



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 189

Future of Financial Advice: Conflicted remuneration

September 2012

About this paper

This consultation paper sets out ASIC's proposals for guidance about complying with the provisions on conflicted remuneration and other banned remuneration in Divs 4 and 5 of Pt 7.7A of the *Corporations Act 2001* (Corporations Act). These provisions apply in relation to financial product advice given to retail clients.

We are seeking feedback on our proposals from Australian financial services (AFS) licensees and their representatives (including authorised representatives), product issuers and sellers, and consumers.

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 28 September 2012 and is based on the Corporations Act as at that date.

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.

Examples in this paper are purely for illustration and are confined to their particular facts.

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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 Divs 4 and 5 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 provisions on conflicted remuneration and other banned remuneration 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 I, '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 9 November 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

What will happen next?

Stage 1	28 September 2012	ASIC consultation paper released
Stage 2	9 November 2012	Comments due on the consultation paper
	November 2012 to February 2013	Drafting of regulatory guide
Stage 3	February 2013	Regulatory guide released

A Background to the proposals

Key points

The provisions on conflicted remuneration and other banned remuneration in Divs 4 and 5 of Pt 7.7A of the *Corporations Act 2001* (Corporations Act) are a key part of the Government's Future of Financial Advice (FOFA) reform package. These obligations have been introduced to more closely align the interests of advisers and their retail clients and improve the quality of financial product advice these clients receive.

We propose to issue a new regulatory guide on our expectations for how AFS licensees and representatives can comply with the conflicted remuneration provisions. Our proposed guidance is set out in Sections B–H of this paper.

This section of the consultation paper sets out some background information on the FOFA reforms, the conflicted remuneration provisions and our approach in administering these provisions.

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 PJC 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 In its report on the inquiry, the PJC commented that:

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

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

- 4 The provisions on conflicted remuneration and other banned remuneration in the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (FOFA Act No. 2)—referred to in this paper as the ‘conflicted remuneration provisions’—are part of the Government’s FOFA reform package. They have been introduced to more closely align the interests of advisers and their retail clients, and improve the quality of financial advice these clients receive.
- 5 In his second reading speech on 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 Bill 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 ban on conflicted remuneration

- 6 Commenting on the conflicted remuneration provisions, the Minister stated in his second reading speech that:
- ... [T]he bill implements a key aspect of the government’s response to the Ripoll report—a ban on the receipt of conflicted remuneration by financial advisers, including commissions from product issuers.
- It is absolutely crucial to the integrity of the advice industry—or any industry involving a high degree of trust and responsibility—that the consumer can be confident that the adviser is working for them.
- It is only by ensuring that advisers’ only source of income is from their clients that clients can be sure that the adviser is working for the client, rather than a product provider.
- For the most part, advisers will not be able to receive remuneration—from product issuers or from anyone else—which could reasonably be expected to influence financial advice provided to a retail client ...
- [T]he message is clear—if in doubt about whether certain remuneration will conflict the advice that they provide to their client—the adviser would be prudent to err on the side of caution.
- 7 Compliance with the conflicted remuneration provisions is mandatory from 1 July 2013. From 1 July 2012, AFS licensees can elect to comply with their obligations in Pt 7.7A of the Corporations Act, including the conflicted remuneration provisions, by lodging a notice with ASIC: see Section G.

Note: A form is available on ASIC’s website to enable AFS licensees to do this: see www.asic.gov.au.

Conflicted remuneration

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

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

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

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

Note: In this consultation paper:

- 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’ mean ‘financial product advice’ as defined in s766B of the Corporations Act.

- 10 The conflicted remuneration provisions in Div 4 of Pt 7.7A only apply to benefits given to AFS licensees and representatives that provide financial product advice to retail clients.

Note: For more information on when a person is providing financial product advice to a retail client, see Regulatory Guide 36 *Licensing: Financial product advice and dealing* (RG 36), Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175) and Consultation Paper 183 *Giving information, general advice and scaled advice* (CP 183).

- 11 There are a number of benefits that are not conflicted remuneration. These are set out in the appendix to this paper.

- 12 There is a presumption that volume-based benefits are conflicted remuneration: s963L. For more information, see Section C.

Other banned remuneration

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

Anti-avoidance

- 14 There is also a ban on entering into or carrying out a scheme that is designed to avoid the application of the provisions in Pt 7.7A of the Corporations Act, including the conflicted remuneration provisions: see s965 and Section H. The anti-avoidance provision is designed to ensure that the policy intent of the FOFA Act No. 2 and the *Corporations Amendment (Future of Financial Advice) Act 2012* (together, the FOFA Acts) is not avoided through industry or transaction restructuring.

Other FOFA reforms

- 15 The ban on conflicted remuneration operates alongside other provisions in the Corporations Act that affect how financial product advice is provided to retail clients. These include the other FOFA reforms, such as those set out in Table 1.

Note: Further information on some of the obligations that apply when financial product advice is provided to retail clients is set out in RG 36 and RG 175.

Table 1: Other FOFA reforms contained in Pt 7.7A

Best interests duty and related obligations	Charging ongoing fees to clients
<p>These obligations apply when:</p> <ul style="list-style-type: none"> • personal advice is provided to a retail client (see Div 2 of Pt 7.7A). <p>Note: The person to whom these obligations apply is generally the individual who provides the personal advice. We refer to this person as the 'advice provider'.</p>	<p>These obligations apply when:</p> <ul style="list-style-type: none"> • personal advice is provided to a retail client by an AFS licensee or representative and there is an ongoing fee arrangement between the client and the licensee or representative (see Div 3 of Pt 7.7A).

Best interests duty and related obligations	Charging ongoing fees to clients
<p>Advice providers must:</p> <ul style="list-style-type: none"> act in the best interests of their clients in relation to the advice; only provide advice if, in light of the actions the advice provider should have taken to comply with the best interests duty, it is reasonable to conclude that the resulting advice is appropriate for the client; give a warning to the client if it is reasonably apparent that the advice is based on incomplete or inaccurate information about the client's objectives, financial situation or needs; and prioritise the interests of the client over their own interests and those of any of their related parties, unless the modified best interests duty applies. 	<p>AFS licensees or representatives must:</p> <ul style="list-style-type: none"> give their client an annual fee disclosure statement outlining information about the fees paid and the services received by the client over the previous year; and only charge an ongoing fee if the client 'opts in' to continue the ongoing fee arrangement every two years. This opt-in requirement applies unless ASIC is satisfied that the licensee or representative is bound by a code of conduct that, among other things, obviates the need for complying with the opt-in requirement in the Corporations Act.
<p>For further information, see:</p> <ul style="list-style-type: none"> Consultation Paper 182 <i>Future of Financial Advice: Best interests duty and related obligations—Update to RG 175</i> (CP 182); and Consultation Paper 183 <i>Giving information, general advice and scaled advice</i> (CP 183). 	<p>Following a public consultation process, we will publish guidance on our approach to approving codes.</p> <p>More information on this is available on our FOFA webpage, accessible from www.asic.gov.au.</p>

Our approach to administering the conflicted remuneration provisions

- 16 We will provide guidance about how we will administer the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A. We have set out our proposed guidance in this paper and are seeking industry and consumer feedback on it. We will discuss our proposed guidance with industry and consumer representatives before it is finalised and released.
- 17 The following policy principles will guide our administration of the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A:
- the provisions are designed to more closely align the interests of retail clients with the interests of those who provide them with financial product advice; and
 - this alignment of interests will depend on the substance of a benefit over its form—that is, whether the benefit is one that could reasonably be expected to influence the financial product advice or financial product recommendations is more relevant than how the benefit has been labelled or presented to the client.
- 18 Complying with the conflicted remuneration provisions will mean that traditional payment structures used in some business models or delivery channels will often need to be changed to comply with the law.

- 19 We will administer the conflicted remuneration provisions in light of other obligations that apply to AFS licensees and their representatives (including authorised representatives) and our guidance on these provisions, where relevant. These obligations may include:
- (a) common law obligations, such as the duty of care and fiduciary obligations;
 - (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) manage conflicts of interest;
 - (ii) provide services efficiently, honestly and fairly;
 - (iii) ensure adequate representative training; and
 - (iv) maintain dispute resolution systems;
 - (e) the FOFA reforms contained in Pt 7.7A (see paragraph 15 and Table 1);
 - (f) 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;
 - (g) trustee duties and obligations under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and under general law; and
 - (h) the duties and obligations imposed on responsible entities of managed investment schemes under Ch 5C of the Corporations Act and under general law.

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

- 20 Relevant ASIC guidance on some of these provisions includes:
- (a) Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104);
 - (b) Regulatory Guide 105 *Licensing: Organisational competence* (RG 105);
 - (c) Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146);
 - (d) Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165); and
 - (e) Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181).

- 21 In this consultation paper, we have included a number of examples. These examples are purely for illustration and are confined to their particular facts.

B Conflicted remuneration

Key points

In deciding whether a benefit is conflicted remuneration, we propose to focus on the substance of a benefit over its form, and consider the overall circumstances in which the benefit is given: see paragraphs 39–44.

In addition to the conflicted remuneration provisions, there are other obligations in the Corporations Act that apply when financial product advice is provided to a retail client. These operate alongside the conflicted remuneration provisions and apply even if a benefit is excluded from the conflicted remuneration provisions: see paragraphs 35–38.

Application of the ban on conflicted remuneration

Proposal

- B1** We propose the guidance set out in this section on what constitutes conflicted remuneration.

Your feedback

- B1Q1** Do AFS licensees and representatives need ASIC guidance to assist in identifying whether a benefit is conflicted remuneration?
- B1Q2** Do you agree with our proposed guidance?
- B1Q3** Do you have any comments on the examples in this section?
- B1Q4** Are there other examples you would like us to provide on benefits that are or are not conflicted remuneration? Please provide as much specific information as possible, as this will assist us in providing further examples, if needed.
- B1Q5** Is there any further guidance we should give on whether a benefit is conflicted remuneration? 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 and representatives to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.

- 22 The Revised Explanatory Memorandum notes that:
- Product commissions may encourage advisers to sell products rather than give unbiased advice that is focused on serving the interests of the clients. Financial advisers have potentially competing objectives of maximising revenue from product sales and providing professional advice that serves the client's interests.
- There is some evidence that these conflicts affect the quality of advice. The 2006 Shadow Shopping exercise of the Australian Securities and Investments Commission (ASIC) found that advice that was clearly or probably non-compliant was around six times more common where the adviser had an actual conflict of interest over remuneration. The conflict of interest may lead to advice that is not compliant and not in the client's interests ...
- [T]he Government decided that product commissions should be banned, the guiding principle being that the interests of advisers and clients should be more closely aligned (paragraphs 2.3–2.6).
- 23 In addition to more closely aligning the interests of clients with the interests of those who provide them with financial product advice, we expect that the conflicted remuneration provisions will lead to an improvement in the quality of financial advice that retail clients receive.
- 24 The Corporations Act prohibits:
- (a) AFS licensees and their representatives (including authorised representatives) from accepting conflicted remuneration (s963E, 963G and 963H);
 - (b) product issuers and sellers from giving conflicted remuneration to AFS licensees and their representatives (s963K); and
 - (c) employers of an AFS licensee or representative from giving their AFS licensee or representative employees conflicted remuneration for work they carry out as an employee (s963J).
- 25 An AFS licensee will breach s963E if one of its representatives accepts conflicted remuneration.
- 26 An AFS licensee must also take reasonable steps to ensure that its representatives do not accept conflicted remuneration: s963F. We expect that an AFS licensee's processes and procedures for monitoring and supervising its representatives will allow the licensee to determine whether its representatives are accepting conflicted remuneration and take appropriate action if this occurs.
- Note: AFS licensees have an obligation to take reasonable steps to ensure that its representatives comply with the financial services laws: s9212A(1)(ca). For more information, see RG 104.
- 27 The consequences of breaching the prohibitions described at paragraph 24 are outlined in Table 2.

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

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

What is conflicted remuneration?

- 28 Conflicted remuneration is any benefit given to an AFS licensee, or its representative, who provides financial product advice to retail clients that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence:
- the choice of financial product recommended to clients by the AFS licensee or representative; or
 - the financial product advice given to clients by the AFS licensee or representative: s963A.
- 29 There are a number of benefits that are not conflicted remuneration. These are set out in Table 4 in the appendix.
- 30 In this consultation paper, we will refer to the factors listed at paragraphs 28(a) and 28(b) as factors that could influence the 'financial product advice'. The conflicted remuneration provisions apply to both personal and general financial product advice, regardless of the channel used to provide the

advice. For example, the provisions apply to financial product advice that is provided verbally, in paper-based format or online.

