty

## Examples of conflicted remuneration

- RG 246.48 The following are examples of benefits that are generally conflicted remuneration:
- (a) commissions, whether upfront or trailing, fixed or variable, paid by a product issuer to a licensed dealer group, whether the payment is made directly or through some other arrangement;
  - (b) volume-based payments from a platform operator to a licensed dealer group;
  - (c) volume-based payments from a licensed dealer group to an authorised representative or other representative;
  - (d) volume-based bonuses and other payments, such as a commission or one-off payment, to a financial adviser, which is calculated by reference to the number or value of financial products acquired by clients following the advice of the financial adviser. The payment could be made by:
    - (i) the financial adviser's dealer group;
    - (ii) a platform operator; or
    - (iii) a product issuer; and
  - (e) a discount on the fees paid by an authorised representative to its AFS licensee based on client funds held in a particular financial product.

Note: A volume-based benefit is one where access to the benefit or the value of the benefit is dependent on the total number or value of financial products:

- (a) recommended by an AFS licensee or its representatives to clients; or
- (b) acquired by clients to whom an AFS licensee or its representatives provide financial product advice.

RG 246.49 However, these benefits are not conflicted remuneration if an exclusion applies: see the appendix to this guide.

RG 246.50 They are also not conflicted remuneration if they could not reasonably be expected to influence the advice given by the AFS licensee or representative.

## The substance of the benefit

RG 246.51 In deciding whether a benefit is conflicted remuneration, we will look at the substance of a benefit over its form, and consider the overall circumstances in which the benefit is given or accepted. This includes how an AFS licensee's or representative's business is structured, the type of financial product advice they provide and the types of products to which the advice relates.

RG 246.52 This means, for example, that if a benefit is conflicted remuneration, doing the following does not change this fact:

- (a) stating in documentation that a benefit is not intended to influence the advice given; or
- (b) renaming the conflicted remuneration as a form of remuneration that is not prohibited by the Corporations Act—for example, renaming a commission from a product issuer as an ‘asset-based fee’, even though the fee continues to be paid by the product issuer to the AFS licensee.

Note: In this guide, an asset-based fee is a fee paid by a client for receiving financial product advice and is dependent on the amount of funds held, used or to be used to acquire financial products by or on behalf of the client. A fee is an asset-based fee even if it is paid by a third party holding assets on behalf of the client, provided that the client directs the third party to pay the fee.

RG 246.53 In forming our view, we will look at a range of factors, including:

- (a) how the AFS licensee or representative gains access to the benefit;
- (b) who is giving the benefit;
- (c) when the benefit is given or accepted;
- (d) what reasonably appears to be the likely reason why the benefit is being given;
- (e) how the value of the benefit is determined; and
- (f) what the benefit is and its features.

RG 246.54 A benefit may be conflicted remuneration if it could reasonably be expected to influence an AFS licensee or representative to give financial product advice recommending that clients acquire financial products or increase their interest in a financial product, rather than providing them with strategic advice, such as retirement planning advice or advice on wealth accumulation strategies. This is because conflicted remuneration includes a benefit that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence the financial product advice given to clients by an AFS licensee or representative: s963A(b).

RG 246.55 This means that it is possible for a product-neutral benefit—that is, a benefit that is the same regardless of which financial products a client acquires—to be conflicted remuneration if it could reasonably be expected to influence the advice provided and it is not excluded from the conflicted remuneration provisions.

Note: For more information on providing non-product-specific personal advice, see RG 175.

### **Buyer of last resort arrangements**

RG 246.56 Arrangements for an AFS licensee to buy a representative’s financial advice business in the future are sometimes called ‘buyer of last resort’ arrangements.

- RG 246.57 In some cases, these arrangements will be structured in a way that could reasonably be expected to influence the advice given by the representative and would therefore be conflicted remuneration, assuming no exclusion from the conflicted remuneration provisions applies. Whether this is the case depends on the circumstances.
- RG 246.58 At the date of issue of this guide, the Australian Government is consulting on regulations that will specify when such arrangements are excluded from the conflicted remuneration provisions. We will update this guide to take into account the effect of the regulations after they have been finalised.

## Benefits that are not conflicted remuneration

- RG 246.59 The conflicted remuneration provisions only apply to benefits given under an arrangement entered into on or after 1 July 2013 (or earlier if an AFS licensee elects to comply with Pt 7.7A before this date): see Section G.

### Specific exclusions

- RG 246.60 The appendix to this guide sets out the benefits that are specifically excluded from being conflicted remuneration. These benefits are excluded regardless of whether they are volume based or not.

### Benefits authorised by the client

- RG 246.61 A monetary or non-monetary benefit is not conflicted remuneration if it is given by a retail client in relation to financial product advice given by the AFS licensee or representative to the client: s963B(1)(d)(ii) and 963C(e)(ii).
- RG 246.62 Benefits given by a retail client covered by these exclusions, or the exclusions in s963B(1)(d)(i) and 963C(e)(i), may include benefits that have been authorised by the client. This is because the Corporations Act states that a reference to doing an act, such as giving a benefit to an AFS licensee or representative, includes authorising the act to be done: s52.
- RG 246.63 We will administer the law as if a benefit has been authorised by a client if the benefit is given at the client's direction or with their clear consent. This is consistent with the Government's intent of how this exclusion is designed to operate: paragraph 2.27 of the Revised Explanatory Memorandum.
- RG 246.64 In our view, consent is 'clear' if it is genuine, express and specific. Mere knowledge of the benefit, or agreement to proceed with financial services in light of a disclosure about the benefit, is not clear consent.
- RG 246.65 Subject to RG 246.66, we consider that this exclusion applies when:

- (a) a benefit is given by the client to an AFS licensee and the licensee subsequently passes on this benefit, or a portion of the benefit, to one of its authorised representatives or other representatives; or
- (b) the AFS licensee passes on the benefit, or a portion of the benefit, to an authorised representative, and the authorised representative passes on the benefit, or a portion of the benefit, to another representative of the AFS licensee (e.g. an employee of the authorised representative).

RG 246.66 However, the exclusion will only apply if the client has authorised passing on the benefits in this way and no AFS licensee or authorised representative that passes on a benefit has discretion over the portion of a benefit that is passed on. If an AFS licensee or representative has this discretion, we do not consider that the benefit has been given at the client's direction or with their clear consent: see RG 246.62–RG 246.64.

#### Example 1: Fees agreed through an application form (not conflicted remuneration)

##### Scenario

A product issuer issues financial products to retail clients through a third-party licensed dealer group whose representatives provide personal and general financial product advice to retail clients.

The application form for the product provides space for the client, or the dealer group on behalf of the client and with the client's specific authority, to indicate the fee the client has agreed that the dealer group will receive for any advice provided. Before the client signs the application form, the representative of the dealer group tells the client that they are authorising the dealer group to receive the fees set out in the application form.

The application form states that the fee paid by the client to the dealer group will be collected by the product issuer as agent of the dealer group. The fee will then be sent by the product issuer to the dealer group. The form also includes a section for the dealer group to consent to this arrangement.

##### Commentary

We consider that the exclusion in s963B(1)(d)(ii) for fees given by a retail client applies to the fee collected by the product issuer and passed on to the dealer group. The client has specified the fee and authorised the product issuer to collect the fee from the client on behalf of the dealer group. Therefore, the fee is not conflicted remuneration.

#### Unlikely to influence the advice

RG 246.67 The Corporations Act sets an objective standard of reasonableness for determining whether a benefit could be expected to influence the advice given. Whether a benefit is capable of doing this depends on the nature of the benefit or the circumstances in which it is given or accepted.

### Salary

RG 246.68 Salary given to an AFS licensee or representative that gives financial product advice to retail clients is generally not conflicted remuneration.

Note: For a situation where a salary increase could be conflicted remuneration, see Example 11.

RG 246.69 This includes salary paid by an employer that is:

- (a) an AFS licensee who pays an employee that is an authorised representative or other representative; and
- (b) an authorised representative who pays an employee that is a representative.

RG 246.70 Specifically, the base salary given to such an employee is not conflicted remuneration if neither the level nor a component of the base salary or salary increases could reasonably be expected to influence the advice given.

RG 246.71 An employee's right to receive their salary is generally conflicted remuneration if it is calculated by reference to the number or value of financial products recommended by the employee to clients. Guidance on salary and the conflicted remuneration provisions is set out in Section D.

### Benefits provided by an AFS licensee to its representatives

RG 246.72 Benefits provided by an AFS licensee to its representatives (including authorised representatives) to cover business expenses incurred in providing financial product advice on behalf of the licensee are generally not conflicted remuneration (e.g. business equipment such as telephones, desks and chairs).

RG 246.73 This applies only if the availability of these resources:

- (a) does not depend on a factor that could reasonably be expected to influence the advice given by the AFS licensee or their representatives; or
- (b) is covered by an exclusion from the conflicted remuneration provisions.

## Benefits of a small value

RG 246.74 Benefits of a small amount are excluded. Under s963C(b) and reg 7.7A.13, a non-monetary benefit is not conflicted remuneration if it is less than \$300 for each AFS licensee or representative that is the final recipient of the benefit, and identical or similar benefits are not given on a frequent or regular basis.

RG 246.75 If a benefit is given to an AFS licensee and it passes on this benefit to a representative, the representative is the final recipient of the benefit. If the AFS licensee keeps half of a benefit and passes on the other half to a

representative, the licensee is the final recipient of half of the benefit and the representative is the final recipient of the other half.

RG 246.76 AFS licensees must keep records of benefits between \$100 and \$300 that are given to it or any of its representatives: reg 7.8.11A.

RG 246.77 We use the amounts in regs 7.7A.13 and 7.8.11A as a guide in considering when we are more likely to scrutinise a benefit to determine whether it is conflicted remuneration.

RG 246.78 Accordingly, we are more likely to scrutinise monetary and non-monetary benefits to determine whether they are conflicted remuneration if:

- (a) for benefits that are given on a frequent or regular basis:
  - (i) the value of each benefit is over \$100; and
  - (ii) the combined value of all benefits is greater than \$300 for each AFS licensee or representative that is the final recipient of the benefit; or
- (b) for a benefit that is not given on a frequent or regular basis, its value is greater than \$300 for each AFS licensee or representative that is the final recipient of the benefit.

RG 246.79 We consider these benefits are more likely to influence the advice given.

## Other obligations

RG 246.80 Other obligations in the Corporations Act apply when personal advice is given to a retail client—for example, the best interests duty and related obligations in Div 2 of Pt 7.7A, and the requirement to give a Financial Services Guide (FSG) and Statement of Advice (SOA) in Pt 7.7. These requirements operate alongside the conflicted remuneration provisions and apply even if a benefit is excluded from the conflicted remuneration provisions.

Note: For more information on the best interests duty and related obligations, see RG 175 and RG 244. For more information on providing FSGs and SOAs, see RG 175.

RG 246.81 In addition to these obligations, AFS licensees need to have in place adequate arrangements to manage conflicts of interest that may arise in relation to activities undertaken by the licensee or its representatives: s912A(1)(aa). This is particularly relevant where a benefit is excluded from the conflicted remuneration provisions. Some benefits that are excluded from the conflicted remuneration provisions can create conflicts of interest for an AFS licensee and/or its representatives.

Note: For more information on complying with the conflicts management obligation in s912A(1)(aa), see Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181).

**Example 2: Brokerage-based payments****Scenario**

An advice provider is a representative of a trading participant in a prescribed financial market. The percentage of the brokerage fees paid to the advice provider by the trading participant, who is its employer, is calculated by reference to its annualised brokerage earned, and this is calculated on a quarterly basis.

The advice provider realises that, with two days remaining before the end of the quarter, they are very close to earning enough brokerage for their firm to increase their proportion of the brokerage retained. The advice provider calls various clients and gives personal advice to each of them that their equities portfolios could benefit from some re-balancing towards listed energy stocks that have been appearing in the media lately. However, the advice provider does not conduct an investigation into these clients' current relevant circumstances.

Three of the advice provider's clients agree that they have not looked at their portfolio in some time and, based on the advice provider's advice, decide that they would like to diversify into energy-related equities.

The advice provider disposes of some of the holdings of each client and replaces them with energy-related equities, as agreed. In doing this, the advice provider increases its own brokerage for the quarter, which moves it into a new remuneration band.

**Commentary**

Because of the exclusion in reg 7.7A12D, the brokerage earned by the advice provider is not conflicted remuneration.

However, the advice provider is in breach of its obligations in Div 2 of Pt 7.7A. The advice provider, in their efforts to move to a higher remuneration bracket, is advising clients to re-balance their share portfolio. Among other things, the advice provider has not considered or investigated the client's objectives, financial situation and needs.

In this situation, the advice provider is in breach of the best interests duty in s961B and the obligation to prioritise the client's interests in s961J. It is also likely to be in breach of the appropriate advice requirement in s961G.

