



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 182

# Future of Financial Advice: Best interests duty and related obligations—Update to RG 175

August 2012

## About this paper

This consultation paper sets out ASIC's proposed guidance for persons who provide personal financial product advice to retail clients, and explains:

- the processes to follow to act in the best interests of the client; and
- how to meet the other obligations in Div 2 of Pt 7.7A of the *Corporations Act 2001* (Corporations Act).

In assessing whether these processes are effective, we will consider whether they are being applied and the outcome of following them.

This paper includes a draft new section of Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175). We are seeking the views of Australian financial services (AFS) licensees, authorised representatives, advisers and consumers on our proposals.

### 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 paper was issued on 9 August 2012 and is based on the Corporations Act as at the date of issue.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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## The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy. Among other things, we would like your feedback on the costs and benefits of implementing our proposed guidance, rather than the costs and benefits of the requirements in Div 2 of Pt 7.7A of the Corporations Act. These were extensively consulted on by the Government under a different process.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our guidance on the best interests duty and related obligations in the Corporations Act. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section C, 'Regulatory and financial impact'.

### Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 20 September 2012 to:

Prashanti Ravindra  
Senior Lawyer  
Strategic Policy  
Australian Securities and Investments Commission  
Level 5, 100 Market Street  
Sydney NSW 2000  
facsimile: 02 9911 2414  
email: [policy.submissions@asic.gov.au](mailto:policy.submissions@asic.gov.au)

## What will happen next?

<b>Stage 1</b>	9 August 2012	ASIC consultation paper released
<b>Stage 2</b>	20 September 2012	Comments due on the consultation paper
	September– December 2012	Drafting updates to Regulatory Guide 175 <i>Licensing: Financial product advisers— Conduct and disclosure</i> (RG 175)
<b>Stage 3</b>	December 2012	Updated regulatory guide released

## A Background to the proposals

### Key points

The best interests duty and related obligations in Div 2 of Pt 7.7A of the *Corporations Act 2001* (Corporations Act) are a key part of the Government's Future of Financial Advice (FOFA) reform package. These obligations have been introduced to improve the quality of personal financial product advice received by retail clients.

We propose to provide updated guidance in Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175) on our expectations for how advice providers can comply with the best interests duty and related obligations. Our proposed amendments are shown in a draft new section of RG 175, attached to this paper.

This section of the consultation paper sets out some background information on the FOFA reforms and the new obligations, and explains our approach in developing the proposals in this paper.

### The Future of Financial Advice reforms

- 1 In April 2010, the former Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen, announced the Government's Future of Financial Advice (FOFA) reform package, aimed at improving the trust and confidence of retail investors in the financial advice sector.
- 2 The FOFA reforms represent the 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. The inquiry examined the issues associated with the collapses of financial product and services providers, such as Storm Financial, Opes Prime and other similar collapses.
- 3 Commenting on the effect of the collapse of Storm Financial on investors, the PJC stated:
 

The committee acknowledges the catastrophic effect that the collapse of Storm Financial has had on many investors ... These investors now face great challenges in meeting living expenses, repaying debts and, in some cases, keeping their homes (paragraph 3.1).
- 4 Among other things, the PJC also expressed concerns with 'the apparent provision of one-size-fits-all advice to Storm's investment clients, without the appropriate regard for their personal circumstances': paragraph 3.127.

5 The PJC found that the law relating to how personal advice is provided could be improved, commenting that:

The committee supports the proposal for the introduction of an explicit legislative fiduciary duty on financial advisers requiring them to place their clients' interests ahead of their own. There is no reason why advisers should not be required to meet this professional standard, nor is there any justification for the current arrangement whereby advisers can provide advice not in their clients' best interests, yet comply with section 945A of the Corporations Act. A legislative fiduciary duty would address this deficiency (paragraph 6.28).

6 The PJC also recommended that the *Corporations Act 2001* (Corporations Act) include a fiduciary duty for financial advisers, requiring them to place their clients' interests ahead of their own: Recommendation 1, paragraph 6.29.

7 ASIC's Report 279 *Shadow shopping study of retirement advice* (REP 279), which sets out the results of our 2011 shadow shopping research into personal advice about retirement, also demonstrates that there is room for improvement in the quality of advice many retail clients receive. The study results included that:

- (a) 39% of advice examples reviewed were poor and did not meet the requirements of s945A for providing appropriate advice;
- (b) 58% were adequate; and
- (c) 3% were good.

8 The best interests duty and related obligations contained in the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (FOFA Act No. 2) are part of the Government's FOFA reform package and have been introduced to improve the quality of financial advice received by retail clients.

9 In his second reading speech to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 on 24 November 2011, The Hon Bill Shorten MP, Minister for Financial Services and Superannuation, stated that the FOFA Act No. 2 was intended to 'bring into effect significant reform to the regulation of financial advice, which in turn will enhance trust and confidence in the sector'.

## The best interests duty and related obligations

10 The best interests duty and related obligations are set out in Div 2 of Pt 7.7A of the Corporations Act. In his second reading speech, the Minister stated that:

The best interests duty is a legislative requirement to ensure the processes and motivations of financial advisers are focused on what is best for their clients. It is true that this will ultimately lead to better advice in many cases, but first and foremost it is about regulating conflicts, not the intrinsic quality of the advice provided.

11 The best interests duty and related obligations replace the conduct obligations in Subdiv B of Div 3 of Pt 7.7 of the Corporations Act relating to the basis of advice—that is, the requirement to have a reasonable basis for personal advice (s945A), and the obligation to warn the client if advice is based on incomplete or inaccurate information (s945B).

Note: In this consultation paper:

- references to sections (s), parts (Pts), divisions (Divs) and subdivisions (Subdivs) are to the Corporations Act, unless otherwise specified;
- 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
- references to ‘advice’ or ‘personal advice’ mean financial product advice given or directed to a person (including by electronic means) in circumstances where the provider of the advice has considered one or more of the client’s objectives, financial situation and needs, or a reasonable person might expect the provider to have considered one or more of these matters (s766B(3)).

12 It is mandatory for Australian financial services (AFS) licensees and their representatives that provide personal advice to clients to comply with the best interests duty and related obligations from 1 July 2013. From 1 July 2012, licensees can elect to comply with their obligations in Pt 7.7A of the Corporations Act, including the best interests duty and related obligations, by lodging a notice with ASIC.

Note: A form is available on ASIC’s website to enable AFS licensees to do this: see [www.asic.gov.au](http://www.asic.gov.au).

13 Until 1 July 2013, if the best interests duty and related obligations do not apply (i.e. an AFS licensee has not elected to comply with Pt 7.7A), the obligations in s945A and 945B will apply to the licensee and their authorised representatives: see paragraph 14.

### Who the obligations apply to

14 The ‘old’ obligations in Subdiv B of Div 3 of Pt 7.7 apply to the AFS licensee or authorised representative that provides the personal advice—that is, the ‘providing entity’. These obligations are:

- (a) to provide appropriate advice under s945A; and



- (b) to warn the client if advice is based on incomplete or inaccurate information under s945B.
- 15 A providing entity must generally also give the client a Statement of Advice under Subdiv C of Div 3 of Pt 7.7, if personal advice is provided.
- 16 Failure to comply with these obligations is a criminal offence.
- 17 In contrast, the ‘new’ obligations in Div 2 of Pt 7.7A apply to the ‘advice provider’. This is generally the individual who provides the personal advice. However, if there is no individual that provides the advice, which may be the case if advice is provided through a computer program, the obligations in Div 2 of Pt 7.7A apply to the legal person that provides the advice (e.g. a corporate licensee or authorised representative): s961.
- 18 A failure to comply with the obligations in Div 2 of Pt 7.7A may result in a civil penalty against an authorised representative or AFS licensee: s961K and 961Q. An advice provider and their licensee or authorised representative may be subject to administrative sanctions for a breach of the obligations in Div 2 of Pt 7.7A—for example, being banned from providing financial services for a period of time. Further, a client, or ASIC, may take civil action for any loss or damage suffered as the result of a failure to comply with the best interests duty and related obligations: see s961M.
- 19 There are no criminal sanctions for breaching a provision in Div 2 of Pt 7.7A.
- 20 A number of financial services businesses outsource their personal advice functions to financial advisory firms (e.g. trustees of superannuation funds). Where this occurs, it is the individual advice provider of the outsourced entity that has a duty to act in the best interests of their client and comply with the other obligations in Div 2 of Pt 7.7A (assuming it is an individual who provides the advice).
- 21 Table 1 summarises the key changes under the Corporations Act for persons providing personal advice to retail clients.

**Table 1: Summary of key changes for persons providing personal advice to retail clients**

	Obligations in Div 3 of Pt 7.7	‘New’ obligations in Div 2 of Pt 7.7A
<b>Who the obligations apply to</b>	The ‘providing entity’—that is, the AFS licensee or authorised representative that provides the personal advice.	The ‘advice provider’—this is generally the individual who provides the personal advice. However, if there is no individual that provides the advice, which may be the case if advice is provided through a computer program, the obligations apply to the legal person that provides the advice (e.g. a corporate licensee or authorised representative).

	Obligations in Div 3 of Pt 7.7	'New' obligations in Div 2 of Pt 7.7A
<b>What the obligations are</b>	<p>Under Subdiv B:</p> <ul style="list-style-type: none"> <li>to provide appropriate advice (s945A); and</li> <li>to warn the client if advice is based on incomplete or inaccurate information (s945B).</li> </ul> <p>Under Subdiv C:</p> <ul style="list-style-type: none"> <li>to give the client a Statement of Advice.</li> </ul>	<p>To act in the best interests of the client: best interests duty (s961B).</p> <p>To provide appropriate advice (s961G).</p> <p>To warn the client if advice is based on incomplete or inaccurate information (s961H).</p> <p>To prioritise the interests of the client (s961J).</p>
<b>When the obligations apply</b>	<p>Subdiv B will apply until 1 July 2013, unless a person elects to comply with Pt 7.7A before this date (from 1 July 2012).</p> <p>Subdiv C will continue to apply after 1 July 2013.</p>	<p>Pt 7.7A applies from 1 July 2013, unless a person elects to comply before this date (from 1 July 2012).</p>
<b>Compliance</b>	Failure to comply is a criminal offence.	Failure to comply may result in a civil penalty.

### Key obligations in Div 2 of Pt 7.7A

22 There are four key obligations in Div 2 of Pt 7.7A imposed on persons who provide personal advice to clients.

**Table 2: Key obligations in Div 2 of Pt 7.7A for advice providers providing personal advice to retail clients**

Obligation	Summary
Acting in the best interests of the client: best interests duty (s961B)	<p>Advice providers must act in the best interests of their client.</p> <p>One way an advice provider can demonstrate they have done this is by showing they have carried out certain steps in advising their clients. These steps, which act as a safe harbour for complying with the best interests duty, are set out in s961B(2): see paragraph 46.</p> <p>A modified form of the best interests duty applies when advice is provided:</p> <ul style="list-style-type: none"> <li>on a basic banking product only, and the advice provider is an agent or employee of an Australian authorised deposit-taking institution (ADI), or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; or</li> <li>on a general insurance product only.</li> </ul> <p>When the modified best interests duty applies, advice providers only need to undertake a limited number of steps to have acted in the best interests of their client: see paragraphs 24–26.</p>
Providing appropriate advice (s961G)	Assuming the advice provider has complied with the best interests duty in s961B, the resulting advice must only be given if it is reasonable to conclude that it is appropriate for the client.
Warning the client if advice is based on incomplete or inaccurate information (s961H)	If it is reasonably apparent that the advice is based on incomplete or inaccurate information about the client's objectives, financial situation and needs, advice providers must give a warning to the client.
Prioritising the interests of the client (s961J)	Advice providers must prioritise the interests of the client over their own interests and those of any of their related parties, including their AFS licensee or associates of their licensee.

- 23 In addition, we consider that the following obligations require an AFS licensee to keep records of the personal advice that is provided to clients:
- (a) the duty to ‘do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly’ (s912A(1)(a)); and
  - (b) the duty to have an adequate dispute resolution system (s912A(1)(g)).

### **The modified best interests duty**

- 24 A modified form of the best interests duty applies when:
- (a) the advice is about a basic banking product only, and the advice provider is an agent or employee of an Australian ADI, or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI (s961B(3)); or
  - (b) the advice is about a general insurance product only (s961B(4)).
- 25 When the modified best interests duty applies, advice providers:
- (a) only need to undertake a limited number of steps to show they have acted in the best interests of the client;
  - (b) must comply with the appropriate advice requirement;
  - (c) must comply with the obligation to warn the client if advice is based on incomplete or inaccurate information; and
  - (d) do not need to comply with the requirement to prioritise the client’s interests.
- 26 The Government is also consulting on regulations relating to the application of the best interests duty where the subject matter of the advice sought by the client is about more than one of the following:
- (a) a basic banking product;
  - (b) a general insurance product; and
  - (c) a product that is not a financial product.
- 27 We will take these regulations into account in our final guidance on the best interests duty.

Note: See Treasury, Exposure Draft—Third Package of Regulations, at [http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=consultation/third\\_package/default.htm](http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=consultation/third_package/default.htm).