Note: Information on the distinction between general advice and personal advice is set out in RG 175 and CP 183.

- 31 The benefit could be a monetary or non-monetary benefit. Non-monetary benefits could take a number of forms, including:
- (a) free or subsidised business equipment or services (e.g. computers and other hardware, software, information technology support and stationery);
 - (b) hospitality-related benefits (e.g. tickets to sporting events or concerts and subsidised travel);
 - (c) shares or other interests in a product issuer or licensed dealer group;
 - (d) loans to an AFS licensee or representative;
 - (e) buyer-of-last-resort arrangements;
 - (f) marketing assistance;
 - (g) attendance at networking events; and
 - (h) promotion or other ways of recognising an employee based on product recommendations or sales.

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

Note 2: Whether a benefit including a non-monetary benefit is conflicted remuneration is discussed in Sections B–D.

- 32 There is a presumption that volume-based benefits are conflicted remuneration: s963L. This is discussed in greater detail in Section C.

Onus of proof

- 33 Generally, the party claiming that the conflicted remuneration provisions have been breached will bear the onus of proving that a benefit is conflicted remuneration. However, where the presumption that volume-based benefits are conflicted remuneration applies, the onus is on the person who seeks a finding that the volume-based benefit is not conflicted remuneration to show this to be the case (e.g. a representative who receives the benefit or their responsible AFS licensee).

Note: More information on volume-based benefits is set out in Section C.

Examples of conflicted remuneration

- 34 The following are examples of benefits that are conflicted remuneration:
- (a) upfront and trailing commissions paid by a product issuer to a licensed dealer group, whether the payment is made directly or through some other arrangement, such as through a non-cash payment facility;
 - (b) volume-based payments from a platform operator to a licensed dealer group; and
 - (c) volume-based bonuses and other payments, such as a commission or one-off payment, to a financial adviser, which is calculated by reference to the number or value of financial products acquired by clients based on the advice of the financial adviser. The payment could be made by:
 - (i) the financial adviser's dealer group;
 - (ii) a platform operator; or
 - (iii) a product issuer.

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

- recommended by an AFS licensee or its representatives to a client; or
- acquired by a client to whom an AFS licensee or its representatives provide financial product advice.

Other obligations

- 35 There are other obligations in the Corporations Act that apply when personal advice is given to a retail client—for example, the best interests duty and related obligations in Div 2 of Pt 7.7A, and the requirement to give a Statement of Advice (SOA) in Subdiv C of Div 3 of Pt 7.7. These requirements operate alongside the conflicted remuneration provisions and apply even if a benefit is excluded from the conflicted remuneration provisions.

Note: For more information on the best interests duty and related obligations, see CP 182 and CP 183. For more information on providing SOAs, see RG 175.

- 36 Example 1 illustrates how some of the provisions in Div 2 of Pt 7.7A on the best interests duty and related obligations apply when an advice provider receives remuneration that the Government is proposing to exclude from the conflicted remuneration provisions. Paragraph 2.30 of the Revised Explanatory Memorandum states that the Corporations Regulations 'will also ensure that the traditional remuneration arrangements of employee brokers (often paid as a percentage of brokerage) are not unduly impacted by the conflicted remuneration measures'. We will take these regulations into account in our final guidance on the conflicted remuneration provisions.

Example 1: Brokerage-based payments**Scenario**

An advice provider is a representative of a market participant. The percentage of the brokerage fees paid to the advice provider is calculated by reference to their annualised brokerage earned, and this is calculated on a quarterly basis.

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

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

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

Commentary

The Government is proposing to exclude brokerage paid to an advice provider from the conflicted remuneration provisions. In this example, we have assumed that the brokerage is not conflicted remuneration.

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

- the best interests duty in s961B;
- the appropriate advice requirement in s961G; and
- the obligation to prioritise the clients interests in s961J.

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

Note: More information on complying with the obligation in s912A(1)(aa) is set out in RG 181.

- 38 The Government is proposing to enact laws on how the trustees of superannuation funds charge members for financial product advice. This includes the types of advice for which the SIS Act will allow fees to be collectively charged across a fund's membership ('intra-fund advice'). It is currently proposed that intra-fund advice needs to be provided in a way that complies with the Corporations Act, including the conflicted remuneration provisions.

Note: For more information, see the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 and the Explanatory Memorandum to this Bill introduced into Parliament on 19 September 2012.

The substance of the benefit

Proposal

- B2** We propose to explain in our guidance that, in deciding whether a benefit is conflicted remuneration, we will look at the substance of a benefit over its form, and consider the overall circumstances in which the benefit is given: see paragraphs 39–44. We consider this means that:

- (a) a benefit that has a number of interrelated components may sometimes be characterised as a single benefit (paragraph 42);
- (b) a benefit does not need to relate to a specific financial product to be conflicted remuneration (paragraph 43); and
- (c) a benefit may be conflicted remuneration if it influences an AFS licensee or representative to give product-specific advice rather than non-product-specific advice with strategic recommendations (paragraph 44).

Your feedback

- B2Q1 Do you agree with our proposed guidance?
- B2Q2 Do you have any comments on the example given?
- B2Q3 Are there other examples you would like us to provide?
- B2Q4 Is there any further guidance we should give on whether a benefit is conflicted remuneration?

- 39 In deciding whether a benefit is conflicted remuneration, we will look at the substance of a benefit over its form, and consider the overall circumstances in which the benefit is given. The conflicted remuneration provisions are concerned with benefits that could influence the provision of financial product advice in a way that is not aligned with the interests of the client. Whether this is the case will depend on the substance of a benefit, rather than its form, what the benefit is called or how it has been presented to the client.

Note: See also paragraph 17, which sets out policy principles that will guide our administration of the conflicted remuneration provisions.

- 40 This means, for example, that doing the following does not change the fact that a benefit is conflicted remuneration:
- (a) stating in documentation that a benefit is not intended to influence the financial product advice; or
 - (b) renaming the conflicted remuneration as a form of remuneration that is not prohibited by the Corporations Act—for example, renaming a commission from a product issuer an ‘asset-based fee’, even though the fee continues to be paid by the product issuer to the AFS licensee as a proportion of the client’s ongoing funds under management.

Note: True asset-based fees are typically paid by the client—even if they are paid by a third party holding assets on behalf of the client, such as a responsible entity—and are calculated by reference to the value of the client’s assets. The client may stop paying these fees at any time by withdrawing from the relevant arrangement.

- 41 In forming a view on whether a benefit is conflicted remuneration, we will look at a range of factors, including:
- (a) how the AFS licensee or representative gains access to the benefit;
 - (b) who is giving the benefit;
 - (c) when the benefit is given;
 - (d) what reasonably appears to be the likely reason why the benefit is being given;
 - (e) how the value of the benefit is determined; and
 - (f) what the benefit is and its features.

42 We will generally consider a benefit that has a number of interrelated components as a single benefit if they are given at the same time.

43 A benefit does not need to relate to a specific financial product to be conflicted remuneration. For example, the benefit could be one that means the AFS licensee or representative is more likely to recommend financial products issued by a particular issuer.

44 A benefit may be conflicted remuneration if it influences an AFS licensee or representative to give financial product advice recommending that clients acquire specific financial products, rather than providing them with factual information or non-product-specific advice, such as advice on budgeting or debt management.

Note: For more information on providing non-product-specific personal advice, see CP 182.

Example 2: Incentive scheme for a financial planner (conflicted remuneration)**Scenario**

An issuer of exchange-traded funds (ETFs) feels that its products are not well understood by financial advisers or retail clients. The issuer has developed a new interactive tool to help financial advisers explain its different ETFs to their clients and to assist advisers to determine how the issuer's ETFs can be utilised within their clients' portfolios.

The issuer is keen to increase consumer understanding of its ETFs and to encourage advisers to use its new tool.

The issuer runs a print and outdoor advertising campaign encouraging current and potential customers to see one of its advice partners and go through the interactive tool. It also sets up a points-based incentive scheme for advisers who use the tool. Every time an adviser runs through the tool with a client, they receive 10 points.

If, as a result of meeting with a client and assessing their situation, an adviser recommends that the client invests in one of the issuer's ETFs, the adviser receives an additional five points. The top 10 advisers who collect the most points over the course of the incentive program receive \$5,000.

Commentary

The incentive program is likely to be conflicted remuneration because it could influence advisers to recommend that clients invest in the issuer's ETFs rather than providing them with non-product-specific advice (or advice on other financial products). Even though the advertising campaign may result in many clients specifically requesting advice about the issuer's ETFs, this does not alter the fact that the incentive program is a form of conflicted remuneration.

Benefits that are not conflicted remuneration

- 45 Only benefits that could reasonably be expected to influence the financial product advice given by an AFS licensee or representative will be conflicted remuneration, unless they are otherwise excluded.

Note: Table 4 in the appendix sets out the benefits that are specifically excluded from being conflicted remuneration.

- 46 The Corporations Act sets an objective standard of reasonableness for determining whether a benefit could be expected to influence the financial product advice given. Whether a benefit is capable of doing this will depend on the nature of the benefit or the circumstances in which it is given.
- 47 The following examples illustrate certain types of benefits that we think are unlikely to be conflicted remuneration because it is unlikely that they could reasonably be expected to influence the financial product advice.

Example 3: Salary (not conflicted remuneration)

The base salary given to an employee that is an AFS licensee or representative who provides financial product advice to retail clients is unlikely to be conflicted remuneration, if neither the level nor a component of the base salary, salary increases, or the chances of promotion are contingent on the number or value of financial products:

- recommended by the employee to clients; or
- acquired by clients based on the financial product advice provided by the employee.

Note 1: Example 11 is an example where salary could be conflicted remuneration.

Note 2: Performance benefits for employees are discussed in Section D.

Example 4: Services provided by an AFS licensee to its representatives (not conflicted remuneration)

Benefits provided by an AFS licensee to its representatives (including authorised representatives) to cover business expenses incurred in providing financial product advice on behalf of the licensee are generally not conflicted remuneration (e.g. business equipment such as telephones, desks and chairs). This applies only if the availability of these resources does not depend on the content of the financial product advice given or how advised clients act.

Benefits of a small value**Proposal**

- B3** We propose that a benefit is more likely to be conflicted remuneration if:
- its value is greater than \$300 for each AFS licensee or representative that receives the benefit; or
 - for benefits that are given on a frequent or regular basis, the combined value of all benefits given is greater than \$300 for each AFS licensee or representative that receives the benefit: see paragraphs 48–49.

Your feedback

B3Q1 Do you agree with our proposed guidance?

B3Q2 Do you have any comments on the example given?

B3Q3 Are there other examples you would like us to provide on benefits that are or are not conflicted remuneration?

B3Q4 Do you agree that benefits of more than \$300 for each AFS licensee or representative receiving the benefit are more likely to be conflicted remuneration?

B3Q5 Do you agree that a benefit is more likely to be given 'on a frequent or regular basis' if it is given at least three times over a one-year period to the same AFS licensee or to the same representative?

48 A non-monetary benefit is not conflicted remuneration if it is less than \$300 for each AFS licensee or representative that receives the benefit, and identical or similar benefits are not given on a frequent or regular basis: s963C(b) and reg 7.7A.13. We have used this amount as a guide in considering when monetary benefits are likely to be conflicted remuneration. Accordingly, we consider that monetary and non-monetary benefits are more likely to be conflicted remuneration if:

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

Note: In this consultation paper, references to regulations (regs) are to the Corporations Regulations, unless otherwise specified.

49 We are more likely to consider that a benefit is given on a frequent or regular basis if it is given at least three times over a one-year period to the same AFS licensee or to the same representative.

Example 5: Lunch (not conflicted remuneration)

Scenario

An employee of a product issuer takes five representatives who provide financial product advice to retail clients out to lunch on one occasion at a restaurant in the city where the representatives work. They discuss the products issued by the employee's employer. The value of the lunch is less than \$150 per head.

Commentary

We would not consider such a benefit to be conflicted remuneration. However, if the employee of the product issuer took the five representatives out to lunch on a regular basis, we are more likely to consider this to be conflicted remuneration.

C Volume-based benefits

Key points

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

We propose that the size of a benefit, and the portion of the benefit that is volume based compared with the portion that is not, are relevant when looking to prove that a volume-based benefit is not conflicted remuneration: see paragraphs 54–55.

We propose that volume-based benefits that may be conflicted remuneration include:

- where a platform operator or other product issuer is also a licensed dealer group, benefits received in its capacity as platform operator or other product issuer (see paragraphs 56–58); and
- equity arrangements with representatives (see paragraph 59).