## C Volume-based benefits

### Key points

Volume-based benefits are presumed to be conflicted remuneration: s963L.

Factors to consider in showing that a volume-based benefit is not conflicted remuneration include the connection of the benefit to the advice, when the advice was provided, the value of the benefit and the content of the advice.

This section considers situations where volume-based benefits are:

- passed on to representatives of an AFS licensee;
- given as part of a white label stockbroking arrangement;
- given to a licensed dealer group that is also a product issuer; and
- given as part of an equity arrangement.

We have taken a no-action position on management and administration fees accepted by product issuers. This applies where no personal advice is given by a product issuer about its own products or products of the same class as products it issues, or where a registrable superannuation fund accepts management or administration fees that may be charged under the SIS Act.

We have provided guidance that, in some circumstances:

- a volume-based benefit may not be conflicted remuneration if it is passed on to the client; and
- we are less likely to scrutinise a benefit that is not passed on to the adviser, if certain controls are in place.

### Volume-based benefits and conflicted remuneration

RG 246.82 There is a presumption that volume-based benefits are conflicted remuneration: s963L. A benefit is volume based if access to the benefit or the value of the benefit is wholly or partly dependent on the total number or value of financial products:

- (a) recommended by an AFS licensee or representative to clients; or
- (b) acquired by clients to whom an AFS licensee or representative provides financial product advice.

Note: A non-volume-based benefit may also be conflicted remuneration if it could reasonably be expected to influence the advice given. This is not covered by the presumption in s963L.

RG 246.83 The presumption in s963L does not apply to benefits that are covered by an exclusion from the conflicted remuneration provisions: see the appendix to this guide.

- RG 246.84 However, if an excluded benefit is passed on or reflected in a benefit given to another AFS licensee or representative that provides financial product advice to retail clients, this is considered a separate benefit. This separate benefit is only excluded from the conflicted remuneration provisions if it satisfies the conditions of an exclusion or could not reasonably be expected to influence the advice given: see RG 246.41–RG 246.45.
- RG 246.85 A benefit may be a volume-based benefit if, for example, it is:
- (a) calculated as a fixed percentage (e.g. 1%) of all client funds invested in financial products based on the recommendations of a representative;
  - (b) calculated based on a sliding scale such as:
    - (i) 0.5% for the first \$10 million in client funds invested based on the recommendations of a representative;
    - (ii) 0.75% for amounts over \$10 million and less than \$20 million; and
    - (iii) 1% for amounts over \$20 million; or
  - (c) a flat fee which will only be paid if a threshold based on the number or value of financial products recommended by an AFS licensee or representative or acquired by their clients is met—for example, a \$12,000 bonus that is only paid if client funds in a particular financial product exceed \$20 million.
- RG 246.86 In these cases, either the value of or access to the benefit is dependent on the total value of financial products acquired, based on the recommendations of an AFS licensee or representative.
- RG 246.87 Some asset-based fees paid by retail clients are a volume-based benefit. However, the fee will not be conflicted remuneration if an exclusion, such as the exclusion for benefits given by the client in s963B(1)(d)(ii), applies.
- RG 246.88 It is up to the party seeking to prove that a volume-based benefit is not conflicted remuneration to rebut the presumption and show that the benefit is not one that could reasonably be expected to influence the advice.
- RG 246.89 The Revised Explanatory Memorandum describes the rationale for the presumption in s963L:
- Where there are volume-based benefit structures that are not inherently conflicted, this will be peculiarly within the knowledge of those paying and receiving the benefits. It is therefore appropriate that those parties be required to demonstrate that the benefits are not conflicted (paragraph 2.19).

**Example 3: White label arrangements (conflicted remuneration)**

Note: A 'white label' arrangement for a platform is an arrangement where a licensed dealer group enters into contractual arrangements with a platform operator to rebrand the platform operator's platform to make it appear as its own—that is, the platform is 'badged' or 'promoted' by the dealer group.

**Scenario 1**

A platform operator provides a 'white label' platform to a dealer group that labels the platform as its own. The sub-plans on the platform are the same as the sub-plans the platform operator uses for white label arrangements it has with other dealer groups.

The client pays the platform operator a bundled fee for administration services provided by the platform operator and promotion and distribution services provided by the dealer group. This fee is split between the platform operator and the dealer group.

**Scenario 2**

A responsible entity provides a 'white label' registered managed investment scheme to a dealer group that labels the scheme as its own.

The client pays the responsible entity a bundled fee for administration services provided by the responsible entity and promotion and distribution services provided by the dealer group. This fee is split between the responsible entity and the dealer group.

**Commentary**

In both scenarios, to the extent that the share of the fee between the platform operator or responsible entity and the dealer group is volume based, any volume-based margin accessed by the dealer group would be conflicted remuneration, unless the dealer group, platform operator or responsible entity can show that this is not the case.

**Rebutting the presumption in s963L**

- RG 246.90 Some ways the presumption in s963L can be rebutted is by showing that:
- (a) the value of the benefit is not significant enough that it could reasonably be expected to influence the advice given to a client; or
  - (b) how the benefit is accessed could not reasonably be expected to influence the advice given to a client.
- RG 246.91 Whether the presumption can be rebutted needs to be assessed objectively, based on the circumstances as a whole. Considerations that may be relevant include:
- (a) the connection between the benefit and the financial product advice that is provided to retail clients;
  - (b) how often the AFS licensee or representative who receives the benefit provides financial product advice to retail clients;

- (c) the value of the benefit, including relative to the total remuneration of the AFS licensee or representative;
- (d) what an AFS licensee or representative needs to do to access the benefit;
- (e) the content of the financial product advice; and
- (f) who is advantaged by the benefit.

## Passing on benefits to representatives

RG 246.92 Some benefits given by a licensed dealer group to an authorised representative or other representative are conflicted remuneration. However, this is only the case if the benefit could reasonably be expected to influence the advice they provide and it is not excluded from the conflicted remuneration provisions: see the appendix to this guide.

### Example 4: Benefits given to an authorised representative (not conflicted remuneration)

#### Scenario

An authorised representative is self-employed as a financial adviser and provides financial product advice to retail clients.

Clients pay fees to the authorised representative's AFS licensee for the advice the authorised representative provides to the client on behalf of the AFS licensee. These fees are a combination of flat fees (e.g. \$2,000) and asset-based fees.

The AFS licensee passes 80% of all fees received from the client to the authorised representative.

The authorised representative also employs three other financial advisers who are representatives of the AFS licensee.

#### Commentary

The following benefits are not conflicted remuneration:

- the fees received by the AFS licensee from the client;
- the portion of the fees from the client that the AFS licensee passes on to the authorised representative, provided that the client has authorised this and the AFS licensee has no discretion over the portion of the benefit that is passed on; and
- any fee the authorised representative passes on to representatives of the AFS licensee that they employ, provided that the client has authorised this and the authorised representative has no discretion over the portion of the benefit that is passed on.

These benefits are excluded from the conflicted remuneration provisions because they are given by a client for the provision of financial product advice: s963B(1)(d)(ii) and see RG 246.61–RG 246.66.

### Example 5: Benefits given to an authorised representative (conflicted remuneration)

#### Scenario

An authorised representative is self-employed as a financial adviser and provides financial product advice to retail clients.

One of the products on which the adviser gives advice is the preferred platform of the AFS licensee that authorises the financial adviser to provide financial product advice on the licensee's behalf.

The adviser pays the AFS licensee a 'licensee fee' every quarter for the services the AFS licensee provides to the adviser (e.g. compliance support). This fee is offset against the money the AFS licensee pays the adviser for the revenue the adviser generates.

If client funds held in products that are available through the preferred platform increase by \$4 million in a quarter, the AFS licensee will waive the licensee fee for that quarter.

#### Commentary

The fee waiver is conflicted remuneration. It is a benefit to the adviser that could reasonably be expected to influence the advice they provide. No exclusion from the conflicted remuneration provisions applies in this situation.

## White label stockbroking platforms and securities dealers

- RG 246.93 Where an AFS licensee that is not a market participant outsources trading activities on licensed markets to a third-party market participant, this is usually done through a white label stockbroking platform offered by the market participant. The licensee (known as a 'securities dealer') promotes the market participant's trading platform to make it appear as its own.
- RG 246.94 The main purpose of the platform is to provide execution services to retail clients. However, the securities dealer might also give personal advice or general advice in the form of research about financial products and markets.
- RG 246.95 While many business models exist, retail clients generally pay the market participant a product-neutral, percentage-based fee on all transactions conducted through the platform ('brokerage'). The market participant then passes a portion of this fee back to the securities dealer.
- RG 246.96 If the service is limited to execution only transactions, there is an exclusion from the conflicted remuneration provisions that may apply: see s963B(1)(c) and the appendix to this guide.
- RG 246.97 If financial product advice is provided by the securities dealer, and the proportion of the brokerage it receives from the market participant is volume based with reference to the listed securities traded, this is presumed to be conflicted remuneration under s963L, unless an exclusion applies.

RG 246.98 If no exclusion applies, the securities dealer needs to rebut the presumption and show that the benefit received is not conflicted remuneration—for example, see Example 1.1 in the Revised Explanatory Memorandum:

One licensee (the product provider) provides a white label equity trading platform to another licensee (the promoter), who labels the facility as their own and markets the facility to their clients. The promoter only provides general advice to clients in the form of independent market reports and analysis and has strong internal controls to prevent ‘churning’. The client is charged a product neutral percentage-based fee on all transactions which is collected by the product provider. The product provider passes a proportion of that fee to the promoter. The proportion of the fee that is passed on to the promoter will be presumed to be conflicted under section 963L because the fee is volume-based. However, as the scope for influence in this case is remote, the product provider and promoter are likely to be able to establish that the payment is not conflicted remuneration.

## Licensed dealer groups that are product issuers

### The conflicted remuneration provisions may apply

RG 246.99 If an AFS licensee is a licensed dealer group and a platform operator or other product issuer, some benefits provided to the AFS licensee in its capacity as platform operator or other product issuer may be conflicted remuneration. This may be the case if the increased use of the platform or other product would increase the benefit given to the AFS licensee (e.g. management fees for the product).

RG 246.100 For example, some payments made to an AFS licensee that operates a platform under a private label arrangement might also be conflicted remuneration. This is because the benefits are given to an AFS licensee, or its representatives, who provide financial product advice to retail clients. The conflicted remuneration provisions apply regardless of whether the AFS licensee provides other financial services connected with the financial products they issue, such as a platform.

Note: A ‘private label’ arrangement for a platform is where a licensed dealer group is also a platform operator, although it typically outsources the administration of the platform to another platform operator.

RG 246.101 If the benefit is volume based, the onus will be on the AFS licensee to rebut the presumption in s963L and show that the volume-based benefits are not conflicted remuneration. The licensee can do this by showing that the benefit could not reasonably be expected to influence the advice given.

RG 246.102 If the benefit is not volume based, it is still conflicted remuneration if the benefit could reasonably be expected to influence the advice given.

RG 246.103 The guidance in this section does not apply if a benefit is excluded from the conflicted remuneration provisions. For example, an exclusion applies to

benefits for the issue or sale of a financial product given by the retail client: s963B(1)(d)(i).

### Determining whether a benefit is conflicted remuneration

- RG 246.104 Factors that are relevant in determining whether a benefit is conflicted remuneration when it is accepted by a licensed dealer group that is also a platform operator or other product issuer include:
- (a) those listed at RG 246.53 (e.g. what reasonably appears to be the likely reason why the benefit is being given);
  - (b) what benefit is generated by a recommendation of the dealer group to acquire, hold or increase a client's interest in a product it also issues; and
  - (c) whether the product fees received by the dealer group in its capacity as a platform operator (or other product issuer) are a benefit that could reasonably be expected to influence the advice.
- RG 246.105 We consider that the following examples involve payments that are conflicted remuneration.

#### Example 6: Preferred marketing payment (conflicted remuneration)

##### Scenario

A funds manager makes a payment (either volume-based or a flat fee) to a licensed dealer group that is also a platform operator to get preferred marketing access to the licensed dealer group's advisers.

##### Commentary

Such a payment is conflicted remuneration whether or not the licensed dealer group is also a platform operator. This is because the dealer group's advisers are more likely to recommend that a retail client acquire the funds manager's products through the platform.

#### Example 7: Volume bonuses (conflicted remuneration)

##### Scenario

A funds manager makes a payment to a licensed dealer group that is also a platform operator. The payment is based on the volume of the funds manager's products acquired by clients of the licensed dealer group's advisers.

##### Commentary

Such a payment is conflicted remuneration whether or not the licensed dealer group is also a platform operator. This is because such a payment is likely to influence the dealer group's advisers to recommend the funds manager's products to retail clients.