## Our approach to administering the best interests duty and related obligations

- 28 The following basic policy principles will guide our administration of the best interests duty and related obligations in Div 2 of Pt 7.7A, and are reflected in our proposed guidance:
- (a) the provisions are intended to enhance trust and confidence in the financial advice industry;
  - (b) increased trust and confidence in the financial advice industry should lead to more consumers accessing financial advice;
  - (c) the provisions should lead to a higher quality of advice being provided compared with the standard of advice being provided under s945A and 945B; and
  - (d) if a client were to follow the advice, it is likely that this would leave them in a better position.
- 29 The best interests duty and related obligations are not intended to require advice providers to provide perfect advice to each client. Nor are they intended to prohibit advice providers from charging fees and costs for their services.
- 30 We will administer the best interests duty and related obligations in light of other obligations that apply to AFS licensees and their representatives (including authorised representatives). These obligations may include:
- (a) common law obligations such as the duty of care and fiduciary duties;
  - (b) contractual obligations;
  - (c) compliance with relevant industry standards and codes;
  - (d) regulatory requirements under the Corporations Act, including those in Ch 7 about licensing, disclosure obligations and the requirements to:
    - (i) provide services efficiently, honestly and fairly;
    - (ii) ensure adequate representative training;
    - (iii) manage conflicts of interest; and
    - (iv) maintain dispute resolution systems;
  - (e) regulatory requirements under Div 2 of Pt 7.10 of the Corporations Act and Div 2 of Pt 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which:
    - (i) prohibit, among other things, misleading or deceptive conduct and unconscionable conduct; and
    - (ii) impose implied warranties in contracts for the supply of financial services;

- (f) trustee duties and obligations under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and under general law; and
- (g) the duties and obligations imposed on responsible entities of managed investment schemes under Ch 5C of the Corporations Act and under general law.

## Our proposed guidance

- 31 We will provide guidance about how to comply with the best interests duty and related obligations in Div 2 of Pt 7.7A. Because these are new statutory obligations, we are consulting on our proposed guidance and seeking industry and consumer feedback.
- 32 We are asking for your feedback in this consultation paper on a number of proposals. Among other things, we would like your feedback on the costs and benefits of implementing our proposed guidance—not the costs and benefits of the requirements in Div 2 of Pt 7.7A. These were extensively consulted on by the Government under a different process.
- 33 We will discuss our proposed guidance with industry and consumer representatives before it is finalised and released.
- 34 Our guidance on the best interests duty and related obligations will be contained in an update to Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175).
- 35 To the extent that our guidance on s945A and 945B is relevant to an advice provider’s obligations under Div 2 of Pt 7.7A, we will retain our existing approach in providing guidance. For example, where our guidance on s945A contains practical guidance on giving personal advice and is consistent with the best interests duty, we will retain our existing approach.
- 36 In addition, some of the obligations in Div 2 of Pt 7.7A use the same language that is used in s945A and 945B. For example, both s945B and 961H require the same warning to be given to a client in circumstances where advice is based on incomplete or inaccurate information. Where the ‘old’ provisions in Subdiv B of Div 3 of Pt 7.7 and the ‘new’ provisions in Div 2 of Pt 7.7A use the same language, we will reaffirm our existing guidance.
- 37 When we reissue the updated RG 175, containing our final guidance on the best interests duty and related obligations, we will also make other consequential changes to the regulatory guide. These include updates:

- (a) to reflect the fact that:
  - (i) the obligations in Div 2 of Pt 7.7A apply to the ‘advice provider’ and not the ‘providing entity’; and
  - (ii) criminal sanctions do not apply to the obligations in Div 2 of Pt 7.7A; and
- (b) for consistency with our proposed guidance on giving factual information, general advice and scaled advice (i.e. personal advice that is limited in scope): see Consultation Paper 183 *Giving information, general advice and scaled advice* (CP 183).

38 Sections 945A and 945B will cease to have effect from 1 July 2013. We will retain our guidance on these provisions until this time: see paragraph 40.

## Your feedback

- 39 Our proposed guidance on the best interests duty and related obligations is set out in the attached draft new section of RG 175. We are seeking feedback specifically on our proposals for guidance about meeting the best interests duty and related obligations in Div 2 of Pt 7.7A. We will take into account your comments before publishing a final updated version of the guide.
- 40 Our guidance on s945A and 945B, which is contained in the current Section D of RG 175, will be moved into an appendix after our guidance on the best interests duty and related obligations is finalised and incorporated into the regulatory guide. Our guidance on s945A and 945B will be removed altogether from RG 175 after these provisions cease to have effect, and we will reissue the regulatory guide.

## Relationship with CP 183

- 41 This CP 182 sets out our proposed guidance about meeting the best interests duty and related obligations in Div 2 of Pt 7.7A. This guidance is designed to apply to anyone who provides personal advice to retail clients, including:
- (a) financial advisers;
  - (b) some staff at ADIs;
  - (c) customer service staff at general insurance companies;
  - (d) stockbrokers;
  - (e) insurance advisers;
  - (f) general insurance brokers; and

- (g) employees or outsourced customer service representatives at trustees of superannuation funds and responsible entities.

Note: This list is not intended to be exhaustive.

42 CP 183 sets out our proposed guidance about giving information and financial product advice to retail clients. This includes guidance on how the requirements of the best interests duty can be ‘scaled up’ or ‘scaled down’, depending on a number of factors. It also proposes guidance and examples on how the best interests duty applies to specific advice scenarios when giving scaled advice. These include, but are not limited to:

- (a) basic deposit products (which is the best product for the client?);
- (b) advice from a stockbroker about purchasing shares for existing and new clients;
- (c) how to invest an inheritance; and
- (d) retirement planning.

## B Proposed guidance on the best interests duty and related obligations

### Key points

We propose to amend RG 175 to include guidance on how advice providers can comply with the best interests duty and related obligations: see the draft new section of RG 175, attached to this consultation paper.

Our proposed guidance will cover the following key areas:

- acting in the best interests of the client;
- satisfying the safe harbour for the best interests duty;
- providing appropriate personal advice;
- prioritising the interests of the client; and
- complying with the modified best interests duty for basic banking and general insurance products.

### Acting in the best interests of the client

- 43 A general obligation is imposed on advice providers when giving personal advice to a client to act in the best interests of the client in relation to the advice: s961B(1).

#### Proposal

- B1** We propose to provide guidance on s961B(1). This includes that we expect that the processes for an advice provider to follow in acting in the best interests of their client will result in the client being in a better position, if the client acts on the advice provided.

*See draft RG 175.A25–RG 175.A44.*

#### *Your feedback*

- B1Q1 Do AFS licensees, authorised representatives and individual advisers need ASIC guidance to assist in complying with the best interests duty in s961B(1)?
- B1Q2 Do you agree with our proposed approach to providing guidance on s961B(1)?
- B1Q3 Are there any matters, other than those described at draft RG 175.A29–RG 175.A31, that you think would indicate the client is or is not in a better position as a result of following the advice? Please provide details.



- B1Q4 Are there any factors, other than those listed at draft RG 175.A34, that you think would suggest that an advice provider has complied with the best interests duty in s961B(1)?
- B1Q5 Is there any further guidance or examples we should give on s961B(1)? Please provide as much specific information as possible, as this will assist us to provide further guidance if needed.
- B1Q6 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees, authorised representatives and individual advisers to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.

## Rationale

- 44 The best interests duty is concerned with the actions an advice provider adopts in providing a client with personal advice. We do not consider that the best interests duty involves providing perfect advice. Nor do we propose to examine the quality of advice, or the advice provider's conduct, only by reference to the outcome that is later achieved by the client as a result of following the advice. Instead, the best interests duty is concerned with what occurred at the time the advice was given.

## Satisfying the safe harbour for the best interests duty

- 45 Section 961B(2) contains a 'safe harbour' for complying with the best interests duty in s961B(1). If an advice provider can prove they have taken each of the steps listed in s961B(2), this is one way of demonstrating they have satisfied the best interests duty in s961B(1).

Note: When the modified best interests duty applies, an advice provider does not need to take all the steps listed in the safe harbour to act in the best interests of the client.

- 46 The steps of the safe harbour require an advice provider to:
- (a) identify the objectives, financial situation and needs of the client that were disclosed by the client in their instructions;
  - (b) identify:
    - (i) the subject matter of the advice that is being sought by the client (whether explicitly or implicitly); and
    - (ii) the objectives, financial situation and needs of the client that would reasonably be considered relevant to the advice being sought on that subject matter (client's relevant circumstances);

- (c) if it is reasonably apparent that information relating to the client’s relevant circumstances is incomplete or inaccurate, make reasonable inquiries to obtain complete and accurate information;
- (d) assess whether the advice provider has the expertise required to provide the client with advice on the subject matter being sought and, if not, decline to provide the advice;
- (e) if it would be reasonable to consider recommending a financial product:
  - (i) conduct a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client that would reasonably be considered relevant to advice on that subject matter; and
  - (ii) assess the information gathered in the investigation;
- (f) base all judgements in advising the client on the client’s relevant circumstances; and
- (g) take any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances.

## Proposal

**B2** We propose to give guidance on what we expect advice providers to do to meet each element of the safe harbour for the best interests duty. Among other things, we state in our guidance that what needs to be done will vary depending on the circumstances, including the objectives, financial situation and needs of the client.

See *draft RG 175.A48–RG 175.A113*.

### *Your feedback*

- B2Q1 Do AFS licensees, authorised representatives and individual advisers need ASIC guidance to assist in satisfying the safe harbour for the best interests duty?
- B2Q2 Do you agree with our proposed approach to guidance on the safe harbour?
- B2Q3 If you are an AFS licensee, authorised representative or individual adviser, in complying with the best interests duty in s961B(1), will you rely on the safe harbour in s961B(2) or rely on other processes to show you have complied with the best interests duty?
- B2Q4 If you are relying on other processes, please let us know what these processes are.
- B2Q5 If you are an AFS licensee, authorised representative or individual adviser, in what circumstances (if any) do you currently take steps to verify the veracity of information about the client’s relevant circumstances?

- B2Q6 In what circumstances do you think that the safe harbour for the best interests duty requires an advice provider to take steps to independently verify the veracity of information about the client's relevant circumstances?
- B2Q7 Do you currently ascertain the extent to which considering labour standards, or environmental, social or ethical issues, is relevant to the advice a client is seeking? If so, please provide details on when and how you do this.
- B2Q8 Do you think we should provide guidance on the extent to which the safe harbour for the best interests duty requires advice providers to ascertain whether the subject matter of advice sought by the client includes considering labour standards, or environmental, social or ethical issues?
- Note: RG 175.131 currently contains guidance on making inquiries into the client's attitude towards environmental, social and ethical considerations.
- B2Q9 Is there any further guidance we should give on how to satisfy the safe harbour for the best interests duty? Please provide as much specific information as possible, as this will assist us to provide further guidance if needed.
- B2Q10 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees, authorised representatives and individual advisers to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.

## Rationale

- 47 The proposed guidance sets out our expectations for how an advice provider can show they have met each element of the safe harbour for the best interests duty. Our expectations have been informed by our regulatory experience and what we consider advice providers need to do to act in the client's best interests.

## Providing appropriate personal advice

- 48 Personal advice must only be provided if it would be reasonable to conclude that the advice is appropriate to the client, assuming that the best interests duty has been complied with: s961G.

### Proposal

- B3** We propose that it would be reasonable to conclude that advice is appropriate if:
- (a) it is fit for its purpose—that is, following the advice is likely to satisfy the client's relevant circumstances; and
  - (b) following the advice is likely to leave the client in a better position.

See draft RG 175.A114–RG 175.A133.

*Your feedback*

- B3Q1 Do AFS licensees, authorised representatives and individual advisers need ASIC guidance to assist in complying with the appropriate advice requirement in s961G?
- B3Q2 Do you agree with our proposed approach in providing guidance on s961G?
- B3Q3 Is there any further guidance we should give? Please provide as much specific information as possible, as this will assist us to provide further guidance if needed.
- B3Q4 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees, authorised representatives and individual advisers to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.

## Rationale

- 49 The ‘appropriate advice’ requirement tests the quality of the advice that has been provided, based on what the advice provider should have done in acting in the best interests of their client.

## Prioritising the interests of the client

- 50 An advice provider must prioritise the interests of the client if the advice provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:
- (a) the advice provider;
  - (b) an associate of the advice provider;
  - (c) an AFS licensee of whom the advice provider is a representative;
  - (d) an associate of an AFS licensee of whom the advice provider is a representative;
  - (e) an authorised representative who has authorised the advice provider to provide financial services (or a financial service) on behalf of an AFS licensee; or
  - (f) an associate of an authorised representative who has authorised the advice provider to provide financial services (or a financial service) on behalf of an AFS licensee: s961J.

## Proposal

- B4** We propose that, in complying with the obligation in s961J to prioritise the client's interests, advice providers should consider what an advice provider without a conflict of interest would do.

See draft RG 175.A138–RG 175.A154.

### *Your feedback*

- B4Q1 Do AFS licensees, authorised representatives and individual advisers need ASIC guidance to assist in complying with the obligation to prioritise the client's interests in s961J?
- B4Q2 Do you agree with our proposed approach in providing guidance on s961J?
- B4Q3 Are there any other conflicting interests we should list in our guidance?
- B4Q4 If you are an AFS licensee or authorised representative, will you be putting information barriers in place to ensure that your representative advice providers do not become aware of any conflicting interests held by you or any other of the advice provider's related parties?
- B4Q5 Is there any further guidance or examples we should give? Please provide as much specific information as possible, as this will assist us to provide further guidance if needed.
- B4Q6 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees, authorised representatives and individual advisers to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.