We propose that, in some circumstances:

- a volume-based benefit may not be conflicted remuneration if it is passed on to the client (see paragraphs 60–62); and
- we are less likely to scrutinise a benefit that is not passed on to the adviser, if certain controls are in place (see paragraphs 63–64).

Which volume-based benefits are presumed to be conflicted remuneration?

Proposal

- c1 We propose the guidance set out in this section about when volume-based benefits are conflicted remuneration.

Your feedback

C1Q1 Do AFS licensees and representatives need ASIC guidance to assist in identifying whether the presumption in s963L that volume-based benefits are conflicted remuneration applies or is able to be rebutted?

C1Q2 Do you agree with our proposed guidance?

C1Q3 Do you have any comments on the examples given?

C1Q4 Are there other examples you would like us to provide in relation to the presumption that volume-based benefits are conflicted remuneration? Please provide as much specific information as possible, as this will assist us in providing further examples, if needed.

- C1Q5 A possible consequence of the conflicted remuneration provisions is that they may prevent product issuers—such as trustees of superannuation funds, responsible entities, and platform operators—from giving financial product advice to retail clients to increase or maintain their investment or other interest in the issuer's products. This is because this may result in an increase in, or the maintenance of, management or other fees payable out of the fund. These fees might reasonably be expected to influence the advice. Do you see this as a concern or unintended consequence?
- C1Q6 If you are concerned, does your concern or view apply to all such situations or only to some situations—for example:
- (a) when intra-fund advice is provided by a trustee of a superannuation fund to a member; and
 - (b) when general advice is provided by responsible entities in investor newsletters?
- C1Q7 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.
- C1Q8 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees and representatives to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.

- 50 There is a presumption that volume-based benefits are conflicted remuneration: s963L. A benefit is volume based if access to the benefit or the value of the benefit is wholly or partly dependent on the total number or value of financial products:
- (a) recommended by an AFS licensee or representative to clients; or
 - (b) acquired by clients to whom an AFS licensee or representative provides financial product advice.
- 51 A non-volume-based benefit, such as some flat fees, can also be conflicted remuneration. This is not covered by the presumption in s963L. For example, a flat fee based on past volumes of financial products recommended to, or acquired by, clients is generally conflicted remuneration.
- 52 It is up to the party that is seeking to prove that a volume-based benefit is not conflicted remuneration to rebut the presumption and show that the benefit is not one that could reasonably be expected to influence the financial product advice.
- 53 The Revised Explanatory Memorandum describes the rationale for the presumption in s963L:
- Where there are volume-based benefit structures that are not inherently conflicted, this will be peculiarly within the knowledge of those paying and receiving the benefits. It is therefore appropriate that those parties be required to demonstrate that the benefits are not conflicted (paragraph 2.19).

Example 6: White label platform arrangement (conflicted remuneration)**Scenario**

A platform operator provides a 'white label' platform to a dealer group that labels the platform as its own. The client pays the platform operator a bundled fee for administration services provided by the platform operator and distribution services provided by the dealer group. This fee is split between the platform operator and the dealer group.

Commentary

To the extent that the share of the fee between the platform operator and the dealer group is dependent on volume, any volume-based margin accessed by the dealer group would be treated as conflicted remuneration, unless the dealer group or platform operator can show that this is not the case.

Note 1: This example is based on the example on page 29 of the Revised Explanatory Memorandum.

Note 2: A 'white label' arrangement is an arrangement where a licensed dealer group enters into contractual arrangements with a platform operator to rebrand the platform operator's platform to make it appear as its own—that is, the platform is 'badged' or 'promoted' by the dealer group as its own product.

Note 3: Non-volume-based benefits may also be conflicted remuneration if they could reasonably be expected to influence the financial product advice provided. For more information, see Section B.

Rebutting the presumption in s963L**Proposal**

- c2 We propose that, when deciding whether a benefit that is partly based on volume is conflicted remuneration, we will take into account the size of the benefit, and the proportion of the benefit that is volume based compared with the proportion that is not volume based: see paragraphs 54–55.

Your feedback

- C2Q1 Do you agree with our proposed guidance?
- C2Q2 Do you have any comments on the example given?
- C2Q3 Are there other examples you would like us to provide in relation to rebutting the presumption that volume-based benefits are conflicted remuneration?
- C2Q4 Is there any further guidance we should give?

- 54 The presumption in s963L can be rebutted by showing that the value of the benefit is not significant enough that it could reasonably be expected to influence the financial product advice given to a client. This will need to be assessed objectively, based on the circumstances as a whole, including the size of the benefit, and the proportion of the volume-based benefits compared with the proportion of non-volume-based benefits.

- 55 A benefit that is passed on to the client as described in paragraph 60 is an example where a volume-based benefit would not be considered one that could reasonably influence the financial product advice.

Arrangements where a licensed dealer group is also a platform operator or other product issuer

Proposal

- c3 We propose that, if a platform operator or other product issuer is also a licensed dealer group, benefits received in its capacity as platform operator (or other product issuer) may be conflicted remuneration: see paragraphs 56–58.

Your feedback

- C3Q1 Do you agree with our proposed guidance?
 C3Q2 Do you have any comments on the examples given?
 C3Q3 Are there other examples you would like us to provide?
 C3Q4 Is there any further guidance we should give?

- 56 If a licensed dealer group is also a platform operator or other product issuer, benefits provided to the AFS licensee in its capacity as platform operator (or other product issuer) may be conflicted remuneration. This may be the case if the AFS licensee or its representatives recommend the increased use of the platform (or other product). For example, payments made to an AFS licensee that operates a platform under a private label arrangement might be conflicted remuneration.

Note 1: A 'private label' arrangement is where a licensed dealer group is also a platform operator, although it typically outsources the administration of the platform to another platform operator.

Note 2: An exception applies to benefits given by the retail client: s963B(1)(d).

- 57 This is because the benefits are given to an AFS licensee, or its representatives, who provide financial product advice to retail clients as well as financial services connected with the financial product they issue. If the benefit is volume based, the onus will be on the AFS licensee to rebut the presumption in s963L and show that the volume-based benefits are not conflicted remuneration. If the benefit is not volume based, it would still be conflicted remuneration if it is a benefit that could reasonably be expected to influence the financial product advice.
- 58 We consider that the following examples involve payments that are conflicted remuneration:

Example 7: Preferred marketing payment (conflicted remuneration)

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

Such a payment would be conflicted remuneration whether or not the licensed dealer group is also a platform operator.

Example 8: Volume bonuses (conflicted remuneration)

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

Such a payment would be conflicted remuneration whether or not the licensed dealer group is also a platform operator.

Equity arrangements with representatives

Proposal

- c4** We propose that equity arrangements with representatives may be conflicted remuneration: see paragraph 59.

Your feedback

- C4Q1 Do you agree with our proposed guidance?
 C4Q2 Do you have any comments on the example given?
 C4Q3 Are there other examples you would like us to provide?
 C4Q4 Is there any further guidance we should give?

- 59 Equity arrangements involve giving representatives and other AFS licensees shares or other interests in the AFS licensee's business. Depending on how the arrangement is structured, it may enable representatives to receive volume-based payments in the form of dividends or other profit-sharing benefits, which may be conflicted remuneration. Different classes of shares may be set up to distinguish different classes of representatives (e.g. based on revenue generated for the AFS licensee).

Example 9: A white label platform arrangement (conflicted remuneration)**Scenario**

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

Commentary

Such arrangements are presumed to be conflicted remuneration under s963L because they are volume-based payments in the form of dividends that could reasonably be expected to influence the choice of financial products (in this case the platform) recommended by the AFS licensee or representative.

Volume-based benefits that may not be conflicted remuneration**Proposal**

- c5 We propose to give guidance that in some circumstances:
- (a) a volume-based benefit may not be conflicted remuneration if it is passed on to the client (see paragraphs 60–62); and
 - (b) we are less likely to scrutinise a benefit that is not passed on to the adviser, if certain controls are in place (see paragraphs 63–64).

Your feedback

C5Q1 Do you agree with our proposed guidance?

C5Q2 Do you think that there are other circumstances when a volume-based benefit is not conflicted remuneration?

C5Q3 Do you have any comments on the examples given?

C5Q4 Are there other examples you would like us to provide?

C5Q5 Do you agree with our proposal that one way to show that a volume-based benefit is not conflicted remuneration is to show that the benefit has been promptly passed on to the client?

C5Q6 Is there any further guidance we should give?

Benefits that are passed on to the client

- 60 Some dealer groups receive volume-based benefits and pass on the whole amount to their clients. Regardless of whether or not the benefit is volume based, we do not consider that a benefit is conflicted remuneration if:
- (a) it is promptly passed on to the client (within a week of receiving the benefit) by the AFS licensee or representative that accepts the benefit; and
 - (b) the AFS licensee or representative accepts the benefit on the condition that they will pass it on to the client.
- 61 In this situation, the benefit is unlikely to influence the financial product advice provided.

- 62 In many cases, a product issuer or seller may be able to satisfy themselves that they are not giving an AFS licensee or representative conflicted remuneration if:
- (a) the benefit is given on the condition that it is passed on in its entirety to the client; and
 - (b) a product issuer reasonably believes the benefit will be passed on.

Benefits that are not passed on to the adviser

- 63 Some licensed dealer groups receive benefits, which are often volume based, from platform operators and other product issuers but do not pass on these benefits, or any portion of them, to the representatives who provide the financial product advice to clients. Instead, the dealer group uses the benefit to pay for its operating expenses.
- 64 Where this occurs, we are less likely to scrutinise the benefit under the conflicted remuneration provisions if there are controls in place to ensure that the benefit does not influence the financial product advice given by representatives of the dealer group: see Example 10.

Example 10: Benefits that are not passed on to the adviser (not conflicted remuneration)

Scenario

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

Commentary

We are less likely to scrutinise the benefit in our administration of the conflicted remuneration provisions if the dealer group can show that:

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

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

If the benefit is volume based, the onus is on the dealer group to show that the benefit is not conflicted remuneration. We expect that the dealer group would keep sufficient records relating to the benefit to be able to show that it could not reasonably be expected to influence the financial product advice.

Note 1: Information on implementing and maintaining policies in the context of conflicts management arrangements is set out in RG 181.

Note 2: A non-monetary benefit is not conflicted remuneration if it:

- is for the provision of information technology software or support, and the benefit:
 - is related to providing financial product advice to retail clients about the financial products issued or sold by the benefit provider; and
 - complies with the conditions in the regulations. At this stage, there are no conditions in the regulations (s9763C(d)); or
- has a genuine educational or training purpose that is relevant to providing financial product advice to a retail client (s963C(c)).

For more information, see the appendix.

D Performance benefits for employees

Key points

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

In assessing whether they can show that a volume-based performance benefit is not conflicted remuneration, we propose that employers should consider:

- the eligibility criteria for the performance benefit;
- how difficult it is for staff to meet these criteria;
- the purpose of the performance benefit;
- the proportion of the benefit that is volume based;
- the link between the benefit and the financial product advice provided to clients; and
- the proportion of the benefit to the overall remuneration of the employee: see Table 3.

We propose that we will be more likely to scrutinise performance benefits that are more than 5% or 7% (inclusive) of an employee's base salary, depending on whether the benefit is wholly or partly volume based: see paragraphs 77–79.

How do the conflicted remuneration provisions apply to performance benefits?

Proposal

- D1 We propose the guidance set out in this section about when a performance benefit given to an employee is conflicted remuneration.

Your feedback

- D1Q1 Do employers of AFS licensees and representatives need ASIC guidance to assist in identifying whether a performance benefit is conflicted remuneration?
- D1Q2 Do you agree with our proposed guidance?
- D1Q3 Do you have any comments on the examples provided?
- D1Q4 Are there other examples you would like us to provide on performance benefits for employees? Please provide as much specific information as possible, as this will assist us in providing further examples, if needed.

D1Q5 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.

D1Q6 Will our proposed guidance (as distinct from what is needed to comply with the law) require employers to implement new performance arrangements or change existing arrangements? If so, please describe the changes and the likely costs involved.

65 This section considers how the conflicted remuneration provisions apply to performance benefits given to employees who provide financial product advice to retail clients. For more information on when a person is providing financial product advice to a retail client, see RG 36, RG 175 and CP 183.

66 The conflicted remuneration provisions do not prohibit employees who provide financial product advice to retail clients from receiving performance pay. They do affect how these arrangements are structured. There is a need to strike a balance between rewarding performance and avoiding inappropriate influence over financial product advice: see paragraph 2.20 of the Revised Explanatory Memorandum.