## Equity arrangements

- RG 246.106 Equity arrangements involve giving representatives and other AFS licensees shares or other interests in an AFS licensee's business. Depending on how the arrangement is structured, it may enable representatives to receive volume-based payments in the form of dividends or other profit-sharing benefits, which may be conflicted remuneration.
- RG 246.107 Equity arrangements with a representative may be put in place to more closely align the interests of the representative to the ongoing success of the AFS licensee's business. For example, the profitability of a licensed dealer group is likely to improve as more fee-for-service revenue from clients is received based on advice given by representatives on behalf of the dealer group. This in turn is likely to mean increased dividends for representatives with shares in the dealer group.
- RG 246.108 An equity arrangement is only conflicted remuneration if it could reasonably be expected to influence the advice that the representative gives.
- RG 246.109 Factors that are relevant in determining whether an equity arrangement with a representative is conflicted remuneration include:
- (a) how direct the link is between the value of the equity arrangement and the value or number of financial products recommended or acquired based on the advice of the representative. For example, a benefit is less likely to be conflicted remuneration if it is not dependent on the type of financial products acquired by retail clients or the type of financial product advice given;
  - (b) the remuneration a representative is eligible to receive from the equity arrangement (e.g. dividends);
  - (c) the potential value of the equity interest;
  - (d) the portion of the AFS licensee's business that involves, or is dependent on, remuneration generated from providing financial product advice to clients; and
  - (e) the criteria a representative needs to satisfy to be eligible for an equity interest in the AFS licensee's business. For example, a benefit is more likely to be conflicted remuneration if eligibility is based on meeting financial product sales targets.
- RG 246.110 RG 246.91 sets out other considerations that may be relevant in showing whether an equity arrangement is conflicted remuneration.
- RG 246.111 Apart from equity arrangements with representatives, other types of equity arrangements may also be conflicted remuneration.

**Example 8: A white label platform arrangement (conflicted remuneration)****Scenario**

An AFS licensee company (the promoter) is established to operate a white label platform arrangement. The promoter issues shares to another AFS licensee that is a financial planning business. The financial planning business includes the promoter's white label platform on its approved product list. The promoter pays regular dividends to the financial planning business as a shareholder, based on the profit derived from the white label platform arrangement.

**Commentary**

A benefit given under this arrangement is presumed to be conflicted remuneration under s963L because it is a volume-based payment. It is up to the promoter or financial planning business to show that the arrangement is not conflicted remuneration because it could not reasonably be expected to influence the choice of financial products (in this case the platform) recommended by the financial planning business and its representatives.

**Management fees charged by product issuers**

- RG 246.112 The conflicted remuneration provisions may prevent product issuers—such as trustees of superannuation funds, responsible entities, and platform operators—from giving financial product advice to retail clients to increase or maintain their investment or other interest in the issuer's products. This is because such advice may result in an increase in, or the maintenance of, management or administration fees payable out of the fund. These fees might reasonably be expected to influence the advice.
- RG 246.113 We will not take action against a product issuer where they breach the conflicted remuneration provisions by accepting management or administration fees.
- RG 246.114 In relation to a responsible entity of a registered managed investment scheme, we will also not take action for any breach of s601FC(1)(k) as result of the unlawful payment. Section 601FC(1)(k) requires, among other things, that a responsible entity must ensure that all payments out of scheme property, such as management fees, are made in accordance with the Corporations Act.
- RG 246.115 The no-action positions in RG 246.113 and RG 246.114 only apply if:
- (a) the product issuer does not provide any personal advice about products that it issues or about products of that class; and
  - (b) the no-action position in RG 246.116 does not apply.
- RG 246.116 We will also not take action against a trustee of a registrable superannuation fund for a breach of the conflicted remuneration provisions for accepting

management or administration fees that may reasonably be expected to influence the advice that the *Superannuation Industry (Supervision) Act 1993* (SIS Act) allows to be charged: s99F of the SIS Act. This type of advice is commonly called ‘intra-fund’ advice.

Note: An ASIC no-action position merely states our current intention to not take regulatory action on a particular state of affairs or conduct. It does not preclude third parties from taking legal action on conduct covered by the no-action position: see Regulatory Guide 108 *No-action letters* (RG 108).

## Volume-based benefits that may not be conflicted remuneration

RG 246.117 In some situations, an AFS licensee or representative may be able to show that a volume-based benefit is not conflicted remuneration: see RG 246.118–RG 246.123. There may be other similar situations (e.g. where the value of the benefit is not significant enough that it could reasonably be expected to influence the advice given to a client).

### Benefits that are passed on to the client

RG 246.118 Some AFS licensees and representatives, which are typically authorised representatives, receive volume-based benefits and pass on the whole amount to their clients. Regardless of whether or not the benefit is volume based, we think it is unlikely that a benefit is conflicted remuneration if:

- (a) it is promptly passed on to the client (as soon as practicable but no later than three months after receiving the benefit) by the AFS licensee or representative that accepts the benefit; and
- (b) the AFS licensee or representative accepts the benefit on the condition that it will be passed on to the client.

RG 246.119 In this situation, the benefit is unlikely to influence the advice provided.

RG 246.120 In many cases, a product issuer or seller may be able to satisfy itself that it is not giving an AFS licensee or representative conflicted remuneration if:

- (a) the benefit is given on the condition that it is passed on in its entirety to the client; and
- (b) a product issuer reasonably believes the benefit will be passed on.

### Benefits that are not passed on to the adviser

RG 246.121 Some licensed dealer groups receive benefits, which are often volume based, from platform operators and other product issuers but do not pass on these benefits, or any portion of them, to the individual representatives who provide the financial product advice to clients.

- RG 246.122 Instead, the dealer group uses the benefit to pay for its operating expenses. It may also pass on a portion of the benefit to an authorised representative to help pay for the authorised representative's operating expenses. The authorised representative does not pass on this benefit to individual representatives who provide the financial product advice to clients.
- RG 246.123 Where this occurs, we are less likely to scrutinise the benefit under the conflicted remuneration provisions if there are controls in place to ensure that the benefit does not influence the advice given by representatives of the dealer group.

Note: For information on implementing and maintaining policies in the context of conflicts management arrangements, see RG 181. For more information on how the conflicted remuneration provisions apply to non-monetary benefits (e.g. information technology costs), see the appendix to this guide.

### Example 9: Benefits that are not passed on to the adviser (not conflicted remuneration)

#### Scenario

A licensed dealer group receives a commission from a platform operator but does not pass on any portion of the commission to its advisers who provide advice to retail clients on behalf of the dealer group. Instead, the dealer group uses the benefit to pay for its operating expenses, such as information technology costs.

#### Commentary

We are less likely to scrutinise the benefit if the dealer group can show, or a product issuer or seller can rely on a dealer group showing, that:

- no portion of the benefit is passed on to an individual that provides financial product advice to a retail client;
- the platforms and the products its advisers can recommend to clients are not selected based on the potential value of the benefit the dealer group receives from the platform operator or other product issuer. For example, it could show this by demonstrating it has robust policies that are implemented and maintained for platform and product selection;
- it does not promote any specific platform or other product to its individual advisers or clients other than by way of general adviser education; and
- it makes available a diverse range of platforms and has an extensive list of products its advisers can potentially recommend to clients.

In this situation, we think it is unlikely that the benefit could reasonably be expected to influence the advice given to a client. This is because the individual adviser does not receive any portion of the benefit, and the dealer group does not influence the specific products (if any) that its advisers recommend to clients.

If the benefit is volume based, the onus is on the dealer group to show that the benefit is not conflicted remuneration. We expect the dealer group to

keep sufficient records relating to the benefit to be able to show that it could not reasonably be expected to influence the advice.

We also think it is unlikely that the benefit could reasonably be expected to influence the advice given to a client if the dealer group passed on a portion of the benefit to an authorised representative that also uses the benefit to pay for its operating expenses, and the authorised representative can show the matters listed above.

## D Performance benefits for employees

### Key points

Not all performance benefits given to employees who provide financial product advice to retail clients are conflicted remuneration.

Employers should consider the following factors in assessing whether they can show that a volume-based performance benefit is not conflicted remuneration:

- the eligibility criteria for the performance benefit and how difficult it is to meet these criteria;
- the purpose of the performance benefit;
- the weighting of the benefit in relation to an employee's total remuneration;
- the link between the benefit and the financial product advice provided to clients;
- what involvement the employee has in the advice giving process;
- the environment in which the benefit is given; and
- whether an exclusion from the conflicted remuneration provisions applies (see Table 3).

### Performance benefits and conflicted remuneration

RG 246.124 The conflicted remuneration provisions may affect performance benefits given by an employer (e.g. an AFS licensee or authorised representative) to employees who provide financial product advice to retail clients.

Note: For more information on when a person is providing financial product advice to a retail client, see RG 36, RG 175 and RG 244.

RG 246.125 The conflicted remuneration provisions do not prohibit employees who provide financial product advice to retail clients from receiving performance pay. However, they do affect how these arrangements may be structured. As noted in paragraph 2.20 of the Revised Explanatory Memorandum, there is a need to strike a balance between rewarding performance and avoiding inappropriate influence over financial product advice.

RG 246.126 Complying with the conflicted remuneration provisions may mean that remuneration arrangements used in many financial services businesses will need to change.

RG 246.127 A representative of an AFS licensee, other than an authorised representative, is not prohibited from accepting a 'conflicted' performance benefit that is given to them by their employer: s963H. However, their employer, or an

employer of an AFS licensee, must not give its employees conflicted remuneration for work they carry out as an employee: s963J.

RG 246.128 Performance benefits for employees may include:

- (a) bonuses;
- (b) pay rises;
- (c) promotion or other forms of recognition;
- (d) reward-focused entertainment or travel; and
- (e) shares or options in the employer's business: see RG 246.106–RG 246.111.

Note: This is not intended to be an exhaustive list.

RG 246.129 These benefits are only conflicted remuneration if they could reasonably be expected to influence the advice given by an employee that is an AFS licensee or representative.

RG 246.130 A benefit is not conflicted remuneration if the employee does not give financial product advice to retail clients or the benefit is excluded from the conflicted remuneration provisions: see the appendix to this guide.

RG 246.131 We recognise that not all performance benefits provided to employees could reasonably be expected to influence the advice they provide.

#### Example 10: A bonus paid to a financial adviser (not conflicted remuneration)

##### Scenario

A financial adviser who is a representative of an AFS licensee and provides financial product advice to retail clients receives a \$5,000 bonus from their AFS licensee.

The bonus is paid in recognition of:

- high levels of customer satisfaction;
- an increase in customer referrals;
- an outstanding compliance rating; and
- developing referral networks with other professional services firms.

##### Commentary

The bonus is unlikely to be conflicted remuneration because it would not reasonably be expected to influence the financial product advice given by the adviser.

RG 246.132 Some performance benefits are entirely volume based. In these situations, we consider it would be difficult for the employer to rebut the presumption that the benefit is conflicted remuneration. Guidance on considerations that are relevant in doing this are set out at RG 246.91.

- RG 246.133 A performance benefit calculated on remuneration that is excluded from being conflicted remuneration may still be conflicted remuneration if it could reasonably be expected to influence the advice provided and it is not itself excluded from the provisions.

### Example 11: Remuneration for a financial adviser

#### Scenario

A financial adviser (a representative) receives a base salary of \$80,000 to service the client base of their employer who is an AFS licensee. The work they do for their employer includes attending half-yearly meetings with some of the AFS licensee's clients, responding to telephone queries and providing quarterly portfolio reports.

For the ongoing service, clients pay an annual percentage-based fee to the AFS licensee calculated on the value of financial products that they have acquired based on the advice provided by the AFS licensee's advisers (an asset-based fee).

Each year the adviser's salary is adjusted to reflect any increase in the asset-based fees paid by the clients they advise.

#### Commentary

While the asset-based fees paid by clients to the AFS licensee would not be conflicted remuneration because of the exclusion in s963B(1)(d)(ii), adjustments made to the adviser's salary to reflect any increase in the asset-based fees paid by clients is a separate benefit. How the conflicted remuneration provisions apply to the salary increases needs to be considered separately.

In this case, access to, and the value of, the future salary increases are dependent on the value of financial products acquired by the adviser's clients. The benefit would be presumed to be conflicted remuneration because it is volume based: s963L.

To rebut the presumption in s963L, the employer needs to show that future salary increases could not reasonably be expected to influence the advice given.

The employer may be able to show that, in the circumstances, the prospect of future salary increases could not reasonably be expected to influence the advice the adviser provides because this does not influence:

- whether the adviser provides product-specific advice (for which asset-based fees are charged) instead of strategic advice; and
- if the adviser provides product-specific advice, which products the adviser recommends.

If this is the case, the future salary increases are not conflicted remuneration.

For more details on how to evaluate whether a performance benefit is conflicted remuneration, see Table 3.