## Rationale

- 51 Section 961J requires that an advice provider should not act to further their interests, or those of any of their related parties, over the client's interests when giving the client personal advice. Considering what an advice provider without a conflict of interest would do will help advice providers in complying with this obligation.

## Complying with the modified best interests duty

- 52 Paragraphs 24–26 of this consultation paper set out when a modified form of the best interests duty applies. When the modified best interests duty applies, advice providers will only need to comply with s961B(2)(a)–(c) to have acted in the best interests of their client.

### Proposal

- B5** We propose that our guidance for complying with s961B(2)(a)–(c) will also apply when the modified best interests duty applies.

*See draft RG 175.A45–RG 175.A47, RG 175.A121–RG 175.A125 and RG 175.A150–RG 175.A151.*

#### *Your feedback*

- B5Q1 Do AFS licensees, authorised representatives and individual advisers need ASIC guidance to assist in complying with the modified best interests duty?
- B5Q2 Do you agree with our proposed approach in providing guidance on the modified best interests duty?
- B5Q3 Is there any further guidance we should give? Please provide as much specific information as possible, as this will assist us to provide further guidance if needed.
- B5Q4 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees, authorised representatives and individual advisers to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.

### Rationale

- 53 When the modified best interests duty applies, an advice provider need only comply with s961B(2)(a)–(c). We propose to state that our guidance on s961B(2)(a)–(c) is also relevant when the modified best interest duty applies.
- 54 CP 183 contains examples about giving scaled advice in a way that complies with the modified best interests duty.

## C Regulatory and financial impact

- 55 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us, we think they will strike an appropriate balance between:
- (a) ensuring that retail clients receive personal advice that is appropriate for them in light of the subject matter of advice sought and their objectives, financial situation, and needs;
  - (b) ensuring that licensees comply with the best interests duty and related obligations in Div 2 of Pt 7.7A of the Corporations Act; and
  - (c) not causing licensees to incur unreasonable costs in complying with the best interests duty and related obligations.
- 56 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:
- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
  - (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
  - (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).
- 57 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 58 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:
- (a) the likely compliance costs;
  - (b) the likely effect on competition; and
  - (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

## Key terms

Term	Meaning in this document
ADI	Authorised deposit-taking institution
advice	Personal advice
advice provider	<p>A person to whom the obligations in Div 2 of Pt 7.7A of the Corporations Act apply when providing personal advice to a client. This is generally the individual who provides the personal advice. However, if there is no individual that provides the advice, which may be the case if advice is provided through a computer program, the obligations in Div 2 of Pt 7.7A apply to the legal person that provides the advice (e.g. a corporate licensee or authorised representative)</p> <p>Note: These obligations will apply from 1 July 2013, or a person may elect to comply from 1 July 2012.</p>
AFS licence	<p>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</p> <p>Note: This is a definition contained in s761A of the Corporations Act.</p>
AFS licensee	<p>A person who holds an Australian financial services licence under s913B of the Corporations Act</p> <p>Note: This is a definition contained in s761A of the Corporations Act.</p>
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
authorised representative	<p>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</p> <p>Note: This is a definition contained in s761A.</p>
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 the Pt 7.1 of Ch 7 of the Corporations Regulations



Term	Meaning in this document
client's relevant circumstances	The objectives, financial situation and needs of a client that would reasonably be considered relevant to the subject matter of advice sought by the client
conflicts priority rule	The rule to prioritise a client's interests as set out in s961J of the Corporations Act
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: <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: see also s763B–765A.</p>
financial product advice	A recommendation or a statement of opinion, or a report of either of these things, that: <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
FOFA Act No. 2	<i>Corporations Amendment (Further Future of Financial Advice Measures) Act 2012</i>
general advice	Financial product advice that is not personal advice <p>Note: This is a definition contained in s766B(4) of the Corporations Act.</p>
licensee	An AFS licensee

Term	Meaning in this document
modified best interests duty	<p>The limited number of steps an advice provider needs to take to act in the best interests of the client when:</p> <ul style="list-style-type: none"> <li>• the advice is about a basic banking product only and the advice provider is an agent or employee of an Australian ADI, or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI (s961B(3)); or</li> <li>• the advice is about a general insurance product only (s961B(4))</li> </ul>
personal advice	<p>Financial product advice given or directed to a person (including by electronic means) in circumstances where:</p> <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 the definition contained in s766B(3) of the Corporations Act.</p>
PJC	Parliamentary Joint Committee on Corporations and Financial Services
platform	<p>For the purposes of this consultation paper, investor directed portfolio services (IDPS) and IDPS-like schemes, but does not extend to nominee and custody services, as defined in Regulatory Guide 149 <i>Nominee and custody services</i> (RG 149), superannuation master trusts or other superannuation funds, self-managed superannuation funds or managed discretionary account services</p> <p>Note: This is the same definition used in Consultation Paper 176 <i>Review of ASIC policy on platforms: Update to RG 148</i> (CP 176).</p>
providing entity	A person to whom the obligations in Pt 7.7 of the Corporations Act apply. This is the AFS licensee or an authorised representative that provides the financial product advice
Pt 7.7 (for example)	A part of the Corporations Act (in this example, numbered 7.7)
related party	<p>A related party of an advice provider is:</p> <ul style="list-style-type: none"> <li>• an associate of the advice provider;</li> <li>• an AFS licensee of whom the advice provider is a representative;</li> <li>• an associate of an AFS licensee of whom the advice provider is a representative;</li> <li>• an authorised representative who has authorised the advice provider to provide financial services (or a financial service) on behalf of an AFS licensee; or</li> <li>• an associate of an authorised representative who has authorised the advice provider to provide financial services (or a financial service) on behalf of an AFS licensee</li> </ul>

Term	Meaning in this document
representative of an AFS licensee	<p>Means:</p> <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>
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 2011
RG 146 (for example)	An ASIC regulatory guide (in this example numbered 146)
s782 (for example)	A section of the Corporations Act (in this example numbered 782), unless otherwise specified
safe harbour for the best interests duty	The steps set out in s961B(2) of the Corporations Act. If an advice provider proves they have taken these steps, they are considered to have met their obligation to act in the best interests of their client
scaled advice	Personal advice that is limited in scope
SOA (Statement of Advice)	<p>A document that must be given to a client for the provision of personal advice under Subdivs C and D of Div 3 of Pt 7.7 of the Corporations Act</p> <p>Note: See s761A for the exact definition.</p>

## List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to provide guidance on s961B(1). This includes that we expect that the processes for an advice provider to follow in acting in the best interests of their client will result in the client being in a better position, if the client acts on the advice provided.</p> <p>See draft RG 175.A25–RG 175.A44.</p>	<p>B1Q1 Do AFS licensees, authorised representatives and individual advisers need ASIC guidance to assist in complying with the best interests duty in s961B(1)?</p> <p>B1Q2 Do you agree with our proposed approach to providing guidance on s961B(1)?</p> <p>B1Q3 Are there any matters, other than those described at draft RG 175.A29–RG 175.A31, that you think would indicate the client is or is not in a better position as a result of following the advice? Please provide details.</p> <p>B1Q4 Are there any factors, other than those listed at draft RG 175.A34, that you think would suggest that an advice provider has complied with the best interests duty in s961B(1)?</p> <p>B1Q5 Is there any further guidance or examples we should give on s961B(1)? Please provide as much specific information as possible, as this will assist us to provide further guidance if needed.</p> <p>B1Q6 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees, authorised representatives and individual advisers to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.</p>
<p>B2 We propose to give guidance on what we expect advice providers to do to meet each element of the safe harbour for the best interests duty. Among other things, we state in our guidance that what needs to be done will vary depending on the circumstances, including the objectives, financial situation and needs of the client.</p> <p>See draft RG 175.A48–RG 175.A113.</p>	<p>B2Q1 Do AFS licensees, authorised representatives and individual advisers need ASIC guidance to assist in satisfying the safe harbour for the best interests duty?</p> <p>B2Q2 Do you agree with our proposed approach to guidance on the safe harbour?</p> <p>B2Q3 If you are an AFS licensee, authorised representative or individual adviser, in complying with the best interests duty in s961B(1), will you rely on the safe harbour in s961B(2) or rely on other processes to show you have complied with the best interests duty?</p> <p>B2Q4 If you are relying on other processes, please let us know what these processes are.</p>

Proposal	Your feedback
	<p>B2Q5 If you are an AFS licensee, authorised representative or individual adviser, in what circumstances (if any) do you currently take steps to verify the veracity of information about the client's relevant circumstances?</p>
	<p>B2Q6 In what circumstances do you think that the safe harbour for the best interests duty requires an advice provider to take steps to independently verify the veracity of information about the client's relevant circumstances?</p>
	<p>B2Q7 Do you currently ascertain the extent to which considering labour standards, or environmental, social or ethical issues, is relevant to the advice a client is seeking? If so, please provide details on when and how you do this.</p>
	<p>B2Q8 Do you think we should provide guidance on the extent to which the safe harbour for the best interests duty requires advice providers to ascertain whether the subject matter of advice sought by the client includes considering labour standards, or environmental, social or ethical issues?</p> <p>Note: RG 175.131 currently contains guidance on making inquiries into the client's attitude towards environmental, social and ethical considerations.</p>
	<p>B2Q9 Is there any further guidance we should give on how to satisfy the safe harbour for the best interests duty? Please provide as much specific information as possible, as this will assist us to provide further guidance if needed.</p>
	<p>B2Q10 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees, authorised representatives and individual advisers to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.</p>

Proposal	Your feedback
<p>B3 We propose that it would be reasonable to conclude that advice is appropriate if:</p> <p>(a) it is fit for its purpose—that is, following the advice is likely to satisfy the client’s relevant circumstances; and</p> <p>(b) following the advice is likely to leave the client in a better position.</p> <p>See draft RG 175.A114–RG 175.A133.</p>	<p>B3Q1 Do AFS licensees, authorised representatives and individual advisers need ASIC guidance to assist in complying with the appropriate advice requirement in s961G?</p> <p>B3Q2 Do you agree with our proposed approach in providing guidance on s961G?</p> <p>B3Q3 Is there any further guidance we should give? Please provide as much specific information as possible, as this will assist us to provide further guidance if needed.</p> <p>B3Q4 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees, authorised representatives and individual advisers to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.</p>
<p>B4 We propose that, in complying with the obligation in s961J to prioritise the client’s interests, advice providers should consider what an advice provider without a conflict of interest would do.</p> <p>See draft RG 175.A138–RG 175.A154.</p>	<p>B4Q1 Do AFS licensees, authorised representatives and individual advisers need ASIC guidance to assist in complying with the obligation to prioritise the client’s interests in s961J?</p> <p>B4Q2 Do you agree with our proposed approach in providing guidance on s961J?</p> <p>B4Q3 Are there any other conflicting interests we should list in our guidance?</p> <p>B4Q4 If you are an AFS licensee or authorised representative, will you be putting information barriers in place to ensure that your representative advice providers do not become aware of any conflicting interests held by you or any other of the advice provider’s related parties?</p> <p>B4Q5 Is there any further guidance or examples we should give? Please provide as much specific information as possible, as this will assist us to provide further guidance if needed.</p> <p>B4Q6 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees, authorised representatives and individual advisers to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.</p>

Proposal	Your feedback
<p>B5 We propose that our guidance for complying with s961B(2)(a)–(c) will also apply when the modified best interests duty applies.</p> <p>See draft RG 175.A45–RG 175.A47, RG 175.A121–RG 175.A125 and RG 175.A150–RG 175.A151.</p>	<p>B5Q1 Do AFS licensees, authorised representatives and individual advisers need ASIC guidance to assist in complying with the modified best interests duty?</p> <p>B5Q2 Do you agree with our proposed approach in providing guidance on the modified best interests duty?</p> <p>B5Q3 Is there any further guidance we should give? Please provide as much specific information as possible, as this will assist us to provide further guidance if needed.</p> <p>B5Q4 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees, authorised representatives and individual advisers to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.</p>

## Attachment: Draft new section of RG 175

This attachment sets out our draft new section of Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175), which contains our proposed guidance on the best interests duty and related obligations. This guidance will be incorporated into RG 175 once it has been finalised.



# The best interests duty and related obligations

## Key points

The best interests duty and related obligations in Div 2 of Pt 7.7A require advice providers when providing personal advice to retail clients to:

- act in the best interests of their clients (see RG 175.A25–RG 175.A113);
- provide appropriate advice (see RG 175.A114–RG 175.A133);
- warn the client if advice is based on incomplete or inaccurate information (see RG 175.A134–RG 175.A137); and
- prioritise the client’s interests (see RG 175.A138–RG 175.A154).

We consider that what is needed to comply with the best interests duty can be ‘scaled up’ or ‘scaled down’, depending on a number of factors: see RG 175.A155–RG 175.A159.

## Overview

RG 175.A1 Personal advice, by its nature, is generally relied on by retail clients who may suffer significant loss if the advice is conflicted or is not of good quality. For this reason, the law imposes specific obligations on persons who provide personal advice to retail clients. As set out in Table 1, this section considers what is required when personal advice is provided to retail clients.