67 A representative of an AFS licensee, other than an authorised representative, is not prohibited from accepting a ‘conflicted’ performance benefit that is given to them by their employer: s963H. However, their employer, or an employer of an AFS licensee, must not give its employees conflicted remuneration for work they carry out as an employee: s963J.

68 Performance benefits for employees may include:

- (a) bonuses;
- (b) pay rises;
- (c) attendance at networking events;
- (d) promotion or other forms of recognition;
- (e) reward-focused conferences and other events; and
- (f) shares or options in their employer.

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

69 These benefits will be conflicted remuneration if they influence the financial product advice given by an employee that is an AFS licensee or representative.

70 Some employers determine the amount of any performance benefit given to an employee based on a number of differently weighted criteria. This approach is referred to by many employers as a ‘balanced scorecard’ approach. Often, one or more criteria in the balanced scorecard relate to the volume of financial products recommended or acquired by clients (volume-

based criteria). If this is the case, the performance arrangement is presumed to be conflicted remuneration: s963L. The onus is on the employer to show that the performance benefit is not conflicted remuneration, taking into account all the circumstances.

Example 11: Remuneration for a financial planner (conflicted remuneration)

Scenario

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

For the ongoing service, clients pay an annual percentage-based fee to the AFS licensee calculated on the value of financial products that they have acquired based on the advice provided by the AFS licensee's advisers (an asset-based fee). The AFS licensee has a policy of only charging a fee-for-service for initial advice provided, based on the planner's hourly charge rate. This fee is not dependent on the financial products recommended or the volume of funds invested.

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

Commentary

The initial upfront fee charged to the client is not conflicted remuneration.

To the extent that the planner's salary progression is based on the increase in asset-based fees paid by the planner's clients, this is a volume-based benefit and is presumed to be conflicted remuneration under s963L.

Access to, and the value of, the benefit—that is, future salary increases—is dependent on the value of financial products acquired by the planner's clients. This benefit would be subject to the ban in s963J, which prohibits an employer from giving its AFS licensee and representative employees conflicted remuneration for work carried out as an employee. To rebut the presumption in s963L, the employer would need to prove that the future salary increases could not reasonably be expected to influence the financial product advice provided by the financial planner.

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

71 Some performance benefits are entirely volume based. In these situations, it would be difficult for the employer to rebut the presumption that the benefit is conflicted remuneration.

Evaluating the performance benefit

Proposal

D2 We propose to give guidance on the issues that employers can consider when seeking to show that a volume-based performance benefit is not conflicted remuneration: see paragraphs 72–76. These issues include:

- (a) the eligibility criteria for the performance benefit;
- (b) how difficult it is for staff to meet these criteria;
- (c) the purpose of the performance benefit;
- (d) the proportion of the benefit that is volume based;
- (e) the link between the benefit and the financial product advice provided to clients; and
- (f) the proportion of the benefit to the overall remuneration of the employee.

Your feedback

D2Q1 Do you agree with our proposed guidance?

D2Q2 If you are an employer and use a balanced scorecard approach to determine performance benefits, are there other non-volume-based factors on which your balanced scorecards are based, apart from those we have listed at paragraph 72?

D2Q3 Is there any further guidance we should give?

- 72 Some of the types of non-volume-based criteria on which a balanced scorecard may be based include:
- (a) complying with the law;
 - (b) meeting the employer's compliance and other corporate policies;
 - (c) the quality of financial advice given by the employee;
 - (d) client satisfaction with the employee;
 - (e) measures of customer loyalty or advocacy, such as the employee's net promoter score;
 - (f) the number of new clients the employee has brought to the business;
 - (g) the value of investable assets of the employee's clients;
 - (h) the training undertaken by the employee; and
 - (i) the number of complaints received about the employee.
- 73 Some of these criteria will be prerequisites for eligibility to receive a performance benefit (a 'gate opener'), rather than a factor on which the value of the performance benefit is based. For this reason, employers need to

evaluate the performance benefit as a whole to determine whether it is not conflicted remuneration.

- 74 In doing this, employers should consider the issues set out in Table 3. For the benefit not to be conflicted remuneration, the employer must be able to prove it could not reasonably be expected to influence the financial product advice given by the employee.

Table 3: Issues to consider when evaluating performance benefits

Eligibility criteria	The criteria that must be met for an employee to be eligible to receive a performance benefit, and how difficult it is to meet these eligibility criteria. (This could be done by reference to the proportion of employees who are able to meet the criteria).
Satisfying the eligibility criteria	The more difficult the eligibility criteria are to satisfy, the less likely it is that the performance benefit will be one that could reasonably be expected to influence the financial product advice.
Purpose of the performance benefit	It is relevant to consider the behaviour the employer is trying to encourage through the performance benefit. For example, are the criteria that make up the scorecard designed to encourage an employee to provide advice that is in the client's best interests or to recommend that clients acquire financial products regardless of their interests?
Proportion of the benefit that is volume based	In determining the value of the performance benefit, the proportion of the benefit that is volume based compared with the portion that is not.
Link between the benefit and financial product advice	How direct the link is between the performance benefit and the value or number of financial products recommended or acquired by clients, based on the advice provided by the employee. For example, a performance benefit is likely to be conflicted remuneration if it contains a criterion based on the volume of product sales compared with one that contains a criterion based on the profitability of an employee's business unit: for more information, see paragraph 75.
Proportion of benefit to overall remuneration	The relative proportion of the benefit to the overall remuneration of the employee, which includes the performance benefit and other forms of remuneration, such as salary.

Remuneration based on total profitability

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

Keeping records

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

When a performance benefit may be conflicted remuneration

Proposal

- D3 We propose that, in administering the conflicted remuneration provisions, we are more likely to scrutinise performance benefits that are:
- (a) 5% or more of an employee's base salary, if the benefit is wholly volume based; or
 - (b) 7% or more of an employee's base salary, if the benefit is partly volume based and regardless of what weighting is given to the volume-based criteria: see paragraphs 77–79.

Your feedback

D3Q1 Do you agree with our proposed guidance?

D3Q2 Do you have any comments on the example given?

D3Q3 Do you agree that a performance benefit is more likely to be conflicted remuneration if it is more than 5% or 7% (inclusive) of an employee's base salary, depending on whether the benefit is wholly or partly volume based?

D3Q4 If you do not agree, please provide details and the percentages that you think are appropriate.

D3Q5 Do you think that our guidance should explicitly state when a performance benefit will or will not be conflicted remuneration? For example, should we state that a performance benefit is conflicted remuneration if it is 5% or more of an employee's base salary, where the benefit is wholly volume based, or 7% or more, where the benefit is partly volume based? If so, do you agree with these percentages? If not, please provide details.

- 77 In administering the conflicted remuneration provisions, we are more likely to scrutinise performance benefits that are:
- (a) 5% or more of an employee's base salary, if the benefit is wholly volume based; or
 - (b) 7% or more of an employee's base salary, if the benefit is partly volume based and regardless of what weighting is given to the volume-based criteria.

- 78 We may still scrutinise benefits that are less than these percentages, but are less likely to. Ultimately, whether a performance benefit is conflicted remuneration will depend on the circumstances as a whole.
- 79 We have chosen the percentages listed at paragraph 77 by taking into account the performance benefits we understand are given to tellers and customer service specialists at ADIs.

Example 12: Bonus arrangements for a teller at an ADI (conflicted remuneration)

Scenario

A teller at an Australian authorised deposit-taking institution (ADI) has a base salary of \$50,000 per year. They provide general advice to retail clients on basic banking products, cash management trusts, superannuation products and credit products. They are also eligible for an annual bonus of between \$3,500 and \$5,000 (i.e. 7–10% of their base salary). To be eligible for the bonus, they must have:

- complied with all of their employee's compliance and other corporate policies; and
- achieved a performance rating of 'meets expectations' or higher.

Seventy per cent of tellers at the ADI meet these criteria. In determining the size of a teller's bonus:

- a weighting of 40% is given to the volume of financial products acquired by clients based on the recommendation of the teller;
- a weighting of 20% is given to the volume of credit products acquired by clients based on the recommendation of the teller; and
- the non-volume-based criteria, such as the teller's net promoter score, is given a combined weighting of 40%.

Commentary

We are more likely to scrutinise this performance benefit as it is 7–10% of the employee's base salary and is partly volume based. The benefit is a form of conflicted remuneration. The exclusion in s963D does not apply because access to the performance benefit is not dependent on advice being provided only on a basic banking product.

Note: The Government is consulting on regulations prescribing when the conflicted remuneration provisions apply to a benefit given in relation to a basic banking product and other types of financial products.

E Volume-based shelf-space fees

Key points

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

We propose that, when looking to show that a benefit is not a volume-based shelf-space fee:

- if the 'fee-for-service' exclusion is being relied on, there should be a correlation between the fee and the platform operator's costs in providing the service (see paragraphs 89–92); and
- if the 'scale efficiencies' exclusion is being relied on, we expect that platform operators will receive and keep a written, up-to-date and appropriately verified analysis from the funds manager about its costs and how the value of the rebate or discount is referable to the economies of scale the funds manager is able to realise by placing its products on the platform (see paragraphs 93–97).

We will not take action against a platform operator who accepts a volume-based shelf-space fee if that fee is passed on promptly to clients: see paragraph 98.

The ban on volume-based shelf-space fees

Proposal

- E1 We propose the guidance set out in this section about whether a benefit is a prohibited volume-based shelf-space fee.

Your feedback

- E1Q1 Do platform operators and funds managers need ASIC guidance to assist in determining whether a benefit is a prohibited volume-based shelf-space fee?
- E1Q2 Do you agree with our proposed guidance?
- E1Q3 Do you have any comments on the examples?
- E1Q4 Are there other examples you would like us to provide? Please provide as much specific information as possible, as this will assist us in providing further examples, if needed.
- E1Q5 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.

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

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

81 This ban applies in situations where:

- (a) an AFS licensee or an RSE licensee (the platform operator) is, or offers to be, the provider of a custodial arrangement;
- (b) a monetary or non-monetary benefit is given, or is to be given, by another AFS licensee or RSE licensee (the funds manager) to the platform operator; and
- (c) a financial product to which the custodial arrangement relates is a financial product in which the funds manager deals: s964.

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

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

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

84 A shelf-space fee is a fee for making the product available through the platform or for being promoted through the way in which the platform operates.

85 A benefit is generally presumed to be a volume-based shelf-space fee if the benefit, or the value of the benefit, is wholly or partly dependent on the total number or value of the funds manager's financial products to which the custodial arrangement relates: s964A(2). This would include fees that are based on past, current or projected volumes, even if other factors were considered in determining the value of the benefit: see Example 13. It would also include a fee paid by a funds manager, calculated by reference to each of the funds manager's products on the platform.

86 The presumption in s964A(2) does not apply if the platform operator can prove that one of the following applies to all or part of the benefit:

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

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

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

88 The scale efficiencies exclusion, which is an exclusion from the presumption that a fee is a prohibited volume-based shelf-space fee, is designed to apply to situations where the funds manager is able to realise economies of scale because of the volume of business they have been able to generate by placing its products on the platform (e.g. in marketing its products and communicating with investors). In such a situation, a discount may be given or a rebate may be paid to the platform operator by the funds manager in recognition of these economies of scale. These economies of scale will be referred to as ‘scale efficiencies’.

The fee-for-service exclusion

Proposal

E2 We propose to provide guidance on when a platform operator may be able to rely on the fee-for-service exclusion, and the issues that it will need to consider: see paragraphs 89–92.

Your feedback

E2Q1 Do you agree with our proposed guidance?

E2Q2 Do you think that there are any types of fees apart from those listed at paragraph 92 to which the fee-for-service exclusion will apply?

E2Q3 Is there any further guidance we should give?

E2Q4 If you are a platform operator, to what degree do you anticipate that our proposed guidance (as distinct from what is needed to comply with the law) will require you to implement new processes, or change existing processes, to:

- (a) avoid accepting a volume-based shelf-space fee; and
- (b) demonstrate that a benefit is a reasonable fee for service (to rely on the fee-for-service exclusion)?

E2Q5 If you are or will be implementing new processes, or changing existing processes, please describe the changes and the likely costs involved as a result of our proposed guidance (as distinct from what is needed to comply with the law).