## Evaluating the performance benefit

- RG 246.134 Some employers determine the amount of any performance benefit given to an employee based on a number of differently weighted criteria. This approach is referred to by many employers as a ‘balanced scorecard’ approach.
- RG 246.135 Often, one or more criteria in the balanced scorecard relate to the volume of financial products recommended or acquired by clients (volume-based criteria). If this is the case, the part of the performance arrangement that is volume based is presumed to be conflicted remuneration under s963L. The onus is on the employer to show that it is not conflicted remuneration, taking into account all the circumstances.
- RG 246.136 Some of the types of non-volume-based criteria on which a balanced scorecard may be based include:
- (a) complying with the law;
  - (b) meeting the employer’s compliance and other corporate policies;
  - (c) the quality of financial advice given by the employee;
  - (d) client satisfaction with the employee;
  - (e) measures of customer loyalty or advocacy, such as the employee’s net promoter score;
  - (f) the number of new clients the employee has brought to the business;
  - (g) the value of investable assets of the employee’s clients;
  - (h) the amount of time-based fees generated by the employee;
  - (i) the training undertaken by the employee; and
  - (j) the number of complaints received about the employee.
- RG 246.137 A performance benefit based only on non-volume-based criteria is not presumed to be conflicted remuneration.
- RG 246.138 Some of the criteria in a balanced scorecard may be prerequisites for eligibility to receive a performance benefit (a ‘gate opener’), rather than a factor on which the value of the performance benefit is based. For this reason, employers need to evaluate the performance benefit as a whole to determine whether it is not conflicted remuneration.
- RG 246.139 In doing this, relevant factors for an employer to consider are likely to include the issues set out in Table 3. For the benefit not to be conflicted remuneration, it must not reasonably be expected to influence the advice given by the employee or it must be excluded from the conflicted remuneration provisions.

RG 246.140 Paragraph 2.20 of the Revised Explanatory Memorandum discusses when a performance benefit may not be conflicted remuneration:

Factors that will be relevant in assessing whether a benefit could reasonably be expected to influence the advice will include the weighting of the benefit in the total remuneration of the recipient, how direct the link is between the benefit and the value or number of financial products recommended or acquired and the environment in which the benefit is given. For example, if the benefit was based on the total profitability of the licensee, it was on a small percentage of the total remuneration of the recipient, and in order to qualify for the benefit, the recipient must also satisfy other criteria, such as criteria based on consumer satisfaction and compliance with internal processes and legal requirements, it would be less likely of being able to influence the recommendations or advice provided to retail clients.

RG 246.141 We are less likely to scrutinise performance benefits that are designed to more closely align the interests of employees who provide financial product advice to retail clients with the interests of their clients. An example might be a performance benefit that only rewards an employee for providing good quality financial product advice and does not depend on a particular type of product being recommended or the type of advice being provided.

RG 246.142 There is an exclusion for remuneration, including performance benefits, received by an employee of an Australian authorised deposit-taking institution (ADI) that provides financial product advice about basic banking and general insurance products and advice that is not financial product advice, such as advice on credit facilities: see reg 7.7A.12H.

**Table 3: Factors to consider when evaluating performance benefits**

<b>Eligibility criteria</b>	<p>What are the criteria that must be met for an employee to be eligible to receive a performance benefit, and could satisfying such criteria reasonably be expected to influence the advice given? For example, a relevant consideration is whether eligibility criteria explicitly or implicitly encourage the recommendation of a particular product.</p> <p>The more difficult it is to satisfy the eligibility criteria, the less likely that the performance benefit could reasonably be expected to influence the advice given. One way to measure this might be by reference to the proportion of employees who are able to meet the criteria.</p>
<b>Purpose of the performance benefit</b>	<p>What behaviour does the employer appear to be trying to encourage through the performance benefit? For example, the criteria that make up the scorecard may appear to be designed to encourage an employee to recommend that clients acquire specific financial products regardless of their interests, which means the performance benefit is likely to be conflicted remuneration. It may also cause advice to be given that does not comply with the best interests duty and related obligations in Div 2 of Pt 7.7A.</p>
<b>Weighting of the benefit in relation to total remuneration</b>	<p>What is the relative proportion of the benefit compared to the employee's overall remuneration? For example, the overall remuneration would include the performance benefit and any other forms of remuneration (e.g. salary).</p>

<b>Link between the benefit and financial product advice</b>	How direct is the link between the performance benefit and the value or number of financial products recommended or acquired by clients, based on the advice provided by the employee? For example, a performance benefit is more likely to be conflicted remuneration if it contains a criterion based on the volume of product sales compared with one that contains a criterion based on the profitability of an employee's business unit: for more information, see RG 246.143.
<b>Involvement of recipient in advice giving process</b>	How directly involved in the advice giving process is the recipient of the benefit? For example, if the recipient of a benefit helps prepare the advice but does not provide input into the recommendations that are made to a retail client, the performance benefit is less likely to be conflicted remuneration.
<b>Environment in which the benefit is given</b>	<p>In addition to the factors above, it is also relevant to consider whether the benefit is given in an environment that encourages the provision of good quality financial product advice that is in the client's interests.</p> <p>This could be specifically evidenced if, to qualify for the benefit, the recipient must also satisfy other criteria, such as criteria based on the quality of advice given, consumer satisfaction and compliance with internal processes and legal requirements.</p> <p>It may also be relevant to consider non-performance-based practices such as:</p> <ul style="list-style-type: none"> <li>• training;</li> <li>• monitoring and supervision; and</li> <li>• workplace policies and procedures, including the consequences of not complying with such policies and procedures.</li> </ul>
<b>Excluded benefits</b>	If part of a performance benefit is not conflicted remuneration because one or more exclusions apply, it is not relevant to consider that part of the benefit in determining whether the rest of the performance benefit is conflicted remuneration.

### Remuneration based on total profitability

- RG 246.143 If an employee is remunerated based on the total profitability of their employer or the business unit in which they work, and not the employee's individual sales, this would not be conflicted remuneration if the size of the business unit is large enough that the impact of the individual employee's sales on the profitability of the employer or the relevant business unit could not reasonably be expected to influence the advice given.

### Keeping records

- RG 246.144 We expect employers to keep records of how an employee's performance benefit has been calculated. Among other things, the employer's remuneration policy and documentation for how individual performance benefits are calculated are relevant records. Keeping records is essential to help the employer show that the presumption in s963L can be rebutted.

## E Volume-based shelf-space fees

### Key points

The Corporations Act prohibits a platform operator from accepting a benefit that is a volume-based shelf-space fee.

When looking to show that a benefit is not a volume-based shelf-space fee:

- if the 'fee-for-service' exclusion is being relied on, we are more likely to scrutinise a fee if:
  - there is a sudden increase in the fee after the commencement of s964A that is unrelated to the platform operator's costs;
  - the fee is based on the value of funds under management;
  - the fee is inconsistent with the fees charged for similar services provided to other funds managers; or
  - the fee is inconsistent with the average fees charged by other platform operators.
- if the 'scale efficiencies' exclusion is being relied on, a platform operator must be able to demonstrate how a rebate or discount was arrived at and how it is referable to scale efficiencies or estimated scale efficiencies gained by the funds manager from distributing its products through the platform.

We will not take action against a platform operator who accepts a volume-based shelf-space fee if that fee is passed on promptly to clients.

### The ban on volume-based shelf-space fees

RG 246.145 The Corporations Act prohibits a platform operator from accepting a benefit if it is a volume-based shelf-space fee: s964A(1). The purpose of the ban is to prevent:

[t]he receipt by platform operators of volume-based benefits to the extent that such incentives are merely a means of product issuers or funds managers 'purchasing' shelf space or preferential positions on administration platforms (paragraph 2.61 of the Revised Explanatory Memorandum).

RG 246.146 This ban applies in situations where:

- (a) an AFS licensee or a trustee that is a responsible superannuation entity (RSE licensee) (the platform operator) is, or offers to be, the provider of a custodial arrangement;
- (b) a monetary or non-monetary benefit is given, or is to be given, by another AFS licensee or RSE licensee (the funds manager) to the platform operator; and

- (c) a financial product to which the custodial arrangement relates is a financial product in which the funds manager deals: s964.

RG 246.147 A platform operator, for the purposes of this ban, is typically an operator of an investor directed portfolio service (IDPS), IDPS-like scheme, nominee or custody service, or superannuation master trust.

Note: For more information on IDPSs, see RG 148. For more information on nominee and custody services, see Regulatory Guide 149 *Nominee and custody services* (RG 149).

RG 246.148 In particular, platform operators are prohibited from accepting volume-based shelf-space fees from funds managers: s964A(1). If a platform operator provides financial product advice to retail clients, the conflicted remuneration provisions in Div 4 of Pt 7.7A are also relevant: see Sections B–D.

RG 246.149 A ‘shelf-space fee’ is a fee for making the product available through the platform. It also includes a discount on an amount payable, or a rebate of an amount paid, by a funds manager for its products being available through the platform.

RG 246.150 A benefit is generally presumed to be a volume-based shelf-space fee if the benefit, or the value of the benefit, is wholly or partly dependent on the total number or value of the funds manager’s financial products to which the custodial arrangement relates: s964A(2). This includes fees that are based on past, current or projected volumes, even if other factors were considered in determining the value of the benefit: see Example 12. It also includes a fee paid by a funds manager, calculated by reference to each of its products on the platform.

RG 246.151 The presumption in s964A(2) does not apply to the extent that a platform operator can show that one of the following applies to all or part of the benefit:

- (a) the benefit is ‘a reasonable fee for a service provided to the funds manager by the platform operator or another person’ (fee-for-service exclusion);
- (b) the benefit is ‘a discount on an amount payable, or a rebate of an amount paid, to the funds manager by the platform operator, the value of which does not exceed an amount that may reasonably be attributed to efficiencies gained by the funds manager because of the number or value of financial products in relation to which the funds manager provides services to the platform operator, or through the platform operator to another person’ (scale efficiencies exclusion): s964A(3).

Note: Platform operators must also consider their obligations under Pt IV of the *Competition and Consumer Act 2010*.

RG 246.152 If one or both of these exclusions applies to a benefit, or part of a benefit, the benefit or part of it will not be presumed to be a prohibited volume-based shelf-space fee. However, even if a platform operator believes it can rely on the exclusions in s964A(3), it is still possible that the fee is a prohibited volume-based shelf-space fee.

## The fee-for-service exclusion

RG 246.153 Whether the fee-for-service exclusion can be relied on depends on the circumstances of the case. The services provided by the platform operator to the funds manager need to be identified. For the fee to be reasonable, we consider there should generally be a correlation between the fee and the platform operator's costs in providing the service. We recognise that other factors may be relevant in setting the price of the fee.

RG 246.154 The types of fees to which this exclusion apply include:

- (a) fees charged to cover the platform operator's costs in listing a product on its platform; and
- (b) fees for reporting services provided by the platform operator to the funds manager about clients who have invested in its products and advisers who have recommended its products.

Note: This is not intended to be an exhaustive list.

RG 246.155 We are more likely to scrutinise a fee to determine whether it is a prohibited volume-based shelf-space fee because the fee-for-service exclusion does not apply if:

- (a) there is a sudden increase in the fee after the commencement of s964A that is unrelated to the platform operator's costs;
- (b) the fee is based on the value of funds under management (these fees are unlikely to correlate with the platform operator's costs in providing the service);
- (c) the fee is inconsistent with the fees charged for similar services provided to other funds managers; or
- (d) the fee is inconsistent with the average fees charged by other platform operators.

Note: The fee may still not be a prohibited volume-based shelf-space fee to the extent the scale efficiencies exclusion applies.

## The scale efficiencies exclusion

RG 246.156 The scale efficiencies exclusion is mainly designed to apply to situations where the funds manager can realise economies of scale due to the volume of business it generates by placing its products on the platform ('scale efficiencies'). In such a situation, a discount may be given or a rebate may

be paid to the platform operator by the funds manager in recognition of these economies of scale.

- RG 246.157 To rely on the scale efficiencies exclusion, a platform operator must be able to demonstrate how a rebate or discount was arrived at and how it is referable to scale efficiencies or estimated scale efficiencies gained by the funds manager from distributing its products through the platform.
- RG 246.158 One way a platform operator may do this is by receiving and keeping regular and appropriately verified written analyses from the funds manager about its costs and how the value of the rebate or discount is referable to scale efficiencies or estimated scale efficiencies. The analysis should set out details about how the funds manager's fixed costs (as opposed to costs that vary with each financial product sold) have reduced by reference to the number or value of financial products that are acquired by clients using the platform.
- RG 246.159 The value of the rebate or discount for scale efficiencies will therefore change depending on the number or value of financial products acquired through the platform.
- RG 246.160 A platform operator may rely on other methods to demonstrate the amount of the discount or rebate is not more than the scale efficiencies. We expect that these other methods would, at a minimum, have the same level of analysis and veracity in demonstrating the scale efficiencies or estimated scale efficiencies as described at RG 246.158.
- RG 246.161 We do not consider that receiving a written confirmation from a funds manager alone that states that a discount or rebate is referable to the scale efficiencies gained by the funds manager without providing further information has the same level of analysis and veracity as described at RG 246.158.