**Table 1: Overview of best interests duty and related obligations for advice providers providing personal advice to retail clients**

Topic	Location of guidance	Provisions of Corporations Act
Acting in the best interests of the client (best interests duty)	RG 175.A25–RG 175.A47	s961B(1)
Safe harbour for complying with the best interests duty	RG 175.A48–RG 175.A113	s961B(2)
Providing appropriate advice	RG 175.A114–RG 175.A133	s961G
Warning the client if advice is based on incomplete or inaccurate information	RG 175.A134–RG 175.A137	s961H
Prioritising the interests of the client	RG 175.A138–RG 175.A154	s961J
Modified best interests duty and related obligations, including: <ul style="list-style-type: none"> <li>• acting in the best interests of the client;</li> <li>• providing appropriate personal advice;</li> <li>• warning the client if advice is based on incomplete or inaccurate information; and</li> <li>• prioritising the interests of the client</li> </ul>	RG 175.A45–RG 175.A47, RG 175.A121–RG 175.A125 and RG 175.A150–RG 175.A151	s961B(3), 961B(4), 961G, 961H, 961J(2) and 961J(3)

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Topic	Location of guidance	Provisions of Corporations Act
Giving scaled advice	RG 175.A155–RG 175.A159	Div 2 of Pt 7.7A
Personal advice record-keeping obligations	RG 175.A160–RG 175.A164	s912A(1)(a), 912A(1)(g)

RG 175.A2 The best interests duty and related obligations are set out in Div 2 of Pt 7.7A of the Corporations Act and generally apply to the individual providing the personal advice. This is in contrast with the obligations in Pt 7.7, which apply to the ‘providing entity’—that is, the AFS licensee or authorised representative that provides financial product advice.

RG 175.A3 If there is no individual that provides the advice for the purposes of Div 2 of Pt 7.7A, which may be the case if advice is provided through a computer program, the legal person that provides the advice is required to comply with the Div 2 of Pt 7.7A obligations (e.g. a corporate licensee or authorised representative): s961.

Note: In this section:

- references to sections (s), parts (Pts) and divisions (Divs) are to the Corporations Act, unless otherwise specified; and
- references to ‘advice’ or ‘personal advice’ mean financial product advice given or directed to a person (including by electronic means) in circumstances where the provider of the advice has considered one or more of the client’s objectives, financial situation and needs, or a reasonable person might expect the provider to have considered one or more of these matters (s766B(3)).

RG 175.A4 In this section, we will refer to the person to whom the best interests duty and related obligations apply as the ‘advice provider’.

RG 175.A5 AFS licensees also have an obligation to take reasonable steps to ensure that their representatives comply with s961B, 961G, 961H and 961J: s961L.

RG 175.A6 The importance of the obligations in Div 2 of Pt 7.7A is highlighted by the fact that a failure to comply with them may result in a civil penalty against an authorised representative or AFS licensee: s961K and 961Q. An advice provider and their licensee and authorised representative may be subject to administrative sanctions for a breach of the obligations in Div 2 of Pt 7.7A—for example, being banned from providing financial services for a period of time. Further, a client, or ASIC, may take civil action for any loss or damage suffered as a result of a failure to comply with the best interests duty and related obligations: see s961M.

Note: In this section, 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.

RG 175.A7 There are no criminal sanctions for breaching a provision in Div 2 of Pt 7.7A.

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- RG 175.A8 The best interests duty and related obligations apply to all personal advice, but not to general advice. For a discussion of the difference between personal advice and general advice, see Section B.
- RG 175.A9 A condition of a contract (or other arrangement) is void if it seeks to waive any of the obligations in s961B, 961G, 961H and 961J: s960A. Additionally, these obligations cannot be avoided by any notice or disclaimer provided to the client. Disclosure cannot be used to avoid the obligations imposed on advice providers in Div 2 of Pt 7.7A.
- RG 175.A10 Compliance with the best interests duty and related obligations is mandatory from 1 July 2013. From 1 July 2012, AFS licensees can elect to comply with their obligations in Pt 7.7A, including the best interests duty and related obligations, by lodging a notice with ASIC.
- Note: A form is available on ASIC's website to enable AFS licensees to do this: see [www.asic.gov.au](http://www.asic.gov.au).
- RG 175.A11 Until 1 July 2013, if the best interests duty and related obligations do not apply (e.g. an AFS licensee has not elected to comply with Pt 7.7A), the obligations in s945A and 945B will apply to the licensee and their authorised representatives.
- RG 175.A12 We will continue to monitor the provision of personal advice to determine whether further ASIC guidance on the best interests duty and related obligations is required to ensure that the law's objectives are being met.

### **Our approach to administering the best interests duty and related obligations**

- RG 175.A13 In his second reading speech to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, the Minister for Financial Services and Superannuation stated:
- The best interests duty is a legislative requirement to ensure the processes and motivations of financial advisers are focused on what is best for their clients.
- RG 175.A14 The following basic policy principles will guide our administration of the best interests duty and related obligations in Div 2 of Pt 7.7A:
- (a) the provisions are intended to enhance trust and confidence in the financial advice industry;
  - (b) increased trust and confidence in the financial advice industry should lead to more consumers accessing financial advice;
  - (c) the provisions should lead to a higher quality of advice being provided compared to the standard of advice being provided under the legal requirements in s945A and 945B; and

- (d) if a client were to follow the advice, it is likely that this would leave them in a better position. For more information see: RG 175.A17–RG 175.A21.

RG 175.A15 The best interests duty and related obligations are not intended to require advice providers to provide perfect advice to each client. Nor are they intended to prohibit advice providers from charging fees and costs for their services.

RG 175.A16 We will also administer the best interests duty and related obligations in light of other obligations that apply to AFS licensees and their representatives (including authorised representatives). These obligations may include:

- (a) common law obligations such as the duty of care and fiduciary duties;
- (b) contractual obligations;
- (c) compliance with relevant industry standards and codes;
- (d) regulatory requirements under the Corporations Act, including those in Ch 7 about licensing and disclosure obligations and the requirement to:
  - (i) provide services efficiently, honestly and fairly;
  - (ii) ensure adequate representative training;
  - (iii) manage conflicts of interest; and
  - (iv) maintain dispute resolution systems;
- (e) regulatory requirements under Div 2 of Pt 7.10 of the Corporations Act and Div 2 of Pt 2 of the ASIC Act, which:
  - (i) prohibit, among other things, misleading or deceptive conduct and unconscionable conduct; and
  - (ii) impose implied warranties in contracts for the supply of financial services;
- (f) trustee duties and obligations under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and under general law; and
- (g) the duties and obligations imposed on responsible entities of managed investment schemes under Ch 5C of the Corporations Act and under general law.

RG 175.A17 When considering whether to take administrative or enforcement action, we will give weight to whether, based on the circumstances at the time the advice was given, it was reasonable for the advice provider to believe that the advice would be likely to leave the client in a better position. If a reasonable person would not think the advice would be likely to leave the client in a better position, it is difficult to see how the advice provider has met their obligations in Div 2 of Pt 7.7A, including acting in the best

interests of the client, providing appropriate advice and prioritising the client's interests: s961B, 961G and 961J.

- RG 175.A18 We encourage AFS licensees to take this into account in their approach to monitoring the compliance of their representatives, including in determining what records they require advice providers to keep.
- RG 175.A19 We consider that the concept of leaving the client in a better position is relevant in determining whether:
- (a) the best interests duty in s961B(1) has been complied with (see RG 175.A27–RG 175.A32);
  - (b) an advice provider has based all judgements in advising the client on the client's relevant circumstances under s961B(2)(f) in the safe harbour for complying with the best interests duty (see RG 175.A109); and
  - (c) appropriate advice has been provided s961G (see RG 175.A116(b)).
- RG 175.A20 The concept of leaving the client in a better position is not necessarily confined to a monetary improvement, but can encompass such things as a person's preparedness for the future, susceptibility to risk or having access to certain product features or services. Leaving the client in a better position does not include improvements that are trivial or that have no value to the client, taking into account the subject matter of advice sought by the client: see Example 1.
- RG 175.A21 For more information and examples about leaving the client in a better position, see: RG 175.A27–RG 175.A32.

### **Quality of financial advice**

- RG 175.A22 Complying with the best interests duty and related obligations is important in helping to ensure that clients are provided with good quality financial advice. As stated above, we expect that good quality financial advice will be likely to leave the client in a better position.
- RG 175.A23 We consider that any process of giving good quality financial advice has some or all of the following features:
- (a) a clearly defined scope and an investigation of the client's relevant circumstances;
  - (b) assistance given by the advice provider to the client, if required, to set prioritised, specific and measurable goals and objectives;
  - (c) where relevant, consideration of potential strategies and options that are available to the client to meet their objectives and needs;
  - (d) where relevant, consideration of all aspects of the impact of the advice—for example, tax or social security consequences;

- (e) good communication with the client. This includes:
  - (i) providing a Statement of Advice (SOA) that is logically structured and easy to understand, if one is required; and
  - (ii) if appropriate, depending on how the advice is provided, verbal interactions that aim to ensure that the advice and recommendations are understood; and
- (f) where relevant, strategic and product recommendations that are appropriate for the client's relevant circumstances.

Note: The client's relevant circumstances are the objectives, financial situation and needs of the client that would reasonably be considered relevant to the subject matter of advice sought by the client.

RG 175.A24 ASIC's Report 279 *Shadow shopping study of retirement advice (REP 279)* considers the features of good quality financial advice. While it is based on a review of retirement advice that was provided under the legal requirements existing in 2011, before the best interests duty applied, the principles that underpin good quality advice, as set out in REP 279, indicate what we consider to be good practice.

## Acting in the best interests of the client

RG 175.A25 When providing personal advice to a client, an advice provider must act in the best interests of the client in relation to that advice: s961B(1). In this section, we refer to this as the 'best interests duty'.

RG 175.A26 In his second reading speech to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, the Minister for Financial Services and Superannuation stated:

Financial planners and those who work in the financial services industry implicitly understand that the brand of financial advice needs renewal following a string of collapses including Storm, Trio and Westpoint. I believe that the vast majority of financial planners do see their role as making their dealings with customers such that, after having dealt with the planner, the customer is better off than if the customer had never sought financial advice to begin with ... The best interests duty is a legislative requirement to ensure the processes and motivations of financial advisers are focused on what is best for their clients. It is true that this will ultimately lead to better advice in many cases, but first and foremost it is about regulating conflicts, not the intrinsic quality of the advice provided.

## Leaving the client in a better position

RG 175.A27 Consumers who seek financial advice expect that the advice provided will leave them in a better position. We expect that the processes for an advice provider to follow in acting in the best interests of their client will result in the client being in a better position, if the client acts on the advice provided.

Whether this is the case is assessed objectively, based on the facts existing at the time the advice is provided and by reference to the subject matter of the advice sought by the client.

- RG 175.A28 If a reasonable person would not think the advice would be likely to leave the client in a better position, it is difficult to see how the advice provider is acting in the best interests of the client. It may also indicate that the advice provider has not complied with their other obligations in Div 2 of Pt 7.7A: see RG 175.A19.
- RG 175.A29 The client is not in a better position if the improvement is trivial or has no value to the client, taking into account the subject matter of advice sought by the client: see Example 1.

#### Example 1: Advice that does not leave the client in a better position

##### Scenario

A client holds a portfolio of products through a platform. An advice provider recommends that the client switch to another platform because the format of its consolidated reports on the client's holdings will be easier for the client to follow. However, the fees for this other platform are 50% higher than the fees the client is currently paying.

##### Commentary

We would not consider that the personal advice recommending that the client switch to the other platform would result in the client being in a better position in a material or substantial sense.

- RG 175.A30 Leaving the client in a better position is not necessarily confined to a monetary improvement, but can encompass such things as a client's preparedness for the future, susceptibility to risk or having access to certain product features or services. Not all clients will seek financial advice to improve their financial situation: see Examples 2 and 3.

#### Example 2: A 'health check' on a client's financial affairs

##### Scenario

A client seeks personal advice to get a 'health check' on the state of their financial affairs in light of their long-term financial goals.

The advice provider reviews the client's financial situation and provides them with advice that they are on track to meet these goals. They do not recommend that the client acquire or dispose of any financial products, and the client does not do so.

##### Commentary

This advice does not involve an improvement in the client's financial situation. However, the client is in a better position because the review has confirmed that they are on track to meet their long-term financial goals.

**Example 3: Advice to a client on providing for a relative****Scenario**

A client seeks and obtains personal advice on how to restructure their financial arrangements so that they can pay the medical expenses of a sick relative.

**Commentary**

This advice does not involve an improvement in the client's financial situation. However, the client is in a better position because following the advice would result in meeting their wish to pay for their relative's medical expenses.

- RG 175.A31 In some circumstances, an advice provider may have to tell a client that the client's financial circumstances will not allow them to achieve their goals or meet their needs. For example, an advice provider may have to advise a person who is 60 years old that they will not have enough money to provide the income they expect for their planned retirement at age 65. In this situation, leaving the client in a better position may involve providing the client with non-product-specific advice on the advantages and disadvantages of different options for saving for and living in retirement—such as working for longer, increasing superannuation contributions, downsizing to a smaller property or travelling less after retirement.
- RG 175.A32 As mentioned at RG 175.A17 and RG 175.A19, leaving the client in a better position is also relevant:
- (a) as a basic policy principle that will guide our administration of the best interests duty and related obligations in Div 2 of Pt 7.7A, including in considering whether to take administrative or enforcement action;
  - (b) in determining whether an advice provider has based all judgements in advising the client on the client's relevant circumstances under s961B(2)(f) in the safe harbour for complying with the best interests duty (see RG 175.A109); and
  - (c) in determining whether appropriate advice has been provided s961G (see RG 175.A116(b)).