89 Whether the fee-for-service exclusion can be relied on will depend on the circumstances of the case. The services provided by the platform operator to the funds manager need to be identified. For the fee to be reasonable, we consider there should be a correlation between the fee and the platform operator's costs in providing the service. Consistency with the fees charged for similar services provided to other funds managers would also be relevant in determining whether a platform operator is able to rely on this exclusion. If a fee charged by a platform operator is inconsistent with the average fees charged by other platform operators, this may indicate that the fee is not a reasonable fee for service.

90 We are more likely to scrutinise a fee if there is a sudden increase in the fee following the commencement of s964A.

Note: For details on when s964A commences and the transitional arrangements that apply, see Section G.

91 We consider that fees that are based on the value of funds under management are unlikely to represent a reasonable fee for service, and we are more likely to scrutinise these fees.

92 The types of fees to which this exclusion apply include:

- (a) fees charged to cover the platform operator's costs in listing a product on its platform. We understand that, currently, most platform operators charge a fee of \$5,000–\$10,000 per product on the platform; and
- (b) fees for reporting services provided by the platform operator to the funds manager about clients who have invested in its products and advisers who have recommended its products.

Note: This is not intended to be an exhaustive list of the types of fees to which the fee-for-service exclusion will apply.

The scale efficiencies exclusion

Proposal

- E3 We propose to provide guidance on when a platform operator may be able to rely on the scale efficiencies exclusion, and the issues that it will need to consider: see paragraphs 93–97.

Your feedback

- E3Q1 Do you agree with our proposed guidance?
- E3Q2 Do you have any comments on the examples given?
- E3Q3 Are there other examples you would like us to provide?
- E3Q4 To rely on the scale efficiencies exclusion, do you agree that platform operators should have a written, up-to-date and appropriately verified analysis from the funds manager about their costs and how the value of the rebate or discount is referable to scale efficiencies? If not, what do you think platform operators need to do to rely on the exclusion?
- E3Q5 If you are a funds manager, do you use benchmarks to measure your scale efficiencies and the rebate that is provided to the platform operator based on these efficiencies? An example of a benchmark approach is:
- (a) not paying a rebate if there is less than \$500 million in products sold through the platform;
 - (b) paying a rebate of 10 basis points if \$500–\$750 million in products are sold through the platform; and
 - (c) paying a rebate of 20 basis points if more than \$750 million in products are sold through the platform.
- E3Q6 If you use benchmarks, please provide details on how these benchmarks are set and whether you think it would be useful for ASIC to provide guidance on using benchmarks in our guidance on relying on the scale efficiencies exclusion.
- E3Q7 If you are a platform operator, to what degree do you anticipate that our proposed guidance (as distinct from what is needed to comply with the law) will require you to implement new processes, or change existing processes, to:
- (a) avoid accepting a volume-based shelf-space fee; and
 - (b) demonstrate that a benefit represents a discount or rebate for efficiencies gained by the funds manager by using the platform (to rely on the scale efficiencies exclusion)?

- E3Q8 If you are or will be implementing new processes, or changing existing processes, please describe the changes and the likely costs involved as a result of our proposed guidance (as distinct from what is needed to comply with the law).
- E3Q9 If you are a funds manager that uses a platform to distribute your products, do you anticipate that, as a result of our proposed guidance (as distinct from what is needed to comply with the law), the platform operator will ask you to provide it with information about the efficiencies you have gained by using the platform? If so, do you need to implement new processes, or change existing ones? Please describe the changes and the likely costs involved.
- E3Q10 If you are a funds manager, what information do you think platform operators will ask you to provide?

- 93 To rely on the scale efficiencies exclusion, a platform operator must demonstrate that a fee from a funds manager is referable to the economies of scale the funds manager is able to realise because of the volume of business it has been able to generate by placing its products on the platform (scale efficiencies).
- 94 We expect platform operators to be able to demonstrate how a rebate or discount was arrived at and how it is referable to efficiencies gained by the funds manager from distributing its products through the platform. In doing this, we expect that platform operators will receive and keep a written, up-to-date and appropriately verified analysis from the funds manager about its costs and how the value of the rebate or discount is referable to scale efficiencies.
- 95 We also expect that the analysis will set out details about how the funds manager's fixed costs (as opposed to costs that vary with each financial product sold) have reduced by reference to the number or value of financial products that are acquired by clients using the platform.
- 96 The value of the rebate or discount for scale efficiencies will therefore change depending on the number or value of financial products acquired through the platform.

Example 13: A volume-based shelf-space fee (prohibited)

Scenario

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

Commentary

The fee is presumed to be a volume-based shelf-space fee because it is based on the value of the funds manager's financial products acquired by retail clients to which the custodial arrangement with the platform operator relates. This is the case even if the fee is based on the value of products acquired over a particular period in the past.

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

Example 14: A fee for 'scale efficiencies' (not prohibited)**Scenario**

A responsible entity enters into an agreement for interests in its XYZ Managed Investment Scheme to be made available through a platform. Under the agreement, a fee is to be paid to the platform operator based on the efficiencies gained by the responsible entity from distributing interests in the XYZ Managed Investment Scheme through the platform. The fee is reviewed annually based on a statement provided to the platform operator by the responsible entity that contains details about:

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

The platform operator also receives an opinion from an expert about the statement, including the calculation of the fee and the reasonableness of any assumptions used.

Commentary

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

- 97 If a platform operator accepts a fee and relies on the scale efficiencies exclusion, we are more likely to scrutinise the fee if it is inconsistent with the fees accepted by other platform operators for similar volumes of business.

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

Proposal

E4 We propose to provide guidance that we will not take action against a platform operator that accepts a volume-based shelf-space fee if that fee is passed on promptly to clients: see paragraph 98.

Your feedback

E4Q1 Do you agree with our proposed guidance?

E4Q2 Is there any further guidance we should give?

98 We will not take action against a platform operator that accepts a fee if that fee is passed on promptly to clients because we do not consider that it will be regarded as a volume-based shelf-space fee. We consider that taking such an approach is consistent with the overall policy intent of the ban on volume-based shelf-space fees, which is designed to prevent funds managers from purchasing preferential positions on platforms. If a volume-based shelf-space fee is rebated back to clients, the volume-based shelf-space fee is unlikely to influence how platform operators select which products are available on the platform or the prominence that they are given.

Non-volume-based shelf-space fees

Proposal

E5 We propose to provide guidance that, although the ban on volume-based shelf-space fees does not extend to non-volume-based fees, the obligation to manage conflicts of interest and the anti-avoidance provision will still apply: see paragraphs 99 and 101. In addition, if the platform operator or its representatives provide financial product advice to retail clients, such payments may be conflicted remuneration: see paragraph 100.

Your feedback

E5Q1 Do you agree with the proposed guidance?

E5Q2 Is there any further guidance we should give?

99 Although the ban on volume-based shelf-space fees in s964A does not extend to non-volume-based fees paid by funds managers to platform operators, platform operators will still need to comply with the general obligation in s912A(1)(aa) to have in place adequate arrangements to manage conflicts of interest. RG 181 sets out our general approach to assessing compliance with s912A(1)(aa).

Note: A flat fee based on the historical number or value of the funds manager's financial products available through a platform is a volume-based shelf-space fee and is covered by the ban in s964A: see paragraph 85.

- 100 If a platform operator or its representatives also provide financial product advice to retail clients, the conflicted remuneration provisions may apply: see paragraphs 56–58.
- 101 If a platform operator accepts a non-volume-based shelf-space fee, this may also be an avoidance scheme to which the anti-avoidance provision applies: see paragraphs 129–131.

F Asset-based fees on borrowed amounts

Key points

In determining whether an amount is borrowed, we propose that AFS licensees and representatives cannot ignore any information they have discovered when making client inquiries as a result of complying with the best interests duty in s961B: see paragraphs 110–111.

We propose that asset-based fees should only be charged on portfolios of products purchased with a combination of borrowed and non-borrowed amounts if it is possible to separately identify the financial products purchased with borrowed amounts from those purchased with non-borrowed amounts: see paragraph 112.

The general ban on asset-based fees on borrowed amounts

Proposal

- F1 We propose the guidance set out in this section on the application of the ban on AFS licensees and their representatives charging asset-based fees on borrowed amounts.

Your feedback

- F1Q1 Do AFS licensees and representatives need ASIC guidance to assist in determining when an asset-based fee on a borrowed amount may be charged?
- F1Q2 Do you agree with our proposed guidance?
- F1Q3 Do you have any comments on the example given?
- F1Q4 Are there other examples you would like us to provide? Please provide as much specific information as possible, as this will assist us in providing further examples, if needed.
- F1Q5 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.
- F1Q6 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees and representatives to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.

102

AFS licensees and authorised representatives that provide financial product advice to retail clients are generally prohibited from charging asset-based

fees on borrowed amounts that are to be used to acquire financial products by or on behalf of a client: see s964D and 964F. If an AFS licensee or representative is found to have charged asset-based fees on borrowed amounts, they may be liable for a civil penalty.

- 103 An AFS licensee will also contravene this general prohibition if one of its representatives (other than an authorised representative) charges an asset-based fee on a borrowed amount. Again, this borrowed amount must be used to acquire financial products by or on behalf of a client: s963D(2).
- 104 There is no restriction on how an amount is borrowed for this ban to apply. An amount could be borrowed through secured or unsecured means, including through a credit facility or a margin lending facility: s964G(1). An amount is no longer borrowed if it has been repaid: s964G(2).
- 105 The ban has been introduced because of the potential for advisers to artificially increase the size of their advice fees by ‘gearing up’ their clients: see The Hon Bill Shorten MP’s second reading speech on 24 November 2011. By ‘gearing up’, we mean increasing the proportion of a client’s portfolio that is based on borrowed amounts. This was a feature of the Storm Financial business model that was examined in the PJC inquiry in 2009.

Example 15: Asset-based fees charged on a margin loan (prohibited)

Scenario

A licensed dealer group charges a retail client, to whom it provides financial product advice, an advice fee of 2.5% of the total amount the client has borrowed under a margin loan, which one of the dealer group’s advisers has arranged for the client. The purpose of the margin loan is to provide the client with funds that they can invest, based on the advice of the adviser.

Commentary

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

When the ban does not apply

- 106 The ban does not apply if it is not reasonably apparent that an amount has been borrowed: s964D(3) and 964E(2). This is an objective standard based on whether something would be apparent to a person with a reasonable level of expertise in the subject matter of the advice sought by the client, and that person were to exercise care and objectively assess the information given to the AFS licensee or representative by the client: s964H.
- 107 This means that the ban on charging asset-based fees will not apply to an AFS licensee or authorised representative if they do not know that an

amount used to acquire financial products by or on behalf of a client has been borrowed, as long as this fact is not reasonably apparent.

The fee is not for providing financial product advice

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

109 If a fee charged is not for providing financial product advice, it is not an asset-based fee. For example, application fees and the interest charged on a loan taken out by a client to purchase financial products are not asset-based fees.

Interaction with the best interests duty

Proposal

F2 We propose that AFS licensees and authorised representatives cannot ignore any information they have discovered when making client inquiries as a result of complying with the best interests duty in s961B: see paragraphs 110–111.

Your feedback

F2Q1 Do you agree with our proposed guidance?

F2Q2 Is there any further guidance we should give?

110 When an AFS licensee or authorised representative provides personal advice to a retail client, they may discover, in the course of making inquiries into the client's relevant circumstances, that their client is asking them to acquire financial products using money that the client has borrowed. The client inquiries need to be made to comply with the best interests duty in s961B.

111 The ban on charging asset-based fees on borrowed amounts does not affect the obligation under s961B to make inquiries into the client's relevant circumstances. AFS licensees and representatives cannot ignore the information they have discovered in the course of making these client inquiries when determining whether an amount is borrowed for the purposes of the ban on charging asset-based fees on borrowed amounts: see s964D(5) and 964E(4).

Note: See CP 182 and CP 183.

Portfolios of products purchased with borrowed and non-borrowed amounts

Proposal

F3 We propose that asset-based fees should only be charged on portfolios of products purchased with a combination of borrowed and non-borrowed amounts if it is possible to separately identify the financial products purchased with borrowed amounts from those purchased with non-borrowed amounts: see paragraph 112.

Your feedback

F3Q1 Do you agree with our proposed guidance?

F3Q2 Is there any further guidance we should give?

- 112 When a client has a portfolio of products purchased with a combination of borrowed and non-borrowed amounts, we consider that:
- (a) if the financial products purchased with borrowed amounts can be separately identified from the financial products purchased with non-borrowed amounts, asset-based fees can be charged on the proportion of the portfolio purchased with non-borrowed amounts; and
 - (b) if the financial products purchased with borrowed amounts cannot be separately identified, asset-based fees should not be charged over the whole portfolio. This is because it is not clear which financial products the borrowed amounts have been used to acquire.