#### Example 12: A volume-based shelf-space fee (prohibited)

##### Scenario

A responsible entity enters into a fixed-price contract for three years, commencing on 1 July 2013, to rebate an amount of management fees charged to a platform operator. The annual amount is calculated based on the average volume of retail client business that the responsible entity has been able to generate by placing its financial products on the platform over a three-year period from 1 July 2010 to 30 June 2013. This amount exceeds the actual scale efficiencies gained by the responsible entity in placing its financial products on the platform.

##### Commentary

The rebate is presumed to be a volume-based shelf-space fee because it is based on the value of the responsible entity's financial products acquired by retail clients to which the custodial arrangement with the platform

operator relates. This is the case even if the rebate is based on the value of products acquired over a particular period in the past.

The platform operator cannot rely on the scale efficiencies exclusion for this rebate because it is not directly referable to the scale efficiencies the responsible entity gains by using the platform.

### Example 13: A fee for 'scale efficiencies' (not prohibited)

#### Scenario

A responsible entity enters into an agreement for interests in its XYZ Managed Investment Scheme to be made available through a platform. Under the agreement, a rebate of management fees charged is to be paid to the platform operator based on the estimated scale efficiencies the responsible entity gains by distributing interests in the XYZ Managed Investment Scheme through the platform.

The rebate is reviewed annually based on a statement provided to the platform operator by the responsible entity that contains details about:

- the fixed and variable costs that the responsible entity incurs on interests acquired or held in the scheme through the platform;
- the estimated costs that the responsible entity would have incurred on the products if it had not been able to use the platform but instead offered the products to individual clients directly and the clients held the investments in their own name (these costs have been determined using reasonable assumptions);
- the difference between these two costs represents the value of the scale efficiencies the responsible entity has been able to realise by selling products through the platform; and
- the calculation of the rebate as a percentage (of no more than 100%) of the value of these efficiencies.

The platform operator also receives an opinion from an expert about the statement, including how the rebate was calculated and the reasonableness of any assumptions used.

#### Commentary

In this situation, we think it is likely that the scale efficiencies exclusion can be relied on.

As mentioned at RG 246.152, even if the scale efficiencies exclusion applies, it is still possible that the fee is a prohibited volume-based shelf-space fee. However, this is unlikely to be the case if the rebate:

- is for the reasonable costs that are likely to be saved by the product issuer as a result of clients acquiring financial products through the platform; and
- is not related to making the products available through the platform.

## Passing on a volume-based shelf-space fee to the client

- RG 246.162 We will not take action against a platform operator that accepts a fee if that fee is passed on promptly—that is, as soon as practicable but no later than three months after receiving the benefit—to clients. In this case, we do not consider that the fee will be regarded as a volume-based shelf-space fee. We consider that taking such an approach is consistent with the overall policy intent of the ban on volume-based shelf-space fees, which is designed to prevent funds managers from purchasing preferential positions on platforms.
- RG 246.163 If a volume-based shelf-space fee is rebated back to clients, the volume-based shelf-space fee is unlikely to influence how platform operators select which products are available on the platform or the prominence they are given.

## Non-volume-based shelf-space fees

- RG 246.164 Although the ban on volume-based shelf-space fees in s964A does not extend to non-volume-based fees paid by funds managers to platform operators, platform operators still need to comply with the general obligation in s912A(1)(aa) to have in place adequate arrangements to manage conflicts of interest. RG 181 sets out our general approach to assessing compliance with s912A(1)(aa).
- Note: A flat fee based on the historical number or value of the funds manager's financial products available through a platform is a volume-based shelf-space fee and is covered by the ban in s964A: see RG 246.150.
- RG 246.165 If a platform operator or its representatives also provide financial product advice to retail clients, the conflicted remuneration provisions may apply: see RG 246.99–RG 246.105.
- RG 246.166 If a platform operator accepts a non-volume-based shelf-space fee, this may be an avoidance scheme to which the anti-avoidance provision applies: see RG 246.220–RG 246.222.

## F Asset-based fees on borrowed amounts

### Key points

AFS licensees and authorised representatives that provide financial product advice to retail clients are generally prohibited from charging asset-based fees on borrowed amounts that are to be used to acquire financial products by or on behalf of a client: see s964D and 964E.

In determining whether an amount is borrowed, AFS licensees and representatives cannot ignore any information they have discovered when making client inquiries as a result of complying with the best interests duty in s961B.

If a client has a portfolio of products purchased with a combination of borrowed and non-borrowed amounts, asset-based fees can be charged on the proportion of the portfolio purchased with non-borrowed amounts.

We consider that the ban on asset-based fees on borrowed amounts does not apply to:

- fees that are not for providing financial product advice; and
- financial products that are issued under a dividend or distribution reinvestment plan.

### The general ban on asset-based fees on borrowed amounts

- RG 246.167 AFS licensees and authorised representatives that provide financial product advice to retail clients are generally prohibited from charging asset-based fees on borrowed amounts that are to be used to acquire financial products by or on behalf of a client: see s964D and 964E. If an AFS licensee or representative is found to have charged asset-based fees on borrowed amounts, they may be liable for a civil penalty.
- RG 246.168 An AFS licensee also contravenes this general prohibition if one of its representatives (other than an authorised representative) charges an asset-based fee on a borrowed amount used to acquire financial products by or on behalf of a client: s964D(2).
- RG 246.169 There is no restriction on how an amount is borrowed for this ban to apply. An amount could be borrowed through secured or unsecured means, including through a credit facility, such as a personal loan or a credit card, or a margin lending facility: s964G(1). An amount is no longer borrowed if it has been repaid: s964G(2).
- RG 246.170 The purpose of this ban is to prevent advisers from artificially increasing the size of their advice fees by ‘gearing up’ their clients: see The Hon Bill

Shorten MP's second reading speech to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 on 24 November 2011. 'Gearing up' refers to increasing the amount of a client's portfolio based on borrowed amounts.

#### Example 14: Asset-based fees charged on a margin loan (prohibited)

##### Scenario

A licensed dealer group charges a retail client, to whom it provides financial product advice, an advice fee of 1% of the margin loan, which one of the dealer group's advisers has arranged for the client. The purpose of the margin loan is to provide the client with funds that they can invest, based on the advice of the adviser.

##### Commentary

The dealer group is prohibited from charging the client this fee under s964D. It is an asset-based fee charged on a borrowed amount that will be used to acquire financial products on behalf of the client.

It is possible that a client may also contribute some of their own funds, for example, as initial security for the loan. To the extent that these funds are not borrowed, asset-based fees may be charged. See RG 246.177–RG 246.178 for more information on how such fees may be charged on a portfolio of products purchased with a combination of borrowed and non-borrowed amounts.

## Interaction with best interests duty

- RG 246.171 When an AFS licensee or authorised representative provides personal advice to a retail client, they must make inquiries into the client's relevant circumstances to comply with the best interests duty in s961B. In the course of making these inquiries, they are likely to discover if the client is asking them to acquire financial products using money that the client has borrowed.
- RG 246.172 The ban on charging asset-based fees on borrowed amounts does not affect the obligation under s961B to make inquiries into the client's relevant circumstances. AFS licensees and representatives cannot ignore the information they have discovered in the course of making these client inquiries when determining whether an amount is borrowed for the purposes of the ban on charging asset-based fees on borrowed amounts: see s964D(5) and 964E(4).

Note: See RG 175 and RG 244 for guidance on complying with the best interests duty.

## Instalment warrants

- RG 246.173 An instalment warrant gives the holder of the warrant a beneficial interest in an underlying financial product. It generally has:
- (a) an equity component, which is paid when the warrant is acquired; and
  - (b) a debt component, which is generally a limited recourse loan (i.e. the warrant issuer has no recourse against the warrant holder for repayment of the loan).
- RG 246.174 The holder of the warrant may acquire legal ownership of the underlying financial product by repaying the loan.
- RG 246.175 We consider that the ban on asset-based fees on borrowed amounts applies to the extent an asset-based fee is referable to the debt component of an instalment warrant. Where this is the case, we consider any asset-based fees charged are charged on a borrowed amount used or to be used to acquire the instalment warrant by or on behalf of the client: s964D and 964E.
- RG 246.176 The ban will also apply to any borrowed amounts used to purchase the instalment warrant.

## Portfolios of products

- RG 246.177 A client may have a portfolio of products purchased with a combination of borrowed and non-borrowed amounts. In this case, we consider that, to charge an asset-based fee, the net value of the portfolio should be determined, and the amount borrowed (less any amount repaid) should then be deducted from this net value. Asset-based fees should only be charged on the resulting value of the portfolio after borrowed amounts are deducted.
- RG 246.178 The proportion of borrowed and non-borrowed assets may change over time—for example, if a client borrows additional amounts to add to their portfolio—and fee arrangements should be adjusted to reflect this.

## When the ban does not apply

- RG 246.179 While there is no restriction on how an amount is borrowed for the ban on asset-based fees to apply, the ban does not apply if it is not reasonably apparent that an amount has been borrowed: s964D(3) and 964E(2). This is an objective standard based on whether something would be apparent to a person with a reasonable level of expertise in the subject matter of the advice sought by the client, and that person were to exercise care and objectively assess the information given to the AFS licensee or representative by the client: s964H.

RG 246.180 This means that the ban on charging asset-based fees will not apply to an AFS licensee or authorised representative if they do not know that an amount used to acquire financial products by or on behalf of a client has been borrowed, as long as this fact is not reasonably apparent.

Note: RG 246.171–RG 246.172 discusses how the obligation to make inquiries as part of the best interests duty interacts with the ban on asset-based fees on borrowed amounts.

### Example 15: Client borrows money to invest without the adviser's knowledge

#### Scenario

A client borrows an amount of money for investment purposes from an entity that is unrelated to the client's adviser. The client then seeks personal advice from their adviser. The adviser has no prior knowledge that the client has borrowed funds for investment purposes. The adviser recommends some investments to the client and proposes to charge an asset-based fee for this advice.

#### Commentary

Generally, the process of making reasonable inquiries about the client's relevant circumstances in the course of providing advice should include inquiries about the source of the funds the client has available to them to invest, and whether they were borrowed. If the adviser is made aware that the client's funds are borrowed, then charging an asset-based fee on financial products purchased with the borrowed amount is prohibited under s964D. In this case, it would not be relevant that the client borrowed the amount before the advice was given.

However, if for some reason, the client did not inform the adviser that the funds were borrowed despite reasonable inquiries being made, we consider that it would not be reasonably apparent to the adviser that an amount had been borrowed, and the prohibition would not apply.

### The fee is not for providing financial product advice

RG 246.181 A fee for providing financial product advice to a client is an asset-based fee to the extent that it is dependent on the amount of funds to be used to acquire financial products by or on behalf of the client: s964F.

RG 246.182 If a fee charged is not for providing financial product advice—for example, application fees and the interest charged on a loan taken out by a client to purchase financial products—the ban on asset-based fees on borrowed amounts does not apply to the fee.

### Dividend and distribution reinvestment plans

RG 246.183 When a client acquires a financial product and participates in a dividend or distribution reinvestment plan in relation to that holding, we consider that the ban on asset-based fees on borrowed amounts does not apply to products issued under the dividend or distribution reinvestment plan. This is because these products are not acquired with borrowed amounts.

## G Transitional provisions

### Key points

The conflicted remuneration provisions apply to benefits given under an arrangement entered into on or after 1 July 2013 (unless an AFS licensee elects to comply with the provisions earlier).

Whether a benefit was given under an arrangement entered into before 1 July 2013, and is therefore 'grandfathered', depends on the arrangement under which the benefit was given and its terms.

At the date of issue of this guide, the Australian Government is consulting on regulations that will modify when a benefit is grandfathered. We will update this guide to take into account the effect of the regulations after they have been finalised.

The ban on asset-based fees on borrowed amounts does not apply to such fees charged on or after 1 July 2013 (or the date an AFS licensee elects to comply with Pt 7.7A) if the funds were borrowed and used to acquire financial products before this date.

### When do the conflicted remuneration provisions apply?

RG 246.184 The conflicted remuneration provisions will generally apply from 1 July 2013, unless an AFS licensee or other person lodges a notice with ASIC electing to comply with Pt 7.7A before this date. In this case, the conflicted remuneration provisions and other provisions in Pt 7.7A will apply from the date specified in the notice: s1528(4).

Note 1: The conflicted remuneration provisions are set out in Divs 4 and 5 of Pt 7.7A and are discussed in Sections B–F of this guide. The other provisions in Pt 7.7A include the best interests duty and related obligations in Div 2, and the provisions relating to charging ongoing fees to clients in Div 3: see RG 246.18–RG 246.19 and Table 1.