**Factors we will consider**

- RG 175.A33 We expect that there will be processes an advice provider follows in acting in the best interests of their client. In fact, AFS licensees must take reasonable steps to ensure that their representatives comply with the best interests duty (and the other obligations in Div 2 of Pt 7.7A): s961L. This obligation extends to any processes a licensee develops to assist advice providers to comply with the best interests duty.
- RG 175.A34 We expect that processes for complying with the best interests duty will ensure that, within the subject matter of the advice sought by the client:



- (a) the scope of the advice includes all the issues that must be considered for the advice to meet the client’s objectives, financial situation and needs;
- (b) if the scope of the advice changes, the change is consistent with the client’s objectives, financial situation and needs;
- (c) the client’s objectives, financial situation and needs are identified through inquiries or otherwise; and
- (d) the advice provider focuses on providing non-product-specific advice, or on a combination of non-product-specific advice and product-specific advice, where this would better suit the client’s objectives, financial situation and needs.

#### Example 4: Providing non-product-specific advice

##### Scenario

A client who is 33 years old approaches an advice provider for advice on wealth accumulation strategies. The client has recently received a promotion and has considerable surplus income. On assessment, the advice provider establishes that, because of the high level of income the client receives, they have limited ability to add more funds to superannuation through ‘salary sacrifice’ concessional contributions. The client’s mortgage is significant, but manageable, given their current income and personal circumstances.

The advice provider provides recommendations to salary sacrifice up to the maximum limit for concessional contributions, and to use the surplus funds to repay the mortgage.

##### Commentary

Where personal advice is sought by a client who has surplus income, and is not seeking advice with a limited scope, we are more likely to consider that the best interests duty has been complied with if there is evidence of non-product-specific strategies being considered by the advice provider, such as debt reduction or salary sacrifice.

RG 175.A35 We are more likely to take the view that processes for complying with the best interests duty are not effective and that the best interests duty in s961B(1) is not being complied with if an advice model typically leads to a one-size-fits-all outcome—that is, the processes do not allow the client’s relevant circumstances to be taken into account, or result in advice that does not reflect the client’s relevant circumstances.

RG 175.A36 We do not consider that acting in the client’s best interests involves providing perfect advice. However, advice providers have an obligation to prioritise the interests of the client over their own interests, or those of some of their related parties: s961J. This may impose additional requirements or limitations on an advice provider, other than their obligations under the best interests duty in s961B(1): see RG 175.A138–RG 175.A154. Advice providers also have an obligation to only provide appropriate advice: see RG 175.A114–RG 175.A133.

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RG 175.A37 The Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Revised Explanatory Memorandum) states:

The provision is not about justifying the quality of the advice by retrospective testing against financial outcomes (paragraph 1.23).

RG 175.A38 We consider that ‘retrospective testing against financial outcomes’ involves examining the quality of advice, or advice provider’s conduct, only by reference to the outcome that is later achieved by the client as a result of following the advice. For example, if an advice provider gave advice recommending that a client invest in an Australian equities fund, we would not assess whether the best interests duty in s961B(1) has been complied with only by reference to the performance of that fund. The best interests duty is concerned with what occurred at the time the advice was given.

RG 175.A39 Advice providers will, however, need to ensure that addressing the objectives, financial situation and needs of the client is their paramount consideration when going through the process of providing advice.

RG 175.A40 What is needed to comply with s961B(1) varies depending on the circumstances of each case. We expect advice providers to exercise judgement in acting in the best interests of the client.

RG 175.A41 If an advice provider cannot act in the client’s best interests in providing them with advice, or cannot provide the client with advice that suits their objectives, financial situation and needs, based on the subject matter of the advice sought by the client, the provider must decline to provide the advice. In declining to advise the client, it may be helpful for the advice provider to refer the client to another advice provider who would be better placed to act in the client’s best interests in providing them with advice.

### **Interaction between the best interests duty in s961B(1) and the ‘safe harbour’ in s961B(2)**

RG 175.A42 Section 961B(2) sets out a ‘safe harbour’ for complying with the general best interests duty in s961B(1). Showing that all of the elements in s961B(2) have been met is one way for an advice provider to satisfy the duty in s961B(1). However, it is not the only way. The elements of the safe harbour are discussed at RG 175.A48–RG 175.A113.

RG 175.A43 The Revised Explanatory Memorandum states that:

It is expected that the interpretation of the general obligation in subsection (1) will be informed by the steps set out in subsection (2). Those steps provide an indication of what, as a minimum, is expected of [advice] providers in order to be considered to have acted in the best interests of the client (paragraph 1.25).

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RG 175.A44 Consistent with these statements, advice providers must carry out the steps in s961B(2)(a)–(g)—or other steps that would, at a minimum, produce at least as favourable a result for the client as if s961B(2) had been complied with—whenever they provide personal advice to a client.

Note: An advice provider does not need to show that they have satisfied all the elements of the safe harbour for the best interests duty when the modified best interests duty applies. The modified best interests duty is described at RG 175.A45–RG 175.A47.

## The modified best interests duty

RG 175.A45 In some circumstances, a modified form of best interests duty applies. Table 2 sets out these circumstances and how the best interests duty has been modified.

**Table 2: The modified best interests duty**

Application	Acting in the best interests of the client	Complying with the modified best interests duty
<b>Basic banking products only: s961B(3)</b>		
<p>The subject matter of the advice sought by the client is a basic banking product only, and the advice provider is an agent or employee of an Australian ADI, or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI.</p> <p>Note: Further information on what is a basic banking product and arrangements where a person is acting by arrangement with an Australian ADI under the name of the Australian ADI is set out at RG 175.A47.</p>	<p>The advice provider satisfies the best interests duty in s961B(1) if the advice provider takes the steps in s961B(2)(a)–(c).</p>	<p>Our guidance on s961B(2)(a)–(c) will also apply when the modified best interests duty applies: see RG 175.A50–RG 175.A86. Consultation Paper 183 <i>Giving information, general advice and scaled advice</i> (CP 183) contains examples on the practical application of the modified best interests duty.</p>
<b>General insurance products only: s961B(4)</b>		
<p>The subject matter of the advice sought by the client is a general insurance product only.</p>	<p>The advice provider satisfies the best interests duty in s961B(1) if the advice provider takes the steps in s961B(2)(a)–(c).</p>	<p>Our guidance on s961B(2)(a)–(c) will also apply when the modified best interests duty applies: see RG 175.A50–RG 175.A86. CP 183 contains examples on the practical application of the modified best interests duty.</p>

RG 175.A46 A basic banking product is:

- (a) a basic deposit product;
- (b) a facility for making non-cash payments that is related to a basic deposit product;
- (c) a first home saver account (FHSA) product that is an account into which an Australian ADI accepts, or has previously accepted, contributions; or

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- (d) a facility for providing traveller's cheques: s961F.

Note: A basic banking product also includes any other product prescribed by regulations: s961F(e). At the time of publication, no regulations have been made.

RG 175.A47 For the modified best interests duty that applies when the subject matter of the advice sought by the client is a basic banking product only, the types of arrangement where a person is acting by arrangement with an Australian ADI under the name of the Australian ADI include:

- (a) contractors;
- (b) employees of employment agencies who may be temporarily working for the Australian ADI;
- (c) employees of a body corporate related to the Australian ADI;
- (d) employees of another company who work exclusively for the Australian ADI.

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

## The safe harbour for complying with the best interests duty

RG 175.A48 One way an advice provider can show they have complied with the best interests duty in s961B(1) is by proving they have taken the steps listed in the safe harbour in s961B(2) for complying with the best interests duty. The safe harbour requires an advice provider to:

- (a) identify the objectives, financial situation and needs of the client that were disclosed by the client through instructions;
- (b) identify:
  - (i) the subject matter of the advice sought by the client (whether explicitly or implicitly); and
  - (ii) the objectives, financial situation and needs of the client that would reasonably be considered relevant to the advice sought on that subject matter (client's relevant circumstances);
- (c) if it is reasonably apparent that information relating to the client's relevant circumstances is incomplete or inaccurate, make reasonable inquiries to obtain complete and accurate information;
- (d) assess whether the advice provider has the expertise required to provide the client with advice on the subject matter sought and, if not, decline to provide the advice;
- (e) if it would be reasonable to consider recommending a financial product:
  - (i) conduct a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client that

would reasonably be considered relevant to advice on that subject matter; and

- (ii) assess the information gathered in the investigation;
- (f) base all judgements in advising the client on the client's relevant circumstances; and
- (g) take any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances: s961B(2).

RG 175.A49 In RG 175.A50–RG 175.A113, we set out our expectations for complying with each of these steps.

### **The client's circumstances disclosed through instructions**

RG 175.A50 This first element in the safe harbour requires an advice provider to determine what the client's objectives, financial situation and needs are, based on the information that has been disclosed to the advice provider when they received instructions from the client to provide them with advice: s961B(2)(a).

RG 175.A51 A client may communicate their instructions in a number of different ways. For example, instructions may be provided through a face-to-face meeting, by telephone or email, or by entering information into an online form or program.

RG 175.A52 For an existing client of the advice provider, the client's instructions could include stating that the information previously provided remains relevant.

RG 175.A53 This element will not always require an advice provider to make inquiries to clarify instructions about the client's objectives, financial situation, and needs. However, many clients do not know what their objectives, financial situation or needs are. Clients may also provide instructions that are unclear or seem inconsistent with their circumstances. In these situations, the advice provider may need to make further inquiries of the client to identify their objectives, financial situation and needs from the information disclosed through the client's instructions.

RG 175.A54 We do not interpret the reference to 'instructions' in s961B(2)(a) as always applying to the first communication a client makes with an advice provider when requesting advice. Instructions may be given over a number of communications and vary over the course of these communications.

RG 175.A55 Depending on what a client's instructions are and how they have been provided, advice providers may need to exercise their judgement in determining what the client's objectives, financial situation and needs are from these instructions. For example, many clients ask a financial adviser for

advice in response to a life event, such as divorce, redundancy or receiving an inheritance, rather than on a specific product. In this situation, an advice provider will need to exercise their judgement in identifying what the client's objectives, financial situation and needs are based on the information disclosed by the client about the life event.

### **The subject matter of the advice sought by the client**

- RG 175.A56 The next element of the safe harbour requires an advice provider to identify the subject matter of the advice sought by the client (whether explicitly or implicitly): s961B(2)(b)(i). This is relevant to determining the scope of the advice.
- RG 175.A57 The subject matter of the advice could be a goal the client is seeking to achieve and a strategy for reaching their goal, as well as, or instead of, a recommendation to acquire specific financial products or financial products of a particular class. The request for advice could also be triggered by an event or situation (e.g. divorce, redundancy or receiving an inheritance).
- RG 175.A58 It is only after identifying the subject matter of the advice sought by the client that an advice provider will be able to determine the scope of the advice. An advice provider needs to use their judgement in deciding on the scope of the advice, based on the subject matter of the advice sought by the client. An advice provider should not determine the scope of the advice in a way that is inconsistent with the client's relevant circumstances or the subject matter of the advice they are seeking.
- RG 175.A59 For more information on the scope of advice, see Consultation Paper 183 *Giving information, general advice and scaled advice* (CP 183).

### **Explicit and implicit subject matter**

- RG 175.A60 The subject matter of advice sought by a client may be explicit from the client's request for advice. Examples 5 and 6 are examples of when the subject matter of advice sought by a client is explicit.

#### **Example 5: Explicit advice—Financial calculators**

A client uses a financial calculator that provides personal advice, and it is clear to the client what advice they are receiving by using the calculator.

#### **Example 6: Explicit advice—Advice on nominating beneficiaries**

A client asks the trustee of their superannuation fund for advice only on nominating beneficiaries for their superannuation account with the trustee.

- RG 175.A61 The subject matter of advice sought by a client may also be implicit—for example, when a client requests advice in response to a life event.

#### Example 7: Implicit advice—Receiving a windfall

##### Scenario

A client has received a substantial inheritance from a recently deceased aunt. The client is in their early 20s and completing their final year of university. They have no knowledge of financial matters and are seeking advice about how the inheritance should be applied to improve their financial position. The client has a small credit card debt and a HECS-HELP university fees debt, wants to upgrade their car and would like to buy a house within the next three to five years.

##### Commentary

It is implicit that the client is seeking advice about managing and repaying debt, managing expenses and how to save for future goals based on their circumstances.

- RG 175.A62 When the subject matter of the advice sought by a client is implicit, advice providers may need to discuss with their client the subject matter of the advice they are seeking. Often, advice providers may refine their understanding of the subject matter of advice sought as they discover more information about their client.
- RG 175.A63 For more information, see Example 8 below and CP 183.