G Transitional provisions

Key points

The conflicted remuneration provisions apply to arrangements entered into on or after 1 July 2013 (unless an AFS licensee elects to comply with these provisions earlier).

We propose that a new arrangement is created when a client is transferred into a new financial product: see paragraph 121.

What are the transitional provisions?

Proposal

G1 We propose the guidance set out in this section about the application of the transitional provisions.

Your feedback

G1Q1 Do you have any comments on our proposed guidance?

G1Q2 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.

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

Note 1: The conflicted remuneration provisions are set out in Divs 4 and 5 of Pt 7.7A and are discussed in Sections B–H of this consultation paper. The other provisions in Pt 7.7A include the best interests duty and related obligations in Div 2, and the provisions relating to charging ongoing fees to clients in Div 3: see paragraph 15 and Table 1.

Note 2: A form is available from www.asic.gov.au for AFS licensees to complete and lodge with us if they would like to elect to comply with Pt 7.7A before 1 July 2013.

114 The date on which the conflicted remuneration provisions apply to an individual or entity is referred to as the ‘application day’: see s1528.

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

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

When do the transitional provisions apply?

Proposal

G2 We propose to provide guidance on what arrangements the conflicted remuneration transitional provisions may apply to, and in what circumstances: paragraphs 116–121.

Your feedback

- G2Q1 Do AFS licensees and representatives need ASIC guidance to assist in determining when the conflicted remuneration transitional provisions apply?
- G2Q2 Do you agree with our proposed guidance?
- G2Q3 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, and examples if needed.
- G2Q4 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees and representatives to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.

- 116 The conflicted remuneration provisions do not apply to a benefit given to an AFS licensee or representative if the benefit is given under an arrangement entered into before the application day: s1528(1) and reg 7.7A.16.
- 117 The conflicted remuneration provisions will apply to arrangements entered into on or after the application day.
- 118 A benefit under an arrangement entered into before the application day may be transferred to another AFS licensee or representative on or after the application day without attracting the conflicted remuneration provisions, depending on the form of the arrangement and how the transfer is made.
- 119 An arrangement is defined broadly. It generally means a contract, agreement, understanding, scheme or other arrangement:
- (a) whether it is formal or informal, or partly formal and partly informal;
 - (b) whether it is written or oral, or partly written and partly oral; and
 - (c) whether or not it is enforceable, or intended to be enforceable, by legal proceedings, and whether or not it is based on legal or equitable rights: s761A.
- 120 The types of arrangement covered by the conflicted remuneration provisions are similarly broad. For example:
- (a) agreements from a platform operator to pay an AFS licensee a volume-based rebate or commission;

- (b) agreements from a product issuer to pay an AFS licensee ongoing and upfront commissions; and
- (c) agreements that set out how employees who provide financial product advice to retail clients are to be remunerated.

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

Example 16: An existing trailing commission (not conflicted remuneration)

Scenario

A client has already invested in a financial product before the commencement of the conflicted remuneration provisions, and their adviser receives a trailing commission from the product issuer.

Commentary

The product issuer can continue to pay, and the adviser can continue to receive, the trailing commission. The conflicted remuneration provisions do not apply to such a benefit: s1528.

Note: The conflicted remuneration provisions commence on 1 July 2013 unless a person elects to comply with Pt 7.7A before this date.

- 121 For arrangements that exist before the application day (old arrangements), we consider that the conflicted remuneration provisions will apply, where relevant, when a client is transferred into a new financial product by replacing their existing interest in a product with an interest in the new financial product on or after the application day, and conflicted remuneration is provided under the new product. For example, this could apply to a trailing commission, even if the amount of the commission does not change and the new and old products are very similar.

H Anti-avoidance

Key points

Where the conflicted remuneration provisions prohibit a person from giving or accepting a benefit, a scheme may be an avoidance scheme if it is structured so that an entity related to that person gives or accepts the benefit: see paragraph 128.

If a platform operator accepts a large flat fee that is not a volume-based shelf-space fee, this may be an avoidance scheme: see paragraphs 129–131.

In administering the anti-avoidance provision, we are less likely to scrutinise schemes that are normal commercial transactions conducted in the ordinary course of business: see paragraph 132.

What is anti-avoidance?

- 122 A person must not enter into or carry out a scheme to avoid the application of any provision in Pt 7.7A: s965. This includes:
- (a) the conflicted remuneration provisions in Div 4 of Pt 7.7A (see Sections B–D);
 - (b) the ban on platform operators accepting volume-based shelf-space fees in Subdiv A of Div 5 of Pt 7.7A (see Section E); and
 - (c) the ban on charging asset-based fees on borrowed amounts in Subdiv B of Div 5 of Pt 7.7A (see Section F).
- Note: Although the anti-avoidance provision applies to other provisions in Pt 7.7A (e.g. the best interests duty and related obligations in Div 2), at this stage we are not proposing to provide specific guidance on how the anti-avoidance provision applies to these other provisions.
- 123 The effect of the anti-avoidance provision is that, from 1 July 2012, a person must not, either alone or with other people, enter into or carry out a scheme if:
- (a) it would be concluded that they did so for the sole or non-incidental purpose of avoiding the application of any provision of Pt 7.7A; and
 - (b) the scheme or part of the scheme has achieved—or, apart from s965, would achieve—that purpose: s965(1).
- 124 A person may be liable for a civil penalty if they are found to have breached s965(1).
- 125 The anti-avoidance provision is designed to ensure that the policy intent of the FOFA Acts, including the conflicted remuneration provisions, is not

avoided through industry or transaction restructuring—for example, through a form of vertical integration, such as a private label arrangement.

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

- 126 Section 965(1) could potentially apply to a broad range of schemes—for example, any contract, agreement, plan, proposal, course of action or course of conduct.

Avoidance schemes

- 127 A person who enters into or carries out a scheme, including as set out in paragraphs 128–129, may contravene s965 if:

- (a) it would be concluded that they did so for the sole or non-incidental purpose of avoiding the application of any of the conflicted remuneration provisions; and
- (b) the scheme or part of the scheme has achieved—or, apart from s965, would achieve—that purpose.

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

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

Example 17: Vertically integrated dealer group (an avoidance scheme)

Scenario

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

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

The client pays a bundled percentage-based fee for administration services as well as distribution services. This fee is split between the platform operator and the special purpose AFS licensee, with the special purpose AFS licensee of the dealer group receiving a percentage-based share of the fee based on the level of assets held on the platform.

Commentary

While the volume-based fee is received by the special purpose AFS licensee that does not provide financial product advice to retail clients, the directors and shareholders of the special purpose licensee provide financial product advice to retail clients. This arrangement could reasonably be expected to influence the financial product advice given to clients by the dealer group and its representatives. Such an arrangement is likely to be an avoidance scheme. In addition, if payments are made by the special purpose licensee to its directors and shareholders, this may breach the conflicted remuneration provisions.

- 129 A scheme may be an avoidance scheme if it is structured so that a platform operator is given or accepts a large flat fee that has no connection to:
- (a) the volume of financial products recommended or acquired by clients; or
 - (b) the number or value of financial products available through a platform.
- 130 Such fees may be used to ‘purchase’ preferential positions on a platform. The purpose of the ban on volume-based shelf-space fees is to prevent such arrangements from occurring: see paragraph 80.
- 131 These arrangements may also be a form of conflicted remuneration if the platform operator provides financial product advice to retail clients, such as in the case of a private label arrangement.

Schemes that are unlikely to be avoidance schemes

- 132 In administering the anti-avoidance provision, we are less likely to scrutinise schemes that are normal commercial transactions conducted in the ordinary course of business.
- 133 We are also unlikely to take action in relation to arrangements that have been entered into to comply with the conflicted remuneration provisions.

Example 18: Benefits for information technology software and support (not an avoidance scheme)**Scenario**

Every month a product issuer offers the financial advisers of a dealer group an incentive of \$500 if they sell a certain volume of the issuer’s products. From 1 July 2013, the product issuer no longer makes this offer (and the product issuer has not elected to comply with the conflicted remuneration provisions before this date). Instead, the product issuer offers to provide the dealer group with access to software that they own, which allows the performance of a client’s investment in the issuer’s products to be monitored. The software can be accessed by all of the dealer group’s financial advisers.

Commentary

We would not consider the offer to provide access to this software to be an avoidance scheme. Nor would we consider it to be a form of conflicted remuneration because of the exclusion in s963C(d) for providing information technology software and support: see Table 4 in the appendix.

I Regulatory and financial impact

134 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 benefits that have the potential to influence financial product advice are not given, in light of the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A of the Corporations Act;
- (b) ensuring that AFS licensees, their representatives and other entities comply with the conflicted remuneration provisions; and
- (c) not causing AFS licensees, their representatives and other entities to incur unreasonable costs in complying with the conflicted remuneration provisions.

135 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).

136 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.

137 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. 5.

Appendix: Benefits that are not conflicted remuneration

Table 4: Benefits that are not conflicted remuneration

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide financial product advice to retail clients
Benefits for advice on general insurance products only: s963B(1)(a) and 963C(a)	<p>A monetary or non-monetary benefit, such as a commission, is not conflicted remuneration if it is given for advice on a general insurance product only.</p> <p>This exclusion will not apply if the benefit also relates to another financial product or to a product that is not a financial product (e.g. a credit facility).</p>
Benefits for advice on life risk insurance products only: s963B(1)(b)	<p>A monetary benefit is not conflicted remuneration if it is given for advice on a life risk insurance product only. A life risk insurance product is generally a life policy or a sinking fund policy that is a contract of insurance: see s761A(1)(e).</p> <p>There are some types of policy that this exclusion does not apply to. These are life risk insurance products that are:</p> <ul style="list-style-type: none"> • a group life policy for members of a superannuation entity; or • a life policy for a member of a default superannuation fund. <p>This means that the exclusion for life risk insurance products does not cover benefits for advice on:</p> <ul style="list-style-type: none"> • a group life risk policy inside superannuation whether it is for a default or another type of superannuation fund; and • an individual life insurance policy for the benefit of a member of a default fund.
Benefits in relation to execution-only services: s963B(1)(c)	<p>A monetary benefit is not conflicted remuneration if:</p> <ul style="list-style-type: none"> • it is given in relation to the issue or sale of a financial product; and • the financial product advice about the product, or products of that class, has not been given to the client by the AFS licensee or representative in the 12 months immediately before the benefit is given. <p>This means that a benefit is not conflicted remuneration if it is given in relation to an execution-only issue or sale of a financial product. However, this exclusion will only apply if the financial product advice about the product, or class of product to which the product belongs, has not been given to the client by the AFS licensee or representative in the 12 months immediately before the benefit is given.</p> <p>For AFS licensees that are part of a vertically integrated corporate group, if a separate AFS licensee within the group has provided financial product advice to the client within the previous 12 months, but the AFS licensee seeking to rely on the exclusion has not, this fact alone will generally not prevent the AFS licensee from relying on the exclusion.</p>
Benefits given by the client: s963B(1)(d) and 963C(e)	<p>A monetary or non-monetary benefit is not conflicted remuneration if it is given by a client in relation to:</p> <ul style="list-style-type: none"> • the issue or sale of a financial product by the AFS licensee or representative to the client; or <p style="padding-left: 40px;">Note: This does not apply to additional investments that do not result in an issue or sale, such as additional contributions to a superannuation account.</p> <ul style="list-style-type: none"> • financial product advice given by the AFS licensee or representative to the client: s963B(1)(d).