Note 2: Form FS92 is available from [www.asic.gov.au/forms](http://www.asic.gov.au/forms) for AFS licensees to complete and lodge with us if they would like to elect to comply with Pt 7.7A before 1 July 2013.

RG 246.185 The date on which the conflicted remuneration provisions apply to an individual or entity is referred to as the 'application day'.

RG 246.186 It is not possible to elect to comply with the conflicted remuneration provisions before 1 July 2013 for a benefit that relates to:

- (a) a group life policy for members of a superannuation entity; or
- (b) a life policy for a member of a default superannuation fund: reg 10.18.01.

## Grandfathering and conflicted remuneration

RG 246.187 The conflicted remuneration provisions do not apply to a benefit given to an AFS licensee or representative if the benefit is given under an arrangement entered into before the application day: s1528(1) and reg 7.7A.16. These benefits are ‘grandfathered’.

Note: The conflicted remuneration provisions also do not apply to the extent that it would result in an acquisition of property from a person otherwise than on just terms (within the meaning of paragraph 51(xxxi) of the Constitution).

RG 246.188 We are more likely to scrutinise financial product advice to retail clients for compliance with the Corporations Act if following the advice means that the AFS licensee or their representative receives a grandfathered benefit. An example might be if the advice is to purchase or retain a financial product for which an AFS licensee will receive a grandfathered benefit.

RG 246.189 At the date of issue of this guide, the Australian Government is consulting on regulations that will modify the scope of the transitional provisions in s1528(1) and reg 7.7A.16.

Note: For more information, see <http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=consultation/default.htm>.

RG 246.190 We will update this guide to take into account the effect of the regulations after they have been finalised.

### What is an arrangement?

RG 246.191 An arrangement is defined broadly. It generally means a contract, agreement, understanding, scheme or other arrangement as existing from time to time, whether it is:

- (a) formal or informal, or partly formal and partly informal;
- (b) written or oral, or partly written and partly oral; and
- (c) enforceable, or intended to be enforceable, by legal proceedings (or not), and based on legal or equitable rights (or not): s761A.

RG 246.192 The types of arrangement covered by the conflicted remuneration provisions are similarly broad. For example, they include:

- (a) agreements from a platform operator to pay an AFS licensee a volume-based rebate or commission;
- (b) agreements from a product issuer to pay an AFS licensee ongoing and upfront commissions;
- (c) agreements to transfer an advice business; and
- (d) agreements that set out how employees who provide financial product advice to retail clients are to be paid.

Note: This is not intended to be an exhaustive list.

- RG 246.193 To determine whether a benefit is given under an arrangement entered into before the application day and is therefore grandfathered, it is necessary to determine under what arrangement the benefit is given and the terms of this arrangement. This includes:
- (a) when the arrangement was entered into;
  - (b) what benefits are to be given and received under the arrangement;
  - (c) who gives and receives a benefit; and
  - (d) whether the form and value of the benefit is specified in the arrangement or is discretionary.

### **Changes to an arrangement and new arrangements**

- RG 246.194 It is possible for the terms of an arrangement, including its duration, to be changed on or after the application day without resulting in a new arrangement being created. By ‘new arrangement’ we mean an arrangement that is different from the arrangement entered into before the application day. As mentioned at RG 246.187, a benefit is grandfathered if it is given under an arrangement entered into before the application day.
- RG 246.195 Whether a new arrangement has been created depends on the circumstances, including the terms of the arrangement. If a new arrangement is not created, benefits under the amended arrangement continue to be grandfathered.
- RG 246.196 If an arrangement that is in place before the application day is changed on or after the application day, benefits under the arrangement may not be grandfathered if the changes are so material that the arrangement is no longer the arrangement that was in place before the application day. Whether this is the case will depend on the circumstances.
- RG 246.197 We are more likely to scrutinise changes that we consider are material in determining whether benefits under the arrangement are grandfathered.
- RG 246.198 Minor changes to an arrangement are unlikely to result in a new arrangement being created.
- RG 246.199 It is possible that a number of incremental changes made to an arrangement after the application day may, when viewed as a whole, result in a new arrangement being created. Where this occurs, a benefit may no longer be grandfathered if it is given under this new arrangement. This is because the benefit is not given under an arrangement entered into before the application day: see RG 246.187.
- RG 246.200 We do not generally consider that a discretionary benefit is grandfathered if it is given on or after the application day because we generally consider the giving of such a benefit to be a new arrangement. That is, we consider

determining whether and what discretionary benefit is to be given to be a separate arrangement. If this occurs on or after the application day, the benefit is unlikely to be grandfathered.

## Transferring benefits

- RG 246.201 A benefit under an arrangement entered into before the application day may be transferred to another AFS licensee or representative on or after the application day without the conflicted remuneration provisions applying to the benefit. Whether this is the case depends on the circumstances, including the form of the arrangement and how the transfer is made.
- RG 246.202 At the date of issue of this guide, the Australian Government is consulting on regulations to clarify how the grandfathering provisions apply if a party to an arrangement changes. We will update our guidance to take into account the effect of the regulations after they have been finalised.

## Workplace arrangements

- RG 246.203 Whether a benefit given to an employee under an employment arrangement is grandfathered depends on the terms of the arrangement and when it was entered into.
- RG 246.204 The transitional provisions in s1528(1) and reg 7.7A.16 apply to an employment arrangement, including an enterprise agreement, which was entered into before the application day, even if it continues after the application day. This is the case, provided that:
- (a) the payment of benefits to employees is specified in the employment arrangement; and
  - (b) no material change is made to the arrangement such that the arrangement is no longer the arrangement that was in place before the application day (see RG 246.196–RG 246.197).
- RG 246.205 However, if a benefit paid to an employee is discretionary, we consider it is generally conflicted remuneration: see RG 246.200.
- RG 246.206 If a new employee that provides financial product advice to retail clients enters into an employment arrangement on or after 1 July 2013, we consider that the conflicted remuneration provisions generally apply to this arrangement. This includes cases where the employment arrangement incorporates the terms of an existing enterprise agreement or an employment policy of the employer created before the application day.

**Example 16: Enterprise agreement (not conflicted remuneration)****Scenario**

An enterprise agreement is entered into before 1 July 2013. It specifies:

- as a dollar amount or percentage, the pay rises each class of employee is to receive under the agreement; and
- the bonuses and other performance benefits each class of employee is to receive under the agreement. This is done by stating how the performance benefit can be accessed and how it is calculated.

No party to the enterprise agreement has elected to comply with Pt 7.7A before 1 July 2013.

**Commentary**

We consider that paying a bonus or performance benefit in accordance with the enterprise agreement on or after the application day does not involve giving conflicted remuneration. This is because these payments and how they can be accessed are specified under an agreement entered into before the application day and the benefits are grandfathered.

**Grandfathering and volume-based shelf-space fees**

RG 246.207 The ban on volume-based shelf-space fees, as discussed in Section E, does not apply to a benefit given to a platform operator that is an AFS licensee or RSE licensee if the benefit is given under an arrangement entered into before the application day: s1529(1). That is, these benefits are grandfathered.

RG 246.208 The ban only applies to arrangements entered into on or after the application day.

**Grandfathering and asset-based fees on borrowed amounts**

RG 246.209 The ban on asset-based fees on borrowed amounts applies to asset-based fees charged on or after the application day to borrowed amounts. This is only to the extent that the borrowed amount is used to acquire financial products on or after the application day: s1531(1). For our guidance on the ban on asset-based fees on borrowed amounts, see Section F.

RG 246.210 This means that the ban on asset-based fees on borrowed amounts applies where a client enters into an agreement on or after the application day to borrow money to be used to acquire financial products and asset-based fees are charged.

RG 246.211 The ban does not apply to asset-based fees charged on or after the application day where funds were borrowed and used to acquire financial products before the application day. These fees are a grandfathered benefit.

Note 1: The ban also does not apply to the extent that it would result in an acquisition of property from a person otherwise than on just terms (within the meaning of paragraph 51(xxxi) of the Constitution): s1531(2).

Note 2: The example below only considers how the transitional provisions apply to the ban on asset-based fees on borrowed amounts. Other obligations may apply, such as the best interests duty and related obligations in Div 2 of Pt 7.7A: see RG 175 and RG 244.

### Example 17: Asset-based fees on borrowed amounts

#### Scenario

A financial adviser recommends to the client that the client invest \$400,000 in shares. The adviser is aware that the client has \$300,000 of their own money to invest and recommends that the client acquire the remaining funds through a margin loan of \$100,000.

On 10 January 2012, the client follows the advice and takes out a margin loan and acquires the shares. The adviser charges the client an asset-based fee on the \$100,000 margin loan.

On 10 July 2013, the adviser reviews the client's portfolio. The adviser recommends the client increase their holding in shares and recommends borrowing an additional \$50,000, also by way of a margin loan, to make this acquisition. The additional funds are drawn down on 1 August 2013 and the adviser purports to charge the client an asset-based fee on this \$50,000 margin loan.

#### Commentary

The ban on asset-based fees on borrowed amounts does not apply to the asset-based fee charged on the \$400,000 portfolio, which includes the \$100,000 margin loan. This is because, even though the client is being charged the fee on or after 1 July 2013, the borrowed amount (\$100,000) was used to acquire the shares before 1 July 2013 (the shares were acquired on 10 January 2012). The fees charged are a grandfathered benefit.

However, the ban does apply to the asset-based fee that the adviser purports to charge the client on the additional \$50,000 margin loan. The fees charged are not a grandfathered benefit.

## H The anti-avoidance provision

### Key points

In administering the anti-avoidance provision in s965, we are more likely to scrutinise schemes that appear to have no commercial purpose other than to avoid the application of the conflicted remuneration provisions.

We are less likely to scrutinise schemes that are normal commercial transactions conducted in the ordinary course of business.

### What is anti-avoidance?

- RG 246.212 A person must not enter into or carry out a scheme to avoid the application of any provision in Pt 7.7A: s965. This includes:
- (a) the conflicted remuneration provisions in Div 4 of Pt 7.7A (see Sections B–D);
  - (b) the ban on platform operators accepting volume-based shelf-space fees in Subdiv A of Div 5 of Pt 7.7A (see Section E); and
  - (c) the ban on charging asset-based fees on borrowed amounts in Subdiv B of Div 5 of Pt 7.7A (see Section F).
- RG 246.213 The effect of the anti-avoidance provision is that, from 1 July 2012, a person must not, either alone or with other people, enter into or carry out a scheme if:
- (a) it would be concluded that they did so for the sole or non-incidental purpose of avoiding the application of any provision of Pt 7.7A; and
  - (b) the scheme or part of the scheme has achieved—or, apart from s965, would achieve—that purpose: s965(1).
- RG 246.214 A person may be liable for a civil penalty if they are found to have breached s965(1).
- RG 246.215 The anti-avoidance provision is designed to ensure that the policy intent of the FOFA reforms, including the conflicted remuneration provisions, is not avoided through industry or transaction structuring.
- RG 246.216 Section 965(1) could potentially apply to a broad range of schemes (e.g. any contract, agreement, plan, proposal, course of action or course of conduct).

## Avoidance schemes

- RG 246.217 A person may contravene s965 if they enter into or carry out a scheme that meets the criteria in RG 246.213.
- RG 246.218 We are more likely to scrutinise schemes that appear to have no commercial purpose other than to avoid the application of the conflicted remuneration provisions.

Note: The discussion in this section on arrangements to which the anti-avoidance provision applies is not intended to be exhaustive.

### Schemes with related parties

- RG 246.219 A scheme may be an avoidance scheme if it is structured so that an entity that is related to:
- (a) a person to whom the conflicted remuneration provisions in Div 4 of Pt 7.7A apply accepts or gives conflicted remuneration;
  - (b) a platform operator accepts a fee that would otherwise be a prohibited volume-based shelf-space fee; or
  - (c) an AFS licensee or its authorised representative, to which the ban on charging asset-based fees on borrowed amounts applies, charges a client an asset-based fee on a borrowed amount.

#### Example 18: Establishing a special purpose AFS licensee (likely to be an avoidance scheme)

##### Scenario

A platform operator provides a white label or private label platform arrangement to a licensed dealer group.

The directors and shareholders of the dealer group are also financial advisers who provide financial product advice to retail clients. The dealer group establishes a separate AFS licensee (a special purpose AFS licensee) for the labelled platform arrangement to separate it from the dealer group. The financial advisers are also directors and shareholders of the special purpose AFS licensee.

The client pays a bundled percentage-based fee to the platform operator for administration services as well as distribution services. The administration services are for holding the products through the platform and the reporting that is provided to clients. The distribution services are offering and issuing any financial products available through the platform to clients.

The platform operator gives a portion of the fee to the special purpose AFS licensee. Their portion is a percentage-based share of the fee based on the level of assets held on the platform.

**Commentary**

While the volume-based fee is received by the special purpose AFS licensee that does not provide financial product advice to retail clients, the directors and shareholders of the special purpose licensee provide financial product advice to retail clients. This arrangement could reasonably be expected to influence the advice given to clients by the dealer group and its representatives.