#### How to identify the subject matter of the advice

- RG 175.A64 Some factors that may be relevant in identifying the subject matter of the advice sought by the client include:
- why the client is seeking financial advice;
  - the outcomes the client wants to achieve if they follow the advice (i.e. their goal in seeking advice);
  - how much the client is willing to pay for the advice; and
  - the risk profile that will best suit the client's objectives, financial situation and needs.
- RG 175.A65 These factors need to be considered, where relevant, and weighed against each other in determining the subject matter of the advice being sought by the client. The advice provider should also consider what is expressly sought by the client.
- RG 175.A66 As a matter of good practice, advice providers should tell their clients what they think the subject matter of advice is that the client is seeking and test with the client whether this is correct. If this is not done, there is a much

greater risk that an advice provider will not correctly identify the subject matter of the advice sought by the client.

- RG 175.A67 As mentioned at RG 175.A64(c), how much the client is willing to pay for the advice is a relevant factor in determining the subject matter of the advice the client is seeking. However, it does not mean that advice providers can necessarily interpret the subject matter of advice sought by the client according to what can be provided at the price the client is willing to pay. For example, an advice provider cannot exclude consideration of important issues based on the cost the client is willing to pay, nor can the advice provider then use this to determine the scope of the advice in a way that is inconsistent with the client's objectives, financial situation or needs.
- RG 175.A68 If a client requests advice on a number of topics but is not willing to pay for advice on all of these topics, the advice provider will need to discuss with the client what advice they can provide based on the amount the client is willing to pay. It is up to the client to determine whether or not they will continue to seek advice on a revised subject matter.
- RG 175.A69 If a client seeks advice on a revised subject matter, the advice provider will need to comply with the best interests duty and related obligations in Div 2 of Pt 7.7A in light of this change. Ultimately, if the advice provider cannot do this, they must decline to provide the advice.
- RG 175.A70 As a matter of good practice, if a client is not willing to obtain personal advice because of the cost involved, an advice provider may consider providing the client with alternative solutions, such as:
- (a) giving the client factual information;
  - (b) giving the client general advice; or
  - (c) recommending that the client see a financial counsellor.

#### Example 8: Revising the scope based on a client's ability to pay

##### Scenario

A client in their early 40s asks an advice provider to review every aspect of their financial situation to determine how the advice provider can maximise the client's savings over the medium and long term. The advice provider gives the client an estimate of the cost to prepare the requested advice. This amount is more than the client is willing to pay for the advice.

The advice provider then identifies the key areas that they think the client should receive advice on, based on the objectives, financial situation and needs that the client disclosed to the advice provider in their instructions. The advice provider also explains the risks of not receiving advice on the other areas that would not be covered in the revised scope of advice, and gives the client a revised estimate. The client agrees to receive advice on the revised scope, and acknowledges that they understand the risks of receiving advice that is not as comprehensive as their initial request for advice.



The advice provider gives the advice on the revised subject matter of advice sought by the client. The advice provider also provides the client with some factual information and resources for the areas of advice that are not relevant to the client right now, but may be in the future.

### **Commentary**

This example illustrates how an advice provider may work together with the client to revise the subject matter of advice the client is seeking, where the client is not willing to pay for the cost of advice they initially requested.

### **Range of financial products, classes of financial product and strategies**

RG 175.A71 In determining the scope of the advice, an advice provider will need to have and use their generic knowledge about the broad range of relevant strategies, classes of financial product and specific financial products commonly available to ensure that the scope of the advice they provide is appropriate to their client under s961G: see RG 175.A114–RG 175.A133.

Note: If an advice provider does not have this generic knowledge, they may not have the expertise to provide the advice under s961B(2)(d): see RG 175.A87–RG 175.A91.

### **Identifying the client's relevant circumstances**

RG 175.A72 If an advice provider wishes to rely on the safe harbour for complying with the best interests duty, they must identify the objectives, financial situation and needs of the client that would reasonably be considered relevant to the subject matter of the advice the client is seeking (client's relevant circumstances): s961B(2)(b)(ii).

RG 175.A73 Identifying the client's relevant circumstances requires an advice provider to use their judgement and complete reasonable inquiries into the client's relevant circumstances. Not all of the client's objectives, financial situation and needs will be relevant, in all cases, to the subject matter of the advice sought by the client. There is an objective standard imposed in determining which of the client's circumstances are relevant. What is needed to satisfy this requirement will vary depending on the circumstances, including the client's relevant circumstances and the nature of the advice being sought.

RG 175.A74 To satisfy the requirement in s961B(2)(b)(ii) in any particular case, an advice provider may need to make inquiries additional to those that they normally make. This is particularly important where the advice is relatively complex or where the client has a low level of financial literacy.

RG 175.A75 If a client is an existing client, the advice provider can make inquiries about whether the information already held about the client's relevant circumstances is up-to-date and complete, instead of asking the client to resupply information the advice provider already holds. If the client is seeking advice on a subject matter they have not received advice on before, it is likely the advice provider will need to make additional inquiries to identify the client's relevant circumstances for the current request for advice.

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- RG 175.A76 The client's relevant circumstances, as with the subject matter of the advice, may include a life event they have experienced and/or a goal the client is seeking to achieve.
- RG 175.A77 Advice providers are required to first consider whether the information initially disclosed to them by the client is sufficient to identify the client's relevant circumstances. We expect that, often, it will not be sufficient. In this situation, advice providers will need to make further inquiries to identify the client's relevant circumstances.
- RG 175.A78 In the course of doing this, an advice provider may discover that a subject matter of advice different from the one sought by the client would better suit the client's objectives, financial situation and needs. The advice provider may discuss this with the client and the client may decide to revise the subject matter of the advice they are seeking to the more suitable subject matter identified by the advice provider.
- RG 175.A79 It is also possible that additional information about the client's relevant circumstances may lead to a change or uncertainty in what the advice provider should identify as the subject matter of the advice. If such a change or uncertainty arises, the advice provider must clarify this with the client.
- RG 175.A80 In either case, it may be that more information is required from the client to identify their relevant circumstances. This does not mean that a full 'fact find' or detailed investigation into financial products needs to be done in all cases.
- RG 175.A81 The inquiries an advice provider makes as part of their client fact-find process can be 'scaled up' or 'scaled down', depending on the nature of the advice being sought: see CP 183.

#### **Advice on financial products with an investment component**

- RG 175.A82 Where advice relates to financial product(s) with an investment component, we consider that the client's relevant circumstances will often include the client's:
- (a) need for regular income (e.g. retirement income);
  - (b) need for capital growth;
  - (c) desire to minimise fees and costs;
  - (d) tolerance for the risk of capital loss, especially where this is a significant possibility if the advice is followed;
  - (e) tolerance for the risk that the advice (if followed) will not produce the expected benefits;
  - (f) existing investment portfolio;
  - (g) existing debts;

- (h) investment horizon;
- (i) need to be able to readily ‘cash in’ the investment;
- (j) capacity to service any loan used to acquire a financial product; and
- (k) tax position, social security entitlements, family commitments, employment security and expected retirement age.

Note: This is not an exhaustive list. The client’s relevant circumstances include any other matter that would reasonably be considered relevant to the advice, based on the advice provider’s obligations in s961B. This would normally encompass any matter that the client indicates is important.

### **Inquiries where information is incomplete or inaccurate**

RG 175.A83 If it is reasonably apparent that information about a client’s relevant circumstances is incomplete or inaccurate, an advice provider must make reasonable inquiries to obtain complete and accurate information: s961B(2)(c). What is needed to comply with this requirement will vary depending on the circumstances of each case, including the nature of the advice.

RG 175.A84 An objective standard exists for both:

- (a) the obligation to identify whether the information obtained on the client’s relevant circumstances is incomplete or inaccurate. Advice providers need to exercise judgement in doing this. The relevant standard of conduct required depends on whether something is ‘reasonably apparent’; and
- (b) the obligation to make inquiries to obtain complete and accurate information. The relevant standard is making ‘reasonable inquiries’.

RG 175.A85 Whether something is ‘reasonably apparent’ will be judged by reference to what would be apparent to someone 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 advice provider by the client: s961C.

RG 175.A86 Whether an advice provider needs to make ‘reasonable inquiries’, and what inquiries they need to make, will vary depending on the circumstances.

#### **Example 9: Advice on investing \$5,000 in a basic deposit product**

##### **Scenario**

A person approaches a bank teller, asking them for personal advice about which of the bank’s basic deposit products they should invest \$5,000 in.

##### **Commentary**

The bank teller would not be expected to conduct a full ‘fact find’ in relation to the person’s circumstances. The bank teller would need to ask the client a limited set of additional questions about areas where the bank has

incomplete information about the client's personal circumstances. For example, the bank teller may ask further questions to help them determine when the client would need to access the \$5,000. They may also need to ask the client additional questions about the client's debts or investments.

#### Example 10: Salary sacrificing into superannuation

##### Scenario

A client is seeking advice on starting a 'salary sacrifice' strategy to maximise their annual contributions to superannuation. The client has provided the advice provider with information about their existing superannuation fund and the annual amount they require for living expenses.

##### Commentary

An advice provider needs to exercise judgement in determining the type and level of inquiries required to provide the advice. In this example, the client has not provided information on their age, annual income and employment status (e.g. employed or self-employed). These pieces of information are all needed to provide advice on a salary sacrifice strategy.

The advice provider will need to make further inquiries of the client to obtain this information.

### Assessing the expertise of the advice provider

- RG 175.A87 If an advice provider chooses to rely on the safe harbour for complying with the best interests duty, they must assess whether they have the expertise to provide the advice, based on the subject matter of the advice sought by the client. If, as a result of making this assessment, they determine that they do not have this expertise, they must decline to provide the advice: s961B(2)(d).
- RG 175.A88 In assessing whether they have the necessary expertise, an advice provider should consider the following:
- (a) for individual advice providers, any specific requirements or limitations on providing advice that are imposed on them by their AFS licensee or authorised representative;
  - (b) for individual advice providers, their professional qualifications and training. This includes the extent to which their qualifications and training cover their determination of the broader strategy the advice should be based on;
  - (c) for individual advice providers, their knowledge and skills in relation to advising on the strategy and financial product(s) they are recommending for the client (as relevant); and
  - (d) the AFS licence authorisations of their licensee, or of the advice provider if the advice provider is the licensee. The AFS licence authorisations are relevant because licensees have an obligation to:

- (i) ensure that they are competent to provide the financial services they are authorised to provide;
- (ii) maintain the competence to provide those financial services; and
- (iii) ensure that their representatives are adequately trained, and are competent, to provide those financial services: s912A(1).

Note: For more information, see Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104), Regulatory Guide 105 *Licensing: Organisational competence* (RG 105) and Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146).

RG 175.A89 The Revised Explanatory Memorandum states that:

In most cases, as long as the provider is competent for the purposes of the Corporations Act to provide advice for that class of financial product, the [advice] provider would satisfy this requirement [i.e. s961B(2)(d)]. However, in the situation where the client requests advice on a particularly technical or complex aspect of the financial product, the [advice] provider may not have the expertise to provide this advice even though they are generally competent to provide advice about that class of product. In this situation, in order to act in the client's best interests, the [advice] provider should decline to provide the advice (paragraph 1.39).

RG 175.A90 We consider that being competent under the Corporations Act requires an advice provider to possess generic knowledge about the broad range of relevant strategies, classes of financial product and specific financial products commonly available to ensure that they act in the client's best interests and provide appropriate advice under s961B and 961G.

Note 1: This is similar to our existing guidance in RG 175.135.

Note 2: The training requirements for advice providers are set out in Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146).

RG 175.A91 If an advice provider does decline to provide the advice, they may refer the client to another advice provider who has the expertise to provide the advice.

### **When it is reasonable to recommend a financial product**

RG 175.A92 If, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product, an advice provider must:

- (a) conduct a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client that would reasonably be considered relevant to the subject matter of the advice: s961B(2)(e)(i); and
- (b) assess the information gathered in the investigation: s961B(2)(e)(ii).

RG 175.A93 Section 961D provides that a reasonable investigation conducted under s961B(2)(e) does not require an investigation into every product available. However, if a client requests that an advice provider consider a specific financial product, the advice provider must investigate that financial product.

- RG 175.A94 Before recommending to a client that they acquire a financial product, we expect advice providers to formulate the strategy they are basing the advice on, taking into account the advice provider's obligations under s961B.
- RG 175.A95 We believe that, only after doing this, would an advice provider be able to determine whether it would be reasonable to consider recommending a financial product. In some cases, it would not be reasonable to recommend a financial product, given the subject matter of advice sought by the client. Instead, s961B might require that an advice provider:
- (a) provide the client with non-product-specific advice, which might include the advice to do nothing;
  - (b) advise the client to dispose of a financial product; or
  - (c) advise the client to make an increased investment without any new acquisition of a financial product.

Note: Example 4 is an example of providing non-product-specific advice.

- RG 175.A96 This element of the safe harbour applies to situations where an advice provider recommends that a client use a platform to acquire financial products because the rights of a client in a platform are a type of financial product. This means that an advice provider needs to consider whether or not it would be reasonable to recommend that a client use a platform to acquire financial products or whether they should acquire products directly.
- RG 175.A97 Advice providers often use research produced by external research report providers to identify products that may be suitable for their clients. This research may assist in the development of approved product lists or in the preparation of SOAs. Advice providers are expected to make their own inquiries and research into the products they give advice on. While they may rely to some extent on various service providers, such as research houses, the advice provider remains responsible to the client for the advice they give.

Note: We will give guidance to AFS licensees providing financial product advice to ensure they conduct careful due diligence on any service providers (including research report providers) that they intend to use. We are currently updating our guidance to improve the quality and integrity of research produced by research report providers: see *Regulatory Guide 79 Managing conflicts of interest: An ASIC guide for research report providers* (RG 79) and *Consultation Paper 171 Strengthening the regulation of research report providers (including research houses)* (CP 171).