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide financial product advice to retail clients
	<p>For example, the fees a client pays for the financial advice are not regarded as conflicted remuneration.</p> <p>For this exclusion to apply, the benefit must be given to the AFS licensee or representative that provided the financial product advice to the client. For example, if financial product advice was provided by a representative, the benefit must be given by the client to the representative for the exclusion to apply.</p> <p>Benefits given by the client may include benefits that have been authorised by the client. This is because the Corporations Act states that a reference to doing an act, such as giving a benefit to an AFS licensee or representative, includes authorising the act to be done: s52.</p> <p>We will administer the law as if a benefit has been authorised by a client if it is given at their direction or with their clear consent. This is consistent with the Government's intention of how this exclusion is intended to operate: paragraph 2.2.7 of the Revised Explanatory Memorandum.</p>
Benefits for advice on interests in a time-sharing scheme: reg 7.7A.12	A benefit is not conflicted remuneration if it is given for financial product advice about an interest in a time-sharing scheme.
Benefits with a small value: s963C(b) and regs 7.7A.13 and 7.8.11A	<p>A non-monetary benefit is not conflicted remuneration if it is less than \$300 for each AFS licensee or representative that receives the benefit and identical or similar benefits are not given on a frequent or regular basis.</p> <p>We are more likely to consider a benefit is given on a frequent or regular basis if it is given at least three times over a one year period to the same AFS licensee or to the same representative.</p> <p>AFS licensees must keep records of benefits between \$100 and \$300 that are given to the licensee or one of their representatives: reg 7.8.11A.</p>
Benefits with an educational or training purpose: s963C(c) and regs 7.7A.14, 7.7A.15 and 7.8.11A	<p>A non-monetary benefit, regardless of who gives it, is not conflicted remuneration if it has a genuine educational or training purpose that is relevant to providing financial product advice to the client. The benefit must:</p> <ul style="list-style-type: none"> • be for the provision of an education or training course to an AFS licensee or representative (the participant); or • have the dominant purpose of education or training. <p>Where the benefit is for the provision of an education or training course:</p> <ul style="list-style-type: none"> • education and training activities for the course must take up at least the lesser of six hours a day or 75% of the time spent on the course; and • the participant or their employer or AFS licensee must pay for travel and accommodation relating to the course, and events and functions held in conjunction with the course. <p>Examples of benefits to which this exclusion applies include written material on the tax implications of a product and research on a class of products an adviser gives advice on that would further the adviser's knowledge about these products.</p> <p>AFS licensees must keep records of education and training benefits that they or their representatives receive: reg 7.8.11A.</p>

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide financial product advice to retail clients
<p>Benefits for information technology software and support: s9763C(d) and reg 7.8.11A.</p>	<p>A non-monetary benefit is not conflicted remuneration if it is for the provision of information technology software or support, and the benefit:</p> <ul style="list-style-type: none"> • is related to providing financial product advice to retail clients about the financial products issued or sold by the benefit provider; and • complies with the conditions in the regulations. At this stage, there are no conditions in the regulations. <p>We consider that the following types of benefit are likely to be covered by this exclusion:</p> <ul style="list-style-type: none"> • software for an administration platform where the benefit is given by the owner or distributor of the software; • access to an information technology 'help desk' for problems that an AFS licensee or representative experiences in using administration platform software, where the benefit is given by the owner or distributor of the software; and • access to a website to place client orders <p>We consider that the following types of information technology software and support are unlikely to be covered by the exclusion:</p> <ul style="list-style-type: none"> • payroll administration software and related support services; • accounting software and related support services to manage the accounts of an AFS licensee's or representative's business; and • anti-virus software. <p>If a licensed dealer group receives these kinds of benefits and uses them to meet operating costs, we are less likely to scrutinise the benefit under the conflicted remuneration provisions if:</p> <ul style="list-style-type: none"> • the benefit is not passed on to the adviser; and • there are controls in place to ensure that the benefit does not influence the financial product advice. <p>Our views on when this could be the case are discussed at paragraphs 63–64.</p> <p>AFS licensees must keep records of information technology software or support that they or their representatives receive: reg 7.8.11A.</p>
<p>Benefits given for advice about a basic banking product: s963D</p>	<p>A benefit is not conflicted remuneration if:</p> <ul style="list-style-type: none"> • it is remuneration for work carried out, or to be carried out, by the AFS licensee or representative as an agent or employee of an Australian ADI, or by otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; • access to the benefit, or the amount of the benefit, is dependent on the AFS licensee or representative recommending a basic banking product only; and • the AFS licensee or representative does not, in the course of recommending that basic banking product, give other financial product advice that does not relate to a basic banking product: s963D. <p>This exclusion is designed to allow agents and employees of an Australian ADI, and other representatives acting under the name of the Australian ADI, to receive sales bonuses and other forms of conflicted remuneration.</p>

Type of benefit	Circumstances in which the benefit is given to an AFS licensee or its representatives that provide financial product advice to retail clients
	<p>The exclusion may apply to a number of arrangements where a person is working for an Australian ADI under the name of the Australian ADI, including:</p> <ul style="list-style-type: none"> • contractors; • employees of employment agencies who may be working temporarily for the Australian ADI; • employees of a body corporate related to the Australian ADI; and • employees of another company who work exclusively for the Australian ADI. <p>Note: This is not intended to be an exhaustive list.</p> <p>However, the exclusion does not apply if financial product advice is provided on any product that is not a basic banking product.</p>
138	<p>The Government is consulting on regulations to exclude from the conflicted remuneration provisions benefits relating to:</p> <ol style="list-style-type: none"> (a) advice on general insurance, life insurance and other products; (b) stamping fees; (c) brokerage fees; (d) advice given by an agent or employee of an Australian ADI on basic banking products, general insurance products and products that are not financial products; and (e) some or all of the non-monetary benefits that are excluded from being conflicted remuneration under s963C: see Table 4.
139	<p>We will take these regulations into account in our final guidance on the conflicted remuneration provisions.</p>

Key terms

Term	Meaning in this document
ADI	Authorised deposit-taking institution
advice	financial product advice
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
application day	The day that the provisions in Pt 7.7A apply to an AFS licensee and its representatives
arrangement	Has the meaning given in s761A of the Corporations Act
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
authorised representative	A person authorised by an AFS licensee, in accordance with s916A or 916B of the Corporations Act, to provide a financial service or services on behalf of the licensee Note: This is a definition contained in s761A.
avoidance scheme	A scheme to avoid the application of a provision in Pt 7.7A of the Corporations Act
Ch 2 (for example)	A chapter of the Corporations Act (in this example numbered 2), unless otherwise specified
client	A retail client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of Ch 7 of the Corporations Regulations
conflicted remuneration provisions	The provisions on conflicted remuneration and other banned remuneration in Divs 4 and 5 of Pt 7.7A 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
employee representative	A representative of an AFS licensee that is not an authorised representative

Term	Meaning in this document
fee-for-service exclusion	When the presumption in s964A(2) that certain fees are volume-based shelf-space fees does not apply because a benefit is a reasonable fee charged for a service provided to the funds manager by the platform operator or another person: s964A(3)(a)
financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) <p>Note: This is a definition contained in s763A: see also s763B–765A.</p>
financial product advice	<p>A recommendation or a statement of opinion, or a report of either of these things, that:</p> <ul style="list-style-type: none"> • 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 • could reasonably be regarded as being intended to have such an influence. <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>
FOFA Acts	The <i>Corporations Amendment (Future of Financial Advice) Act 2012</i> and FOFA Act No. 2
funds manager	Has the meaning given in s964 of the Corporations Act
general advice	<p>Financial product advice that is not personal advice</p> <p>Note: This is a definition contained in s766B(4) of the Corporations Act.</p>
IDPS	Investor directed portfolio service, as defined in Class Order [CO 02/294] <i>Investor directed portfolio services</i>
IDPS-like scheme	Investor directed portfolio services-like scheme, as defined in Class Order [CO 02/296] <i>Investor directed portfolio-like services provided through a registered managed investment scheme</i>

Term	Meaning in this document
influence the financial product advice	A benefit that would be expected to influence: <ul style="list-style-type: none"> the choice of financial product recommended by an AFS licensee or its representatives to retail clients; or the financial product advice given to retail clients by the AFS licensee or its representatives
licensee	An AFS licensee
personal advice	Financial product advice given or directed to a person (including by electronic means) in circumstances where: <ul style="list-style-type: none"> 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 <p>Note: This is a definition contained in s766B(3) of the Corporations Act.</p>
PJC	Parliamentary Joint Committee on Corporations and Financial Services
platform operator	Has the meaning given in s964 of the Corporations Act
private label arrangement	An arrangement where a licensed dealer group is also a platform operator, although it typically outsources the administration of the platform to another platform operator
Pt 7.7 (for example)	A part of the Corporations Act (in this example, numbered 7.7)
reg 7.7A.13 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.7A.13), unless otherwise specified
representative	An authorised representative or an employee representative of an AFS licensee
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of Ch 7 of the Corporations Regulations
Revised Explanatory Memorandum	Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012
RG 146 (for example)	An ASIC regulatory guide (in this example numbered 146)
RSE licensee	Has the meaning given in s10 of the SIS Act
s782 (for example)	A section of the Corporations Act (in this example numbered 782), unless otherwise specified

Term	Meaning in this document
scale efficiencies exclusion	When the presumption in s964A(2) that certain fees are volume-based shelf-space fees does not apply because a benefit is a discount on an amount payable, or a rebate of an amount paid, to the funds manager by the platform operator, the value of which does not exceed an amount that may reasonably be attributed to efficiencies gained by the funds manager because of the number or value of financial products in relation to which the funds manager provides services to the platform operator, or through the platform operator to another person: s964A(3)(b)
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
superannuation master trust	A superannuation fund that has an obligation to give documents to retail clients under s1012IA
volume-based benefit	<p>A benefit where access to the benefit or the value of the benefit is dependent on the total number or value of financial products:</p> <ul style="list-style-type: none"> • recommended by an AFS licensee or its representatives to a retail client; or • acquired by a retail client to whom an AFS licensee or its representatives provide financial product advice
white label arrangement	An arrangement where a licensed dealer group enters into contractual arrangements with a platform operator to rebrand the platform operator's platform to make it appear as its own—that is, the platform is 'badged' or 'promoted' by the dealer group as its own product

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose the guidance set out in this section on what constitutes conflicted remuneration.</p>	<p>B1Q1 Do AFS licensees and representatives need ASIC guidance to assist in identifying whether a benefit is conflicted remuneration?</p> <p>B1Q2 Do you agree with our proposed guidance?</p> <p>B1Q3 Do you have any comments on the examples in this section?</p> <p>B1Q4 Are there other examples you would like us to provide on benefits that are or are not conflicted remuneration? Please provide as much specific information as possible, as this will assist us in providing further examples, if needed.</p> <p>B1Q5 Is there any further guidance we should give on whether a benefit is conflicted remuneration? 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 and representatives 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 explain in our guidance that, in deciding whether a benefit is conflicted remuneration, we will look at the substance of a benefit over its form, and consider the overall circumstances in which the benefit is given: see paragraphs 39–44. We consider this means that:</p> <p>(a) a benefit that has a number of interrelated components may sometimes be characterised as a single benefit (paragraph 42);</p> <p>(b) a benefit does not need to relate to a specific financial product to be conflicted remuneration (paragraph 43); and</p> <p>(c) a benefit may be conflicted remuneration if it influences an AFS licensee or representative to give product-specific advice rather than non-product-specific advice with strategic recommendations (paragraph 44).</p>	<p>B2Q1 Do you agree with our proposed guidance?</p> <p>B2Q2 Do you have any comments on the example given?</p> <p>B2Q3 Are there other examples you would like us to provide?</p> <p>B2Q4 Is there any further guidance we should give on whether a benefit is conflicted remuneration?</p>
<p>B3 We propose that a benefit is more likely to be conflicted remuneration if:</p> <p>(a) its value is greater than \$300 for each AFS licensee or representative that receives the benefit; or</p> <p>(b) for benefits that are given on a frequent or regular basis, the combined value of all</p>	<p>B3Q1 Do you agree with our proposed guidance?</p> <p>B3Q2 Do you have any comments on the example given?</p> <p>B3Q3 Are there other examples you would like us to provide on benefits that are or are not conflicted remuneration?</p>

Proposal	Your feedback
<p>benefits given is greater than \$300 for each AFS licensee or representative that receives the benefit: see paragraphs 48–49.</p>	<p>B3Q4 Do you agree that benefits of more than \$300 for each AFS licensee or representative receiving the benefit are more likely to be conflicted remuneration?</p> <p>B3Q5 Do you agree that a benefit is more likely to be given 'on a frequent or regular basis' if it is given at least three times over a one-year period to the same AFS licensee or to the same representative?</p>
<p>C1 We propose the guidance set out in this section about when volume-based benefits are conflicted remuneration.</p>	<p>C1Q1 Do AFS licensees and representatives need ASIC guidance to assist in identifying whether the presumption in s963L that volume-based benefits are conflicted remuneration applies or is able to be rebutted?</p> <p>C1Q2 Do you agree with our proposed guidance?</p> <p>C1Q3 Do you have any comments on the examples given?</p> <p>C1Q4 Are there other examples you would like us to provide in relation to the presumption that volume-based benefits are conflicted remuneration? Please provide as much specific information as possible, as this will assist us in providing further examples, if needed.</p> <p>C1Q5 A possible consequence of the conflicted remuneration provisions is that they may prevent product issuers—such as trustees of superannuation funds, responsible entities, and platform operators—from giving financial product advice to retail clients to increase or maintain their investment or other interest in the issuer's products. This is because this may result in an increase in, or the maintenance of, management or other fees payable out of the fund. These fees might reasonably be expected to influence the advice. Do you see this as a concern or unintended consequence?</p> <p>C1Q6 If you are concerned, does your concern or view apply to all such situations or only to some situations—for example:</p> <p>(a) when intra-fund advice is provided by a trustee of a superannuation fund to a member; and</p> <p>(b) when general advice is provided by responsible entities in investor newsletters?</p> <p>C1Q7 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>C1Q8 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees and representatives to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.</p>