Such an arrangement is likely to be an avoidance scheme. This is because the payment would be prohibited conflicted remuneration if it was paid to the dealer group. However, in this case, it is not prohibited conflicted remuneration because it is paid to the special purpose AFS licensee.

In the circumstances and in the absence of another commercial purpose, it could be concluded that the payment was made to the special purpose AFS licensee for a purpose (that is not incidental) of avoiding the application of the conflicted remuneration provisions.

If payments are made by the special purpose AFS licensee to its directors and shareholders, this may also breach the conflicted remuneration provisions.

**Non-volume based shelf space fees**

- RG 246.220 A scheme may be an avoidance scheme if it is structured so that a platform operator is given or accepts a large flat fee that has no connection to:
- (a) the volume of financial products recommended or acquired by clients; or
  - (b) the number or value of financial products available through a platform.
- RG 246.221 Such fees may be used to ‘purchase’ preferential positions on a platform. The purpose of the ban on volume-based shelf-space fees is to prevent such arrangements from occurring: see RG 246.145.
- RG 246.222 These arrangements may also be a form of conflicted remuneration if the platform operator provides financial product advice to retail clients, such as in the case of a private label arrangement.

**Trading participants and brokerage**

- RG 246.223 Regulation 7.7A.12D generally excludes brokerage from being conflicted remuneration if it is given to a trading participant of a prescribed financial market or their representative: see the appendix to this guide.
- RG 246.224 The exclusion may apply when a person is a trading participant of one prescribed financial market and trades on another financial market.
- RG 246.225 We are more likely to scrutinise conduct to determine whether the anti-avoidance provision has been breached if:
- (a) a person receives brokerage and is a trading participant of a market;
  - (b) the person’s business does not involve genuine measures to deal on this market on behalf of retail clients;

- (c) the person's business substantially consists of arranging transactions on a different market; and
- (d) the person is not a trading participant of the different market.

RG 246.226 This is because we consider this conduct is more likely to be carried out for a purpose (that is not incidental) of avoiding the conflicted remuneration provisions.

## Schemes that are unlikely to be avoidance schemes

RG 246.227 In administering the anti-avoidance provision, we are unlikely to scrutinise schemes that are normal commercial transactions conducted in the ordinary course of business.

RG 246.228 We are also unlikely to take action on arrangements that have been genuinely entered into to comply with the conflicted remuneration provisions.

### Example 19: Benefits for information technology software and support (not an avoidance scheme)

#### Scenario

Every month a product issuer offers the financial advisers of a dealer group an incentive of \$500 if they sell a certain volume of the issuer's products. From 1 July 2013, the product issuer no longer makes this offer (the product issuer has not elected to comply with Pt 7.7A before this date).

Instead, the product issuer offers to provide the dealer group with access to software that it owns, which allows the performance of a client's investment in the issuer's products to be monitored. The software can be accessed by all of the dealer group's financial advisers.

#### Commentary

We would not consider the offer to provide access to this software to be an avoidance scheme. Nor would we consider it to be a form of conflicted remuneration because of the exclusion in s963C(d) for providing information technology software and support: see the appendix to this guide.

## Appendix: Benefits that are not conflicted remuneration

Note: This appendix does not include all exclusions from the conflicted remuneration provisions. For example, it does not include the exclusions in s963B(1)(a), 963B(1)(b), 963C(a) and 963D, which are covered by other exclusions listed below.

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide financial product advice to retail clients
'Grandfathered' benefits	Benefits to which the transitional provisions in s1528(1) and reg 7.7A.16 apply are not conflicted remuneration: see Section G.
Benefits for advice on general insurance products: reg 7.7A.12G	<p>A monetary or non-monetary benefit, such as a commission, is not conflicted remuneration if it is given for advice on a general insurance product.</p> <p>The benefit may also relate to other matters which are not conflicted remuneration: see reg 7.7A.12I</p>
Benefits for advice on life risk insurance products: reg 7.7A.12A	<p>A monetary benefit is not conflicted remuneration if it is given in relation to advice on a life risk insurance product. A life risk insurance product is generally a life policy or a sinking fund policy that is a contract of insurance: see s764A(1)(e).</p> <p>The exclusion does not cover benefits for advice on:</p> <ul style="list-style-type: none"> <li>• a group life risk policy inside superannuation whether it is for a default or another type of superannuation fund; and</li> <li>• an individual life insurance policy for the benefit of a member of a default fund.</li> </ul>
Consumer credit insurance	<p>The conflicted remuneration provisions do not apply if a monetary benefit is given in relation to consumer credit insurance. This is because such benefits are covered by the exclusions for general insurance products (reg 7.7A.12G) and life insurance products (reg 7.7A.12A).</p> <p>The conflicted remuneration provisions also will not apply if a benefit is given for advice in relation to both consumer credit insurance and a non-financial product (e.g. a credit facility), due to regulation 7.7A.12I, which allows mixed benefits in specified circumstances.</p>
Benefits in relation to execution-only services: s963B(1)(c)	<p>A monetary benefit is not conflicted remuneration if:</p> <ul style="list-style-type: none"> <li>• it is given in relation to the issue or sale of a financial product; and</li> <li>• the financial product advice about the product, or products of that class, has not been given to the client by the AFS licensee or representative in the 12 months immediately before the benefit is given.</li> </ul> <p>This means that a benefit is not conflicted remuneration if it is given in relation to an execution-only issue or sale of a financial product. However, this exclusion will only apply if the financial product advice about the product, or class of product to which the product belongs, has not been given to the client by the AFS licensee or representative in the 12 months immediately before the benefit is given.</p> <p>For AFS licensees that are part of a vertically integrated corporate group, if a separate AFS licensee within the group has provided financial product advice to the client within the previous 12 months, but the AFS licensee seeking to rely on the exclusion has not, this fact alone will not prevent the AFS licensee from relying on the exclusion.</p>

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide financial product advice to retail clients
<p>Benefits given by the client: s963B(1)(d) and 963C(e)</p>	<p>A monetary or non-monetary benefit is not conflicted remuneration if it is given by a client in relation to:</p> <ul style="list-style-type: none"> <li>• the issue or sale of a financial product by the AFS licensee or representative to the client: s963B(1)(d)(i); or           <p style="margin-left: 20px;">Note: This does not apply to additional investments that do not result in an issue or sale, such as additional contributions to a superannuation account.</p> </li> <li>• financial product advice given by the AFS licensee or representative to the client: s963B(1)(d)(ii) (e.g. fees calculated based on an hourly rate, a fixed price or as an asset-based fee).</li> </ul> <p>Benefits given by the client may include benefits that have been authorised by the client.</p> <p>We will administer the law as if a benefit has been authorised by a client if it is given at the client's direction or with their clear consent.</p> <p>In our view, consent is 'clear' if it is genuine, express and specific. Mere knowledge of the benefit, or agreement to proceed with financial services in light of a disclosure about the benefit, is not clear consent.</p> <p>Subject to the qualification below, we consider that this exclusion applies when:</p> <ul style="list-style-type: none"> <li>• a benefit is given by the client to an AFS licensee and the licensee subsequently passes on this benefit, or a portion of the benefit, to one of its authorised representatives or other representative; or</li> <li>• if the AFS licensee passes on the benefit, or a portion of the benefit, to an authorised representative, and the authorised representative passes on the benefit, or a portion of the benefit, to another representative of the AFS licensee (e.g. an employee of the authorised representative).</li> </ul> <p>The exclusion will only apply if the client has authorised passing on the benefits in this way and no AFS licensee or authorised representative that passes on a benefit has discretion over the portion of a benefit that is passed on. If an AFS licensee or representative has this discretion, we do not consider that the benefit has been given at the client's direction or with their clear consent.</p> <p>For more information, see RG 246.61–RG 246.66.</p>
<p>'Stamping fees': reg 7.7A.12B</p>	<p>A monetary benefit is not conflicted remuneration:</p> <ul style="list-style-type: none"> <li>• if the benefit is given to an AFS licensee by or on behalf of an entity in relation to the person dealing in a financial product issued by the entity, on behalf of a client; or</li> <li>• if:           <ul style="list-style-type: none"> <li>– the benefit is given to a person by or on behalf of an entity for dealing in a financial product issued by the entity, on behalf of a client; and</li> <li>– the person gives the benefit, directly or indirectly, to a representative of the provider.</li> </ul> </li> </ul> <p>This exclusion only applies to financial products that are:</p> <ul style="list-style-type: none"> <li>• debentures, stocks or bonds that are, or are proposed to be, issued by a government;</li> <li>• shares in, or debentures of, a body that are, or are proposed to be, listed on a prescribed financial market;</li> </ul>

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide financial product advice to retail clients
	<ul style="list-style-type: none"> <li>• interests in a managed investment scheme that is, or is proposed to be, listed on a prescribed financial market; or</li> <li>• a right to acquire, by way of issue, the shares, debentures or interests referred to in the preceding two bullet points.</li> </ul> <p>This exclusion does not apply if the entity is an investment entity.</p>
<p>Brokerage: reg 7.7A.12D</p>	<p>A monetary benefit is not conflicted remuneration if:</p> <ul style="list-style-type: none"> <li>• the benefit consists of a percentage, of no more than 100%, of a brokerage fee that is given to a trading participant of Asia Pacific Exchange Limited, ASX Limited, Chi-X Australia Pty Ltd, National Stock Exchange of Australia Limited or SIM Venture Securities Exchange Ltd (prescribed financial markets); and</li> <li>• the trading participant, directly or indirectly, gives the benefit to a representative of the trading participant.</li> </ul> <p>A trading participant is a participant of a market admitted under the market's operating rules and is allowed, under the market's operating rules, to deal in one or more of the financial products that are traded on the market.</p> <p>A brokerage fee is a fee that a client pays to a trading participant in relation to a transaction in which the trading participant, on behalf of the client, deals in a financial product that is traded on:</p> <ul style="list-style-type: none"> <li>• a prescribed financial market; or</li> <li>• a prescribed foreign financial market.</li> </ul>
<p>Fees for dealing services: reg 7.7A.12E</p>	<p>A monetary benefit is not conflicted remuneration if the benefit is given to an AFS licensee or representative by a retail client in relation to the licensee or representative dealing in a financial product on behalf of the client.</p>
<p>Benefits for advice on interests in a time-sharing scheme: reg 7.7A.12C</p>	<p>A benefit is not conflicted remuneration if it is given for financial product advice about an interest in a time-sharing scheme.</p>
<p>Benefits given for advice about basic banking and general insurance products: reg 7.7A.12H</p>	<p>To the extent that a benefit is given in relation to financial product advice, it is not conflicted remuneration if:</p> <ul style="list-style-type: none"> <li>• the benefit only relates to a basic banking product, a general insurance product or a combination of those financial products;</li> <li>• the AFS licensee or representative that gives financial product advice does not, at the same time, provide advice about any other financial products; and</li> <li>• the AFS licensee or representative is an agent or an employee of an Australian ADI otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI.</li> </ul> <p>This exclusion is designed to allow agents and employees of an Australian ADI, and other representatives acting under the name of the Australian ADI, to receive sales bonuses and other forms of remuneration for the advice that they give about basic banking and general insurance products. It also allows the agents and employees to receive such benefits even if those benefits also relate to advice or services that are not financial product advice (e.g. advice about a credit facility) provided at the same time as advice about the basic banking and/or general insurance products.</p> <p>The exclusion may apply to a number of arrangements where a person is</p>