### Switching advice

- RG 175.A98 In the case of advice to replace one financial product with another financial product (or to switch between investment options within a financial product)—referred to as switching advice—we consider that s961B(2) generally requires an advice provider to consider and investigate:
- (a) the existing product (or option), regardless of whether it is on their AFS licensee's approved product list (if the licensee has one);

- (b) potential new products (or options)—this does not necessarily mean that the consideration and investigation should be limited to products on the licensee’s approved product list (if the licensee has one); and
- (c) the new product (or option) recommended to the client.

Note: Considering and investigating the existing product (or option) and new product (or option) recommended to the client is similar to our existing guidance in RG 175.136.

RG 175.A99 This applies where the client’s existing or new product is a financial product under Ch 7, or if both of them are financial products. The advice provider must also consider whether a client should retain their existing products.

RG 175.A100 In addition, s947D requires an advice provider to make certain inquiries about the costs and benefits of switching (in full or in part) between one financial product and another financial product, and for that information to be included in the SOA. There may be some overlap in the investigations an advice provider makes in satisfying s961B(2)(e) and complying with s947D. There are, however, some things an advice provider needs to do under s961B(2)(e) that are not required by s947D, such as:

- (a) determining whether it is reasonable to recommend financial products; and
- (b) investigating financial products beyond the product(s) the advice provider recommends to determine which product(s) they should recommend.

RG 175.A101 An advice provider’s assessment of the results of their investigation under s961B(2)(e)(i) should be informed by the other requirements in s961B(2). This includes basing all judgements on the client’s relevant circumstances: s961B(2)(f).

### **Approved product lists**

RG 175.A102 Many AFS licensees restrict the range of products their advice providers can advise on through an approved product list. The best interests duty does not prevent or require the use of approved product lists. We do not consider that conducting a reasonable investigation into financial products under s961B(2)(e) necessarily means that product inquiries can be limited to the licensee’s approved product list.

RG 175.A103 In a number of cases, an advice provider will need to investigate and consider a product that is not on their AFS licensee’s approved product list to show that they have acted in the best interests of the client—for example:

- (a) if the client’s existing products are not on the approved product list of the advice provider’s licensee; or

- (b) if an advice provider's approved product list is restricted to one class of product and there are products that are not in that class that would better meet the client's objectives or needs, provided that advice about those other products is within the subject matter of the advice sought by the client.

RG 175.A104 If an advice provider recommends a product that is not on their approved product list, they will need to ensure that they have the appropriate authorisations and approvals from their licensee to provide the advice. Their AFS licensee will also need to ensure that the advice is provided in a way that complies with the relevant legal and regulatory requirements (e.g. the requirement for licensees to have adequate professional indemnity insurance).

Note: Our policy on what we consider to be adequate professional insurance cover is set out in Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126).

RG 175.A105 If an advice provider is unable to recommend products outside their approved product list, and they need to do this to meet their obligations in Div 2 of Pt 7.7A, the advice provider must decline to provide the advice.

RG 175.A106 AFS licensees have an obligation to take reasonable steps to ensure that their representatives comply with the best interests duty and related obligations: s961L. Among other things, this requires licensees to consider whether their approved product list is supporting their representatives in complying with these obligations.

### **All judgements made by the advice provider are based on the client's relevant circumstances**

RG 175.A107 To rely on the safe harbour for the best interests duty, an advice provider must base *all* judgements in advising the client on the client's relevant circumstances—that is, their objectives, financial situation and needs that would reasonably be considered relevant to the subject matter of the advice sought by the client: s961B(2)(f). This includes judgements that the advice provider makes about:

- (a) the scope of the advice;
- (b) the extent of the inquiries they make into the client's relevant circumstances;
- (c) the strategies, and classes of financial product and specific financial products they investigate;
- (d) the strategies, classes of financial product and specific financial products the advice provider recommends; and



- (e) how the client should acquire financial products (where relevant)—for example, whether the client should acquire products directly or through a platform.

RG 175.A108 Recommending a financial product may not match the client’s relevant circumstances in all cases. In some cases, complying with the best interests duty may require an advice provider to give the client non-product-specific advice about, for example, debt levels, estate planning or Centrelink benefits: see Example 4.

RG 175.A109 Even if advice is consistent with the client’s relevant circumstances, we may still consider that an advice provider has not complied with s961B(2)(f) if the advice would not be likely to leave the client in a better position as a result of following the advice. Whether this is the case is judged objectively, based on the circumstances existing at the time the advice is provided.

Note: Leaving the client in a better position is also relevant as a basic policy principle that will guide ASIC’s administration of the best interests duty and related obligations in Div 2 of Pt 7.7A, among other things. For more information on leaving the client in a better position, see RG 175.A27–RG 175.A32.

### Other reasonable steps

RG 175.A110 Section 961B(2)(g) of the safe harbour for the best interests duty provides that an advice provider needs to take ‘any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances’. The words ‘at the time the advice is provided’ mean that this provision does not consider what may have been in the client’s best interests in hindsight. The Revised Explanatory Memorandum states that:

In satisfying this final step [s961b(2)(g)], [an advice] a provider will need to go further than in the previous more specific steps [s961b(2)(a)–(f)], and will have to take any step necessary to demonstrate that it has acted in the best interests of the client (paragraph 1.43).

RG 175.A111 What advice providers need to do to show that they have satisfied s961B(2)(g) varies depending on the circumstances of the case. Advice providers may need to undertake the following steps, if they have not already done so, to comply with s961B(2)(g):

- (a) explain clearly to the client the advice service that *is* and *is not* being provided (see CP 183);
- (b) if the advice includes a product recommendation, provide strategic recommendations that benefit the client (see Example 11 below);
- (c) depending on the subject matter of the advice, specify in the advice that the client should review any decision made about financial products on the basis of the advice provided:
  - (i) once after a period of time;

- (ii) regularly (e.g. every one or two years); or
- (iii) if the client's circumstances change.

The review period will depend on the circumstances, including the recommendation that the advice provider is making, the volatility of any investment returns and the likelihood of a change in the client's circumstances; and

- (d) offer to provide advice (or refer the client to someone who can provide advice) on any other key issues identified by the advice provider that are not part of the scope of the advice. For example, if the advice provider has identified that it is important for the client to consider whether to consolidate their superannuation accounts, they may offer to assist them (or refer the client to someone who can assist them) in providing advice on that topic.

#### Example 11: Advice with strategic recommendations

##### Scenario

A retired client, aged 66, meets with an advice provider because they are confused about why they are not receiving as much of the age pension as they think they are entitled to. The advice provider discovers the client was unsure about what to do with their superannuation benefits when they reached age 65. (The client also retired at 65.) The client has left their superannuation benefits in the accumulation phase and has made lump sum withdrawals about every three months to meet their living expenses.

The advice provider recommends that the client adopts a strategy that will:

- allow the client to take advantage of improved age pension benefits by changing from the accumulation to pension phase of superannuation;
- give the client a regular monthly payment to make it easier to manage their cash flow; and
- place the client in a more tax-effective position by moving their retirement wealth from the accumulation phase, where the maximum tax rate is 15%, to the pension phase, where the tax rate is 0%.

The advice provider recommends that the client switches to an account-based income stream product to give effect to this strategy.

##### Commentary

In addition to providing a product recommendation, the advice provider has made strategic recommendations that benefit the client.

#### Example 12: Offering to provide advice on another topic

##### Scenario

A client has sought advice on obtaining life and total permanent disability (TPD) insurance. In the course of providing the advice, the advice provider

identifies that the client has a spouse who does not work, a mortgage, financial dependants and no income protection insurance.

#### **Commentary**

The advice provider should offer to provide advice on obtaining income protection insurance, or refer the client to someone who can provide that advice. It is up to the client to decide whether they will accept the advice provider's offer to give advice on this topic.

- RG 175.A112 If an advice provider cannot act in the client's best interests in providing them with personal advice, they must decline to provide the advice. In declining to advise the client, they may refer the client to another advice provider who might be better placed to act in the client's best interests in providing them with advice. This applies regardless of whether the safe harbour is being relied on.
- RG 175.A113 As with the other obligations imposed on advice providers in Div 2 of Pt 7.7A, an advice provider cannot contract out of s961B(2)(g) or limit the steps they need to take through disclosure. However, being clear on the scope of the advice provided or the inquiries an advice provider has made into the client's relevant circumstances under s961B(2)(b) is not contracting out because it does not limit the advice provider's obligations. For more information, see CP 183.

## **Providing appropriate personal advice**

- RG 175.A114 Personal advice must only be provided if it would be reasonable to conclude that the advice is appropriate to the client, assuming that the best interests duty—or modified best interests duty, where applicable—has been complied with: s961G. Whether the advice is appropriate is judged by reference to the knowledge and information an advice provider would have acquired in complying with the best interests duty or modified best interests duty, regardless of whether or not they have done so. That is, an advice provider is assumed to know all the information about the client, strategy and product (if any) that they would know if they have properly complied with s961B.
- RG 175.A115 The appropriate advice requirement is directly concerned with the quality of advice resulting from the actions the advice provider has taken in light of the best interests duty.
- RG 175.A116 We consider that advice is appropriate if it would be reasonable to conclude, at the time the advice is provided, that:
- (a) it is fit for its purpose—that is, following the advice is likely to satisfy the client's relevant circumstances; and

Note: The client's relevant circumstances are the objectives, financial situation and needs of the client that would reasonably be considered relevant to the subject matter of advice sought by the client.

- (b) following the advice is likely to leave the client in a better position.

Note: Leaving the client in a better position is also relevant as a basic policy principle that will guide ASIC's administration of the best interests duty and related obligations in Div 2 of Pt 7.7A, among other things. For more information on leaving the client in a better position, see RG 175.A27–RG 175.A32.

RG 175.A117 We consider that s961G imposes a higher standard of conduct and higher standard of advice than the obligation under s945A, which will no longer apply from 1 July 2013.

RG 175.A118 This is because the inquiries an advice provider needs to make are more extensive under the obligations in Div 2 of Pt 7.7A. If the safe harbour for the best interests duty is being relied on, advice providers must also:

- (a) base all judgements in advising the client on the client's relevant circumstances; and
- (b) take any other steps that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

RG 175.A119 In administering the appropriate advice requirement, we will take into account all the circumstances, including (but not limited to):

- (a) what is required of the advice provider under s961B, including whether a modified best interests duty applies: see RG 175.A45–RG 175.A47; and
- (b) whether the advice, if acted on by the client, would be reasonably likely to meet the client's needs and objectives.

RG 175.A120 If none of the financial products the advice provider is authorised to advise on are appropriate for the client, the advice provider must not recommend that a client acquire any financial product.

### **The modified best interests duty**

RG 175.A121 The requirement to provide appropriate advice also applies when the modified best interests duty applies.

RG 175.A122 When the modified best interests duty applies, an advice provider only needs to take the steps in s961B(2)(a)–(c): see Table 2. This means that whether the advice is appropriate is judged by reference to the information and knowledge the advice provider would have acquired as a result of:

- (a) identifying the objectives, financial situation and needs of the client that were disclosed by the client through instructions;

- (b) identifying:
- (i) the subject matter of the advice sought by the client (whether explicitly or implicitly); and
  - (ii) the client's relevant circumstances; and

Note: The client's relevant circumstances are the objectives, financial situation and needs of the client that would reasonably be considered relevant to the subject matter of advice sought by the client.

- (c) if it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, making reasonable inquiries to obtain complete and accurate information: s961B(2)(a)–(c).

RG 175.A123 An advice provider is not expected to have any information and knowledge that would have been acquired as a result of complying with s961B(2)(d)–(g).

RG 175.A124 Therefore, whether it would be reasonable to conclude that the advice is appropriate when the modified best interests duty applies is different to when it does not apply. This is because the knowledge and information an advice provider is expected to have is different.

### Example 13: Appropriate advice and the modified best interests duty

#### Scenario

A customer approaches a bank branch employee and explains that they have an online savings account that earns 5% interest per year, and they would like to know if there is a deposit account offered by the bank that offers a higher rate of interest than they are currently earning with their online savings account.

The advice provider recommends an incentives account, under which a base interest rate of 0.5% is paid, plus an additional 5% if the customer makes a minimum deposit of \$40 per month and makes only one withdrawal a month (bonus interest). An interest rate of 5.5% is potentially available.

The advice provider does not make any inquiries into the client's spending and saving habits. If they had asked the client a few basic questions about this, they would have discovered that the client's spending and saving habits are such that the client would not meet the monthly withdrawal criteria to receive the bonus interest.

This means that, if the client were to change accounts, they would be earning interest at a rate of 0.5% (although the client is currently earning 5% interest per year).

#### Commentary

We expect that, in complying with the modified best interests duty, the advice provider would have discovered that the client would not meet the monthly withdrawal criteria to receive the bonus interest. This means that it would be inappropriate for the advice provider to recommend the client change to the account with the bonus interest.

RG 175.A125 For further examples on the practical application of the modified best interests duty, see CP 183.

### Switching advice

RG 175.A126 In the case of advice to replace one financial product with another financial product (or to switch between investment options within a financial product)—referred to as switching advice—advice providers should consider the benefits and risks of both products (or options).