Proposal	Your feedback
<p>C2 We propose that, when deciding whether a benefit that is partly based on volume is conflicted remuneration, we will take into account the size of the benefit, and the proportion of the benefit that is volume based compared with the proportion that is not volume based: see paragraphs 54–55.</p>	<p>C2Q1 Do you agree with our proposed guidance?</p> <p>C2Q2 Do you have any comments on the example given?</p> <p>C2Q3 Are there other examples you would like us to provide in relation to rebutting the presumption that volume-based benefits are conflicted remuneration?</p> <p>C2Q4 Is there any further guidance we should give?</p>
<p>C3 We propose that, if a platform operator or other product issuer is also a licensed dealer group, benefits received in its capacity as platform operator (or other product issuer) may be conflicted remuneration: see paragraphs 56–58.</p>	<p>C3Q1 Do you agree with our proposed guidance?</p> <p>C3Q2 Do you have any comments on the examples given?</p> <p>C3Q3 Are there other examples you would like us to provide?</p> <p>C3Q4 Is there any further guidance we should give?</p>
<p>C4 We propose that equity arrangements with representatives may be conflicted remuneration: see paragraph 59.</p>	<p>C4Q1 Do you agree with our proposed guidance?</p> <p>C4Q2 Do you have any comments on the example given?</p> <p>C4Q3 Are there other examples you would like us to provide?</p> <p>C4Q4 Is there any further guidance we should give?</p>
<p>C5 We propose to give guidance that in some circumstances:</p> <p>(a) a volume-based benefit may not be conflicted remuneration if it is passed on to the client (see paragraphs 60–62); and</p> <p>(b) we are less likely to scrutinise a benefit that is not passed on to the adviser, if certain controls are in place (see paragraphs 63–64).</p>	<p>C5Q1 Do you agree with our proposed guidance?</p> <p>C5Q2 Do you think that there are other circumstances when a volume-based benefit is not conflicted remuneration?</p> <p>C5Q3 Do you have any comments on the examples given?</p> <p>C5Q4 Are there other examples you would like us to provide?</p> <p>C5Q5 Do you agree with our proposal that one way to show that a volume-based benefit is not conflicted remuneration is to show that the benefit has been promptly passed on to the client?</p> <p>C5Q6 Is there any further guidance we should give?</p>

Proposal	Your feedback
<p>D1 We propose the guidance set out in this section about when a performance benefit given to an employee is conflicted remuneration.</p>	<p>D1Q1 Do employers of AFS licensees and representatives need ASIC guidance to assist in identifying whether a performance benefit is conflicted remuneration?</p> <p>D1Q2 Do you agree with our proposed guidance?</p> <p>D1Q3 Do you have any comments on the examples provided?</p> <p>D1Q4 Are there other examples you would like us to provide on performance benefits for employees? Please provide as much specific information as possible, as this will assist us in providing further examples, if needed.</p> <p>D1Q5 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>D1Q6 Will our proposed guidance (as distinct from what is needed to comply with the law) require employers to implement new performance arrangements or change existing arrangements? If so, please describe the changes and the likely costs involved.</p>
<p>D2 We propose to give guidance on the issues that employers can consider when seeking to show that a volume-based performance benefit is not conflicted remuneration: see paragraphs 72–76. These issues include:</p> <ul style="list-style-type: none"> (a) the eligibility criteria for the performance benefit; (b) how difficult it is for staff to meet these criteria; (c) the purpose of the performance benefit; (d) the proportion of the benefit that is volume based; (e) the link between the benefit and the financial product advice provided to clients; and (f) the proportion of the benefit to the overall remuneration of the employee. 	<p>D2Q1 Do you agree with our proposed guidance?</p> <p>D2Q2 If you are an employer and use a balanced scorecard approach to determine performance benefits, are there other non-volume-based factors on which your balanced scorecards are based, apart from those we have listed at paragraph 72?</p> <p>D2Q3 Is there any further guidance we should give?</p>

Proposal	Your feedback
<p>D3 We propose that, in administering the conflicted remuneration provisions, we are more likely to scrutinise performance benefits that are:</p> <p>(a) 5% or more of an employee's base salary, if the benefit is wholly volume based; or</p> <p>(b) 7% or more of an employee's base salary, if the benefit is partly volume based and regardless of what weighting is given to the volume-based criteria: see paragraphs 77–79.</p>	<p>D3Q1 Do you agree with our proposed guidance?</p> <p>D3Q2 Do you have any comments on the example given?</p> <p>D3Q3 Do you agree that a performance benefit is more likely to be conflicted remuneration if it is more than 5% or 7% (inclusive) of an employee's base salary, depending on whether the benefit is wholly or partly volume based?</p> <p>D3Q4 If you do not agree, please provide details and the percentages that you think are appropriate.</p> <p>D3Q5 Do you think that our guidance should explicitly state when a performance benefit will or will not be conflicted remuneration? For example, should we state that a performance benefit is conflicted remuneration if it is 5% or more of an employee's base salary, where the benefit is wholly volume based, or 7% or more, where the benefit is partly volume based? If so, do you agree with these percentages? If not, please provide details.</p>
<p>E1 We propose the guidance set out in this section about whether a benefit is a prohibited volume-based shelf-space fee.</p>	<p>E1Q1 Do platform operators and funds managers need ASIC guidance to assist in determining whether a benefit is a prohibited volume-based shelf-space fee?</p> <p>E1Q2 Do you agree with our proposed guidance?</p> <p>E1Q3 Do you have any comments on the examples?</p> <p>E1Q4 Are there other examples you would like us to provide? Please provide as much specific information as possible, as this will assist us in providing further examples, if needed.</p> <p>E1Q5 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>E2 We propose to provide guidance on when a platform operator may be able to rely on the fee-for-service exclusion, and the issues that it will need to consider: see paragraphs 89–92.</p>	<p>E2Q1 Do you agree with our proposed guidance?</p> <p>E2Q2 Do you think that there are any types of fees apart from those listed at paragraph 92 to which the fee-for-service exclusion will apply?</p> <p>E2Q3 Is there any further guidance we should give?</p> <p>E2Q4 If you are a platform operator, to what degree do you anticipate that our proposed guidance (as distinct from what is needed to comply with the law) will require you to implement new processes, or change existing processes, to:</p> <p>(a) avoid accepting a volume-based shelf-space fee; and</p> <p>(b) demonstrate that a benefit is a reasonable fee for service (to rely on the fee-for-service exclusion)?</p>

Proposal	Your feedback
	<p>E2Q5 If you are or will be implementing new processes, or changing existing processes, please describe the changes and the likely costs involved as a result of our proposed guidance (as distinct from what is needed to comply with the law).</p>
<p>E3 We propose to provide guidance on when a platform operator may be able to rely on the scale efficiencies exclusion, and the issues that it will need to consider: see paragraphs 93–97.</p>	<p>E3Q1 Do you agree with our proposed guidance?</p> <p>E3Q2 Do you have any comments on the examples given?</p> <p>E3Q3 Are there other examples you would like us to provide?</p> <p>E3Q4 To rely on the scale efficiencies exclusion, do you agree that platform operators should have a written, up-to-date and appropriately verified analysis from the funds manager about their costs and how the value of the rebate or discount is referable to scale efficiencies? If not, what do you think platform operators need to do to rely on the exclusion?</p> <p>E3Q5 If you are a funds manager, do you use benchmarks to measure your scale efficiencies and the rebate that is provided to the platform operator based on these efficiencies? An example of a benchmark approach is:</p> <ul style="list-style-type: none"> (a) not paying a rebate if there is less than \$500 million in products sold through the platform; (b) paying a rebate of 10 basis points if \$500–\$750 million in products are sold through the platform; and (c) paying a rebate of 20 basis points if more than \$750 million in products are sold through the platform. <p>E3Q6 If you use benchmarks, please provide details on how these benchmarks are set and whether you think it would be useful for ASIC to provide guidance on using benchmarks in our guidance on relying on the scale efficiencies exclusion.</p> <p>E3Q7 If you are a platform operator, to what degree do you anticipate that our proposed guidance (as distinct from what is needed to comply with the law) will require you to implement new processes, or change existing processes, to:</p> <ul style="list-style-type: none"> (a) avoid accepting a volume-based shelf-space fee; and (b) demonstrate that a benefit represents a discount or rebate for efficiencies gained by the funds manager by using the platform (to rely on the scale efficiencies exclusion)? <p>E3Q8 If you are or will be implementing new processes, or changing existing processes, please describe the changes and the likely costs involved as a result of our proposed guidance (as distinct from what is needed to comply with the law).</p>

Proposal	Your feedback
	<p>E3Q9 If you are a funds manager that uses a platform to distribute your products, do you anticipate that, as a result of our proposed guidance (as distinct from what is needed to comply with the law), the platform operator will ask you to provide it with information about the efficiencies you have gained by using the platform? If so, do you need to implement new processes, or change existing ones? Please describe the changes and the likely costs involved.</p> <p>E3Q10 If you are a funds manager, what information do you think platform operators will ask you to provide?</p>
<p>E4 We propose to provide guidance that we will not take action against a platform operator that accepts a volume-based shelf-space fee if that fee is passed on promptly to clients: see paragraph 98.</p>	<p>E4Q1 Do you agree with our proposed guidance?</p> <p>E4Q2 Is there any further guidance we should give?</p>
<p>E5 We propose to provide guidance that, although the ban on volume-based shelf-space fees does not extend to non-volume-based fees, the obligation to manage conflicts of interest and the anti-avoidance provision will still apply: see paragraphs 99 and 101. In addition, if the platform operator or its representatives provide financial product advice to retail clients, such payments may be conflicted remuneration: see paragraph 100.</p>	<p>E5Q1 Do you agree with the proposed guidance?</p> <p>E5Q2 Is there any further guidance we should give?</p>
<p>F1 We propose the guidance set out in this section on the application of the ban on AFS licensees and their representatives charging asset-based fees on borrowed amounts.</p>	<p>F1Q1 Do AFS licensees and representatives need ASIC guidance to assist in determining when an asset-based fee on a borrowed amount may be charged?</p> <p>F1Q2 Do you agree with our proposed guidance?</p> <p>F1Q3 Do you have any comments on the example given?</p> <p>F1Q4 Are there other examples you would like us to provide? Please provide as much specific information as possible, as this will assist us in providing further examples, if needed.</p> <p>F1Q5 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>F1Q6 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees and representatives to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.</p>

Proposal	Your feedback
<p>F2 We propose that AFS licensees and authorised representatives cannot ignore any information they have discovered when making client inquiries as a result of complying with the best interests duty in s961B: see paragraphs 110–111.</p>	<p>F2Q1 Do you agree with our proposed guidance?</p> <p>F2Q2 Is there any further guidance we should give?</p>
<p>F3 We propose that asset-based fees should only be charged on portfolios of products purchased with a combination of borrowed and non-borrowed amounts if it is possible to separately identify the financial products purchased with borrowed amounts from those purchased with non-borrowed amounts: see paragraph 112.</p>	<p>F3Q1 Do you agree with our proposed guidance?</p> <p>F3Q2 Is there any further guidance we should give?</p>
<p>G1 We propose the guidance set out in this section about the application of the transitional provisions.</p>	<p>G1Q1 Do you have any comments on our proposed guidance?</p> <p>G1Q2 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>G2 We propose to provide guidance on what arrangements the conflicted remuneration transitional provisions may apply to, and in what circumstances: paragraphs 116–121.</p>	<p>G2Q1 Do AFS licensees and representatives need ASIC guidance to assist in determining when the conflicted remuneration transitional provisions apply?</p> <p>G2Q2 Do you agree with our proposed guidance?</p> <p>G2Q3 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, and examples if needed.</p> <p>G2Q4 Will our proposed guidance (as distinct from what is needed to comply with the law) require AFS licensees and representatives to implement new processes or change existing ones? If so, please describe the changes and the likely costs involved.</p>