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide financial product advice to retail clients
	<p>working for an Australian ADI under the name of the Australian ADI, including:</p> <ul style="list-style-type: none"> <li>• contractors;</li> <li>• employees of employment agencies who may be working temporarily for the Australian ADI;</li> <li>• employees of a body corporate related to the Australian ADI; and</li> <li>• employees of another company who work exclusively for the Australian ADI.</li> </ul> <p>Note: This is not intended to be an exhaustive list.</p>
<p>Benefits with a small value: s963C(b) and regs 7.7A.13 and 7.8.11A</p>	<p>A non-monetary benefit is not conflicted remuneration if it is less than \$300 for each AFS licensee or representative that is the final recipient of the benefit and identical or similar benefits are not given on a frequent or regular basis.</p> <p>AFS licensees must keep records of benefits between \$100 and \$300 that are given to the licensee or one of their representatives: reg 7.8.11A.</p>
<p>Benefits with an educational or training purpose: s963C(c) and regs 7.7A.14, 7.7A.15 and 7.8.11A</p>	<p>A non-monetary benefit, regardless of who gives it, is not conflicted remuneration if it has a genuine educational or training purpose that is relevant to providing financial product advice to the client. The benefit must:</p> <ul style="list-style-type: none"> <li>• be for the provision of an education or training course to an AFS licensee or representative (the participant); or</li> <li>• have the dominant purpose of education or training.</li> </ul> <p>Where the benefit is for the provision of an education or training course:</p> <ul style="list-style-type: none"> <li>• education and training activities for the course must take up at least the lesser of six hours a day or 75% of the time spent on the course; and</li> <li>• the participant or their employer or AFS licensee must pay for travel and accommodation relating to the course, and events and functions held in conjunction with the course.</li> </ul> <p>Examples of benefits to which this exclusion applies include written material on the tax implications of a product and research on a class of products an adviser gives advice on that would further the adviser's knowledge about these products.</p> <p>AFS licensees must keep records of education and training benefits that they or their representatives receive: reg 7.8.11A.</p>
<p>Benefits for information technology software and support: s963C(d) and reg 7.8.11A.</p>	<p>A non-monetary benefit is not conflicted remuneration if it is for the provision of information technology software or support, and the benefit:</p> <ul style="list-style-type: none"> <li>• is related to providing financial product advice to retail clients about the financial products issued or sold by the benefit provider; and</li> <li>• complies with the conditions in the regulations. At this stage, there are no conditions in the regulations.</li> </ul> <p>We consider that the following types of benefit are likely to be covered by this exclusion:</p> <ul style="list-style-type: none"> <li>• software for an administration platform where the benefit is given by the owner or distributor of the software;</li> <li>• access to an information technology 'help desk' for problems that an AFS licensee or representative experiences in using administration platform software, where the benefit is given by the software owner or distributor; and</li> <li>• access to a website to place client orders.</li> </ul> <p>We consider that the following types of information technology software and</p>

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide financial product advice to retail clients
	<p>support are unlikely to be covered by the exclusion:</p> <ul style="list-style-type: none"> <li>• payroll administration software and related support services;</li> <li>• accounting software and related support services to manage the accounts of an AFS licensee's or representative's business; and</li> <li>• anti-virus software.</li> </ul> <p>If a licensed dealer group receives benefits for information technology software and support and uses them to meet operating costs, we are less likely to scrutinise the benefit under the conflicted remuneration provisions if:</p> <ul style="list-style-type: none"> <li>• the benefit is not passed on to the adviser; and</li> <li>• there are controls in place to ensure that the benefit does not influence the advice.</li> </ul> <p>Our views on when this could be the case are discussed at RG 246.121–RG 246.123.</p> <p>AFS licensees must keep records of information technology software or support that they or their representatives receive: reg 7.8.11A.</p>
Mixed benefits: reg 7.7A.12I	<p>A benefit that is excluded from being conflicted remuneration is not conflicted remuneration even if:</p> <ul style="list-style-type: none"> <li>• the benefit also relates to other activities, but only to the extent that the part of the benefit that relates to the other activities is not conflicted remuneration; or</li> <li>• the AFS licensee or representative that provides financial product advice to a client at the same time, provides other services (whether or not financial services).</li> </ul> <p>This exclusion does not apply to the extent that the provisions under which the benefit is given state that:</p> <ul style="list-style-type: none"> <li>• the benefit may only relate to particular financial products or services; or</li> <li>• an AFS licensee or representative must not receive the benefit if they, at the same time, provide other specified financial services.</li> </ul> <p>The effect of this exclusion is that, among other things:</p> <ul style="list-style-type: none"> <li>• an excluded benefit may also relate to products that are not financial products (such as credit facilities) unless the provision excluding the benefit provides otherwise; and</li> <li>• an excluded benefit may also relate to other financial services provided: <ul style="list-style-type: none"> <li>– the component that relates to the other financial services is not conflicted remuneration; and</li> <li>– the provision excluding the benefit does not provide otherwise; and</li> </ul> </li> <li>• the exclusion for basic banking and general insurance products in reg 7.7A.12H does not apply if advice is given on other financial products. This is a condition of relying on the exclusion in reg 7.7A.12H and the condition still applies regardless of the operation of reg 7.7A.12I.</li> </ul> <p>However, the exclusion in reg 7.7A.12H will apply if other services are provided, such as dealing services or a credit service for the purposes of the <i>National Consumer Credit Protection Act 2009</i>.</p>

## Key terms

Term	Meaning in this document
ADI	Authorised deposit-taking institution
advice	Financial product advice
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
application day	The day that the provisions in Pt 7.7A apply to an AFS licensee and its representatives
arrangement	Has the meaning given in s761A of the Corporations Act
ASIC	Australian Securities and Investments Commission
authorised representative	A person authorised by an AFS licensee, in accordance with s916A or 916B of the Corporations Act, to provide a financial service or services on behalf of the licensee Note: This is a definition contained in s761A.
avoidance scheme	A scheme to avoid the application of a provision in Pt 7.7A of the Corporations Act
ban on asset-based fees on borrowed amounts	The provisions in Subdiv B of Div 5 of Pt 7.7A of the Corporations Act
best interests duty	The duty to act in the best interests of the client when giving personal advice to a client as set out in s961B(1) of the Corporations Act
best interests duty and related obligations	The obligations in Div 2 of Pt 7.7A of the Corporations Act
Ch 2 (for example)	A chapter of the Corporations Act (in this example numbered 2), unless otherwise specified
client	A retail client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of Ch 7 of the Corporations Regulations
conflicted remuneration	A benefit given to an AFS licensee, or a representative of an AFS licensee, who provides financial product advice to clients that, because of the nature of the benefit or the circumstances in which it is given: <ul style="list-style-type: none"> <li>• could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to clients; or</li> <li>• could reasonably be expected to influence the financial</li> </ul>

Term	Meaning in this document
	product advice given to clients by the licensee or representative.
	In addition, the benefit must not be excluded from being conflicted remuneration by the Corporations Act or Corporations Regulations
conflicted remuneration provisions	The provisions on conflicted remuneration and other banned remuneration in Divs 4 and 5 of Pt 7.7A of the Corporations Act and in Div 4 of Pt 7.7A of the Corporations Regulations
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
fee-for-service exclusion	When the presumption in s964A(2) that certain fees are volume-based shelf-space fees does not apply because a benefit is a reasonable fee charged for a service provided to the funds manager by the platform operator or another person: s964A(3)(a)
financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <ul style="list-style-type: none"> <li>• makes a financial investment (see s763B);</li> <li>• manages financial risk (see s763C);</li> <li>• makes non-cash payments (see s763D)</li> </ul> <p>Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.</p>
financial product advice	<p>A recommendation or a statement of opinion, or a report of either of these things, that:</p> <ul style="list-style-type: none"> <li>• is intended to influence a person or persons in making a decision about a particular financial product or class of financial product, or an interest in a particular financial product or class of financial product; or</li> <li>• could reasonably be regarded as being intended to have such an influence.</li> </ul> <p>This does not include anything in an exempt document.</p> <p>Note: This is a definition contained in s766B of the Corporations Act.</p>
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
FOFA	Future of Financial Advice
funds manager	Has the meaning given in s964 of the Corporations Act
general advice	<p>Financial product advice that is not personal advice</p> <p>Note: This is a definition contained in s766B(4) of the Corporations Act.</p>

Term	Meaning in this document
grandfathered	A benefit to which the conflicted remuneration provisions do not apply because it is given under an arrangement entered into before 1 July 2013 (or before the date that an AFS licensee elects to comply with Pt 7.7A)
IDPS	Investor directed portfolio service, as defined in Class Order [CO 02/294] <i>Investor directed portfolio services</i> or class orders that replace [CO 02/294]
IDPS-like scheme	Investor directed portfolio services-like scheme, as defined in Class Order [CO 02/296] <i>Investor directed portfolio-like services provided through a registered managed investment scheme</i> or class orders that replace [CO 02/294]
influence the advice	Something that, because of its nature or the circumstances in which it is given, could be expected to influence: <ul style="list-style-type: none"> <li>the choice of financial product recommended by an AFS licensee or its representatives to retail clients; or</li> <li>the financial product advice given to retail clients by the AFS licensee or its representatives</li> </ul>
licensee	An AFS licensee
personal advice	Financial product advice given or directed to a person (including by electronic means) in circumstances where: <ul style="list-style-type: none"> <li>the provider of the advice has considered one or more of the client's objectives, financial situation and needs; or</li> <li>a reasonable person might expect the provider to have considered one or more of these matters</li> </ul> <p>Note: This is a definition contained in s766B(3) of the Corporations Act.</p>
PJC	Parliamentary Joint Committee on Corporations and Financial Services
platform operator	Has the meaning given in s964 of the Corporations Act
private label arrangement (for a platform)	An arrangement where a licensed dealer group is also a platform operator, although it typically outsources the administration of the platform to another platform operator
Pt 7.7A (for example)	A part of the Corporations Act (in this example, numbered 7.7A)
reg 7.7A.13 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.7A.13), unless otherwise specified
representative of an AFS licensee	Means: <ul style="list-style-type: none"> <li>an authorised representative of the licensee;</li> <li>an employee or director of the licensee;</li> <li>an employee or director of a related body corporate of the licensee; or</li> <li>any other person acting on behalf of the licensee</li> </ul> <p>Note: This is a definition contained in s910A of the Corporations Act.</p>

Term	Meaning in this document
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of Ch 7 of the Corporations Regulations
Revised Explanatory Memorandum	Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012
RG 146 (for example)	An ASIC regulatory guide (in this example numbered 146)
RSE licensee	Has the meaning given in s10 of the SIS Act
s782 (for example)	A section of the Corporations Act (in this example numbered 782), unless otherwise specified
scale efficiencies exclusion	When the presumption in s964A(2) that certain fees are volume-based shelf-space fees does not apply because a benefit is a discount on an amount payable, or a rebate of an amount paid, to the funds manager by the platform operator, the value of which does not exceed an amount that may reasonably be attributed to efficiencies gained by the funds manager because of the number or value of financial products in relation to which the funds manager provides services to the platform operator, or through the platform operator to another person: s964A(3)(b)
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
superannuation master trust	A superannuation fund that has an obligation to give documents to retail clients under s1012IA
transitional provisions	The provisions in s1528(1) and reg 7.7A.16, which state that the conflicted remuneration provisions do not apply to a benefit given to an AFS licensee or representative if the benefit is given under an arrangement entered into before 1 July 2013 or the earlier date that an AFS licensee elects to comply with Pt 7.7A
volume-based benefit	A benefit that is not excluded from being conflicted remuneration where access to the benefit or the value of the benefit is dependent on the total number or value of financial products: <ul style="list-style-type: none"> <li>recommended by an AFS licensee or its representatives to retail clients; or</li> <li>acquired by retail clients to whom an AFS licensee or its representatives provides financial product advice</li> </ul>
white label arrangement (for a platform)	An arrangement where a licensed dealer group enters into contractual arrangements with a platform operator to rebrand the platform operator's platform to make it appear as its own—that is, the platform is 'badged' or 'promoted' by the dealer group

## Related information

### Headnotes

AFS licensees, asset-based fees, authorised representatives, avoidance, ban, best interests duty, conflicted remuneration, fee-for-service exclusion, financial product advice, general advice, grandfathered benefits, influence the advice, management fees, performance benefits, personal advice, private label arrangements, representatives, retail clients, scale efficiencies exclusion, volume-based benefits, volume-based shelf-space fees, white label arrangements

### Regulatory guides

RG 36 *Licensing: Financial product advice and dealing*

RG 104 *Licensing: Meeting the general obligations*

RG 108 *No-action letters*

RG 148 *Investor directed portfolio services*

RG 149 *Nominee and custody services*

RG 175 *Licensing: Financial product advisers—Conduct and disclosure*

RG 181 *Licensing: Managing conflicts of interest*

RG 183 *Approval of financial services sector codes of conduct*

RG 244 *Giving information, general advice and scaled advice*

RG 245 *Fee disclosure statements*

### Legislation

*Competition and Consumer Act 2010*, Pt IV

Corporations Act, Pt 7.1, Pt 7.7A, s52, 601FC, 761A, 761G, 763A, 764A, 765A, 766B, 912A, 960A, 961B, 961G, 961J, 963A, 963B, 963C, 963D, 963E, 963F, 963G, 963H, 963J, 963K, 963L, 964, 964A, 964D, 964E, 964F, 964G, 964H, 965, 1528, 1529, 1530, 1531

Corporations Regulations, Pt 7.7A, regs 7.8.11A, 7.7A.12A, 7.7A.12B, 7.7A.12C, 7.7A.12D, 7.7A.12E, 7.7A.12F, 7.7A.12G, 7.7A.12H, 7.7A.12I, 7.7A.13, 7.7A.14, 7.7A.15, 7.7A.16, 10.18.01

Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012

*National Consumer Credit Protection Act 2009*

SIS Act, s99F

### **Consultation papers and reports**

*CP 189 Future of Financial Advice: Conflicted remuneration*

*REP 328 Response to submissions on CP 189 Future of Financial Advice:  
Conflicted remuneration*

### **ASIC forms**

*Form FS92 Notification of intention to comply with Future of Financial  
Advice provisions*