RG 175.A127 We consider that the advice will generally only be appropriate if it would be reasonable to conclude that the net benefits that are likely to result from the new product (or option) are better than under the existing product (or option). This applies where either the new product or the existing product is (or both products are) a financial product under Ch 7.

RG 175.A128 Advice will often be appropriate under s961G if there are overall cost savings for the client that are likely to override the loss of benefits that are of value to the client.

RG 175.A129 The determination of whether there are overall cost savings for the client must take into account all the circumstances, including the cost of the replacement (i.e. making the switch) and the advice provider's fees, if they are payable only if the switch is made.

#### Example 14: Inappropriate superannuation switching advice

##### Scenario

A client has three different superannuation accounts with three different trustees, and approaches an advice provider for advice about how best to consolidate their superannuation.

The advice provider recommends that the client consolidate all of their superannuation accounts into a new fund, which will have higher ongoing fees than the combined fees of their old superannuation accounts. The new fund would not confer any additional benefits on the client.

##### Commentary

This advice would be inappropriate. If the client were to act on the advice, they would not be left in a better position.

### Tax implications outside the advice provider's competence

RG 175.A130 A client's tax position may be relevant to the assessment of the client's relevant circumstances. Advice involving complex tax strategies is likely to involve more inquiries about the client's tax position than relatively simple advice.

RG 175.A131 When there are material tax implications that the client should consider, which go beyond an advice provider's competence, we consider there are two ways that the advice provider can act in the best interests of their client and give appropriate advice under s961B and 961G:

- (a) the advice can be based on advice given to the client by someone with appropriate expertise, such as a registered tax agent—in which case, the advice provider should ensure that they make clear in the SOA and in discussions with the client that they are assuming the tax advice is appropriate, rather than endorsing it; or
- (b) the advice can be limited to matters on which the advice provider is competent to advise—in which case, the advice provider must take steps that it is reasonable to believe will ensure that the client understands that they should seek tax advice from a person with appropriate expertise (or forms their own view if they have appropriate expertise) before following the advice provider's advice.

Note: There may be other ways an advice provider can give appropriate advice under s961B and 961G when there are material tax implications that the client should consider that go beyond the advice provider's competence.

RG 175.A132 We consider that the advice will not be appropriate, and an advice provider would not have acted in the client's best interests, if the advice provider does not reasonably believe that the client understands that tax advice should be obtained before making any decision about a financial product that the advice is intended to influence.

RG 175.A133 Financial advice providers providing taxation advice in the context of providing financial product advice are currently exempt from the tax agent services regime in the *Tax Agent Services Act 2009*. This exemption will expire on 30 June 2013: see reg 13(2), Tax Agent Services Regulations 2009.

#### Example 15: Seeking tax advice

##### Scenario

An advice provider is providing personal advice to a client who wishes to sell their personally held investments which consist of property and shares. The client will contribute the proceeds to superannuation. The client has held some assets for more than 20 years.

##### Commentary

In this situation, we would expect a capital gains tax assessment to be obtained from someone with the appropriate expertise, such as a registered tax agent.

## Giving a warning for advice based on incomplete or inaccurate information

RG 175.A134 Advice providers must make reasonable inquiries to obtain complete and accurate information about the client's relevant circumstances. Personal advice may be provided if an advice provider makes reasonable inquiries into the client's relevant circumstances, even if the client has not, in fact, provided all the information that the advice provider has sought.

Note: See RG 175.A83–RG 175.A86 for more information on making reasonable inquiries to obtain complete and accurate information about the client's relevant circumstances under s961B(2)(c).

RG 175.A135 If it is reasonably apparent, after reasonable inquiries have been made, that information about the objectives, financial situation and needs of the client on which the advice is based is incomplete or inaccurate, an advice provider must warn the client that:

- (a) the advice is, or may be, based on incomplete or inaccurate information relating to the client's relevant circumstances; and
- (b) because of this, the client should, before acting on the advice, consider the appropriateness of the advice, taking into account their objectives, financial situation and needs: s961H.

Note: Something will be 'reasonably apparent' if it 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 advice provider by the client: s961C.

RG 175.A136 This warning must also be given if the modified best interests duty applies. For more information on when the modified best interests duty applies, see RG 175.A45–RG 175.A47.

RG 175.A137 Giving a warning does not relieve an advice provider from the obligation to make reasonable inquiries, act in the best interests of the client or provide advice that is appropriate.

## Prioritising the interests of the client

RG 175.A138 An advice provider must prioritise the interests of the client if the advice provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:

- (a) the advice provider;
- (b) an associate of the advice provider;
- (c) an AFS licensee of whom the advice provider is a representative;
- (d) an associate of an AFS licensee of whom the advice provider is a representative;



- (e) an authorised representative who has authorised the advice provider to provide financial services (or a financial service) on behalf of an AFS licensee; or
- (f) an associate of an authorised representative who has authorised the advice provider to provide financial services (or a financial service) on behalf of an AFS licensee: s961J(1).

RG 175.A139 The parties listed at RG 175.A138(a)–RG 175.A138(f) will be referred to as ‘related parties’ in this regulatory guide. We will refer to s961J(1) as the ‘conflicts priority rule’.

RG 175.A140 The conflicts priority rule does not apply if the advice provider does not know of the conflicting interest, unless they reasonably should have known about it.

RG 175.A141 An AFS licensee or authorised representative may use information barriers to prevent an advice provider from becoming aware of any conflicting interests of the advice provider’s related parties. For example, an information barrier may be set up to prevent a new advice provider of a licensee becoming aware of which products result in commissions that are not prohibited by the conflicted remuneration provisions in Div 4 of Pt 7.7A being paid to a licensee because they have been ‘grandfathered’: see s1528.

RG 175.A142 Using information barriers to avoid becoming aware of a conflicting interest of a related party would breach s961J if the advice provider should reasonably have known about the conflict.

RG 175.A143 Section 961J(1) requires that an advice provider should not act to further their interests over those of the client when giving the client advice. In complying with this obligation, advice providers should be guided by what an advice provider without a conflict of interest would do.

#### Example 16: Related party products

##### Scenario

An advice provider determines that it would be appropriate under s961G to recommend that their client acquire interests in one of two different managed investment schemes. These products are identical except that one product has slightly higher ongoing fees than the other product. The responsible entity of the product with the higher fees is a related party of the advice provider’s AFS licensee.

##### Commentary

To comply with the conflicts priority rule, the advice provider should recommend that the client acquire interests in the managed investment scheme that has the lower ongoing fees. This is what an advice provider without a conflict of interest would do. Of the two products, acquiring interests in the scheme with the lower ongoing fees prioritises the interests of the client over the interests of the related party of the advice provider.

- RG 175.A144 An advice provider cannot comply with the conflicts priority rule merely by disclosing a conflict of interest.
- RG 175.A145 In some cases, complying with the best interests duty and the ‘appropriate advice’ requirement will not be sufficient to comply with the conflicts priority rule: see Example 16.
- RG 175.A146 The conflicts priority rule does not prohibit an advice provider from accepting remuneration from a source other than the client (e.g. a fee from a product issuer). However, Div 4 of Pt 7.7A prohibits advice providers from accepting certain types of remuneration which could reasonably influence the financial product advice they give or the financial products they recommend to clients.
- RG 175.A147 If an advice provider gives priority to maximising the non-client source of remuneration over the interests of the client, the advice provider will be in breach of the conflicts priority rule: see paragraph 1.68 of the Revised Explanatory Memorandum.

#### Example 17: Remuneration conflicts—Life insurance commissions

##### Scenario

An advice provider is providing a client with personal advice on acquiring life insurance. They recommend that the client acquire the life insurance product that pays the greatest commission to the advice provider and their AFS licensee. They do not consider the features of different life insurance products in light of the client’s objectives, financial situation and needs.

##### Commentary

In this situation, we consider that s961J has been breached. The advice provider has given priority to maximising the non-client source of remuneration over the interests of the client.

- RG 175.A148 The conflicts priority rule means that:
- (a) an advice provider must not recommend a product or service of a related party to create extra revenue for themselves, their AFS licensee or the related party, where additional benefits for the client cannot be demonstrated;
  - (b) an advice provider must not ‘over-service’ the client to generate more remuneration for themselves or one of their related parties. This means that the advice provider must provide a level of service commensurate with the client’s needs. For example, they must not recommend an unduly complex strategy if the client is unlikely to seek ongoing advice; and
  - (c) an advice provider must recommend non-financial product solutions relevant to the client’s situation, where appropriate, even if this means

the client is less likely to need financial advice in the future (e.g. advice on debt reduction, estate planning and/or Centrelink benefits).

#### Example 18: Over-servicing a client when advising on a self-managed superannuation fund

##### Scenario

A client approaching retirement meets with an advice provider to seek advice on what to do with their superannuation when they retire. The client has a healthy superannuation balance because they have been contributing to their employer defined benefit superannuation fund for the past 35 years. They have no experience with investing.

This particular defined benefit fund converts to a lump sum benefit on resignation or retirement—there is no pension option with this fund. The client understands that they need to start making some decisions about their superannuation but, because they have no previous investment experience, they are nervous about this process. They want a simple, cost-effective solution that they can easily understand and does not require too much of their time. They are looking forward to retirement and do not want the burden of watching the market every day, as they have seen some of their colleagues do.

The advice provider recommends a self-managed super fund (SMSF) and reassures the client that they do not need to be too involved because the advice provider will look after it for them.

##### Commentary

The recommendation to set up an SMSF to a client with no interest or expertise in investment and related matters means that the client will always need the assistance of the advice provider. This creates ongoing remuneration for the advice provider and some of the advice provider's related parties at a level of service that exceeds the simple solution the client was seeking. The client's interests have not been prioritised when giving the advice.

RG 175.A149 If an advice provider with a conflict is unable to prioritise the client's interests, they must decline to provide the advice to ensure they comply with s961J.

### The modified best interests duty

RG 175.A150 The conflicts priority rule does not apply if the subject matter of the advice sought by the client relates to:

- (a) a basic banking product only, and the advice provider is an agent or employee of an Australian ADI, or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI (s961J(2)); or
- (b) a general insurance product only (s961J (3)).

RG 175.A151 These are both cases where the modified best interests duty applies.

## Interaction with other obligations

- RG 175.A152 In some circumstances, depending on the relationship between a client and their advice provider, an advice provider may owe fiduciary duties to their client. If this is the case, they may be precluded from acting if there is a conflict between:
- (a) their personal interest and their duty to act in the interests of their client; or
  - (b) their duty to another person and their duty to act in the interests of their client.
- RG 175.A153 The conflicts priority rule applies in conjunction with the general obligation in s912A(1)(aa) imposed on all AFS licensees to manage conflicts of interest. If there is a conflict of interest and the conflicts priority rule also applies, a licensee must prioritise the client's interest rather than managing the conflict through other means (e.g. disclosure). This may mean that an advice provider must avoid the conflict when they would not have needed to under s912A(1)(aa).
- RG 175.A154 If there is a conflict, we expect records to be kept of the reasoning behind any recommendation that the client acquire new financial products or increase their interest in an existing product: see RG 175.A164.

## Giving scaled advice

- RG 175.A155 One of the key objectives of the FOFA reforms is to increase access to good quality advice: see *Future of financial advice: Information pack*, 28 April 2011. The importance of facilitating increased access to advice through scaled advice that is limited in scope is also acknowledged in the note to s961B(2), which states that:
- The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.
- RG 175.A156 One way in which ASIC can assist the financial advice industry to increase access to good quality advice is to explain how the requirements of the best interests duty can be 'scaled up' or 'scaled down', depending on a number of factors.
- RG 175.A157 When considering how the requirements of the best interests duty can be applied flexibly, it is important to note that the same rules apply to all personal advice on a particular topic. There are *not* two sets of rules—one

for ‘comprehensive’ advice and one for ‘scaled’ advice that is more limited in scope.

RG 175.A158 This means that the guidance in this regulatory guide about complying with the best interests duty and related obligations remains equally relevant for persons who are providing, or are considering providing, ‘scaled’ advice.

RG 175.A159 We are proposing further guidance, focusing on the practical aspects of giving scaled advice in CP 183.

## Record-keeping obligations that apply to personal advice

RG 175.A160 We expect AFS licensees to keep records of how their advice providers have acted in relation to providing advice. This includes the inquiries an advice provider has made into the client’s relevant circumstances, and the consideration and investigation of the financial products they are advising on (if relevant).

RG 175.A161 In our view, the duties imposed by the Corporations Act require AFS licensees to keep adequate records about their financial services business, and this includes an obligation to keep records of personal advice. The relevant duties of a licensee that we consider require such a record-keeping obligation include:

- (a) the duty to ‘do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly’ (s912A(1)(a)); and
- (b) the duty to have an adequate dispute resolution system (s912A(1)(g)).

RG 175.A162 Records may take various forms, including the advice document, file notes, working papers and fact-find documents.

RG 175.A163 As a matter of good practice, we consider that SOAs and client records should contain evidence of the basis on which an advice provider believes that their advice, if acted on by the client, would be likely to leave the client in a better position, compared with not acting on the advice.

RG 175.A164 In cases where there is a conflict between the client’s interests and those of the advice provider or one of their related parties under s961J, we consider that more detailed records should be kept, particularly in relation to the reasoning behind any recommendation that the client acquire new financial products or increase their interest in an existing product.

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